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THE MORAL FOUNDATION OF CRIMINAL DEFENCES AND THE LIMITS OF CONSTITUTIONAL LAW

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The Supreme Court of Canada's decision in *R v Khill* provided a novel moral framework for self-defence. Whereas self-defence was previously categorized as a justification, the Court now maintains that it constitutes an excuse in some cases. In other cases, the Court suggests self-defence sits between justification and excuse, captured by a principle I elsewhere call "moral permissibility". The Court's choice to adopt a more robust relationship between the moral principles underlying justification/excuse and self-defence is principled. However, the basis for that conclusion—the application of moral philosophy to the law of criminal defences—applies with equal force to the law of duress and necessity. Unfortunately, the statutory duress defence and section 8(3) of the *Criminal Code* limit the juristic scope of those defences. Although these restrictions may be challenged under section 7 of the *Charter*, this challenge will likely fail as defendants need not be denied a defence. Instead, they will be denied a proper moral assessment of their actions. To instill greater coherency into the law, it is prudent to repeal the statutory duress defence. This approach would allow courts to utilize the broad wording of the new "defence of person" provision to develop the law of self-defence, necessity, and duress in line with the moral philosophy underlying these defences. Constitutionalizing the principles underlying criminal defences can nevertheless serve two broader purposes: mitigating the tendency of courts and counsel to unduly rely upon other less transparent (jury nullification) or heavy-handed (judicial review) legal devices to avoid conviction.

La Cour Suprême du Canada a identifié, dans l'arrêt *R c. Khill*, un nouveau cadre d'analyse moral pour la légitime défense. Alors que la légitime défense était précédemment qualifiée de justification, la Cour soutient dorénavant que, dans certains cas, elle peut constituer une excuse. Dans d'autres cas, la Cour suggère plutôt que la légitime défense se situe entre la justification et l'excuse, ce qui reflète une notion que j'identifie ailleurs comme la « permissivité morale ». La Cour a choisi de baser sa décision sur des principes, en établissant un lien plus robuste entre les fondements moraux qui appuient la justification/l'excuse et la légitime défense. Néanmoins, le raisonnement qui mène à cette conclusion — l'application de la philosophie morale au droit de la défense criminelle — s'applique tout autant aux défenses de contrainte et de nécessité. Malheureusement, la défense de contrainte prévue par la loi et l'article 8(3) du *Code criminel* limitent la portée juridique de ces défenses. Bien que ces restrictions puissent être contestées en vertu de l'article 7 de la *Charte*, une telle contestation risquerait d'échouer puisqu'un accusé ne peut être dépourvu d'une défense. La personne accusée sera, plutôt, privée d'une évaluation morale appropriée de ses actes. Pour assurer une meilleure cohérence législative, il serait donc prudent d'abroger la défense de contrainte législative. Cette approche permettrait aux tribunaux d'utiliser la formulation générale de la nouvelle provision de « défense de la personne » afin de développer les principes juridiques de la légitime défense et des défenses de nécessité et de contrainte, en conformité avec la philosophie morale qui sous-tend ces défenses. Constitutionaliser les principes qui appuient les défenses criminelles peut cependant répondre à deux objectifs plus vastes : atténuer la tendance des tribunaux et des avocats à s'appuyer indûment sur des dispositifs juridiques moins transparents (annulation par le jury) ou à employer des mesures plus draconiennes (contrôle judiciaire) pour éviter la condamnation.

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Introduction

Parliament's passage of the *Citizen's Arrest and Self-Defence Act*[1] altered the moral foundation of self-defence. Whereas the previous laws identified self-defence as a justification,[2] the new laws provide that those who meet the statutory elements of the defence are "not guilty of an offence."[3] Parliament's implicit recognition that self-defence may constitute a justification or excuse accords with the legal scholarship assessing the moral foundations of self-defence. Although a person who repels an aggressor's force to preserve themselves constitutes a clear instance of justification, the justificatory rationale weakens in cases "[w]here the competing interests of the accused and the attacker are equal, or are clouded by other considerations such as provocation, disproportionality or misperceived threats."[4]

In *R v Khill*,[5] the Supreme Court of Canada affirmed that Parliament's omission of the term justification from the new self-defence laws means that self-defence may constitute either a justification or an excuse.[6] As Justice Martin wrote for the majority, in several categories of cases "the defending act is not considered rightful or tolerable by many authors, but guilt can be avoided when the circumstances call into question the voluntariness of the act, which brings it closer to an excuse and the law of necessity."[7] Justice Martin further cited my scholarship contending that self-defence "may accommodate a continuum of moral conduct, including acts that are merely 'morally permissible' where the threat and response meet a reasoned equilibrium."[8] As Justice Martin observes, adopting a continuum of moral principles as the rationale underlying a defence means that in some cases "the defence is neither purely a

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1 SC 2012, c 9 [*CASDA*].

2 See *Criminal Code*, RSC 1985, c C-46, s 34(2) (as it appeared on 1 December 2011, before the *CASDA*, *supra* note 1 came into force).

3 *Criminal Code, supra* note 2, s 34; *CASDA, supra* note 1 at s 34.

4 See Colton Fehr, "Self-Defence and the Constitution" (2017) 43:1 Queen's LJ 85 at 88 [Fehr, "Self-Defense"], citing George P Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Company, 1978) at 762–63, 769 [Fletcher, *Rethinking*]; John Gardner & François Tanguay-Renaud, "Desert and Avoidability in Self-Defense" (2011) 122:1 Ethics 111 at 113; Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker" (1994) 104:2 Ethics 252 at 256–59; Kent Greenawalt, "The Perplexing Borders of Justification and Excuse" (1984) 84:8 Colum L Rev 1897 at 1907–11.

5 2021 SCC 37 [*Khill*].

6 See *ibid* at paras 47–48, 107.

7 *Ibid* at para 47.

8 *Ibid* at para 48, citing Fehr, "Self-Defence", *supra* note 4 at 102.

justification nor an excuse, instead occupying a middle ground of 'permissibility' between rightfulness and blamelessness."[9]

In my view, the Supreme Court is signalling profound changes to not only the law of self-defence, but also other defences that fit within the excuse/justification dichotomy. If self-defence must be reconceptualized in light of scholarship criticizing its moral foundations, then the same should follow with respect to the law of duress and necessity. Scholars have long maintained that duress and necessity do not fit neatly into the excuse category of defences. Unlike the new self-defence provisions, however, the duress defence is circumscribed as an excuse per section 17 of the *Criminal Code of Canada*.[10] Although duress exists in both statutory and common law form,[11] it would be peculiar to ascribe each form of the defence a different theoretical basis. It would similarly be incongruous to develop duress and necessity within different moral principles given the close relationship between those defences.[12] To address the theoretical issue, it is therefore necessary to alter the moral foundation of the statutory duress defence.

A potential route for achieving this end requires the Supreme Court to continue down a path it abandoned over the last couple decades: constitutionalizing principles of criminal law theory under section 7 of the *Canadian Charter of Rights and Freedoms*.[13] Although the Supreme Court constitutionalized the principle prohibiting any conviction for a morally involuntary act,[14] it has yet to constitutionalize any moral principles forming the basis of justificatory defences. If the moral principles underlying

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9 *Ibid*. Justice Martin's reference to "blamelessness" is curious as the Supreme Court rejected the contention that acts committed under duress are inherently "blameless." Instead, excuses are captured by the idea of "normative" or "moral" involuntariness: see *R v Ruzic*, 2001 SCC 24 at paras 32–47 [*Ruzic*]. As the Court did not explain its departure in language or suggest that it meant to overturn *Ruzic*, I will assume for the purposes of this article that this was an oversight.

10 *Supra* note 2.

11 The statutory defence applies to principals, while the common law version of the defence applies to parties. See *R v Paquette*, [1977] 2 SCR 189, 70 DLR (3d) 129 [*Paquette*].

