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Article abstract

In theory and in discourse, Canadian criminal law insists on the importance of free will, choice, and difference in order to hold someone criminally responsible and to legitimize punishment. Yet legal doctrine is constructed and applied in a very technical and descriptive manner that usually casts aside practical considerations, proceeds on utilitarian grounds, and simplifies what it means to be free, rational, and different. Recent proposals to strengthen or to eliminate the retributive model (e.g., to include in the analysis considerations such as socio-economic disparities and power differential or to definitely shift the discourse toward utilitarian considerations) still rely on assumptions about agency, liberty, and equality that are grounded in contested sociological evidence. As a result, their capacity to promote concrete reform is limited.

In this paper, the author draws from the works of Bourdieu and other *praxis* theorists and argues that their research could shed new light on our understanding of choice and difference—two essential components in the assessment of responsibility. The author concludes by showing what criminal law theory could look like, especially in the case of poor offenders, if reformers were to consider such sociological evidence.

RETHINKING CRIMINAL RESPONSIBILITY FOR POOR OFFENDERS: CHOICE, MONSTROSITY, AND THE LOGIC OF PRACTICE

*Marie-Eve Sylvestre**

In theory and in discourse, Canadian criminal law insists on the importance of free will, choice, and difference in order to hold someone criminally responsible and to legitimize punishment. Yet legal doctrine is constructed and applied in a very technical and descriptive manner that usually casts aside practical considerations, proceeds on utilitarian grounds, and simplifies what it means to be free, rational, and different. Recent proposals to strengthen or to eliminate the retributive model (e.g., to include in the analysis considerations such as socio-economic disparities and power differential or to definitely shift the discourse toward utilitarian considerations) still rely on assumptions about agency, liberty, and equality that are grounded in contested sociological evidence. As a result, their capacity to promote concrete reform is limited.

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Sur les plans théorique et discursif, les notions de libre arbitre, de choix et de différence constituent les fondements de la théorie de la responsabilité pénale et de la légitimité du pouvoir de punir en droit canadien. Or, dans les faits, la doctrine juridique est construite et appliquée de manière essentiellement technique et descriptive : elle fait abstraction des considérations pratiques, renvoie à des arguments utilitaires et s'appuie sur une vision réductrice de la liberté, de la rationalité et de la différence. Certaines propositions ont récemment été mises de l'avant afin de renforcer le modèle rétributiviste (par exemple en incluant dans l'analyse des considérations telles que les disparités sociales et économiques ainsi que les rapports de pouvoir), ou encore de le remplacer par un modèle utilitariste. Cependant, ces propositions reposent sur une conception de la rationalité, de la liberté et de l'égalité qui est largement contestée sur le plan sociologique. Leur potentiel de réforme est limité.

Dans cet article, l'auteure se fonde sur l'œuvre de Bourdieu, ainsi que sur celle d'autres théoriciens de la pratique, afin de reconsidérer le sens des notions de choix et de différence, deux composantes essentielles de la responsabilité. Elle propose en conclusion certaines modifications à la théorie pénale afin de tenir compte de ces données sociologiques et démontre quel serait l'impact de celles-ci en ce qui concerne les contrevenants les plus pauvres.

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Introduction

In theory and in discourse, criminal law theory insists on the importance of free will, choice, and marked difference in order to hold someone criminally responsible and to legitimize punishment. On the one hand, the idea that an offender freely chose to commit a crime—that she could have done things differently, but yet made the rational decision to commit an offence and thus deserves to be punished and repressed—appears politically and morally convincing to retributivists for whom choice, directly connected to desert, is a key concept and a moral standard.[1] Choice is also central to the utilitarian tradition both at the descriptive and normative levels. Utilitarians suggest that human behaviour is the result of rational choices that maximize pleasure while minimizing pain, and argue that state action should function in a similar manner whenever pursuing general well-being.[2]

On the other hand, the idea of difference, and indeed of extreme difference or "monstrosity",[3] also serves to legitimize exclusion and punishment. Offenders are often perceived as falling into a separate category of human beings—if they are humans at all—based on their behaviour, their living conditions, or their appearance. The fact that they are different from the rest of the population ("us") makes it appropriate and acceptable to treat them differently and makes repression and punishment easier. In moral philosophy, we find references to the monstrosity narrative in the utilitarian tradition, particularly in incapacitation theory, which seeks to prevent future harm through the incarceration, isolation, and control of dangerous offenders.

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1 Paul H. Robinson, "Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical" (2008) 67 Cambridge L.J. 145; Jeffrie G. Murphy, "Marxism and Retribution" (1973) 2 Phil. & Publ. Aff. 217.

2 Jeremy Bentham, "An Introduction to the Principles of Morals and Legislation" in Mary Peter Mack, ed., *A Bentham Reader* (New York: Pegasus, 1969) 85 at 85-89; John Stuart Mill, "Utilitarianism" in *The Basic Writings of John Stuart Mill: On Liberty, The Subjugation of Women & Utilitarianism* (Toronto: Random House, 2002) 230.

3 Criminal law doctrine and theories of punishment do not refer directly to the concept of "monstrosity". However, the idea of difference is present in our concept of penal negligence, and more particularly, in the notions of reasonableness and the reasonable person. In addition, portrayals of criminals as marginals, deviants, or monsters that depart from the norms of reasonable human beings have been implicit in the rules of criminal liability and theories of punishment for centuries. The concept of "monstrosity" draws from criminological literature: see e.g. Lorna A. Rhodes, *Total Confinement: Madness and Reason in the Maximum Security Prison* (Berkeley: University of California Press, 2004) at 163-90; Stanley Cohen, *Folk Devils and Moral Panics*, 3d ed. (New York: Routledge, 2002) at vii-xxxv; Jock Young, *The Exclusive Society: Social Exclusion, Crime and Difference in Late Modernity* (London, U.K.: Sage, 1999) at 96-121. See also Zygmunt Bauman, *Postmodernity and Its Discontents* (Cambridge, U.K.: Polity Press, 1997).

Choice, free will, and difference are also key concepts in criminal law doctrine. They are part of the notion of *mens rea*, while also being integral to the concepts of *actus reus*, capacity, and voluntariness. Commentators continue to insist on the importance of preserving the *mens rea* doctrine according to which no one should be held criminally responsible without personal fault, so as to ensure freedom of choice and respect for human autonomy.[4] The Supreme Court of Canada has repeatedly proclaimed the sacrosanct character of *mens rea*, affirmed its intimate connection to choice,[5] and recognized its constitutional status.[6] A number of defences are also recognized under the constitutional principle of moral involuntariness to refute the presumption according to which whoever commits an act is thought to have really chosen to do so.[7] Marked difference (akin to the idea of monstrosity) has been discursively cast as a deviation from the standard of the reasonable person against which an accused is sometimes judged at the culpability stage of the proceedings.[8]

Yet, there is an important paradox in the Canadian criminal justice system. Despite the rhetorical importance of free will, choice, and difference, criminal law doctrine does not make much of these ideas when assessing the offender's fault in the context of a criminal trial. Key concepts such as *mens rea* and *actus reus* are constructed and applied in a very technical and descriptive manner that often casts aside practical considerations, proceeds on utilitarian grounds, and ignores or simplifies what it really means to be free, rational, and different in a grossly unequal and pseudo-meritocratic society. Offenders are thus convicted, irrespective of their differences and of the impact of socio-economic and political constraints on their choosing to commit crimes. Politically and economically neutral convictions are particularly important in the case of poor offenders who are often the "regular clientele" of the criminal justice system.

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4 Stephen J. Morse, "Inevitable Mens Rea" (2003) 27 Harv. J.L. & Pub. Pol'y 51.

5 *R. v. King*, [1962] S.C.R. 746, 35 D.L.R. (2d) 386; *R. v. Leary*, [1978] 1 S.C.R. 29, 74 D.L.R. (3d) 103; *R. v. Théroux*, [1993] 2 S.C.R. 5, 100 D.L.R. (4th) 624 [*Théroux* cited to S.C.R.].

6 *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, (*sub nom. Reference Re s. 94(2) of Motor Vehicle Act*) 24 D.L.R. (4th) 536; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, 47 D.L.R. (4th) 399; *R. v. Martineau*, [1990] 2 S.C.R. 633, 112 N.R. 83.

7 See especially *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, 197 D.L.R. (4th) 577 [*Ruzic*].

8 *R. v. Hundal,* [1993]1 S.C.R. 867, 149 N.R. 189 [*Hundal* cited to S.C.R.] (whether moral involuntariness is considered as part of *mens rea*); *R. v. Creighton*, [1993] 3 S.C.R. 3, 205 D.L.R. (4th) 632 [*Creighton* cited to S.C.R.]. For examples of excuses, see *R. v. Hibbert*, [1995] 2 S.C.R. 973, 184 N.R. 165 [*Hibbert*]; *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3, 193 D.L.R. (4th) 577 [*Latimer*] (excuses from the standard of the reasonable person).

In this paper, I want to challenge the conventional ways in which we have constructed fault and difference in the Canadian criminal justice system, and suggest an alternate conception of these notions that is both grounded in empirical evidence, and fully takes into account the impact of structural constraints on individual liberty, equality, and rationality. In Part I, I first examine the suggestions made in recent years to strengthen the liberal model of criminal responsibility and to increase "the ability of legal categories to reflect the social context."[9] Scholars and critics have tried with relative success to shift the emphasis of legal analysis from *mens rea* to other aspects of criminal liability, such as imputability (including causation and moral involuntariness), so as to ensure some form of moral philosophical content within inquiries into culpability.[10] Some scholars have suggested creating new defences to consider socio-economic disparities and racial discrimination,[11] while others have suggested changing the theoretical foundations of defences from the concept of moral involuntariness to moral blameworthiness, to allow for moral inquiry.[12] Recognizing the potential for such reconceptualizations, I argue that they ultimately fail to propose a successful model to assess responsibility because they rely on a particular conception of liberty, equality, rationality, and difference that is grounded on questionable sociological evidence and does not account for the complexities of social life or degrees of responsibility.

Law and economics scholars have suggested turning to the economic model in an attempt to ground criminal law theory in empirical evidence. Writing in the utilitarian tradition, they propose to relegate moral inquiries to culpability and to focus on the preventive power of criminal law. In doing so, they claim to present a more sound and comprehensive approach to the study of criminal behaviour.[13] New generations of law and econom-

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9 Alan Norrie, "A Hardship Defence?" (1999) 8 Soc. & Leg. Stud. 569 [Norrie, "Hardship Defence"].

10 See Hugues Parent, *Discours sur les origines et les fondements de la responsabilité morale en droit pénal* (Montréal: Thémis, 2001) at 30, 101-58 [Parent, *Discours*]; Anne-Marie Boisvert, "La responsabilité versant acteurs : vers une redécouverte en droit canadien de la notion d'imputabilité" (2003) 33 R.G.D. 271.

11 Richard Delgado, "'Rotten Social Background': Should the Criminal Law Recognize a Defence of Severe Environmental Deprivation?" (1985) 3 Law & Inequality 9; David L. Bazelon, "The Morality of the Criminal Law" (1976) 49 S. Cal. L. Rev. 385: Jason H. Lee, "Dislocated and Deprived: A Normative Evaluation of Southeast Asian Criminal Responsibility and the Implications of Societal Fault" (2006) 11 Mich. J. Race & L. 671.

12 Benjamin L. Berger, "Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences" (2006) 51 McGill L.J. 99.

13 See generally Louis Kaplow & Steven Shavell, *Fairness versus Welfare* (Cambridge, Mass.: Harvard University Press, 2002).

ics scholars, including those from behavioural law and economics,[14] have also tried to account for individual variations while remaining within the ambit of the economic model. I argue that their proposals should ultimately fail because they rely on false assumptions about human beings and their capacity to make rational choices. Moreover, their use of empirical evidence is quite limited and does not provide a full account of individual behaviour.

In Part II, I turn to sociological evidence to re-examine the notions of fault and difference—two essential components in the assessment of responsibility. In contrast with the more philosophical approach followed by most liberal scholars or the economic approach, sociologists and anthropologists rely on well-supported empirical evidence about human action, agency, and the role of social structures. I draw from the work of French sociologist Pierre Bourdieu[15] and argue that his practice theory, and in particular the concept of *habitus*, help us do justice to these two important notions. In bringing more complexity and nuance to the analysis, practice theory acts as a stark contrast to the binary and exclusive character of criminal law doctrine by showing a spectrum of positions between choice and determinism, or culpability and non-culpability. Practice theory also radically challenges the underlying assumptions of liberty, equality, and rationality in liberalism, and brings them closer to human experience. Finally, practice theory challenges the individual-society duality present in criminal law and creates space for thinking about collective and shared responsibility for social conflicts. I conclude the second part of this paper by showing what criminal law theory could look like, especially in the case of poor offenders, if we were to consider such sociological evidence.

Drawing upon these ideas, I pursue different kinds of objectives. At the epistemological and theoretical levels, I hope to expose the multiple dimensions of choice and difference, which legal scholars have long dismissed. Grounded in empirical investigation, practice theory shows us the enormous potential of reconciling the real with the ideal for liberal criminal law theory.[16] In that sense, I engage with critical scholars who recognize what is of value in liberal theory while pushing it to fulfill its prom-

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14 Christine Jolls, Cass R. Sunstein & Richard Thaler, "A Behavioral Approach to Law and Economics" (1998) 50 Stan. L. Rev. 1471 [Jolls, Sunstein & Thaler, "Behavioral Approach"].

15 Pierre Bourdieu, *The Logic of Practice*, trans. by Richard Nice (Stanford: Stanford University Press, 1990) [Bourdieu, *Logic*]; Pierre Bourdieu, *Practical Reason: On the Theory of Action* (Stanford: Stanford University Press, 1998); Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, trans. by Richard Nice (Cambridge, Mass.: Harvard University Press, 1984) [Bourdieu, *Distinction*].

16 See e.g. Alan Norrie, "'Simulacra of Morality'?: Beyond the Ideal/Actual Antinomies of Criminal Justice" in Antony Duff, ed., *Philosophy and the Criminal Law* (Cambridge: Cambridge University Press, 1998) 101 [Norrie, "Simulcra"].

ises of liberty, equality, and responsibility.[17] Finally, I emphasize the political consequences of such a proposal. Indeed, my commitment to bringing these liberal ideals closer to sociological evidence has arisen in the context of the policing and punishment of poor and homeless offenders.[18] My argument will draw from this case study: I will show how legal doctrine has ignored differences among poor offenders and the constraints on their choosing or not to commit crime, and how, in turn, the logic of practice could help us rethink their responsibility.

I. Current Proposals to Strengthen Choice and Difference

I will first examine the proposals made within liberal theory to make room for a full account of human behaviour, specifically in the context of poor offenders (Part I.A). I then turn to Law and Economics scholars who offered the first and most important attempt to enrich the philosophical discourse on moral culpability with the use of empirical evidence (Part I.B).

A. Attempts to Reconnect Moral Culpability with Its Philosophical Foundations within the Liberal Model

In several of the Supreme Court of Canada's landmark decisions dealing with criminal responsibility, the offenders came from impoverished socio-economic backgrounds: *Vaillancourt*, *Martineau*, *Naglik*, *Ruzic,* to name only a few. For instance, Mrs. Naglik was a poor, young single mother with limited educational opportunities, parental skills, and support, yet these important facts were ultimately dismissed by the Court.[19] The Court's response reveals a fundamental problem with criminal law theory—it claims to give space to a full consideration of choice and difference but does not address directly what it means to choose or be different in specific contexts, such as poverty.

Necessary inquiries into offenders' free will and fault are set aside through reliance on the numerous exceptions in legal doctrine, and the creation and application of different legal categories or interpretive con-

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[17] See generally Nicola Lacey, *State Punishment: Political Principles and Community Values* (London, U.K.: Routledge, 1988); Barbara A. Hudson, "Beyond Proportionate Punishment: Difficult Cases and the 1991 Criminal Justice Act" (1995) 22 Crime, Law & Social Change 59; Neil Hutton, "Sentencing, Inequality and Justice" (1999) 8 Soc. & Leg. Stud. 571; Barbara Hudson, "Punishment, Poverty and Responsibility: The Case for a Hardship Defence" (1999) 8 Soc & Leg. Stud. 583 at 586 [Hudson, "Hardship Defence"].

[18] Marie-Eve Sylvestre, *Policing Disorder and Criminalizing the Homeless in Montreal and Rio de Janeiro: A Critique of the Justifications for Repression in Law and Practice* (S.J.D. dissertation, Harvard University, 2007).

[19] *R. v. Naglik*, [1993] 3 S.C.R. 122, 106 D.L.R. (4th) 212 [*Naglik* cited to S.C.R.].

structions.[20] Specifically, choice is ignored as a result of the application of strict and absolute liability regimes,[21] and as a result of the shift to negligence as a constitutional minimum for one to be convicted of certain criminal offences.[22] Furthermore, when subjective *mens rea* is considered, courts and theorists rely on a series of technical and descriptive cognitive states of mind such as intent and recklessness, which are narrowly understood as having wilfully or recklessly put a person's body into action in order to achieve a particular physical result within a limited time frame. The insufficiency of the present analysis is exemplified by the way legal doctrine dismisses motives, as well as personal values, eliminating the social and psychological contexts in which actions are brought about.[23] Finally, even if we accept the technical character of subjective *mens rea*, we are forced to recognize that inquiries fall short of giving it any consideration because they generally rely on an inference from the *actus reus* to prove subjective *mens rea*.[24] As a result, *mens rea* today has become nothing more than a mythical legal category or a "simulacra",[25] becoming totally disconnected from its philosophical foundations.[26]

Similarly, while defences are meant to ensure the recognition of free will and the exercise of a real choice, the evolution of legal doctrine in this area has considerably limited the depth of moral inquiry and rendered

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20 Mark Kelman, "Interpretive Construction in the Substantive Criminal Law" (1981) 33 Stan. L. Rev. 591 [Kelman, "Interpretive Construction"].

21 *R. v. City of Sault Ste Marie*, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161.

22 See *Hundal*, *supra* note 8; *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49, 289 D.L.R. (4th) 577 [*Beatty*]; *R. v. DeSousa*, [1992] 2 S.C.R. 944, 95 D.L.R. (4th) 595; *Creighton*, *supra* note 8. For a discussion of this shift, see Don Stuart, *Canadian Criminal Law—A Treatise*, 5th ed. (Scarborough: Carswell, 2007) at 260-74 [Stuart, *Criminal Law*].

23 *R. v. Lewis*, [1979] 2 S.C.R. 821, 98 D.L.R. (3d) 111; *Hibbert*, *supra* note 8; *Dynar v. United States*, [1997] 2 S.C.R. 462, 147 D.L.R. (4th) 399; *R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432, 255 D.L.R. (4th) 283. See generally Elaine M. Chiu, "The Challenge of Motive in the Criminal Law" (2005) 8 Buff. Crim. L. Rev. 653; Mark Thornton, "Intention in Criminal Law" (1992) 5 Can. J.L. & Jur. 177; Carissa Byrne Hessick, "Motive's Role in Criminal Punishment" (2006) 80 S. Cal. L. Rev. 89; Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, 2d ed. (Cambridge: Cambridge University Press, 2001) at 37 [Norrie, *Crime*].

24 *Théroux*, *supra* note 5. See also *Beatty*, *supra* note 22 at para. 87; Albert Lévitt, "Extent and Function of the Doctrine of Mens Rea" (1923) 17 Ill. L. Rev. 578.

25 I borrow this expression from Allan Norrie, who in turn borrowed from Alastair MacIntyre. See Alaistair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame, Ind.: Notre Dame University Press, 1980), cited in Norrie, "Simulcra", *supra* note 16. In Canadian law, this simulcra has also been raised in the context of the conflict between the normative and the descriptive conceptualizations of *mens rea*: see Jacques Fortin & Louise Viau, *Traité de droit pénal général* (Montreal: Thémis, 1982); H. Parent, *Traité de droit criminel*, t. 2 (Montreal: Thémis, 2005) at XXVIII.

26 A complete analysis of this argument is beyond the scope of this paper. But see Sylvestre, *supra* note 18.

most of these defences merely technical. The Supreme Court of Canada has been clear with respect to the importance of "strictly controlling and scrupulously limit[ing]"[27] the scope of excuses from "becom[ing] simply a mask for anarchy."[28] In fact, judges are well aware of the political potential resulting from broad application of defences, in particular where economic disparities are concerned. For instance, in the English case of *Southwark*—often cited by the Supreme Court of Canada—the appellant made an application for an order for immediate possession of a building he owned but that was occupied by the accused, a homeless married man with two children, as well as other homeless individuals who had become members of a squatters association as a result of the "extreme housing shortage" in London.[29] The accused admitted that he had no right to be in the house, but requested that his behaviour be excused or justified on the basis of necessity. Lord Davies "after experiencing a feeling of deep depression" rejected the defence. In his concurring opinion, Lord Denning added that "if hunger were once allowed to be an excuse for stealing, it would open a way through which all kinds of disorder and lawlessness would pass. If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door which no man could shut."[30]

Therefore, defences such as necessity are limited to extreme situations. The requirements are constructed to limit the application of the defences to the very few cases where a violation of the law was absolutely necessary (almost in a physical sense). For instance, the first requirement of necessity implies that disaster was so imminent (as opposed to predictable) and so pressing that "normal human instincts cry out for action and make a counsel of patience unreasonable"[31] or, in other words, that the situation has to "overwhelmingly impel disobedience."[32] Defences also largely hide the political and moral choices involved in their applicability criteria.[33] The requirement that there be urgency and imminence excludes an "obstinate and long-standing state of affairs,"[34] putting aside any con-

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27 *Latimer*, *supra* note 8 at para. 27; *Perka v. R.*, [1984] 2 S.C.R. 232, 13 D.L.R. (4th) 1 [*Perka* cited to S.C.R.].

28 *Southwark London Borough Council v. Williams* (1971), Ch. 734 at 746, [1971] 2 W.L.R. 467 (C.A.) [*Southwark*].

29 *Ibid*.

30 *Ibid*.

31 *Perka*, *supra* note 27 at 251, cited in *Latimer*, *supra* note 8 at para. 29.

32 *Ibid.* at para. 26. See also Hugues Parent, *Traité de droit criminel*, t.1, 2d ed. (Montreal: Thémis, 2003) at 485.

33 See Norrie, "Simulcra", *supra* note 16 at 101-55; Kelman, "Interpretive Constitution", *supra* note 20; Berger, *supra* note 12.

34 *Latimer*, *supra* note 8 at para. 38, referring to *Southwark*, *supra* note 28 at 746.

sideration of chronic and structural poverty in cases where, for instance, homeless squatters occupy private property or regulated public spaces. What lies beneath this refusal is the unexamined assumption that when a situation is persistent, especially if it has been going on for years, individuals that are caught in it must have had multiple opportunities to make different choices and avoid violating the law. However, no real effort is made to empirically support this suggestion.

Whether as a result of the dead end reached by case law in regards to *mens rea* or as a result of the limited scope of defences, there have been suggestions in recent years to strengthen the liberal model and to take into consideration the social and political contexts of poor offenders. Scholars who believe in the importance of recognizing certain elements of personal fault, choice, free will, and difference within criminal law—while remaining conscious of the significant limitations of both *mens rea* and defences in providing a satisfactory framework to do so—generally adopt one of three positions.

The first position is to return to a more subjective approach to *mens rea*.[35] Despite the fact that the subjectivist view no longer offers an adequate or complete account of the structure of criminal liability, and that a majority of the Court's judges have shown their preference for a rather objective or harm-based approach to *mens rea*,[36] this remains a defensible option. The Court has indeed affirmed its dedication to subjective standards in other areas of criminal law doctrine.[37]

The second position is more commonly held. According to its proponents, we must reluctantly accept that *mens rea* has fairly limited content, yet we should not abandon the subjectivist approach and turn our attention to other components as sources of moral culpability. This second position has led to the development of new theoretical foundations for defences and to the rediscovery of the notion of "imputability".[38] For instance, Parent argued that by adopting such a framework, courts have freed legal rules from their positivist reliance on a descriptive *mens rea*

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35 Stuart, *Criminal Law*, *supra* note 22.

36 *Creighton*, *supra* note 8. See generally Don Stuart, "The Supreme Court Drastically Reduces the Constitutional Requirement of Fault: A Triumph of Pragmatism and Law Enforcement Expediency" (1993) 15 C.R. (4th) 88; David M. Paciocco, Book Review of *The Charter's Impact on the Criminal Justice System* by Jamie B. Cameron, ed., (1997) 28 Ottawa L. Rev. 249; Anne-Marie Boisvert & André Jodouin, "De l'intention à l'incurie : le déclin de la culpabilité morale en droit pénal canadien" (2002) 32 R.G.D. 759.

37 See e.g. *Hibbert*, *supra* note 8 (in the case of defences).

38 Parent, *Discours*, *supra* note 10.

and ensured that criminal law reconnects with its philosophical foundations of choice and free will.[39]

The third position is held by scholars who are critical of the strict application of defences, which allows courts to ignore power and socio-economic inequalities, as well as racism, and who argue that we must widen the net of defences and broaden our understanding of the reasonable person. One of the most interesting proposals is still that of American critical race theorist Delgado, who proposed that criminal law should recognize a defence of extreme poverty, based on the concept of a "rotten social background" (RSB).[40] Delgado pursued an idea raised by Chief Judge Bazelon of the U.S. Court of Appeals for the District of Columbia Circuit,[41] who suggested that all juries should be instructed in regards to their power of nullification in the case of RSB defendants for whom RSB factored in as an excuse at the time of the offence. Delgado argued that severe environmental deprivation can alter mental processes, and that the experience of living in a ghetto can alter a person's understanding of the imminence of threats, while also affecting their capacity to cool off. He thus concluded that severe social deprivation should be adopted as an excuse, as opposed to a justification, defence in order to avoid punishing those who did not act out of free choice. He also pointed to the possibility that RSB works like entrapment or public policy defences calling for society at large to share in the responsibility.

These propositions all represent valuable proposals to make the most of the framework in which courts operate. The recognition of the key role of imputability opened up interesting new paths of litigation for defence lawyers, especially insofar as causation is concerned, as this could have a concrete bearing on culpability.[42] Moral involuntariness, on the other hand, has yet to replace *mens rea*, especially since the Supreme Court of Canada insisted on keeping the former separate from the notion of moral innocence.[43] While *mens rea* is not the only concept with moral content, it occupies a special status in the assessment of criminal culpability as the only concept that has a direct relationship with moral innocence. Even if moral voluntariness were to be aimed at reconnecting the rules of moral responsibility to their philosophical foundations, it would only partly succeed because considerations of choice and free will have neither a symbolic nor a concrete impact on culpability.

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39 *Ibid*. at 31, 215-67.

40 Delgado, *supra* note 11.

41 *U.S. v. Alexander*, 471 F.2d 923 at 957-61 (D.C. Cir. 1973). See also Bazelon, *supra* note 11. Compare Stephen J. Morse, "The Twilight of Welfare Criminology: A Reply to Judge Bazelon" (1976) 49 S. Cal. L. Rev. 1247 at 1250 [Morse, "Welfare Criminology"].