12 This relationship will be explained in more detail below. See *R v Hibbert*, [1995] 2 SCR 973 at 1017, 99 CCC (3d) 193.

13 Part I of the *Constitution Act, 1982*, being schedule B to the Canada Act 1982 (UK), 1982, c11 [*Charter*]. For a detailed account of the Supreme Court's history constitutionalizing "principles of fundamental justice" relating to criminal justice, see generally Colton Fehr, *Constitutionalizing Criminal Law* (Vancouver: UBC Press, 2022). In essence, the Supreme Court constitutionalized several principles of "instrumental rationality" as principles of fundamental justice and has recently shown a decided preference for employing these principles.

14 See *Ruzic*, *supra* note 9.

my continuum of moral conduct qualify as principles of fundamental justice—prohibitions against convicting persons for morally involuntary, morally permissible, and morally innocent conduct[15]—it becomes possible to constitutionally challenge section 17 of the *Criminal Code*. Such a challenge would be meritorious if the limited juristic scope of the duress defence prevented the accused from successfully pleading a defence to justified conduct.

Unfortunately, the statutory duress defence would survive such a constitutional challenge. Although the provision's scope is limited to excuse-based defences, the Supreme Court could label my moral permissibility principle as an excuse. This would help rationalize a perplexing aspect of the statutory duress defence: its wide-ranging threshold of harm for engaging the defence. In its most recent amendment, Parliament lowered the threshold for pleading the statutory duress defence from "grievous bodily harm" to mere "bodily harm."[16] As the latter term encompasses non-severe harm,[17] it is difficult to understand how the duress defence could solely be encompassed by a moral principle claiming a deprivation of an accused's will. If, however, the term "excuse" is broad enough to include "permissible" actions, then this anomaly can be rationalized as a morally permissible act and need not be involuntary in any sense. The presence of proportionality between the harms caused and averted can rationally serve to lower the threat required to engage the duress defence.[18]

It is nevertheless possible for an accused to plead duress in a "rightful" and therefore justified manner. As the language of the statutory duress defence cannot account for such actions, the potential arises for a justified actor to be denied a defence in violation of section 7 of the *Charter*. Although this renders the duress defence philosophically unsound, the *Charter* requires an unconstitutional effect before a constitutional remedy will be applied. As I maintain that the moral principles underlying criminal defences often overlap, it is likely that any justification-based duress defence could still be captured by the moral involuntariness or moral permissibility principles. The statutory duress defence is therefore likely to survive constitutional scrutiny despite the result being philosophically unsatisfying.

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15 See Colton Fehr, "(Re-)Constitutionalizing Duress and Necessity" (2017) 42:2 Queen's LJ 99 at 126–33 [Fehr, "(Re-)Constitutionalizing"].

16 This amendment will be discussed in more detail below.

17 See *Criminal Code*, *supra* note 2, s 2, "bodily harm".

18 The Supreme Court made a similar comment but failed to recognize that a different moral principle underlies the latter form of the duress defence. See *R v Ryan*, 2013 SCC 3 at paras 59–62 [*Ryan*].

To address the theoretical issue, I maintain that Parliament should repeal section 17 of the *Criminal Code*. This approach would allow courts to use the new self-defence or "defence of person" provision to govern instances of self-defence, duress, and necessity. This is possible because the provision applies to "the act that constitutes the offence" as opposed to being restricted to the "use of force."[19] In developing the law in this manner, however, I maintain that courts should abstain from relying upon concepts such as justification and excuse. It is both more coherent and simpler to apply the continuum of moral principles that I maintain underlie criminal defences. The broad wording of the new defence of person laws combined with the ability to constitutionalize the substantive principles underlying the criminal law—an approach pursued more rigorously in Canada than anywhere else in the world[20]—affords a unique opportunity to test the merits of this novel structure for criminal defences.[21]

Employing this approach to criminal defences would mitigate the tendency of courts to rely upon less transparent or heavy-handed legal devices to avoid conviction. By conceptualizing defences within narrow categories, the criminal justice system often overlooks instances where a defence is feasible, leaving it to either the jury to nullify morally unsound charges or judges to apply the constitution to strike down the relevant offence. The former approach is unfortunate because jurors do not give reasons for their decisions, leaving the public questioning why an accused was acquitted. If judges developed the law of defences more robustly, they could supply such moral reasoning. In other cases, judges strike down a law based on its ability to negatively impact some narrow set of actors. Yet, it is probable in some cases to employ the moral principles underlying defences to acquit these accused. A lack of imagination—which derives in part from the rigid categories of defences developed in Canadian law—prevents judges from developing defences in a manner that does not needlessly strike down democratically enacted laws.

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19 See e.g. Kent Roach, "A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions" (2012) 16 Can Crim L Rev 275 at 279–80; Steve G Coughlan, "The Rise and Fall of Duress: How Duress Changed Necessity Before Being Excluded by Self-Defence" (2013) 39:1 Queen's LJ 83 at 115–25; Colton Fehr, "The (Near) Death of Duress" (2015) 62:1/2 Crim LQ 123 at 145–48 [(Fehr, "(Near) Death"].

20 See George P Fletcher, *The Grammar of Criminal Law: American, Comparative, and International*, vol 1 (New York: Oxford University Press, 2007) at 101; Kent Roach, "Mind the Gap: Canada's Different Criminal and Constitutional Standards of Fault" (2011) 61:4 UTLJ 545 at 546; see generally *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536 (where the ability to constitutionalize substantive principles of fundamental justice was adopted).

21 Although at least one author has briefly raised the idea of substituting moral principles for the excuse/justification dichotomy, this proposal has not been defended to my knowledge. See Greenawalt, *supra* note 4 at 1913.

The article unfolds as follows. Part I outlines the Supreme Court's definition of the terms "justification" and "excuse" and its prior position that the defences of self-defence, duress, and necessity each fit exclusively into one of these categories. Part II reviews the "continuum of moral conduct" the Supreme Court referenced in *Khill*. I use this conception of defences to illustrate why a person acting under self-defence, duress, or necessity could do so in a morally involuntary, permissible, or innocent manner and how those distinctions impact the prerequisites for pleading a defence. Part III contends that although the moral framework I proffer ought to be constitutionalized, this need not result in a successful constitutional challenge to the term "excuse" in section 17 of the *Criminal Code*. Part IV concludes by advocating for the repeal of the statutory duress defence so that courts may use the new defence of person provision to develop the law in line with the constitutional principles underlying criminal defences. Not only would this approach strengthen the relationship between section 7 of the *Charter* and the substantive criminal law, but it would also render the law of criminal defences more coherent.

I. Justification and Excuse

The Supreme Court did not seriously engage with the meaning of the terms "justification" and "excuse" until it developed a common law necessity defence in *Perka v The Queen*.[22] Citing its then-limited jurisprudence, the Court maintained that the necessity defence's theoretical foundations were "ill-defined and elusive."[23] As Chief Justice Dickson explained, this confusion derived from the fact that the necessity defence can embrace two different forms.[24] Citing Justice MacDonald's reasons in *R v Salvador*,[25] Chief Justice Dickson agreed that the necessity defence "covers all cases where non-compliance with law is excused by an emergency or justified by the pursuit of some greater good."[26]

Chief Justice Dickson further elaborated on the meaning of the terms "justification" and "excuse." In his view, a justification-based defence "challenges the wrongfulness of an action which technically constitutes a crime."[27] Put differently, Chief Justice Dickson maintained that the actions of those who break the law may sometimes be considered "rightful" as "[t]he concept of punishment often seems incompatible with the social

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[22] [1984] 2 SCR 232, 13 DLR (4th) 1 [*Perka*].

[23] *Morgentaler v The Queen*, [1976] 1 SCR 616 at 676–77, 53 DLR (3d) 161 [*Morgentaler*].