42 See e.g. *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488 at para. 47, 205 D.L.R. (4th) 613.

43 *Ruzic*, *supra* note 7 at para. 41.

Conscious of the limitations of the concept of moral involuntariness, Berger instead suggested reconnecting criminal defences with the concept of moral blameworthiness.[44] He refers to Kahan and Nussbaum's "evaluative conception of emotions,"[45] which views emotions as reflections of prior assessments of the world on which we can make moral and political judgments. He argues that the doctrinal avoidance of moral inquiry is inherent to the nature of the concept of moral involuntariness[46] which does not provide a proper normative framework in which to evaluate the emotions that affect an individual's actions.[47] In the case of moral voluntariness, what really matters is whether the accused's mind was overwhelmed by emotions to the point that he had no real choice in the circumstances.[48] For Berger, the notion of moral involuntariness actually responds to the "aversion to public moralizing as an impediment to social consensus," according to one version of political liberalism,[49] whereas moral blameworthiness discloses moral arguments and makes evaluation, criticism, and reform possible. He embraces Taylor's framework of normative evaluations.[50]

I welcome Berger's argument that the voluntarist account and political liberalism have hindered public debate about moral issues and social arrangements. I am less optimistic, however, that the concept of moral blameworthiness can successfully provide the necessary space to discuss issues of moral innocence and to disclose moral judgments in the way he suggests. What is problematic in the case of moral voluntariness is representative of two broader lines of criticism that can be levelled against existing legal concepts.

First, the absolutist and exclusive character of legal concepts such as *mens rea* prevents us from considering nuances and engaging in meaningful debate about the various shades and degrees of blame and culpability. Although law in practice is often less binary than it is in theory, and discretionary practices can allow for some grading, evaluation, and nuances, criminal liability is generally structured around dichotomies and calls for

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44 See generally Berger, *supra* note 12 at 117.

45 Dan M. Kahan & Martha C. Nussbaum, "Two Conceptions of Emotion in Criminal Law" (1996) 96 Colum. L. Rev. 269 at 275; Dan M. Kahan, "The Progressive Appropriation of Disgust" in Susan A. Bandes, ed., *The Passions of Law* (New York: New York University Press, 1999) 63; Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge, U.K.: Cambridge University Press, 2001).

46 Berger, *supra* note 12.

47 *Ibid*.

48 *Ibid*. at 109.

49 *Ibid*. at 121.

50 See generally Charles Taylor, *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995).

exclusive decisions: someone is either guilty or not guilty, either had or lacked the choice of committing a crime, and acted either reasonably or unreasonably.[51] Indeed, what is particularly striking about the Supreme Court of Canada's decisions where defences based on self-defence, duress, or necessity have been accepted, is that they include references to expressions such as "lack of choice" or "the accused did not have any realistic choice."[52] This certainly explains why courts are reluctant to admit these types of defences. It also perpetuates the common belief that defendants often distort reality, amplify its scope or even "feign" excuses all in order to obtain their acquittal in the context of a criminal trial,[53] whereas it is precisely the narrow construction of defences that is to blame for such a result. In our system, stories need to be neatly slotted into predetermined boxes and distorted to fit into binary categories in order to be heard.

In fact, even the most radical subjectivists such as Delgado merely seek to broaden defences to take into consideration socio-economic inequalities in cases where choice is nearly absent or neutralized. As Dressler noted in response to Delgado, "the law has allowed only those defenses that fall within specific, reasonably identifiable categories in which choice is obviously substantially limited."[54] Dressler rejected Delgado's proposal because he felt that it would introduce a deterministic understanding of human beings. For him, there is always choice, although admittedly, some choices are harder to make than others; to state otherwise is offensive to those who make the right choices despite the lack of recognition for the difficulty of their positions.[55] What is troubling in that discussion is their insistence on a certain type of rationality and on a false dichotomy between choice and constraint (i.e., lack of choice). The phi-

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51 See Nils Christie, "Images of Man in Modern Penal Law" (1986) 10 Contemp. Crises 95 [Christie, "Images"].

52 *Ruzic*, *supra* note 7 at para. 47; *Latimer*, *supra* note 8 at para. 2; *R. v. Lavallee*, [1990] 1 S.C.R. 852 at 890, 67 Man. R. (2d) 1 [*Lavallee*].

53 See *R. v. Stone*, [1999] 2 S.C.R. 290 at para. 175, 173 D.L.R. (4th) 66, Bastarache J. Bastarach J. stated that the words of Schroeder J.A. in *R. v. Szymusiak*, came to his mind in regards to automatism: "[A] defence which in a true and proper case may be the only one open to an honest man, but it may just as readily be the last refuge of a scoundrel" ([1972] 3 O.R. 602 at 608 (C.A.)). Further down, he also justified placing on the accused the legal burden to prove involuntariness on a balance of probabilities, arguing that "Like extreme drunkenness akin to automatism, genuine cases of automatism will be extremely rare. However, because automatism is easily feigned and all knowledge of its occurrence rests with the accused, putting a legal burden on the accused to prove involuntariness on a balance of probabilities is necessary to further the objective behind the presumption of voluntariness" (*ibid.* at para. 180). See also *R. v. Rabey*, [1980] 2 S.C.R. 513 at 546, 114 D.L.R. (3d) 193, Dickson J., dissenting; *R. v. Swain*, [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481, Lamer J. (defence of mental disorder).

54 Joshua Dressler, "Professor Delgado's 'Brainwashing' Defence: Courting a Determinist Legal System" (1979) 63 Min. L. Rev. 335 at 355.

55 Morse, "Welfare Criminology", *supra* note 41 at 1252.

losophical debate should not be cast in two artificial categories with an autonomous human being who controls his destiny and makes rational choices on the one hand, and an automaton that is pushed around by psychological forces or social-economic disadvantages on the other. Such an opposition is misleading, as it does not correspond to reality. Constraint is not a liberal fantasy; nor is choice a conservative conspiracy. In that sense, moral blameworthiness does not help us leave this binary framework.

Second, the concept of moral blameworthiness is just as embedded in a limited conception of liberal theory (even if it relies on a different version of that theory) as moral involuntariness. Even if we were to expand its normative foundations by including an evaluative conception of emotions, the liberal framework would remain largely unchallenged, particularly insofar as its assumptions about freedom, equality, and rationality are concerned. Even if these notions allowed us to include moral inquiry into the analysis, they would only reveal that the true problem lies in the assumptions of the philosophical discourse itself (i.e., liberty, equality, and rationality). Unless we directly challenge these assumptions, any proposal for change will remain incomplete.

The liberal model, whether it is grounded in retributive or utilitarian theories, relies on an understanding of human beings as free, equal, and rational individuals. Lacey explains this common ground by suggesting that both philosophies of punishment are set within the broader framework of the political theory of liberalism.[56] These philosophies rely on five important assumptions about human beings. The first assumption is that individuals and society exist separately and have diverging interests, and that the primacy of the individual is conceptually opposed to society. Second, human beings are rational agents capable of reasoning about the means to attain their chosen ends, and who also value reason over emotion and intuition. Deriving from the first two assumptions, it is further assumed that individuals have freedom of choice. Therefore, offenders should be held responsible for their actions since they are the result of a free mind. This idea of choice also presumes a profound distrust of paternalism and tends to favour autonomy. This assumption grounds the idea that to hold poor people responsible for their behaviour and to punish them does not constitute a denial of their dignity, but rather affirms their autonomy; in other words, punishing individuals for the choices they make is a sign of respect. Finally, it assumes that there is a formal equality of opportunities. All individuals are free and equal and have all the necessary latitude to not only make the decisions they consider appropriate for their own lives but also to accept the consequences associated with

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[56] Lacey, *supra* note 17 at 143-68.

those decisions. In turn, such a framework ignores the actual differences that exist between differently situated individuals.

The same assumptions also underlie the notions of moral involuntariness and *mens rea*. These rules presume the existence of freedom, equality, and (a particular type of) rationality. The Court's decisions in *Hundal*[57] and in the *Creighton* quartet[58] render explicit that substantive debate: not only do the majorities completely refuse to consider subjective factors in the evaluation of moral culpability, but they also clearly define free will as the capacity to gather information, process it rationally, and then make the right decision when faced with a series of possible paths of action.

The discussion is exemplified by the debate that emerged in *Creighton* in regards to the nature of the objective test. Justice McLachlin, as she then was, rallying the majority, excluded any consideration of human frailties or strengths from the assessment of the offender's capacity to comply with the reasonable person standard. She stated that the minimum standards of behaviour imposed by criminal law could not be lowered simply because of the educational, psychological or "habitual" conditions (i.e., excuses) of an accused. For her, incapacity to assess the risks should be considered only in situations "where the person is shown to lack the capacity to appreciate the nature and quality or the consequences of his or her acts."[59] She reasoned that the minimum standards of conduct prescribed by criminal law should apply universally to all individuals regardless of their different personal situations, including whether a person is "rich and poor, wise and naive."[60] This "universality of rights" argument relies on principles of equality and individual responsibility that are implicit in criminal law theory. Justice McLachlin relied on a statement made by Justice Wilson in *Perka*, which qualifies as one of those rare self-conscious statements made by the Court in relation to the underlying premises of criminal law:

> [I]t may be said that this concept of equal assessment of every actor, regardless of his particular motives or the particular pressures operating [u]pon his will, is so fundamental to the criminal law as rarely to receive explicit articulation. However, the entire premise expressed by such thinkers as Kant and Hegel that man is by nature a rational being, and that this rationality finds expression both in the human capacity to overcome the impulses of one's own will and in the universal right to be free from the imposition of the impulses and

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57 *Hundal*, *supra* note 8.

58 *Creighton*, *supra* note 8; *R. v. Gosset,* [1993] 3 S.C.R. 76, 105 D.L.R. (4th) 681 [*Gosset* cited to S.C.R.]; *R. v. Finlay*, [1993] 3 S.C.R. 103, 105 D.L.R. (4th) 699; *Naglik*, *supra* note 19.

59 *Creighton*, *supra* note 8 at 63.

60 *Ibid*.

> will of others supports the view that an individualized assessment of offensive conduct is simply not possible.[61]

This statement suggests that the principle of equality is "so fundamental" that it is rarely articulated in case law or doctrine. It also clearly proposes a model of the "rational actor" that is based on a belief in the human (or inhuman or subhuman?) capacity to overcome what is considered as "impulses of one's own will" and constraints imposed by the will of others. Criminal law, according to Justice McLachlin, requires us to go beyond our own individual character traits and conditions, and accept the normal compromises and sacrifices related to life in society, ruling out at the same time what being different means.[62]

For Chief Justice Lamer, an accused should be held to the standard of the reasonable person only if, at the time of the offence, he had the capacity to attain this standard in the circumstances of the case. Chief Justice Lamer urged the Court to consider human frailties[63] and particular strengths.[64] Failing to consider the personal characteristics of an offender, which may have affected his capacity to properly assess the risks involved in a situation, amounts to punishing someone for something that he could not help doing. Despite his disagreement with the majority of the Court, Chief Justice Lamer's conception of moral fault does not radically differ from that of the majority. For him, the types of human frailties that should be included in the analysis consist of personal characteristics that "the accused could not control or otherwise manage in the circumstances," such as illiteracy.[65] This specifically excludes situations that the accused contributed to creating, such as voluntary intoxication. It is unclear whether in the Chief Justice's mind, poverty would be the kind of permanent attribute that an accused could choose or not (especially in light of subsequent decisions of the Supreme Court of Canada).[66] Chief Justice Lamer suggests that, on occasion, an accused may not have the necessary space to properly process the relevant information because of his frailties. Yet if he voluntarily entered into a situation or did not take the necessary precautions to circumvent his incapacity, the accused could be held responsible. Despite its seemingly more considerate approach, the model of the free and equal individual who acts rationally has also ultimately been

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61 See *Perka*, *supra* note 27 at 272 [references omitted]. See also *Creighton*, *supra* note 8 at 62 [references omitted].

62 *Ibid.* at 62, 65, citing Oliver Wendell Holmes Jr., *The Common Law* (Boston: Little, Brown, and Company, 1881).

63 *Naglik*, *supra* note 19 at 142-43.

64 *Gosset*, *supra* note 58 at 96; *Creighton*, supra note 8 at 30.

65 *Ibid*.

66 *Gosselin v. Québec (A.G.)*, 2002 SCC 84, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257; *R. v. Banks* (2007), 84 O.R. (3d) 1, 275 D.L.R. (4th) 640 (C.A.).

carried over to inquiries into personal fault in Chief Justice Lamer's reasons for judgment.

Finally, within the context of the liberal model, the initial construction of and subsequent reliance on the standard of the reasonable person reveals a series of assumptions pertaining to normality as well as its counterpart, monstrosity. Indeed, there is always an unstated system of reference whenever someone is comparing behaviours.[67] In addition to ignoring gender, race and class differences, the reasonable person standard also ignores essential human traits, including selflessness, spontaneity, unpredictability, and passion.[68]

As a result, these proposals reveal important problems with liberal theory. First, the philosophical discourse on choice and personal responsibility lacks empirical foundations. It relies on assumptions of liberty, equality, rationality, and normality that do not take into consideration sociological findings about how human beings really think and act, and how real differences in their material and social conditions affect their life choices. The problem with this scheme is the misfit between the legal assumptions of freedom, equality, and choice, and the inequality in the economic distribution of wealth and in the political distribution of power. Second, while liberal theory claims to be making room for a nuanced assessment of choice, difference, and responsibility, our current liberal model simply never does it.