[24] See *Perka*, *supra* note 22 at 245.

[25] [1981] 45 NSR (2d) 192, 59 CCC (2d) 521 (NSCA).

[26] See *Perka*, *supra* note 22 at 245 citing *Salvador*, *supra* note 25 at 542.

[27] *Perka*, *supra* note 22 at 246.

approval bestowed on the doer."[28] In the necessity context, Chief Justice Dickson cites the example of "the Good Samaritan who commandeers a car and breaks the speed laws to rush an accident victim to the hospital" as an actor "whose actions we consider *rightful*, not wrongful."[29] As this example illustrates, the moral reasoning is driven by a balancing of the seriousness of the crime committed against the important objective achieved by disobeying the law.[30]

The concept of excuse was further defined by Chief Justice Dickson in *Perka* as a wrongful act that results in an acquittal because the circumstances under which the act was performed render the act non-attributable to the actor.[31] Influenced by the work of George Fletcher, Chief Justice Dickson explained that the necessity defence in this form "rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience."[32] George Fletcher described this understanding of the necessity and duress defences as based on "moral or normative involuntariness."[33] Although the conduct is physically voluntary, it may still be excused if the actor had "no other viable or reasonable choice available."[34]

Chief Justice Dickson nevertheless refused to develop the law of necessity as both a justification and excuse. Citing his reasons in *R v Morgentaler*,[35] Chief Justice Dickson reiterated that "[n]o system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value".[36] Although the *Criminal Code* specifies several instances of justifiable conduct, any further judicial development of justificatory defences "would import an undue subjectivity into the criminal law." This subjectivity would "invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions."[37] For Chief Justice Dickson, this is not "a role which fits well with

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28 *Ibid*.

29 *Ibid* [emphasis in original].

30 See *ibid* at 247–48.

31 See *ibid* at 246.

32 *Ibid* at 248.

33 *Ibid* at 249 citing Fletcher, *Rethinking*, *supra* note 4 at 803.

34 *Perka*, *supra* note 22 at 250.

35 *Supra* note 23.

36 See *Perka*, *supra* note 22 at 248 citing *Morgentaler*, *supra* note 23 at 678.

37 *Perka*, *supra* note 22 at 248.

the judicial function," as "[s]uch a doctrine could well become the last resort of scoundrels" and "a mask for anarchy."[38]

Unfortunately, Chief Justice Dickson failed to explain why statutory authority could not be invoked as the basis for preserving a justification-based necessity defence. Importantly, section 8(3) of the *Criminal Code* allows judges to preserve any "principle of the common law that renders any circumstance a justification or excuse," unless the principle is "altered by or ... inconsistent with ... any Act of Parliament." As the necessity defence is not codified, there was no clear provision with which a justification-based necessity defence would conflict. It was, therefore, arguable that Chief Justice Dickson ought to have invoked the common law jurisprudence he cited to preserve necessity as both a justification and an excuse.

Chief Justice Dickson was nevertheless correct to abstain from using the common law to develop a justification-based necessity defence, as such a position would create an "inconsistency" between the necessity defence and the statutory duress defence. As the Supreme Court later observed in *R v Hibbert*,[39] the "similarities between the [duress and necessity defences] are so great that consistency and logic requires that they be understood as based on the same juristic principles."[40] This position is reasonable as the only significant difference between the defences derives from the nature of the threat. With duress, the threat derives from a third party, while necessity defences are based on threats posed by anything else other than the victim of the crime.[41] As section 17 of the *Criminal Code* clearly states that duress is an excuse, developing necessity or the common law defence of duress with different juristic principles would give rise to an "inconsistency" within the meaning of section 8(3) of the *Criminal Code*. The main obstacle to developing duress and necessity as justificatory defences is therefore the statutory duress defence's insistence that duress is an "excuse."

Three options are available to address this problem. First, Parliament could amend the statutory duress defence by deleting the word "excuse." This would allow courts to use section 8(3) of the *Criminal Code* to develop a more robust conception of the duress and necessity defences. Second, Parliament could repeal the defence and allow the broader language of the new defence of person provision to govern the law of duress and necessity. Finally, and most promising given the laggard pace of criminal

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38 *Ibid*, citing *Southwark London Borough Council v Williams*, [1971] Ch 734.

39 *Supra* note 12.

40 *Ibid* at 1017.

41 See Kent Roach, *Criminal Law*, 5th ed (Toronto: Irwin Law, 2012) at 317.

law reform in Canada,[42] courts could employ section 7 of the *Charter* to challenge the statutory duress defence. If the term "excuse" unduly restricts defendants from pleading a defence, then it must be struck down, which in turn would rid the law of the "inconsistency" currently preventing courts from using the common law to develop these defences coherently. To assess whether this latter option is viable, it is first necessary to explain which moral principles underlie criminal defences and why those principles qualify as "principles of fundamental justice" under section 7 of the *Charter*.

II. The Continuum of Moral Conduct

The continuum of moral conduct referenced by Justice Martin in *Khill* takes its cue from a central feature of criminal defences: proportionality. The conclusion that a person's conduct may be rightful and therefore justified is reasonable in cases where the harm averted is greater than the harm caused. Likewise, the conclusion that a person's conduct is wrongful and therefore may only be excused is logical if the harm caused is greater than the harm averted. But there are many cases where the harm caused and averted are at least roughly proportionate. In those cases, it is better to employ an intermediary moral principle that I call "moral permissibility." As I explain below, this framework is sensible, as there is a direct correlation between the degree of proportionality underlying an act and the stringency with which courts employ the other "evaluative" factors relevant to determining the merits of criminal defences.

A. Moral Involuntariness

The Supreme Court's understanding of the moral involuntariness principle and its relationship with the duress and necessity defences developed over several decades. Beginning with *Perka*, Chief Justice Dickson maintained that a person acts in a morally involuntary manner in circumstances where the threat is so perilous and imminent "that normal human instincts cry out for action and make a counsel of patience unreasonable."[43] A moral involuntariness defence therefore requires the accused to prove that they had no realistic choice but to break the law.[44] However, as excuses by definition provide a defence to wrongful conduct, Chief Justice Dickson explicitly chose not to require that the accused act

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42 See Kathleen Harris, "Experts urge Liberals to update 'embarrassingly bad' Criminal Code" (18 November 2016), online: *CBC* <cbc.ca/news> [perma.cc/GDP5-Y9QX] (citing Stephen Coughlan among other Canadian criminal law scholars).

43 *Perka*, *supra* note 22 at 251.

44 *Ibid*.

legally at the time the necessitous circumstance arose.[45] As he observed, "[a]t most the illegality ... of the preceding conduct will colour the subsequent conduct in response to the emergency as also wrongful."[46]

Chief Justice Dickson nevertheless imposed a further requirement for conduct to qualify as morally involuntary: proportionality between the harm caused and averted.[47] As he explained, "[n]o rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil."[48] Citing Fletcher, Chief Justice Dickson agreed that "if the gap between the harm done and the benefit accrued becomes too great, the act is more likely to appear voluntary and therefore inexcusable."[49] As an example, Chief Justice Dickson cites Fletcher's hypothetical scenario wherein an "actor has to blow up a whole city in order to avoid the breaking of his finger".[50] In those circumstances, Fletcher maintains that it is reasonable for the law to expect the person to endure the harm to himself.[51]

The problems with the Supreme Court's development of the moral involuntariness principle are directly related to Chief Justice Dickson's misreading of Fletcher's description of proportionality's relationship to moral involuntariness. Fletcher observed that utilitarian disproportionality may be relevant if the gap "becomes too great" as such a gulf between the harms caused and averted would render the act "more likely to appear voluntary."[52] Nothing in this description of proportionality's relationship to moral involuntariness *requires* the harms averted and caused be proportionate.[53] Instead, as the Court later hinted in *R v Latimer*,[54] Fletcher was describing a threshold means to dismiss a moral involuntariness claim without assessing whether the harm at issue was sufficiently

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45 See *ibid* at 253–57.