B. The Empirical Models of Law and Economics

One of the most important proposals that seeks to connect philosophical discourse to empirical evidence comes from law and economics scholars.[69] For the proponents of the economic approach, criminal behaviour—like human behaviour in general—is the result of a person's decision to maximize utility after having contemplated a stable set of preferences and accumulated information.[70] They believe that law can influence this decision by increasing the severity of punishment and the certainty of detec-

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67 Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, N.Y.: Cornell University Press, 1990) at 51, 56-60.

68 Myra Marx Ferree, "The Political Context of Rationality: Rational Choice Theory and Resource Mobilization" in Aldon D. Morris & Carol McClurg Muellen, eds., *Frontiers in Social Movement Theory* (New Haven, Conn.: Yale University Press, 1992) 29.

69 There are other proposals within the utilitarian tradition, but my analysis will focus on empirical claims.

70 See Gary S. Becker, "Crime and Punishment: An Economic Approach" (1968) 76 J. Pol. Econ. 169 at 176. See generally Alex R. Piquero & Stephen G. Tibbetts, eds., *Rational Choice and Criminal Behaviour: Recent Research and Future Challenges* (New York: Routledge, 2002); Jules L. Coleman, "Afterword: The Rational Choice Approach to Legal Rules" (1989) 65 Chicago-Kent L. Rev. 177.

tion; that is, by increasing the potential price that criminals would have to pay or, in moral philosophy terms, by increasing the pain they are assumed to want to avoid.[71] Although they suggest that we should abandon desert as the determining moral principle and focus on utility, choice is still at the very heart of this model: it "follows the economists' usual analysis of choice and assumes that a person commits an offence [by thoughtfully and deliberately choosing to do so] if the expected utility to her exceeds the utility she could get by using her time and other resources at other activities."[72]

Classical law and economics models have suffered criticisms for their failure to provide an accurate description of human agency and for offering, at best, coherent but circular systems with which to predict behaviour.[73] Among subsequent generations of law and economics scholars, two groups of individuals have tried to respond to such criticisms.

The first project comes from the "second wave" of welfare economics. Kaplow and Shavell suggest that policymaking and legal rules should be exclusively based on their effects on the overall welfare of individuals, taking issue with the legal theorists who put fairness in the forefront.[74] According to them, exclusively considering welfare could either completely eliminate criminal activity or significantly reduce it. They attempt to distance themselves from traditional economics in order to offer a more comprehensive notion of welfare, which could account for variations among individuals: in their model, fairness and other values are considered as "tastes", but only insofar as they affect the well-being of individuals. Tastes are rejected whenever their consideration would lead to a situation in which everybody would be worse off.

Behavioural law and economics scholars Jolls, Sunstein, and Thaler aim to add the insight of behavioural social sciences to economic analysis of law in order to provide a better description of choice and human behaviour, and to strengthen the predictive power of law and economics theory.[75] They observe that "[o]bjections to the rational actor model in Law and Economics are almost as old as the field itself."[76] They want to deal with the claim that rational choice economists do not consider real people

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71 Becker, *supra* note 70 at 176.

72 *Ibid*. at 176.

73 For examples of some of these criticisms, see generally Mark Kelman, "Consumption Theory, Production Theory, and Ideology in the Coase Theorem" (1979) 52 S. Cal. L. Rev. 669 at 678; Duncan Kennedy, "Cost-Benefit Analysis of Entitlement Problems: A Critique" (1981) 33 Stan. L. Rev. 387; Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass.: Harvard University Press, 1987).

74 Kaplow & Shavell, *supra* note 13.

75 Jolls, Sunstein & Thaler, "Behavioral Approach", *supra* note 14 at 1473-74.

76 *Ibid*. at 1473.

in their hypothetical models. Toward this end they propose that the current model can be perfected by introducing the idea that actual individuals tend to display three "bounds", namely, bounded rationality (i.e., people suffer biases like over-optimism, they encounter cognitive limitations such as memory failures, and they follow heuristics), bounded willpower (i.e., people suffer temptations to act against their long-term self-interest), and bounded self-interest (i.e., people are concerned with fairness and with others and, as such, they can be both nicer and/or more spiteful to make sure others are treated more fairly than the models generally assume).[77] Their proposal is bold in that they are trying to propose an encompassing theory with full, descriptive, prescriptive, and normative powers,[78] and also modest in that they still largely reproduce the flaws of the classical approach.[79]

These two proposals ultimately fail to supply an empirically sound model that can predict criminal behaviour and impute responsibility. I suggest that they make four important series of mistakes.

First, these scholars underestimate problems related to access to and processing of information. Rational action oriented in light of knowledge of all circumstances and intentions of the participants involved simply "cannot be regarded as an anthropological description of practice."[80] This line of criticism is often levelled against rational choice theory by economists themselves. As Hayek observed, real people never have access to all of the relevant information and are forced to rely on pieces of information. "[K]nowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess."[81]

Law and economics scholars label such limitations as "information costs" and insist that we can circumvent this problem by giving more information to individuals. However, getting the information to offenders might not always provide the expected results. For example, increasing police visibility in a community may only reassure potential offenders who would then be operating in a controlled environment. It may also have perverse effects since, in this example, the costs of policing would also

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77 *Ibid*. at 1476, 1545.

78 *Ibid*. at 1474.

79 For a response to Jolls, Sunstein & Thaler, "Behavioral Approach" (*supra* note 14), see Richard A. Posner, "Rational Choice, Behavioral Economics and the Law" (1998) 50 Stan. L. Rev. 1551; Mark Kelman, "Behavioral Economics as Part of a Rhetorical Duet: A Response to Jolls, Sunstein, and Thaler" (1998) 50 Stan. L. Rev. 1577 [Kelman, "Behavioral Economics"].

80 Bourdieu, *Logic*, *supra* note 15 at 63.

81 F.A. Hayek, "The Use of Knowledge in Society" (1945) 45 Amer. Econ. Rev. 519 at 519.

dramatically increase just as the accessibility of public spaces would proportionately decrease. Finally, even if someone had all the information, he would still be limited if he could not process it in the specific manner that is assumed by the rational choice model.[82] Offenders often have other (rational) reasons than the chances of being caught when engaging in criminal activity.

In fact, the law and economics model seems to work for one reason: all of the variables appear to add up because they have been first introduced and constructed as a self-sufficient and logical puzzle that needs only to be properly assembled to provide all of the answers.[83] Law and economics scholars have alienated their powers: they created a system that can be applied successfully to a series of hypothetical and fictitious situations, yet, in the midst of all of these concordant results, they forgot that they were in fact the instigators of this system, thus allowing themselves to be governed solely by their own construction.[84]

Second, far from being morally neutral, law and economics scholars champion a conception of humans as opportunistic beings with selfish needs and impulses that ought to be neutralized.[85] This reveals a simplistic (and ultimately wrong) understanding of human nature. In her feminist structuralist critique of rationality, Ferree argues that the persistent failure of the rational choice model has historically been hidden behind an evolving redefinition of rationality and self interest.[86] In all rational choice model formulations, human beings are left as empty forms, devoid of any of their human content, including their vulnerability, spontaneity, selflessness, inner conflicts, and complexities. They also lose all sense of social context and community by ignoring that individuals are social beings and largely interdependent. This individual-centered and simplistic analysis leads to economic mistakes as law and economics scholars exclude relevant costs from their equations. For example, Kaplow and Shavell consider the disutility of individuals, yet they do not calculate the disruptive effects of punishment on communities and on nationwide ethno-

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82 Kelman, "Behavioral Economics", *supra* note 79 at 1582.

83 Hayek, *supra* note 81 ("*If* we possess all the relevant information, *if* we can start out from a given system of preferences and *if* we command complete knowledge of available means, the problem which remains is purely one of logic" at 519 [emphasis in original]).

84 See e.g Karl Marx, "On the Jewish Question" in *Karl Marx: Selected Writings*, 2d ed. trans. by David McLellan (Oxford: Oxford University Press, 1977) 39 at 46, referring to Ludwig Feuerbach, *Essence of Christianity*, trans. by George Eliot (Mineola, N.Y.: Dover, 2008). Marx uses and transforms Feuerbach's idea of religious alienation.

85 Kaplow & Shavell, *supra* note 13 at 64-65.

86 Ferree, *supra* note 68.

racial relationships, or the costs of recidivism associated with socialization in prison.[87]

While the three "bounds" proposed by behavioural law and economics were meant to bridge the gap between the model and real agents, JST fail in truly distancing themselves from a simplistic portrayal of humans. The second bound referred to by JST, according to which individuals not only have generally limited willpower, but also seek immediate benefits and underestimate long-term costs, is undeniably connected to this two-dimensional image.

Third, behavioural law and economics scholars falsely assume that individuals are always similarly situated and fail to account for structural differences of power between individuals. They generally consider social, economic, and political constraints as reflecting mere preferences. In the case of the welfare-based model, they assume that everyone is equal and that everyone can be at times either a criminal or a victim; or that, in any event, a person's economic, social, and political position of power is precisely the result of merit.

In response, the liberal critique of equality of opportunity correctly stresses that deep inequalities between individuals early in life cannot be explained away by notions of merit since it is widely recognized that some people are simply given a head start.[88] However, disparities in the economic distribution of wealth and political power are not just the result of early life circumstances, and starting positions are not only the result of good fortune or social circumstances over which no one has any control. In reality, these are directly related to ongoing conditions of exploitation and injustice that tend to appear along gender, race, and class lines. They are also the result of individual positions in a field, whether social, economic, or cultural.[89]

Finally, law and economics scholars make absolute normative claims that put their overall project at risk. JST admit that economists generally

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87 See e.g. Marc Mauer & Meda Chesney-Lind, eds., *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New York: New Press, 2003).

88 See John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999) at 89:

> We do not deserve our place in the distribution of native endowments, any more than we deserve our initial starting place in society. That we deserve the superior character that enables us to make the effort to cultivate our abilities is also problematic; for such character depends in good part upon fortunate family and social circumstances in early life for which we can claim no credit.

89 Pierre Bourdieu, "The Forms of Capital" in John G. Richardson, ed., *Handbook of Theory and Research for the Sociology of Education* (New York: Greenwood Press, 1986) 241.

look for simplicity and parsimony,[90] holding that "economics makes things hard on agents, but easy on economists."[91] But they suggest that their perspective "offers a more complicated and unruly picture of human behaviour," even if it means less predictability, "precisely because behaviour is more complicated and unruly."[92] Unfortunately, they cannot build on this important epistemological insight. Jolls, Sunstein and Thaler are quick to point to the limitations of their model: "The three bounds we describe *do not (at least as we characterize them here) constitute a full description of human behaviour in all its complexity*."[93] They acknowledge having to discard a lot of relevant information about human behaviour if they are to depart from traditional economic assumptions.[94] They are concerned with prediction and, as a result, they are ready to sacrifice scientific explanation, regardless of whether it contradicts their conclusions. They write, "[W]e do not emphasize behavioural patterns that depart from standard economic assumptions but fail to point in systematic directions; such patterns would not generate distinct predictions (*although they would of course matter to a full account of individual behaviour*)."[95] In doing so, they acknowledge that their model is useful only insofar as it is not confronted with the unpredictability of social life.

In his rejoinder, Kelman welcomes the insights of behavioural social science, but argues that these are merely "interpretative tropes" or "stories" of human behaviour that are similar to a variety of other interpretive traditions offering other accounts of individual choices.[96] In fact, he argues that the situation is more complicated than their model could ever possibly encompass both for descriptive and prescriptive purposes.[97]

In their defence, JST argue that their behavioural approach will lead to an accumulation of information that, with sufficient research, will ultimately produce an accurate picture of human rationality.[98] Yet, their problem is not quantitative, but qualitative: they are neither going far enough nor are they offering anything beyond a very limited list of fea-

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90 Jolls, Sunstein & Thaler, "Behavioral Approach", *supra* note 14 at 1487.

91 *Ibid*. at 1545.

92 *Ibid*. at 1487.

93 *Ibid*. at 1480 [emphasis added].

94 *Ibid*. at 1481.

95 *Ibid*. [emphasis added].

96 See Kelman, "Behavioral Economics", *supra* note 79 at 1579-80; Christine Jolls, Cass Sunstein & Richard Thaler, "Theories and Tropes: A Reply to Posner and Kelman" (1998) 50 Stan. L. Rev. 1593 at 1593-94, 1605 [Jolls, Sunstein & Thaler, "Theories"].

97 Kelman, "Behavioral Economics", *supra* note 79 (they "maintain [the] quite stunning belief that very basic insights from elementary economics have swallowed up the remainder of the social sciences and humanistic interpretivism" at 1580).

98 Jolls, Sunstein & Thaler, "Theories", *supra* note 96.

tures. Most importantly, they remain within a larger but ultimately restrictive framework dictated by a particular type of rationality.

The liberal and economic models fail in many respects in their approach to crime and punishment and, in particular, in offering a satisfactory account of human behaviour and of our ability to choose and be different from one another. The liberal model relies on a philosophical discourse that generally ignores or is completely disconnected from sociological evidence of power and wealth distribution and does not make room for nuances and intermediate positions. As for the economic alternative, not only is it extremely selective as to the types of knowledge that it is prepared to include in its calculations, but it also excludes the consideration of power and socio-economic constraints. Both of these models make false assumptions about liberty, equality, and a certain type of rationality, and they both make strong claims as to their neutrality when, in fact, they are hiding important moral, social, economic, and political choices. However, contrary to the principle of utility, the ideals embodied in the liberal model could perhaps be transformed to live up to their promises.

II. Turning to Sociological Analysis: Embracing Complexity

I turn next to sociological and anthropological research in order to show what it could mean to consider choice and difference in all of their complexity, particularly in the case of homeless and poor offenders (Parts II.A-II.B).[99] I then present an analysis of the different insights that result from emphasizing *praxis* to better understand social behaviour and the apportionment of responsibility (Part II.C), and I discuss the implications of this proposal for the criminal justice system and the liberal model (Part II.D).

A. The Importance and Complexity of Choice

I have a choice and I don't have a choice[100].

The critique of the limited understanding of choice in criminal law theory, above, does not undermine its importance. If anything, we need to take choice more seriously. As anthropological and sociological research reveals, poor and homeless people value choice and emphasize its centrality in their lives. For instance, in his excellent ethnography of street vendors and panhandlers sharing the sidewalks of New York City, Duneier reports how homeless people often refer to choice when explaining their

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[99] For a detailed analysis of the contradictory and yet complementary aspects of both discourses in the criminal justice system, see Sylvestre, *supra* note 18.

[100] Rhodes, *supra* note 3 at 67 [emphasis added].

decision to live on the street.[101] In Montreal, a street youth, Simon, refused to sleep in a shelter even during the worst winter nights, explaining that "we chose to live in the street, we won't go hide ourselves; we are here."[102] We could all too easily conclude that these individuals have merely assimilated the discourse of their domination, essentially transforming external constraints into acts of will. However, we would be missing something fundamentally important to them and to us all, as human beings, if we were to understand their situations as merely structural. As Rhodes reports, "too great an emphasis on [external] influence robs the inmates of something."[103] That "something" is fundamentally important and connects offenders with humanity as a whole.

Choice matters because offenders feel it is important to regain control over their lives: "They think they can control me, but I'm gonna be the one in control," said one inmate.[104] There is a need to choose one's own behaviour for questions of self-possession and dignity in order to stop being pushed around by surrounding circumstances and external constraints. Choice is also linked to rehabilitation and strength: "I chose to do positive. I really chose it," explained one former convict.[105] The ability to choose means that offenders are able to change and to hope of possibly getting out of their life to achieve something better. If we tell them that they did not choose their previous criminal behaviour or previous life, it may mean that they will not be able to choose what is next and ahead of them, or to seek a better path if they want. Many people feel that they have something to prove to others and they constantly look for an opportunity to do so. While there is an evident tension here between that desire and reality, initial affirmations of choice are important.

Choice allows for resistance against life constraints, and more directly against the prevailing social order. Hakim explains how, after finishing college, he looked in vain for a job in publishing. He eventually ended up working as a proof-reader in law, accounting, and investment banking firms until he was dismissed for alleged incompetence. He said that, as a black man, he had difficulty maintaining his integrity within a corporate environment that is largely indifferent toward racism. Hakim said that he

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101 Mitchell Duneier, *Sidewalk* (New York: Farrar, Straus and Giroux, 1999). A New York City street vendor named Hakim explained, "I came to this sidewalk by choice, not by force" (*ibid*. at 40).

102 Malorie Beauchemin, "La famille des sans-abri s'élargit" *Le Devoir* (31 December 2004) A1 at A6 [translated by author].

103 Rhodes, *supra* note 3 at 83.

104 *Ibid*. at 55.

105 Class intervention made by an inmate invited to Lani Guinier's course "Critical Perspectives on the Law: Issues of Race, Gender, Class and Social Change" at Harvard Law School in the spring of 2005.

chose to live on the street and become a street vendor, specializing in "black books" in Greenwich Village.[106] When someone loses everything, choice and freedom become their last ammunition against repression and injustice, as well as their last source of self-respect.

The admissibility of the "rotten social background" defence discussed previously likewise relies on choice because certain individuals and groups would otherwise be portrayed as being exclusively criminogenic and their actions would be considered predetermined. Many authors have criticized the specious association between "black faces" and criminality,[107] and between crime and poverty.[108] Although we cannot deny the impact of poverty and racism on someone's living conditions, and thus potentially on criminal behaviour, neither should we accept that these are causally linked. In addition to being false and perpetuating stereotypes, this idea diverts attention away from race and class biases found in the definitions of crime and prosecution. When choice is properly taken into account, crime is understood as something that can be done by people from any background.

Yet, we need to realize that affirmations of choice are always more nuanced than they first appear: people are not mere accomplices to their own misery and suffering. Statements of choice are systematically followed by a series of explanations regarding the circumstances that surrounded the actual moment of choice. For instance, Hakim added that "[his] own experience is that [he] had to confront a very painful need to figure out how to exist economically without having to go and apply for what is considered a 'job'."[109] Because he believed racist corporate America would make him lose his integrity, he felt that becoming a street vendor was among the reasonable alternatives available to him at the time. In Simon's case, he explained his affirmed choice by noting: "in addition, they do not accept our dogs in [the shelters]."[110] In explaining his choice to live in the streets, he added; "I thought there was no room for me in this consumers' society. I decided to live my life as I chose, in peace with my

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106 Duneier, *supra* note 101 at 23-24.

107 See generally Michael Tonry, *Malign Neglect*: *Race, Crime, and Punishment in America* (New York: Oxford University Press, 1995); Sonia N. Lawrence & Toni Williams, "Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing" (2006) 56 U.T.L.J. 285; Justice Clarence Thomas, "Personal Responsibility" (2000) 12 Regent U.L. Rev. 317 at 324.

108 Jack Katz, *Seductions of Crime*: *Moral and Sensual Attractions in Doing Evil* (New York: Basic Books, 1988) at 313-17.

109 Duneier, *supra* note 101 at 41.

110 Beauchemin, *supra* note 102 at A6 [translated by the author].

values. If I live in the streets, it is to be free. I do not want to have any schedule. I am capable of organizing myself."[111]

Duneier finds that many of the street people with whom he interacted described having actively participated in their decision to become homeless, although the extent and meaning of such participation greatly varied. Some of them relate having been thrown out by their families due to alcohol or drug problems over which they claim full personal responsibility. Some report having voluntarily given up on entering the formal economy as they lack the cultural capital to enter structured working places, and others simply could not pay the increasing rent with their meagre minimum-wage earnings. Duneier draws a distinction between playing an active role in and making a voluntary choice to enter street life. He points to a key moment that was experienced by almost all of the men that he encountered on Sixth Avenue: "Even man who had been put out of their houses ... had a moment when they gave up and said—to use the vernacular of the streets—'Fuck it!'"[112] Duneier explains that this choice to give up was often made either in time of depression or under the influence of drugs, which could have altered these men's perceptions of the world, leaving the impression that anything else but their addiction was not pressing. Some of the life choices that they were forced to face are simply not the kind of choices that most people have to make as they go through their daily lives: "Ron's choice between, say, buying a vial of crack and keeping his money for rent was not the choice a healthy, well-functioning person who is short of money makes between buying a cup of coffee and buying a newspaper."[113] A person who stands near eviction from his apartment or who is going through a family crisis naturally comes to see the world through that lens.

Speaking about the nineteenth-century poor, Fecteau writes that while their history cannot be reduced to rational or strategic calculation, it cannot be understood as lacking rationality either. Their history is best conceived as one of freedom and resistance against domination and inequality:

> *La "liberté" du pauvre au XIX^e siècle ne peut se penser comme un espace d'autonomie comblé par la rationalité stratégique de l'acteur. Non pas, évidemment, que l'acte rationnel soit inaccessible aux classes populaires, que l'expression de la libre volonté leur soit constamment déniée, ou qu'ils soient incapables d'initiative, d'innovation, de capacité de transformation du monde. Bien au contraire : c'est par leur action, leur résistance, leur inventivité face à*

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111 *Ibid*.

112 Duneier, *supra* note 101 at 50.

113 *Ibid*.

> *l'adversité, par la puissance de leurs espérances et l'ampleur de leurs attentes, que peut se penser notre histoire. Mais cette histoire elle-même ne peut faire l'économie de la domination, de l'inégalité, du pouvoir des dominants.*[114]

B. Understanding Monstrosity

The idea of monstrosity is first connected to the idea of difference and social distance between the offender and those who want to control him. The fact that many actors in the criminal justice system—whether it is a police officer, a judge, a public servant or a lay person—cannot identify with poor offenders, and project different values, results in general incomprehension and lack of empathy for the issues with which they are confronted on a daily basis. For law enforcement officers, this incomprehension is reinforced by the fact that they are often trained or forced by their jobs to dissociate themselves from the subjects they control. The capacity—or rather the incapacity—to make sense of an individual and of where she comes from is thus at play here.[115] In familiar settings, we can usually rely on a series of experiences, knowledge, and feelings to formulate an opinion about an individual, as well as her merits and her capacity to be loved and to suffer. In contrast, with the monster, we are unable to make sense of that "totality of knowledge" and experience to which Christie refers:

> The underlying mechanism is simple. Think of children. Our own children and those of others. Most children sometimes act in ways that according to the law might be called crimes. Some money may disappear from a purse. … He beats his brother. But still, we do not apply the categories from penal law. We do not call the child a criminal and we do not call the acts, crimes.
>
> Why?
>
> It just does not feel right.
>
> Why not?
>
> Because we know too much. We know the context, the son was in desperate need of money, he was in love for the first time, his brother had teased him more than anybody could bear. … And the son himself; we know him so well from thousands of encounters. In that totality of knowledge a legal category is much too narrow. He took that money, but we remember all the times he generously

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[114] Jean-Marie Fecteau, *La liberté du pauvre : sur la régulation du crime et de la pauvreté au XIX^e siècle Québécois* (Montréal: VLB éditeur, 2004) at 34.

[115] See e.g. Dianne Pothier, "But It's for Your Own Good" in Margot Young *et al.*, eds., *Poverty—Rights, Social Citizenship, Legal Activism* (Vancouver, B.C.: UBC Press, 2007) 40. She states, "The ultimate question is whether the court 'gets' the context of the claimant in order to be able to make a sensible judgment about human dignity" (*ibid.* at 42).

> shared his money or sweets or warmth. He hit his brother, but has more often comforted him.
>
> But this is not necessarily true of the kid who just moved in across the street.[116]

For Christie, "[s]ocial distance ... increases the tendency to give certain acts the meaning of being crimes, and the persons the simplified meaning of being criminals."[117] Lack of identification with and knowledge about others also makes repression seem all the more reasonable. It ultimately allows us to evade responsibility: given that crime becomes something that "others" do, this prevents us from confronting what truly makes violence and crime fundamentally human. By labelling offenders as monsters, we are ultimately feeding a desire to kill whatever is left of their humanity, however humiliating it may be for them.

In Christie's analysis, lack of empathy and comprehension of the other in his totality also leads us to the idea of egocentrism and self-absorption. Linking it back to the idea of choice, when we think about our own decisions and actions, we are generally able to explain some of the constraints, thoughts, and pressures that we felt in acting, and we are more likely to blame external causes. In contrast, since we are generally unable to discern the personal and social constraints others face, we usually end up attributing their mistakes to internal causes or personal attributes. Whereas we are often struck by the brutal unpredictability of social life in our own lives, we tend to view others as living under perfect circumstances and thus, we reason that they should consequently be personally blamed for the consequences of their decisions. This fundamental error of attribution leads us to be generally more demanding when it comes to others—requiring that they plan ahead for the unpredictable, believing that they should have known better and been more careful.[118]

The idea of monstrosity also carries with it ingrained fears of the unknown, the strange or paranormal, and ultimately fear of ourselves and of our own fatal human condition. Naming and identifying monsters helps sort out our pain and our anger, and allows us to find a quick, albeit temporary, solution to address our suffering and feelings of insecurity. In *Waiting for the Barbarians*, Cavafy painfully wonders why the streets are empty and surrounded with a sense of confusion and restlessness, and suggests that this is because "the night has fallen and the barbarians

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116 Nils Christie, *Crime Control as Industry: Towards Gulags, Western Style,* 3d ed. (New York: Routledge, 2000) at 22.

117 *Ibid*.

118 See e.g. Edward E. Jones & Victoria A. Harris, "The Attribution of Attitudes" (1967) 3 J. of Exper. Soc. Psych. 1.

have not come" as if "they were, those people, a kind of solution."[119] The monsters that we have created in our criminal justice systems play the same role as these "barbarians". They are scapegoats for collective problems and our common fate.

Monstrosity thus needs to be confronted. In the sense of recognizing differences such as poverty, the idea of monstrosity matters if we are to preserve diversity and plurality in society. More precisely, it matters because considering difference creates room for justice and dignity, instead of mere pity and compassion, which are generally unwanted by street populations (or by anyone for that matter). It is also important to identify what really differentiates these people from the "rest of us" and to understand what we share in common. What is in fact striking about the practical realities of the criminal justice system is that monstrous offenders are truly the exception. Yet, they are rarely perceived as such. If we make room to consider what it truly means to be different and how different criminals really are, we could undoubtedly come to realize that street people or poor offenders are human beings foremost, and that they operate within specific contexts, conditions, and opportunities, much like every one of us. As Bourgois once said about street-level drug dealers living in East Harlem, New York, criminals offenders "are not 'exotic others' operating in an irrational netherworld. On the contrary, they are 'made in America'."[120]

C. Reconciling the Dichotomies: Practice Theory

In criminal law theory, choice and constraint can hardly cohabit in the same space or apply to the same individual: they seem mutually exclusive. The same binary categories are also found in moral philosophy—between free will and determinism—and, most importantly, in criminal law doctrine where we are asked to decide whether a person had or lacked the choice to commit an act, whether she acted voluntarily or involuntarily and, ultimately, whether she is guilty or not guilty. Similarly, we largely oppose normal and deviant behaviour and reasonable and disreputable people. Between these categories, there is no space for human beings.

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[119] C.P. Cavafy, "Waiting for the Barbarians" in Anthony Hirst, ed., *C.P. Cavafy: The Collected Poems*, trans. by Evangelos Sachperoglou (Oxford: Oxford University Press, 2007) 15 at 17.