46 *Ibid* at 254.

47 See *ibid* at 252–53 (although Chief Justice Dickson originally required that the harm caused be less than the harm averted, the Supreme Court later only required that the harm caused and averted be proportionate; see *R v Latimer*, 2001 SCC 1 at para 32 [*Latimer*]).

48 *Perka, supra* note 22 at 252.

49 *Perka*, *supra* note 22 at 252 citing Fletcher, *Rethinking*, *supra* note 4 at 804.

50 *Ibid*.

51 See *ibid*.

52 Fletcher, *Rethinking*, *supra* note 4 at 804.

53 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 110.

54 *Supra* note 47 at para 34.

imminent and perilous.[55] Despite this recognition, the Supreme Court continues to maintain that proportionality is inherent to the law of duress and necessity.[56]

It is nevertheless curious that Fletcher chose to include a harm to the hypothetical offender that does not itself engage the other requirements of a moral involuntariness defence. Put differently, it is not clear that a broken finger constitutes a degree of harm that renders one's choice to commit a crime involuntary.[57] Modifying Fletcher's hypothetical scenario to make the accused's choice between blowing up a city and being killed themselves provides a better framing of the tension inherent to including a proportionality requirement in the moral involuntariness defence. The wrongfulness of the act derives directly from the disproportionality inherent to killing many people to preserve the accused's life. Yet the choice facing such an accused now meets the imminence and sufficient peril requirements as the consequence is the most severe and will follow immediately upon refusing to commit the relevant crime.

Although disproportionality renders any excused act inherently wrongful, it is difficult to understand why the *degree* of wrongfulness ought to prevent the defendant from pleading an excuse. Such an approach transforms the basic conception of excuses into a principle based on something other than voluntariness and "more readily analyzable as... [a] justification".[58] This point is well-illustrated by considering the core case of self-defence wherein an innocent accused must kill-or-be-killed in response to threats posed by a non-innocent aggressor. In this case, the accused's actions meet all the requirements of a moral involuntariness defence, as the threat is of imminent peril. They also meet the Court's proportionality requirement.[59] Yet the Court has consistently maintained that the core case of self-defence is a justification connoting rightful conduct.[60] As explained earlier, it is the proportionality factor that drives the justificatory reasoning in a case of self-defence. Requiring that the defendant prove this core element of a justification to plead an excuse is

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55 See *ibid* at para 31. See also George P Fletcher, *Rethinking Criminal Law* (New York: Oxford University Press, 2000) at 803–04.

56 See *Ryan*, *supra* note 18 at para 59.

57 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 121. In my view, the threat would not constitute "grievous" bodily harm. As I explain below, this is the appropriate standard for a moral involuntariness defence.

58 Stephen G Coughlan, "Duress, Necessity, Self-Defence, and Provocation: Implications of Radical Change?" (2002) 7 Can Crim L Rev 147 at 158.

59 See *ibid* at 198–99.

60 See e.g. *Ryan*, *supra* note 18 at para 26.

therefore not sensible as it blurs the line between justification and excuse.[61]

It is nevertheless possible to assuage Chief Justice Dickson's central concern that a duress or necessity defence without a proportionality requirement would "become the last resort of scoundrels" and "a mask for anarchy."[62] This risk is especially concerning given Chief Justice Dickson's conclusion that the illegality of an accused's actions giving rise to a necessitous circumstance is insufficient to bar a moral involuntariness defence.[63] Yet such circumstances are still relevant in considering whether a defence ought to be afforded. This is because the reason a person finds themselves in their precarious position must impact whether the action was reasonably foreseeable. As the Court held in *R v Ryan*,[64] a person cannot plead duress "if they knew that their participation in a conspiracy or criminal association came with a risk of coercion and/or threats to compel them to commit an offence."[65] Although this is an explicit statutory requirement, the Court reasonably maintains that such a fact is also capable of preventing an accused from proving there was "no safe avenue of escape" except to commit the impugned criminal act if they are a party to an offence, and therefore, must rely upon the common law duress defence.[66]

Considering the person's role in bringing about their perilous scenario is also consistent with the new self-defence provisions. The central issue in the *Khill* case turned on the statutory requirement that triers of fact consider the accused's "role in the incident" in determining the merits of any self-defence claim. The defence argued for a narrow interpretation of this term that would require considering only "unlawful, provocative or morally blameworthy conduct on the part of the accused—categories based in the previous legislation."[67] As Justice Martin held for the majority, "Parliament's intent is clear that 'the person's role in the incident' refers to the person's conduct … during the course of the incident, from be-

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61 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 119–20, citing Coughlan, "Implications", *supra* note 58 at 198-99.

62 *Perka*, *supra* note 22 at 248 citing *Williams*, *supra* note 38.

63 See *Perka*, *supra* note 22 at 254–55.

64 *Supra* note 18.

65 *Ibid* at paras 75–77. The requirement that an accused demonstrate that there is no "legal way out" in the necessity context serves a similar function (See *Latimer*, *supra* note 47 at para 30 citing *Perka*; see generally *Latimer* at paras 28–31).

66 *Ryan*, *supra* note 18. For the rationale underlying why accused must plead the statutory defence if a principal, and the common law defence if a party to an offence, see generally *Paquette*, *supra* note 11.

67 *Khill*, *supra* note 5 at para 24.

ginning to end, that is relevant to whether the ultimate act was reasonable in the circumstances."[68] As a result, a claim of self-defence "calls for a review of the accused's role, if any, in bringing about the conflict."[69]

As self-defence, duress, and necessity each consider the reasons why an accused is placed in their perilous circumstance, the possibility of criminals using the law of defences to exploit the criminal justice system is significantly mitigated. Not only will an accused's choice to participate in a criminal organization routinely bar a duress or necessity defence, considering the broader context of the accused's claim of self-defence will allow courts to mitigate concerns about unsavoury actors using force in circumstances where the accused ought to have avoided causing harm altogether. The facts of *Khill* are illustrative.[70] After hearing a noise outside his rural home late at night, the accused grabbed his gun and covertly located the trespasser. Upon confronting the trespasser, the accused mistakenly claimed that the trespasser possessed a gun which he maintained justified killing the trespasser. The Court concluded that the accused's choice to confront the trespasser with a gun in the dark was relevant to determining the merits of his self-defence claim.

A further inconsistency in the law of duress arises from the threshold of harm required to plead the defence. Writing for a unanimous Supreme Court in *Ryan*,[71] Justices LeBel and Cromwell confirmed that it is not necessary for an accused to prove a "grievous" threat of bodily harm. Instead, the Court required only a threat of "bodily harm,"[72] defined in section 2 of the *Criminal Code* as harm which "interferes with the health or comfort of the person and that is more than merely transient or trifling." The Court's position that the duress defence is an excuse based on the concept of moral involuntariness is undefendable given this low threshold of harm. Similar to Fletcher's example of a broken finger, it is difficult to see how a threat of harm that is "more than merely transient or trifling" can engage an accused's ability to choose whether to commit a crime.[73]

To understand the Supreme Court's rationale for maintaining this inconsistency, it is necessary to expand upon its understanding of the term "proportionality." In addition to a utilitarian proportionality requirement, the Court maintained that the moral involuntariness principle requires

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68 *Ibid* at para 74.

69 *Ibid*.

70 *Ibid* at paras 6–14.

71 Although Justice Fish dissented in part, his dissent related only to whether a stay of proceedings was the appropriate remedy in the case.

72 *Ryan*, *supra* note 18 at para 59.