[120] Philippe Bourgois, *In Search of Respect: Selling Crack in El Barrio*, 2d ed. (Cambridge: Cambridge University Press, 2003) at 326.

For Bourdieu, these dichotomies do not reflect rationality in practice.[121] Despite the originality and importance of Bourdieu's thinking, as well as the depth and scope of his empirical investigation,[122] few people have explored the significance of his work for criminal justice[123] and, in particular, for the development of a theory that connects human behaviour and criminal responsibility. I suggest that his practice theory, and especially the key concept of *habitus*, can help avoid the pitfalls of both traditional criminal law theory and existing alternatives as a result of dichotomies found in each between voluntarism and determinism, agency and structure, choice and constraint, and monstrosity and normality. As Harcourt once wrote, "[p]ractice theory is a realm that brings together decision making and symbolism in a dynamic relationship—a relationship that produces a more fluid conception of structures and a more structured notion of decision making."[124]

Practices in Bourdieu's theory of action emerge from the intersection of three key concepts of the *habitus*, the capital, and the field: "[(*habitus*) (capital)] + field = practice."[125] A field is a structured and socially patterned space constituted by the different positions occupied by individuals interacting in that space. According to this definition modern societies are composed of many fields, including, for example, the economic, artistic, political, educational, and juridical fields.[126] Each field responds to its own

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121 Pierre Bourdieu, "Les juristes, gardiens de l'hypocrisie collective" in *Normes juridiques et régulation sociale* (Paris: Librairie Générale de Droit et de Jurisprudence, 1991) 95 at 95.

122 Practice theory is grounded in several years of empirical research (ethnography and other qualitative methods) about social behaviour and practices in different fields including the educational, the cultural, and the economic. See David Swartz, *Culture & Power: The Sociology of Pierre Bourdieu* (Chicago: University of Chicago Press, 1997). See also Bourdieu's main works: Bourdieu, *Distinction*, *supra* note 15; Pierre Bourdieu, *Outline of a Theory of Practice*, trans. by Richard Nice (Cambridge: Cambridge University Press, 1977) [Bourdieu, *Outline*]. For a thorough analysis of the importance of social theory in law, see Craig Calhoun, "Social Theory and the Law: Systems Theory, Normative Justification and Postmodernism" (1989) 83 Nw. U.L. Rev. 398.

123 But see Loïc Wacquant, *Les prisons de la misère* (Paris: Raisons d'agir, 1999); Bernard E. Harcourt, *Language of the Gun: Youth, Crime, and Public Policy* (Chicago: University of Chicago Press, 2006) at 145ff. [Harcourt, *Language*]; Bernard E. Harcourt, "Measured Interpretation: Introducing the Method of Correspondence Analysis to Legal Studies" (2002) U. Ill. L. Rev. 979 at 980-81, 990 n. 33, 999-1002; Bourgois, *supra* note 120 at 17.

124 Harcourt, *Language*, *supra* note 123 at 157.

125 Bourdieu, *Distinction*, *supra* note 15 at 101. A complete description of practice theory and Bourdieu's sociology is beyond the scope of this paper. For more, see generally Bourdieu, *Outline*, *supra* note 122.

126 Bourdieu has written articles and books about different fields. See e.g. Pierre Bourdieu, *Homo Academicus*, trans. by Peter Collier (Stanford: Stanford University Press, 1988) (on education and the academic field); Pierre Bourdieu, *The State Nobility: Elite Schools*

rules and is relatively autonomous from the others as long as its actors believe in the superiority of those rules for governing the practices and rituals in their field.[127] Relationships, common interests, and distinctions among individuals all depend on their position in a field. In turn, one's position in the field depends on the amount of capital one can mobilize. The notion of capital is a general concept of accumulation that Bourdieu uses beyond the classic economic notion (for instance, he refers to symbolic, cultural, political, and relational capital). It includes elements such as wealth, access to resources and social networks, knowledge, and reputation. Finally, the *habitus* consists in a series of predispositions that result from social conditioning and that produce affinities. It is "the habitual, patterned ways of understanding, judging, and acting which arise from our particular position as members of one or several social 'fields' and from our particular trajectory in the social structure."[128]

The structure of the *habitus* is produced by personal history and conditionings associated with objective socio-economic conditions of existence (e.g., the economic and social necessity that is based on low economic or social capital). Early experiences are crucial in constructing the *habitus*. Once it is produced, the *habitus* ensures "its own constancy and defence" against "crises and critical challenges" by not only selecting information that reinforces it, but by also rejecting information that is capable of challenging its conclusions and, above all else, by avoiding situations in which it is likely to be called into question.[129] This is neither the result of a completely unconscious, nor a completely willed mind, but rather the result of a series of systematic "choices" regarding places, events, and persons made by the *habitus* to protect itself. For instance, people commonly dis-

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in the Field of Power, trans. by Lauretta C. Clough (Stanford: Stanford University Press, 1996) (on the political field); Pierre Bourdieu, *Rules of Art: Genesis and Structure of the Literary Field*, trans. by Suzan Emanuel (Stanford: Stanford University Press, 1996) (on the literary field); Pierre Bourdieu "The Force of Law: Toward a Sociology of the Juridical Field", trans. by Richard Terdiman, (1987) 38 Hastings L.J. 805 (on the juridical field).

127 For example, in the juridical field, the legal professionals and the parties accept and believe that courts' decisions are structured by the rules of legislation, regulations, and judicial precedents: *ibid*. at 807 (note the excellent introduction by Richard Terdiman).

128 *Ibid.* at 811.

129 Bourdieu, *Logic*, *supra* note 15 at 60-61. Bourdieu proposes an interesting intermediate position to the debate between Freud and Sartre about the existence of the "unconscious" and the nature of denial. For Freud, the existence of "splitting portions of the mind" makes it possible for human beings to know and not know something at the same time. For Sartre, there is a unified single consciousness: the person who denies something is acting in "bad faith" as she must know the truth in order to conceal it. See Stanley Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Cambridge: Polity Press, 2001) at 40.

cuss political questions with those who largely share their opinions or read the "good" books to avoid having their beliefs challenged.[130]

The *habitus* is internalized as second nature. It functions as "systems of durable, transposable dispositions, structured structures predisposed to function as structuring structures,"[131] (i.e., as principles that generate and organize practices and representations that can be objectively adapted to their ultimate outcomes). The *habitus* follows a dynamic of constraint and innovation, since it is capable of producing an infinite number of practices that are relatively unpredictable but also strictly limited in their diversity by the constraints initially set on its inventions.[132] While the *habitus* excludes radical departures and extravagances (those things that are "not for us"[133]), it does not engage in mere repetitions. We cannot begin to understand this mechanism if we keep ourselves locked within the dichotomies between determinism and freedom, conditioning and creativity, consciousness and the unconscious, and the individual and society. The *habitus* boasts an infinite capacity to generate thoughts, actions, perceptions, and expressions, all within historically and socially situated limits or structures. It provides both a conditioned and a conditional freedom (a "universe of possibles"[134]), which is "as remote from creation of unpredictable novelty as it is from simple mechanical reproduction of the original conditioning."[135]

In that sense, choice and constraint are not two sides of one coin, nor are they two opposite notions with which human beings struggle and between which they are asked to choose. Instead, they are two necessary components of a continuing relationship and interaction that we need to grasp in order to have a complete understanding of the complexity of individuals and their environment. The *habitus* bears an interesting relationship with calculus and deliberation. It does not presuppose "a conscious aiming at ends or an express mastery of the operations necessary in order to attain them."[136] It is not that the *habitus* can never be "accompanied" by strategic calculations (e.g., an estimate of one's chances to commit a crime successfully), but rather that the responses have already

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130 *Ibid*. See also Anthony Giddens, *The Constitution of Society* (Berkeley: University of California Press, 1984).

131 Bourdieu, *Logic*, *supra* note 15 at 53.

132 *Ibid*. at 55.

133 *Ibid*. at 64.

134 *Ibid*. at 42, 64. In Bourdieu's work, the concept of a "universe of possibles" comes from the French expression "*l'univers des possibles*".

135 *Ibid*.

136 *Ibid*. at 53.

been defined without any calculation based on objective conditions.[137] Agents do not "consciously adjust their [subjective] aspirations to an exact evaluation of their chances of success, ... [but rather] the possibilities and impossibilities, freedoms and necessities, opportunities and prohibitions ... generate dispositions objectively compatible with these conditions."[138]

Practice theory cannot be reduced to rational choice. For Bourdieu, the rational actor model fails to make explicit that in order for people to comply with the model and think in the ways the model presupposes, they need to have the "economic and cultural capital required ... to seize the [so-called] opportunities" to do either right or good that are thought to be universally available.[139] In the world of practice, real agents never make choices in such abstract and perfect conditions; instead, their responses depend on the specific chances that that they truly have. "Only in imaginary experience (in the folk tale, for example) ... does the social world take the form of a universe of possible(s) equally possible for any possible subject."[140] In turn, practice theory is not determined conditioning that would be repeated without the strategic intervention of actors. Bourdieu is one of the first poststructuralists to bring actors back into structural models, recognizing the role of actors in creating, maintaining, and reinforcing structures.[141] Through the *habitus*, human beings have a precise idea of what is and is not available to them, and what is and is not reasonable (i.e., the possibles). Some actions and practices are systematically ruled out, while others impose themselves as necessary. This is strategy, rather than calculation. Practice gives rise to a series of "moves" that are objectively organized but that lack any subjective intention.[142] It is "intentionless invention of regulated improvisation."[143]

Practice theory has two additional features that need to be explored. First, the *habitus* is internally incorporated, not as a result of mental processes, but rather through the postures, movements, and feelings of the body. The embodiment of practice provides a contrast when compared to the exclusively cerebral aspect of the rational choice model. To illustrate this corporeal aspect of practice, Bourdieu refers to the language of sports, calling it a "feel for the game."[144] This feel for the game allows a

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[137] *Ibid*.

[138] *Ibid*. at 54.

[139] *Ibid*. at 64.

[140] *Ibid*.

[141] Swartz, *supra* note 122 at 290; Giddens, *supra* note 130.

[142] Bourdieu, *Logic*, *supra* note 15 at 62.

[143] *Ibid*. at 57.

[144] *Ibid*. at 66; Harcourt, *Language*, *supra* note 123 at 149.

player to "anticipat[e] the future inscribed in all the concrete configurations on the pitch or board."[145] When the game is played in the field, everything that is performed has a sense of direction and meaning. However, as opposed to sports, in real life, individuals cannot simply suspend their commitment to the game in order to visualize the arbitrariness of the social construct in which they participate; they are born with it and caught up in it. Practical sense is thus a series of motor schemes and body automatisms that are put into play in specific contexts. For instance, in the particular setting of Kabyle society in Algeria, women and men adopted different body postures (either curved down or standing straight up), which are also reflected in their respective signs of respect or domination (lowering one's head versus looking up) and in their division of labour (men cut the wood and women pick it up).[146] The fundamental classification structures, as well as the perception and expression schemes of the *habitus*, are all acquired and reproduced by the body through re-enactment of a specific *modus operandi*.[147]

The second particular feature of practice theory is its temporal aspect. "Practice has a logic which is not that of the logician":[148] this logic is imminent, caught up in the present and in practice. Before acting, agents are unaware of the *habitus*, of its principles and of its possibilities: "it can only [be discovered] by enacting them, unfolding them in time."[149] This explains why people often do not know how they will react to a situation until they are practically confronted by it. Moreover, individuals are usually forced to act "on the spot" and "in the heat of the moment," thus excluding the benefit of having some perspective.[150]

Flyvbjerg proposes a similar model, relying on the phenomenology of human learning developed by the Dreyfus brothers.[151] This model identifies five levels within the process of learning human skills. At the first level, the novice learns to identify the facts and characteristics of a situation, and how to follow the rules he has learned. The advanced beginner then obtains real-life experience by recognizing similarities in relation to previous situations. He slowly learns to be less deliberative and rule-

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145 Bourdieu, *Logic*, *supra* note 15 at 66.

146 *Ibid*. (referring to ethnography conducted in Algeria at 70-71).

147 *Ibid*. at 73-74.

148 *Ibid*. at 86.

149 *Ibid*. at 92.

150 *Ibid*. at 82.

151 For a summary of the "Dreyfus model" and Flyvbjerg's response, see Brent Flyvbjerg, *Making Social Science Matter: Why Social Inquiry Fails and How It Can Succeed Again*, trans. by Steven Sampson (Cambridge: Cambridge University Press, 2001) at 9-24. Thanks to Bernard Harcourt for referencing Flyvbjerg: Harcourt, *Language*, *supra* note 123 at 149.

oriented, thus focusing more on practical experience. At the third level, the competent performer sees in any given situation an overwhelming number of recognizable elements all at once. He learns to quickly prioritize and organize information and, as he learns how to exercise his judgment, he also becomes personally involved to the point of feeling responsible for the decisions that are taken. To reach the proficient performer and expert levels, the student needs to make a "qualitative jump"[152] from rational analytical decision-making to *arational* (beyond rationality, yet not irrational), holistic, interpretative, and intuitive judgment-making. At these two levels, analytical reasoning slows one down and body involvement becomes crucial. The expert cannot be dissociated from his object. He has totally incorporated the relevant scripts and recognizes situations in a way that can hardly be verbalized, let alone reduced to an initial set of rules.[153] According to Flyvbjerg, "most people find themselves at the 'proficiency' and 'expertise' levels in using the skills necessary to manage their everyday activities and normal social interaction."[154] Bourdieu refers to the virtuoso instead of Dreyfus's expert, venturing away from analytical rational language. Nevertheless, Flyvbjerg's concept of arationality is helpful in visualizing the mechanisms through which some behaviour is incorporated in the body and re-enacted in real-time action under specific circumstances.[155]

In Bourdieu's conception, thoughts, expressions, perceptions, and actions (which are generally referred to as practices) can all be better understood as being based on learned scripts that are produced by the *habitus*. I suggest that it is within this theoretical framework that we can start rethinking human behaviour that is sometimes understood as criminal, as well as the responsibility of agents.