73 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 121.

that the accused meet "societal expectations" with respect to resisting any threat.[74] In *Ryan*, the Court concluded that an accused will fail to satisfy the latter proportionality requirement where "the threat is of insufficient seriousness."[75] It is possible that this understanding of the societal expectation requirement could prevent mere bodily harm from forming the basis of a moral involuntariness defence. This nevertheless raises questions that the Court in *Ryan* did not answer: what qualities render an action insufficiently serious and how do those qualities derive from the moral involuntariness principle?

The societal expectation requirement may more plausibly be understood by interpreting it through the lens of the adjective "moral." As Stanley Yeo observes, the adjective "stipulates that social policy and values form an integral part of [the moral involuntariness] concept."[76] Building on Yeo's work, I elsewhere contend that the term "moral" ought to serve as a screening function with respect to the quality of the emotions that underlie a moral involuntariness claim.[77] This position is sensible if I am correct that utilitarian proportionality does not belong in a moral involuntariness assessment and the threat of harm must always be grievous to engage the moral involuntariness principle. The latter consideration and the other main elements relevant to a moral involuntariness claim (no reasonable avenue of escape and a temporal connection between the threat and harm averted)[78] relate directly to whether the accused adequately feared the threat towards their person and therefore acted "involuntarily." The only plausible way to give the adjective "moral" any meaning is therefore to focus on the quality of the emotions underlying why the accused maintains they have no realistic choice but to commit a crime.

This conception of the moral involuntariness principle is capable of addressing other legitimate concerns. Benjamin Berger maintains that relying on the Supreme Court's understanding of moral involuntariness as a conceptual basis for excuses will allow improper emotions to provide the basis for a defence.[79] As an example, he cites an accused who kills as a re-

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74 *Ryan*, *supra* note 18 at paras 70–74. I include this factor under the heading of proportionality in line with the Supreme Court's development of the duress and necessity defences. The societal expectation requirement may be better thought of as an evaluative factor, but that issue is unnecessary to resolve for present purposes.

75 *Ibid* at para 62.

76 See Stanley Yeo, "Revisiting Necessity" (2010) 56:1/2 Crim LQ 13 at 20.

77 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 115–16.

78 These factors will be described in more detail below.

79 See Benjamin L Berger, "Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences" (2006) 51:1 McGill LJ 99 at 103, 109–111 [Berger, "Emotions"].

sult of the victim's sexual advances, giving rise to "homosexual panic."[80] Yet such an emotional response is itself infected by the view that homosexuality is somehow morally intolerable. As contemporary Canadian values firmly reject this view, it is possible to conclude that an accused cannot plead a moral involuntariness defence in this circumstance as convicting the accused "denounces [their] underlying reasons for succumbing to the pressure and seeks to deter others from fostering such values."[81]

Terry Skolnik further contends that the societal expectation requirement construes proportionality "as a moral judgment of appropriateness rather than as a traditional evaluation of how the strength of the threat … impacts voluntarism."[82] This criticism is again understandable given the Supreme Court's unclear explanation of the societal expectation requirement. Skolnik's legitimate concerns nevertheless fall by the wayside if the societal expectation requirement only ensures the *emotions* underlying the accused's response are appropriate. Under this view, the analysis remains focused on the impact of the threat on the accused's will while the societal expectation requirement ensures that unpalatable emotional responses cannot form the basis of a moral involuntariness claim.

In summary, the Supreme Court's development of the moral involuntariness principle resulted in three main errors. The first is the inclusion of a utilitarian proportionality requirement. Although utilitarian proportionality is a proper requirement for a justificatory version of the duress and necessity defences, it is irrelevant to whether an action qualifies as morally involuntary. Second, the Court failed to rationalize the societal expectation requirement inherent to the moral involuntariness principle. The various criticisms of this aspect of the moral involuntariness principle are nevertheless mitigated if the societal expectation requirement focuses on the acceptability of the accused's emotional response. Under this view, a moral involuntariness assessment must simply be based on a socially tolerable emotion (e.g., fear, love) that deprives the accused of a "realistic choice" but to commit a crime. Finally, the Court's choice to develop the duress and necessity defences exclusively within the moral involuntariness principle is unsustainable given the low threshold of harm permitted to form the basis of the defence. It is simply unclear how harm

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80 *Ibid* at 113 (citing *R v Fraser* (1980), 55 CCC (2d) 503, 26 AR 33 (Vlex) (Alta CA)). Although *Fraser* is a provocation case, Berger correctly maintains that loss of will underlies the duress, necessity, and provocation defences.

81 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 119.

82 Terry Skolnik, "Three Problems with Duress and Moral Involuntariness" (2016) 63:1/2 Crim LQ 124 at 144.

that is merely more than "trivial" is capable of depriving a person of her ability to choose whether to commit a crime.

B. Moral Permissibility

Although the moral involuntariness principle ought not include a utilitarian proportionality requirement or lower the applicable threshold of harm, these adjustments to the duress defence become reasonable when considering the relationship between proportionality and the evaluative factors relevant to the law of defences. As alluded to earlier, the latter factors include the degree of harm threatened, whether a temporal connection exists between the harm threatened and the commission of the crime, and whether the accused was capable of taking any reasonable avenues of escape. These factors are also more generally informed by the accused's broader role in bringing about the circumstances under which it became necessary to commit a crime.[83]

Although the conclusion that the harms caused and averted are proportionate need not impact the stringency with which every evaluative factor is applied, it should have an effect on the ability of the defendant to plead a defence in some cases. The Supreme Court in *Ryan* made a similar observation. As Justices LeBel and Cromwell observed, "[g]iven the different moral qualities of the acts involved, it is generally true that the justification of self-defence ought to be more readily available than the excuse of duress."[84] I see no reason why this statement should not apply with equal force to a justificatory version of the duress and necessity defences. The greater the relative good caused by an accused's actions, the less society can reasonably expect the defendant to labour under extreme pressures before committing a crime.

Applying this rationale, I agree with the Supreme Court in *Ryan* that it is not sensible to maintain a high threshold of harm for the duress and necessity defences in cases where utilitarian proportionality exists. This is sensible as the high threshold of harm is one of the driving factors for excuse-based defences. As the proportionality requirement pushes the defendant towards a justificatory defence, it is unreasonable to expect that they meet the strictest requirement for an excuse-based defence. For an act to be permissible, however, it seems intuitive that the defendant acting under duress or necessity must take any reasonable avenue of escape.

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[83] See e.g. *Ryan*, *supra* note 18 at paras 55–80 (describing the common law requirements for a duress defence); *Latimer*, *supra* note 47 at paras 28–31 (describing the requirements for a necessity defence); *Criminal Code*, *supra* note 2, s 34(2) (describing the factors relevant to a self-defence claim).

[84] *Ryan*, *supra* note 18 at para 26.

This logic follows because avoiding harm entirely is preferable to committing a crime where the interests of the accused and the victim are equal. It is also reasonable to demand that there exists some temporal connection between the criminal act and the harm averted. If the threat is of some distant future harm, it will be possible for the defendant to take action to avoid the need to commit a crime. If this position is persuasive, then the moral permissibility principle is perfectly captured by the Court's current conception of the duress defence. Its insistence that duress is encompassed entirely by the moral involuntariness principle should therefore be replaced with the view that duress may be encompassed by *at least* two moral principles: moral involuntariness and moral permissibility.

A second benefit to adopting the moral permissibility principle is that it can help explain the moral rationale underlying some of the non-core cases of self-defence. As Justice Martin observed in *Khill*, a variety of self-defence scenarios do not clearly connote "rightful" conduct. For Justice Martin, the justificatory rationale dissipates "where the accused uses force against a reasonably perceived threat that does not exist in fact, against an attack that they have provoked, and when the defending act is not proportional or necessary."[85] Justice Martin's implicit endorsement of my view that the moral permissibility principle better captures the moral rationale for these types of defences provides good reason to adopt this principle.[86] For brevity's sake, however, I will not repeat my views concerning how the moral permissibility principle better explains the aforementioned categories of self-defence.[87] Suffice it to say that the principle's ability to rationalize the Supreme Court's duress defence and shed new light on some of self-defence's intractable cases renders it worth preserving.

C. Moral Innocence

The final principle that I maintain underlies justification- and excuse-based defences derives from the Supreme Court's conclusion that some defensive acts are "rightful."[88] As Chief Justice Dickson observed in *Per-*

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[85] *Khill*, *supra* note 5 at paras 47–48, citing Alan Brudner, "Constitutionalizing Self-Defence" (2011) 61:4 UTLJ 867 at 891–95; Fehr, "Self-Defence", *supra* note 4 at 109; Kimberly Kessler Ferzan, "Justification and Excuse" in John Deigh & David Dolinko, eds, *The Oxford Handbook of Philosophy of Criminal Law* (Oxford: Oxford University Press, 2011) 239 at 252–53; Roach, "Preliminary Assessment", *supra* note 19 at 276–77.

[86] See *Khill*, *supra* note 5 at para 48.

[87] For a detailed review, see Fehr, "Self-Defence", *supra* note 4 at 103–19.

[88] See *Ryan*, *supra* note 18 at para 26.

ka, this conclusion arises primarily from a utilitarian balancing of the harms caused and averted by the defendant's actions. Where the harms averted clearly outweigh those caused, the accused's conduct will be a strong candidate for a justification-based defence. In distilling this justificatory rationale into a basic moral principle, I agree with Stephen Coughlan's observation that it would be paradoxical to conclude that a person who acts rightfully is somehow morally blameworthy.[89] In my view, a person who cannot be blamed for committing a crime and acted "rightfully" in the circumstances acts in a morally innocent manner.

The fact that the harm averted clearly outweighs any harm caused by a defendant's criminal conduct is nevertheless insufficient to warrant a defence. As explained earlier, the function of utilitarian proportionality is to *relax* the other evaluative factors relevant to defences, not to do away with them. Chief Justice Dickson's example of an accused who commandeers a vehicle to drive a dying person to the hospital is again illustrative. Presumably, Chief Justice Dickson meant to convey that the defendant stole the vehicle because there were no other clear legal means available to bring the injured person to the hospital. If the defendant knew that an emergency vehicle was readily available or arriving shortly, it seems intuitive that their conduct ought not to be justified. This conclusion is reasonable because the defendant is prioritizing their own desire to be a "hero" over the public good. Stealing a car and driving at high speeds to a hospital is dangerous, and emergency response teams are specifically trained (e.g., medical degrees or paramedical training) and equipped (e.g., medical equipment, sirens) to minimize the chance for further harm to occur in such emergencies. Although the good intentions of the defendant might be relevant at sentencing, the disregard for the lawful alternative should be sufficient to deny a defence.

A duress scenario can also illustrate the tension with requiring the reasonable avenue of escape criterion to be met in instances where the harm averted outweighs the harm caused. In *R v Allen*,[90] the accused was offered a ride home by two other attendees of a party. Upon entering the vehicle, however, the defendant was physically abused and subsequently compelled to commit a series of robberies. During the final robbery, he entered a hotel room and was told that if he tried to escape the kidnappers would "come in shooting and leave no witnesses." While committing the robbery in a non-threatening manner, the defendant was afforded an opportunity to enter a nearby elevator and escape his attackers. The de-

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89 See Coughlan, "Implications", *supra* note 58 at 188.

90 2014 SKQB 402 [*Allen*]. I should disclose that I ghost-wrote the factum in this case challenging the constitutionality of excluding robbery and assault with a weapon from the statutory duress defence.

fendant nevertheless maintained that it was necessary to commit the robbery out of concern for the hotel staff given the threats made by his kidnappers. As such, he committed the robbery and returned to his kidnappers.[91]

The Crown contended that the defendant's decision not to enter the elevator failed to satisfy the reasonable avenue of escape requirement. The trial judge nevertheless granted the defendant a duress defence.[92] As with the constitutional challenge, the trial judge failed to consider how the moral foundations of the defendant's actions ought to have impacted the criteria for pleading a duress defence.[93] It is nevertheless possible to conclude that the defendant's actions were morally involuntary given that there was no reasonable means to escape the threat to the hotel staff. As the duress defence applies equally to threats posed to defendants and third parties,[94] this explanation renders the trial judge's conclusion sustainable. As explained earlier, however, the fact that an act could qualify as "morally involuntary" does not mean it cannot be justified. The defendant's decision to put himself back in the hands of his captors to avoid the potential harm to the hotel staff is an instance of self-sacrifice that ought to render his actions justifiable. In my view, this provides a better explanation of the defendant's actions as it takes into account his full set of moral reasons, not simply the fact that a threat existed to others.

Given the grave nature of the threat in *Allen*, relaxing the threshold of harm was simply not an available means to soften the evaluative factors to account for the harms averted being greater than those caused. The imminence of the threat and close presence of the threatening party further rendered it unmeaningful for proportionality to relax these other key evaluative factors relevant to the duress defence. Thus, despite the moral reasoning being based on justificatory principles, it does not appear that pleading a justification-based duress defence in this scenario gives rise to a legally relevant effect. Given the overlap between the moral involuntariness and moral innocence principles, Allen would be afforded a defence pursuant to either principle. As I will explain when considering the con-

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91 See *ibid* at paras 5–6, 48. I also reproduced some elements of the oral decision that the judge did not report in their judgment.

92 As the application of the duress defence was not a reported decision, I am recalling the Crown's position and judge's conclusion from my involvement in the case.

93 See *Allen*, *supra* note 90 at paras 7, 90. Although the justificatory argument was framed as a breach of the instrumental rationality principles, the trial judge refused to address this aspect of the constitutional challenge given his ruling that the impugned restrictions violated the moral involuntariness principle. For a more detailed review of the instrumental rationality argument, see generally Fehr, "(Near) Death", *supra* note 19.

94 See *Ruzic*, *supra* note 9 at para 54.

stitutionality of the statutory duress defence, the distinct possibility that other justification-based versions of the duress defence will run into a similar dilemma could shield section 17 of the *Criminal Code* from being declared unconstitutional.

The fact that the harm averted clearly outweighs the harm caused nevertheless serves to relax the evaluative factors in more common cases. For instance, a threshold of harm ought not to be imposed when the underlying act is morally innocent. In the self-defence context, defendants have always been allowed to repel unprovoked force with equal force regardless of whether the threat constitutes "bodily harm."[95] The "rightful" nature of the underlying act permits the accused to respond with force to ward off any real or threatened intrusion onto their physical integrity. Similarly, the requirement to take any reasonable avenue of escape is also minimized in the core case of self-defence. The law of self-defence has never required that an accused in this scenario take every reasonable avenue of escape to avoid confrontation. Instead, accused are permitted to stand their ground if they are wrongfully attacked. The proportionality of the harm used, the morally blameworthy state of the victim, and the broader deterrence-based benefits to the socio-legal order render the defensive act justifiable regardless of whether the defendant could have avoided the confrontation.[96]

The context of each case may nevertheless give rise to more difficult challenges. Take an accused who decides to stand their ground vis-à-vis a wrongful attack using proportionate force but does so for racist purposes. Put differently, if the attacker were white, the accused would have retreated, but because the attacker is a minority, the accused decided to act in self-defence. It is difficult to conclude that this person's actions are morally correct given their racist motives for acting in self-defence. If the attacker's threat is grievous, then it is possible to plead moral involuntariness as the wrongness of the act does not categorically prohibit the defendant from pleading a defence. As concluded earlier, however, the societal expectation requirement would bar such a defence as this provides the most plausible meaning to the adjective "moral." In this circumstance, the accused's response is based not on a tolerable emotion such as fear, but on an intolerable emotion that society rightly can hold a person accountable for fostering. As the societal expectation requirement implicitly operates as part of the moral permissibility principle,[97] a similar conclusion ought

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95 See *Ryan*, *supra* note 18 at para 26.