D. Practice Theory and Criminal Responsibility for Poor Offenders

I will now assess the descriptive and normative power of practice theory, in particular in the case of poor offenders, and suggest what a practice theory of criminal responsibility could look like.

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[152] Flyvbjerg, *supra* note 151 at 21.

[153] *Ibid.* at 9.

[154] *Ibid.* at 42.

[155] Anthony Giddens also developed a theory of "structuration" that greatly relies on practice (*supra* note 130). For Giddens, people know much more than they are able to articulate. He believes that we need to study this practical knowledge, which he calls practical consciousness: "Practical consciousness consists of all the things which actors know tacitly about how to 'go on' in the contexts of social life without being able to give them direct discursive expression" (*ibid.* at xxiii). Practical consciousness is distinct from discursive consciousness and from the unconscious; in other words, it is neither repressed, nor distorted knowledge. Routine directly influences practical consciousness.

1. The Descriptive and Normative Power of Practice Theory

The descriptive power of practice theory is clear. It offers a more fluid conception of agency based on the dynamic interaction between structuring structures and rational decision-making. It is flexible enough to incorporate constraint and accommodate innovation so as to recognize the power of structures and the possibilities of individuals. In that sense, practice theory uniquely illuminates the critiques raised against the liberal model and the economic approach. Contrary to the economic approach to crime, practice theory does not take basic economic assumptions as its starting point, only to then cast aside social behaviour for the sake of preserving the model. Rather, practice theory starts from what empirical research reveals about human behaviour and social interactions. If there is a disconnect between the model and social life as it is observed through fieldwork, it is not the result of human life being too complex, but rather because the model needs to adjust.

When applied to poor offenders, practice theory means recognizing that necessity creates constraints with general overreaching effects on the life prospects and conditions of individuals. For instance, the decision to live on the streets is often made during times of emotional instability, drug addiction, or violence, which in turn can be connected to job and housing insecurity or a lack of access to social services and family support. Real agents shape their aspirations according to concrete indices of what is and is not accessible to them. Living in the streets is not the end of choice, but rather the context within which choices and options must be imagined. Choosing to sleep in a park or on the sidewalk does not only result from the fact that shelters are full (although this is also a crude reality). Nor is it always true that the people in question cannot afford to pay for a cheap hotel room for the night (most street people end up making a small sum of money each day) or that they spend all of their money on drugs (although some money is often spent on drugs or alcohol). Many homeless people echoed the following sentiments: they feel safer surrounded by friends in the streets; they feel that they can escape from the police when they are in the open; they need to save money for the winter season; they feel more comfortable using drugs in the streets since they disturb less people (or so they think) and they avoid the risk of becoming sick while alone; they do not want to get used to a bed because they are generally unable to afford it; and they want to sleep with their dogs or close to their personal belongings or their place of work (they need to keep their vending spot on a street, for instance).[156] Street-level and minimum-wage workers also choose within constraints. Some lack the cultural capital necessary to enter structured working places. For instance, Bourgois tells the story of Ray, a gang member in El Barrio, New

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[156] Duneier, *supra* note 101 at 85-87.

York, who, after struggling to stop selling drugs, opened a small pool hall only to see it close because he had failed to produce the appropriate paperwork and because it was not wheelchair accessible.[157] Bourgois also recounts the story of various street-level drug dealers who had joined street gangs out of their desire to ensure their self-respect and dignity, often doing so regardless of—or in addition to—the monetary considerations.

Practice theory, along with other sociological and anthropological accounts of human behaviour, calls for a closer examination of what goes on in everyday life, at the very moment of action, as individuals face adversity and react to it.[158] For its emphasis on the historically and socially constructed *habitus* and its own capacity to strategically adapt to situations, practice theory strikes a balance between two ideas—constraint and choice—while recognizing the singular importance of each of them. For instance, the pervasiveness of poverty in someone's life will influence his steps and movements, as well as the consequences that he will have to face in everyday life:

> Every problem magnifies the impact of the others, and all are so tightly interlocked that one reversal can produce a chain reaction with results far distant from the original cause. A run-down apartment can exacerbate a child's asthma, which leads to a call for an ambulance, which generates a medical bill that cannot be paid, which ruins a credit record, which hikes the interest rate on an auto loan, which forces the purchase of an unreliable used car, which jeopardizes a mother's punctuality at work, which limits her promotions and earning capacity, which confines her to poor housing. [159]

Practice theory sheds light on other people's role in the decision-making process. I am not referring to someone making her own decisions in light of another's preferences,[160] but pointing to the fact that others' choices to change the context, to add constraints, or to react to offenders, all have an impact on the individual and society: "social reality exists *both* inside and outside of individuals."[161] The degree of others' participation in a conflict often makes the difference between holding the status of victim,

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[157] Bourgois, *supra* note 120 at 29.

[158] Erving Goffman, *The Presentation of Self in Everyday Life* (Garden City, N.Y.: Doubleday Anchor Books, 1959); Patricia Ewick & Susan Silbey, *The Common Place of Law* (Chicago: University of Chicago Press, 1998).

[159] David K. Shipler, *The Working Poor: Invisible in America* (New York: Vintage Books, 2005) at 11.

[160] See Jolls, Sunstein & Thaler, "Behavioral Approach", *supra* note 14 at 1521. Compare Posner, *supra* note 79 ("imitative behavior ... is not irrational, because the behavior of other people is often a reliable guide to what you should do to maximize your own welfare" at 1573).

[161] Swartz, *supra* note 122 at 96.

offender, accomplice, bystander, or even that of prosecutor.[162] Practice theory reminds us that we should pay attention to others to see how their own responsibility is rendered invisible amid current legal structures.

At the normative level, practice theory presents several challenges for criminal law theory. It challenges several of the dichotomies on which the system relies in order to operate,[163] including the binary character of criminal responsibility and the sacrosanct principle of individual responsibility. It also calls for a profound redefinition of the three fundamental assumptions based on which the liberal philosophical discourse was developed: equality, liberty, and rationality.

By bringing more complexity and nuance into the analysis, practice theory stands in stark contrast to the absolutist and exclusive character of criminal law doctrine, revealing the spectrum of possibilities that exists between choice and lack of choice, culpability and non-culpability, normality and unreasonableness, and blame and innocence. Practice theory sheds light on the moral, social, and political choices that are contained in legal doctrine, and it confronts the ambiguity of the social conflicts that the liberal model all too often avoids through its reliance on extreme poles.[164] While practice theory does not tell us how—or on which criteria—we should make moral judgments, it opens up a broader spectrum of possibilities to consider when making such judgments, simply because it does not blindly exclude them per se.

Practice theory further challenges the individual-society duality asking us to rethink an important claim of criminal law: the fact that it delivers justice to individuals, one at a time, for the protection of society. The fact that responsibility is placed only on individuals is so fundamental to our criminal law that we cannot imagine it being reallocated differently or elsewhere.[165] In *R. v. Nette*,[166] Justice Arbour wrote that the civil law rules of causation provided limited assistance to establishing the criminal law standard since "criminal law does not recognize contributory negligence, nor does it have any mechanism to apportion responsibility for the harm occasioned by criminal conduct, except as part of sen-

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[162] See generally Alvaro P. Pires, *Legislative Policy and "Two-Sided" Crimes: Some Elements of a Pluridimensional Theory of the Criminal Law (Drugs, Prostitution, etc.): Expert's Report Prepared for the Special Committee of the Senate of Canada on Illegal Drugs* (Ottawa, 2002), online: Parliament of Canada <http://www.parl.gc.ca>.

[163] See Christie, "Images", *supra* note 51. Christie argues that "dichotomies are the natural equipment for penal law" (*ibid.* at 95). According to him, the need for sharp distinctions and clarity arise from the fact that pain will be inflicted and thus, needs to be justified.

[164] See e.g. *Lavallee*, *supra* note 52 (legal doctrine accepts to withdraw responsibility to an individual in the rare cases where she had no choice).

[165] Norrie, *Crime*, supra note 23 at 15-31.

[166] 2001 SCC 78, [2001] 3 S.C.R. 488 at para. 49, 205 D.L.R. (4th) 613.

tencing after sufficient causation has been found."[167] Moreover, while we may consider at times the contributory fault of a third party within the context of a defence (e.g., self-defence), it will be considered only in those instances where it had the effect of completely neutralizing the will of the accused. In those cases, this information will be used only to find an accused not guilty, rather than to divide responsibility in any real sense.[168]

Delivering justice to individuals based on their personal choices only has the net effect of "desocializing individual life."[169] It hides the collective dimension of many offences and does not allow for a public and transparent debate about the possibility of common responsibility: "the criminal justice system focuses moral condemnation on individuals and deflects it away from the social order."[170] It conceals the fact that some offences are actually committed as a result of others' choices, and that crimes sometimes represent one of the few available options in light of someone's objective conditions. Whereas under the traditional liberal model and pursuant to the economic approach, crimes are often perceived as simplistic acts undertaken by individuals who seek immediate personal interests, it may well be that we need to think in terms of interactions rather than acts.[171] Furthermore, offences would be better understood if seen as embedded in social systems, dynamics of power, political and cultural resistance, as well as daily survival.[172] We face *collective* problems and *social* conflicts but the answers to these issues are framed in individual terms. Sociological and anthropological research provides an opportunity to rethink this equation.[173] These arguments make us realize the artificial

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167 *Ibid*. at para. 49.

168 See generally Hudson, "Hardship Defence", *supra* note 17 at 574.

169 Norrie, *Crime*, *supra* note 23 at 36.

170 Jeffrey Reiman, *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice,* 8th ed. (Boston: Pearson, 2007) at 177.

171 See Christie, "Images", *supra* note 51 at 96.

172 E.P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century" in *Customs in Commons: Studies in Traditional Popular Culture* (New York: New Press, 1993) at 185ff. See generally Bourgois, *supra* note 120 at 327; Harcourt, *Language*, *supra* note 123 at 99.

173 There are certainly political reasons for ignoring sociology and anthropology in criminal law given the focus of theses sciences on the role of structures in the interpretation and analysis of crime. In the behavioural economics context, see Kelman, "Behavioral Economics", *supra* note 79. He notes that the law and economics' emphasis on psychology, as opposed to other social sciences, is probably not by chance, as the methodology used by psychologists is individually oriented like that of economists (*ibid*. at 1582, n. 13).

character of legal categories, which impede creative and imaginative solutions.[174]

Since it is grounded in empirical evidence, practice theory also challenges the assumptions of liberty, equality, and rationality that underlie the philosophical discourse of the liberal model. In doing so, it pushes the liberal model to the edge, stretching and transforming its basic premises so as to force them to confront socio-economic constraints and power differentials. It raises the inevitable question of whether the liberal model can actually withstand such a critique. Some abolitionist scholars have convincingly suggested that it could not.[175] Others have argued that any suggestion toward strengthening choice would reinforce retributivism and the calamity of the proportionality principle, which is arguably responsible for an unprecedented era of penal severity.[176]

In bringing in practice theory, my primary goal is to challenge the liberal model and to encourage the radicalization of its most basic premises. The changes I propose follow from my criticism that this model continues to be ignored in the assessment of criminal culpability while being consistently used to legitimize repression. Therefore, the liberal model should be taken more seriously and be properly used in the assessment of criminal liability.

Radicalizing the discourse is risky but valuable for two reasons. First, I have insisted on the importance of choice and difference for responsibility and resistance; however, they need to be understood in all of their complexity in order to apportion responsibility for different social conflicts. Second, the liberal ideals of freedom, equality, and rationality have significantly more potential than they have been allowed to express thus far, confined as they are to a particular liberal theory that focuses on universality and ignores power and structures, and to a fundamentally exclusive criminal justice system that claims a monopoly over all means of conflict-resolution.

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174 See Minow, *supra* note 67 at 2. For an examination of how individualistic and altruistic approaches to legal rules might rest on "contradictory visions of the universe", see generally Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L. Rev. 1685; Kelman, "Interpretive Constitution", *supra* note 20.

175 Louk Hulsman & Jacqueline Bernat de Celis, *Peines perdues : le système pénal en question* (Paris: Le Centurion, 1982); Willem de Haan, *The Politics of Redress: Crime, Punishment and Penal Abolition* (London, U.K.: Unwin Hyman, 1990).

176 See e.g. James Q. Whitman, "A Plea Against Retributivism" (2003) 7 Buff. Crim. L. Rev. 85.

2. Toward a Practice Theory of Responsibility

What would this sociological approach mean for the criminal justice system? How would an understanding of choice and difference based on practice theory make a difference?