96 See *ibid*.

97 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 120–23. Although I did not explain this point in detail, it is implicit that a person's claim that an action is "permissible" requires that there be no clear moral objection to the conduct at issue.

to follow with respect to any moral permissibility defence thereby denying this accused a defence despite otherwise meeting the requirements for a self-defence claim.

The aforementioned examples are illustrative of the core function of the utilitarian proportionality principle: its ability to explain why certain evaluative factors are relaxed in a variety of circumstances where an accused's conduct is considered "rightful." However, it is important to recognize that utilitarian proportionality itself ought not always be sufficient to establish a defence even in circumstances where conduct might otherwise appear "rightful" or "permissible." Sometimes other factors can be determinative, especially if the emotions underlying those responses are improper or the defendant insisted on breaking the law despite the existence of clearly better alternatives being readily available for avoiding a particular harm. The fluidity of the moral principles underlying the law of criminal defences is desirable as it allows courts to better track the moral reasons for granting or withholding a defence. It nevertheless raises a further question: do these principles provide an improved constitutional framework for determining whether an accused ought to be afforded a defence?

III. The Limits of Constitutional Law

Various legal scholars have observed that the Supreme Court's decision to constitutionalize excuse-based defences logically requires that they also constitutionalize the principles underlying justification-based defences.[98] As morally involuntary actions are "wrongful" and justificatory actions "rightful," it would be incongruous to deny the latter actors constitutional protection given their higher moral standing. A similar rationale ought to apply with respect to a moral permissibility defence given its higher moral claim vis-à-vis a moral involuntariness defence.[99] If my prior work is correct that each principle qualifies as a principle of fundamental justice,[100] the question arises: how would this broader conception of the relationship between fundamental justice and criminal defences impact the statutory duress defence?

Section 17 of the *Criminal Code* provides in relevant part that "[a] person who commits an offence under compulsion by threats of immediate

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98 See e.g. Benjamin L Berger, "A Choice Among Values: Theoretical and Historical Perspectives on the Defence of Necessity" (2002) 39:4 Alta L Rev 848 at 863; Yeo, *supra* note 76 at 16; Brudner, *supra* note 85; Fehr, "(Near) Death", *supra* note 19; Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 101.

99 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 101.

100 See *ibid* at 126–33.

death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a [criminal association]." The provision also provides a list of offences to which an accused is barred from pleading the defence. Despite many of these exclusions clearly violating the moral involuntariness principle,[101] the statutory duress defence was first constitutionally challenged in *R v Ruzic*[102] for requiring any threat of harm to be "immediate" and mandating that the threatening party be "present" when the accused commits the crime.

The facts of *Ruzic* illustrate how it is possible for an accused to feel compelled to commit a crime without the threat being imminent or the threatening party present. Ruzic was told that her mother would be harmed if she did not import drugs into Canada from Belgrade. Importantly, this threat was made during the Yugoslav Wars when the region was in a lawless state, rendering police assistance practically useless. The fact that the threatening party was an assassin during the Yugoslav Wars also rendered these threats believable.[103] Despite her actions meeting the other elements of a duress claim, the non-impending nature of the threat and the absence of the threatening party at the time the offence was committed in Canada barred Ruzic's defence. As the Supreme Court concluded, however, Ruzic's circumstances were still morally involuntary[104] as she had no "realistic choice" but to import the drugs into Canada. The credibility and severity of the threat alongside the unique context of the pressures she faced underpinned this conclusion.[105]

After the imminence and presence requirements were severed from section 17 of the *Criminal Code*, the statutory duress defence required only a threat of "death or bodily harm" that the accused reasonably believed would be carried out if the crime was not committed. In addition, several offences remained excluded from the ambit of the defence, as were those

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[101] See Martha Shaffer, "Scrutinizing Duress: The Constitutional Validity of Section 17 of the *Criminal Code*" (1998) 40 Crim LQ 444; Colton Fehr, "The Constitutionality of Excluding Duress as a Defence to Murder" (2021) 44:4 Man LJ 111; *R v Aravena*, 2015 ONCA 250 at paras 61–67 [*Aravena*]; *Allen*, *supra* note 90 at para 90. For an argument that the exclusion of murder is consistent with the moral involuntariness principle, see *R v Willis*, 2016 MBCA 113 at para 167 [*Willis*].

[102] *Supra* note 9.

[103] See *ibid* at paras 2–7.

[104] I contend elsewhere that her defence would actually qualify as morally permissible, but that argument is unnecessary to elaborate for present purposes (See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 122–23).

[105] See *Ruzic*, *supra* note 9 at paras 9–10. It is notable that Ruzic was acquitted by a jury and therefore reasons for the defence were not provided.

defendants pleading duress who belonged to a criminal association.[106] Given the inability of these remaining elements to capture the essence of the moral involuntariness principle,[107] the Supreme Court used the common law to supplement the statutory duress defence. As opposed to an imminence requirement, accused were required to demonstrate that there was no reasonable avenue of escape available.[108] And in place of the presence requirement, the defendant was required to establish a "temporal connection" between the threat and the offence committed.[109] These more lenient elements were further supplemented with both a utilitarian proportionality requirement and the broader requirement that the defendant's conduct meet society's expectations in terms of normal human resistance to threats.[110]

As explained earlier, the inclusion of a utilitarian proportionality requirement in the duress and necessity defences is inconsistent with the Supreme Court's position that excuses connote morally involuntary conduct. Similarly, a threat of mere "bodily" harm is incapable of denying an accused a "realistic choice" of whether to commit a crime. If the word "excuse" were interpreted to mean "morally involuntary," it would become illogical to read in a utilitarian proportionality requirement or relax the threshold of harm for pleading the duress and necessity defences. The inclusion of the word "excuse" in section 17 of the *Criminal Code* would therefore limit the ability of an accused to plead the duress and necessity defences. As this would give rise to the potential for convicting those acting in a morally permissible manner, such a reading of the statutory duress defence would be inconsistent with section 7 of the *Charter*.[111]

Section 17 of the *Criminal Code* may nevertheless be interpreted in a manner that avoids this constitutional issue. Although the common law historically required threats of "grievous" bodily harm,[112] maintaining this requirement is inconsistent with both the current wording of the statutory duress defence and its legislative history. Despite the Supreme Court in *Ryan* not being explicit on this point, it is important that the previous version of the statutory duress defence required proof of a threat of "death

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106 See *Ryan*, *supra* note 18 at paras 43–46. These exclusions will be discussed further below.

107 An action cannot, for instance, be morally involuntary if the person has a clear avenue to escape.

108 See *Ryan*, *supra* note 18 at paras 43–46.

109 *Ibid*.

110 See *ibid* at paras 43–46, 70–74.

111 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 126–33.

112 *Ryan*, *supra* note 18 at para 59.

or grievous bodily harm."[113] The deletion of the word "grievous" in the latest provision therefore makes it reasonable to conclude that Parliament intended to make the threshold of harm for pleading the statutory duress defence more flexible. The conclusion that proportionality is capable of lessening the harm threshold required for pleading the duress defence might therefore be read into the duress defence. This conclusion is sensible as the variable threshold of harm is difficult to render coherent without a proportionality requirement.