We first need to recognize the instances in the criminal justice system where discretion is used to consider degrees of freedom, difference, and culpability. In practice, classifications are not so uncompromisingly binary and the law already allows state agents room for manoeuvre from the initial decision-making process made by the police officer, who can either issue a simple warning or send youth back to their parents or to community counselling, to the Crown prosecutors, who have extraordinary—and yet completely unchecked—powers to negotiate or drop the charges, and to judges, who can exercise discretion to hear additional evidence, press defence lawyers to contextualize their clients' conduct in order to support a defence (and include motives through the back door), or to mitigate sentencing. Yet, discretion often depends on the success of an identification process between the state agent and the offender, and can be guided by positive or negative stereotypes in favour of some individuals to the exclusion of others.[177]

As discussed in the first part of this paper, the consideration of defences, as well as other conceptual proposals within the current framework, are partial moves toward greater consideration of context and constraint in criminal law, yet they fall short of doing it meaningfully. Many scholars have also explored the possibility that legal doctrine could give more serious consideration to moral culpability at the sentencing stage. Some have rightfully observed that the courts have undermined—or ignored—the "degree of responsibility" aspect of the proportionality principle in favour of the assessment of the gravity of the offence.[178] Other scholars have suggested considering poverty, homelessness, and social disadvantage as mitigating factors.[179] In response, others argue that the progressive potential of considering social context is overestimated given that it is largely based on the stereotype that poor and minority offenders are more likely to commit crimes; they argue, rather, that the sentencing process should consider discriminatory law enforcement practices, which

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[177] William J. Chambliss, *Power, Politics, & Crime* (Boulder, Co.: Westview Press, 2001).

[178] Boisvert & Jodouin, *supra* note 36 at 781-89. See also *R. v. Proulx*, 2000 SCC 5, [2001] 1 S.C.R. 61 at para. 54, 249 N.R. 201.

[179] Dales E. Ives, "Inequality, Crime and Sentencing: *Borde*, *Hamilton*, and the Relevance of Social Disadvantage in Canadian Sentencing Law" (2004) 30 Queen's L.J. 114; Hudson, "Hardship Defence", *supra* note 17.

make it more likely for some individuals or groups to end up in the criminal justice system.[180]

Canadian courts have not enthusiastically supported such sentencing proposals, but such proposals are worth developing and pursuing. First, there is no contradiction in accepting, on the one hand, that poverty and homelessness have an impact on free will and, on the other hand, that there is a great deal of racism in law enforcement decisions. Poverty creates specific contexts in which agents are presented with a restricted range of choices. Individuals belonging to a certain social class, or occupying a specific position in one given field, as Bourdieu would say, are more likely to generate similar thoughts and actions because they have incorporated similar types of limits or structures. Among these structuring structures is the fact that the poor and minorities, as a class or a group, are more likely to be controlled by the criminal justice system than others. This does not deny poor people's autonomy and free will, but rather acknowledges the objective constraints in which choices are made. Second, proposals at the sentencing stage should start by acknowledging the fact that the *Criminal Code* has explicitly recognized the existence of "degrees of responsibility" since 1995 without making much of it.[181]

It is nonetheless important to draw distinctions at the culpability stage rather than reserving these tasks to sentencing. We have historically kept—and arguably some may still want to keep—both parts of the analysis separate: absolute and binary judgments on guilt, and flexible, proportionate, and individualized sentencing decisions.[182] Sentencing principles—including high maximum sentences, proportionality, degrees of punishment, and the multiplication of penalties—have allegedly provided balance to otherwise inflexible (and mostly harm-based) culpability decisions. But this is a mistake. The balanced nature of criminal law theory is a legal fiction. Changes in sentencing laws—including mandatory minimum sentences—have reduced judicial discretion. Moreover, the prominent character of the objectives of retribution, denunciation, and deterrence at the sentencing stage increased penal severity and limited flexibility.[183] Further, focusing only on sentencing reinforces the individual character of crime and responsibility. It neither promotes the understanding of crime as a social conflict nor emphasizes the interaction between agency and structuring structures. The importance of destabilizing the individualistic conception of responsibility should not be underesti-

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[180] See e.g. Lawrence & Williams, *supra* note 107 at 330-31.

[181] R.S.C. 1985, c. C-46, s. 718.1.

[182] R. Saleilles, *L'individualisation de la peine : étude de la criminalité sociale* (Paris: Librairie Félix Alcan, 1927).

[183] Boisvert & Jodouin, *supra* note 36 at 776; *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207, 250 A.R. 273.

mated because it threatens the law's conception as apolitical and ahistorical, and draws attention to the "political processes that need to be engaged with to meet social problems underlying crime."[184]

In that vein, practice theory can offer a refreshing alternative to providing "in-advance group exemptions" from punishment.[185] Principled recognition that some individuals or groups are less blameworthy than others because of their disadvantages actually creates newly disadvantaged groups and produces new forms of inequality when individuals struggle to be included in the privileged category.[186] The solution cannot reside in creating new boxes and having defendants distort their stories to fit into them for lack of alternative consideration of their particular exercise of choice or difference. Practice theory shows how actions are generated within historically and socially situated limits for all individuals. It is not the case that some offenders lacked choice or were coerced by some external constraints; rather, their decisions were among the kind of choices perceived in their body in real-time action for people like them.

More concretely, a practice theory of criminal responsibility could translate into three propositions. First, the criminal justice system should be used with parsimony. Second, criminal law theory should recognize multiple degrees of responsibility at the culpability stage, which in turn could allow for different kinds of verdicts: imputable, responsible, and (in exceptional cases) blameworthy. At this stage, mercy should be considered a realistic and accessible option. Third, criminal responsibility should be shared among the parties to a conflict, including the state, whenever relevant. Regarding the first proposition, practice theory draws our attention to the proposals of penal abolitionists and liberal scholars alike—to avoid criminal justice all together whenever possible. Suggesting how freedom and difference are embedded in structural constraints as well as in others' choices and conceptions of difference reminds us that we assign blame solely to some individuals—often poor and perceived as different—diverting our attention away from our collective responsibility for their suffering and exclusion.

Thinking about responsibility in collective terms could mean a series of different things. Turning the harm principle on its head, we could come to consider many of our repressive responses as disproportionate and harmful,[187] knowing that a lot of harm is itself created with the adoption of exclusive and punitive means of dispute resolution and individual ways

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184 Norrie, "Hardship Defence", *supra* note 9 at 569; c.f. Hutton, *supra* note 17 at 579-80.

185 Hudson, "Hardship Defence", *supra* note 17 at 585.

186 *Ibid.* at 578.

187 See generally Bernard E. Harcourt, "The Collapse of the Harm Principle" (1999) 90 J. Crim. Law and Criminology 109.

of thinking about responsibility. We need to recognize that it is possible to express values and induce changes in behaviour without resorting to the criminal justice system. As a concrete step, we could create a presumption of last resort to the criminal justice system and require that prosecutors justify why they decided to press criminal charges instead of referring a given case to other non-punitive conflict resolution systems, such as community-level settings unregulated by the state. This might considerably change the balance of power for plea-bargaining and reduce the amount of petty crimes charges—insofar as regulatory offences are concerned.

Second, it may be useful to divide liability into different degrees such as imputability, responsibility, culpability, blame, and accepting that there could be responsibility irrespective of blame within the criminal justice system.[188] Individuals may have committed the material elements of an offence and be held imputable for them, yet blame and culpability may be withheld. We can thus imagine a system in which mercy would gain a greater role and penal moderation would become more than a sentencing provision of the *Criminal Code*. According to Grotius, punishment should be considered not as a debt or the state's duty, but as a permission or possibility.[189] Similarly, pardons should be considered a reasonable and morally defensible option.[190]

Finally, dividing responsibility means that responsibility could be shared with third parties, including the state. There are examples of divided responsibility in other jurisdictions. For instance, in the case of Genézio,[191] who had been charged with robbery, a Brazilian judge took an innovative approach. The young man had broken into a dwelling along with two accomplices, had threatened the owner at gunpoint, and had stolen some electrical appliances. Judge Prado insisted on the gravity of the offence, especially given the level of violence involved. However, he mentioned that "everyone knew that society contributed to creating and making such violence possible by permitting unjust distribution of wealth and by denying the necessary resources to ensure education, health and general welfare."[192] While Brazilian criminal law generally requires that indi-

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188 See e.g. Hudson, "Hardship Defence", *supra* note 17 at 589 (discussion about a continuum in freedom of choice).

189 Hugo Grotius, "On Punishments" in *On the Law of War and Peace*, trans. by Francis W. Kelsey (Amsterdam: Johan Blaeu, 1646) vol. 2, book 2 at 462.

190 See generally Carol S. Steiker, "Tempering or Tampering? Mercy and the Administration of Criminal Justice" in Austin Sarat & Nasser Hussain, eds., *Forgiveness, Mercy, and Clemency* (Stanford: Stanford University Press, 2007) 16; Paulo D. Barrozo, "Punishing Cruelly: Punishment, Cruelty and Mercy" (2008) 2 Crim. L. & Phil. 67.

191 No. 14.426 (6 April 1993), 4th Criminal Division of Niterói, RJ, Brazil, online: <http://www.geraldoprado.com>.

192 *Ibid.* at 3.

viduals make good use of their free will, there are some situations where the state should be held to account for creating the conditions in which such violence developed. In this case, the personal history of the accused revealed that, as a juvenile, he was placed in an institution where the state failed to create the conditions for him to potentially lead a decent life (Genézio suffered physical abuse) and made criminality the only possible option for him. Judge Prado referred to the notion of "co-responsibility" according to which culpability should be borne equally by the state and the individual[193] and concluded that Genézio was only partially responsible. Despite the apparently disappointing result for Genézio—he was condemned to the minimum mandatory term of five years in prison—the case is interesting. Not only was the decision made at the point of determining culpability, as opposed to the sentencing stage, but it also demonstrates the possibility of apportioning responsibility with the state. In doing so, it sent a clear message: if we are to justify punishment based on desert and on the related idea of having violated the social equilibrium, not only should the accused have had the opportunity to be part of that social equilibrium at some point, but the state should also bear its share of the blame for not having made this possible. Further, if we are to justify punishment in the name of marked departure from society's norms, we should make sure that we all have a fair chance to comply with such norms.[194] The state should also be responsible for biases and discrimination in law enforcement leading to overrepresentation of poor offenders in the criminal justice system. Finally, sharing responsibility could extend to third parties, especially in the case of offences where the difference between the victim and the offender is a matter of considering when the police arrived at a crime scene, or who survived an accident.

What would practice theory mean for some of the iconic cases recently considered by the criminal courts, including the *Creighton* quartet, *Ruzic*, or *Latimer*? It is difficult to answer such a question because the three propositions set forward would drastically change the ways in which criminal charges are pressed, but most importantly, how criminal cases are argued. If courts admit sociological evidence as relevant to a criminal trial and open the discussion about what choosing to commit a crime really means for this offender and how different this offender's behaviour really was, new arguments could be raised, and new decisions as to their importance could be made. Nils Christie once explained how "[m]any among us have, as laymen, experienced the sad moments of truth when our lawyers tell us that our best arguments in our fight against our neighbor are without any legal relevance whatsoever and that we for

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193 *Ibid*.

194 Murphy, *supra* note 1.

God's sake ought to keep quiet about them in court."[195] What would happen if these were finally considered, or if the state and other parties could be held responsible for social conflicts? This is clearly a promising path, but one that requires more specific arguments and answers in future research.

Conclusion

In his historical account of the ancient juridical city of "Fictionopolis",[196] Norrie recounts that the city was ruled by a wise old king facing popular discontentment. He was bored of examining many requests for mercy coming from those who—generally subject to the arbitrary and harsh laws of the kingdom—were facing execution. The king sought the advice of a group of enlightened advisers, who claimed to speak on behalf of the people. They had a few new ideas and, as the kingdom's wealth creators, they were quite convincing. In the new regime individuality, equality, freedom, and certainty were substituted for exemplarity, discretion, and arbitrariness. To maintain law and order, they would treat all men as equals and respect their ability to choose. Of course, the enlightened advisers were well aware of the fact that in Fictionopolis some men were more equal and free than others in terms of property distribution and power. As a result, choice and freedom were more than rhetorical arguments, but there was a gap between their ideal legal assumptions and real economic distribution of wealth and the political distribution of power. While the law was genuinely meant to protect all individuals, it actually protected the advisers and those close to them.[197]

There are indeed important gaps between theory and practice—between what the law assumes and people's actual material conditions. One problem, however, is that freedom, equality, and the idea of difference have precisely been *rhetorical* arguments in criminal law theory for far too long. They are rarely considered when assessing an offender's culpability but are heavily relied upon at the discursive and theoretical levels by actors in the criminal justice system, as well as the general population, with legitimating effects. While we should all work at the political level to improve the conditions of all citizens, we should not assume that the problem is only in the political and economic spheres and that there is nothing wrong with legal theory. We cannot simply ask that the real world change

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195 Nils Christie, "Conflicts as Property" (1977) 17 Brit. J. Crim. 1 at 4.

196 See Norrie, *Crime*, *supra* note 23 at 3.

197 *Ibid*.

so that the theory can work well in some remote future. Instead, good theory must start by taking account of the situation at hand.[198]

Recent attempts to strengthen the retributive model and to include further moral inquiry into culpability have failed because they reinforce underlying assumptions about liberty, equality, rationality, and difference, which—drawing from liberal theory—are disconnected from any sociological understanding of action. The law and economics approach does not provide a valid substitute for this failure, and it wrongly abandons the liberal ideals of choice, freedom, and diversity. Liberalism does not live up to its promises. By challenging the binary character of criminal responsibility—in particular its sole reliance on individual choices—and by suggesting how we could radicalize liberal ideals, practice theory and other sociological and anthropological research open up a new universe of possibilities for criminal law reform.

By introducing such evidence, we can start thinking about new practices and change our beliefs about poor offenders. Transforming criminal law theory by creating room to consider certain repressive responses as harmful, and opening up the possibility of co-responsibility, are all important steps in this direction. The symbolic and practical effects of creating such space in law should not be underestimated both in the context of punishing poor offenders and, more generally, in the criminal justice system. If nothing else, it will pose an interesting challenge to traditional legal scholarship, which has too often denied the historical and political nature of criminality and human behaviour.

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[198] I borrow here from Roberto Unger who uses this expression in several of his works.