Interpreted in this manner, the Supreme Court's error rests in its suggestion that duress is only encompassed by one moral principle. As I explained earlier, the presence of utilitarian proportionality can result in a duress defence being morally permissible and, in rare cases, even constituting a "rightful" or morally innocent act. Although the latter type of act is surely the basis of a justification-based defence, it is not clear whether a moral permissibility defence could be categorized as an excuse. If it were, section 17 of the *Criminal Code* could be read as adopting two moral principles: moral involuntariness and moral permissibility. The philosophical foundation of the duress defence could therefore be rendered coherent in all but true instances of justificatory duress defences. A similar conclusion would follow for the necessity defence, as this broader understanding of the term "excuse" would allow courts to utilize section 8(3) of the *Criminal Code* to provide a dual moral rationale for the common law defence.[114]

Interpreting the term "excuse" broadly enough to incorporate the moral permissibility principle is nevertheless controversial. Kimberly Kessler Ferzan maintains that any role for the concept of permissibility in the law of criminal defences ought to count as a justification. As she explains, there must be room for justification to include permissible conduct given the broader purpose of the criminal law: to prohibit moral wrongs.[115] As permissible acts are not clearly wrong, it is plausible to label such defences as justifications. On the other hand, Fletcher takes the view that "[a] justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act."[116] He us-

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[113] *Criminal Code*, RSC 1970, c C-34, s 17.

[114] See Part I, *supra*.

[115] See Ferzan, *supra* note 85 at 242. See also Joshua Dressler, "New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and *Rethinking*" (1984) 32:1 UCLA L Rev 61 at 64.

[116] Fletcher, *Rethinking*, *supra* note 4 at 759.

es the etymology of the Latin word "jus" to bolster his view that justifications may only connote "rightful" behaviour.[117]

The problem of classifying the concept of permissibility is not novel. As Kent Greenawalt explains, whether permissible actions are justifications or excuses raises "fundamental questions about the exercise of moral evaluation."[118] Applying different forms of deontological and consequentialist ethics allows moral philosophers to conclude that permissible acts are either wrongful or non-wrongful.[119] The timeless nature of these debates is likely what drove Justice Martin to conclude in *Khill* that little purpose is served by parsing the philosophical foundations of the moral permissibility principle. As she observed, a permissibility rationale simply "suggests the defence is neither purely a justification nor an excuse, instead occupying a middle ground of 'permissibility' between rightfulness and blamelessness."[120]

Although Justice Martin's reasoning is inconsistent with my preferred interpretation of the term "permissible,"[121] it is nevertheless a defendable conclusion, as a justificatory conceptualization of the moral permissibility principle is arguably determinative of the statutory duress defence's constitutionality. To strike down that provision on the proposed basis is tantamount to demanding perfection in moral philosophy from Parliament in circumstances where moral philosophers themselves reasonably disagree about the meaning of a particular term. In my view, using the *Charter* to alter a democratically enacted law in light of such reasonable and persistent disagreement would far exceed the legitimate boundaries of judicial review. This is especially true as I cannot see the defence of any accused individual practically turning on whether the moral permissibility principle is better suited to a justificatory or excusatory rationale.

The fact that an accused may be truly justified when acting under duress nevertheless poses a further problem. The inability to plead a justificatory duress defence might be thought to render the statutory duress defence inconsistent with section 7 of the *Charter*. This potential issue, however, need not result in an unconstitutional *effect* on any defendant. This follows because such an accused may still be able to plead a moral involuntariness or moral permissibility defence despite their conduct being justified. This was the result in the *Allen* case reviewed earlier. More-

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117 See George P Fletcher, "Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?" (1979) 26:6 UCLA L Rev 1355 at 1358–59.

118 Greenawalt, *supra* note 4 at 1904.

119 See *ibid*.

120 *Khill*, *supra* note 5 at para 48.

121 See Fehr, "Self-Defence", *supra* note 4 at 102–03. I broadly concur with Ferzan's view.

over, it is difficult to think of a hypothetical scenario where it is possible to commit an act under duress in a morally innocent manner that fails to meet the requirements of either the moral involuntariness or moral permissibility principles. It is, therefore, unlikely that the incoherence of the statutory duress defence would give rise to a constitutional issue. Although the defence of an accused individual would be based on a watered-down moral rationale, the fact that they still would receive a defence would prevent any finding of a constitutional violation. It would be impossible for the impugned law to engage the threshold interests of "life, liberty, or security of the person" as required under section 7 of the *Charter*.[122]

To explain why the moral foundation of Allen's defence did not impact its availability, it is necessary to return to the relationship between proportionality and the evaluative factors relevant to criminal defences. As explained earlier, proportionality between the harms caused and averted serves to relax the threshold of harm requirement in the duress/necessity context. And where the harm averted clearly outweighs the harm caused, it is reasonable to relax the remaining evaluative factors and simply require that the accused's conduct is "reasonable in the circumstances."[123] Yet an act such as Allen's only appears reasonable because of the extreme circumstances that otherwise sustain a moral involuntariness or permissibility defence. Justificatory versions of duress are particularly susceptible to such overlap given the significant threats that typically form the basis of such defences. Put differently, a high degree of threat will typically be necessary for the threatened harm to outweigh the interests of the innocent victim. If true, there may not be a practical difference between the application of the principles underlying the continuum of moral conduct in some scenarios.

This is not to say that other instances of justified conduct might not be barred by the combined wording of sections 8(3) and 17 of the *Criminal Code*. The term "excuse" incorporated into the necessity defence by virtue of these provisions prevents a justificatory version of the defence from serving any function. As the moral permissibility principle logically requires only the threshold of harm to be relaxed in duress and necessity scenarios, there is no room to relax other evaluative factors in justificatory instances of the necessity defence.[124] For the same reasons expressed in

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[122] *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 55; *Charter*, *supra* note 13, s 7 (that section requires that a law deprives a person of a threshold interest (life, liberty, or security of the person) before a law must conform with the principles of fundamental justice).

[123] See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 123–24.

[124] See Part II, *supra*.

the preceding paragraph, however, I find it difficult to devise a scenario wherein an accused pleading a justification-based necessity defence could not also fit their defence into the moral involuntariness or moral permissibility principles.[125] Resolving this issue is not, however, strictly necessary for determining the constitutionality of the statutory duress defence. This follows because any unconstitutional effect would derive more directly from the word "inconsistency" in section 8(3) of the *Criminal Code*, not the limited juristic basis of the statutory duress defence. Thus, only the former provision would be susceptible to constitutional challenge if a hypothetical accused could be denied a defence as a result of the inability to preserve a justificatory version of the necessity defence.

Although Parliament's choice to label the statutory duress defence an "excuse" does not give rise to a clear constitutional issue, the theoretical issues caused by the defence's limited moral foundation ought not to be ignored. Such an approach would be inconsistent with a primary function of criminal law: communicating the moral quality of a person's actions.[126] This function is important because the law's ability to communicate that a person's actions were innocent as opposed to permissible or morally involuntary impacts the dignity interests of those who plead criminal defences. Put differently, a person who acted "rightfully" and, to a lesser extent, "permissibly," will feel validated by the law, while a person whose actions are normatively involuntary will feel that they committed a wrong – albeit one there is little purpose in punishing.[127] If I am right that the law ought not to abstain from making a full moral assessment of an accused's actions, then it is prudent to think of ways to amend the law of defences to allow for a more coherent development of their philosophical foundations.

IV. Restructuring Defences

Adopting the continuum of moral conduct outlined earlier would allow courts to communicate more clearly with respect to the moral rationale underlying an accused's claim of duress, necessity, and self-defence. To achieve this end, however, it is necessary to either amend or repeal section 17 of the *Criminal Code*. Although amending the provision by deleting the term "excuse" would allow courts to develop a morally coherent duress defence, the statutory duress defence's wording raises other problems. A citizen reading its text would reasonably believe that a threat

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[125] I will discuss one scenario in Part IV, *infra*, where such overlap exists.

[126] See John Gardner, "The Gist of Excuses" in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) 121 at 133.

[127] See *ibid*.

must be imminent and that the threatening party must be present at the time of the crime, despite these strict requirements being fundamentally altered in *Ruzic*. The fact that many of the excluded offences – such as robbery, arson, and assault with a weapon – are all but certainly inconsistent with at least the moral involuntariness principle also provides an impetus to repeal the statutory duress provision.[128] Courts and scholars even maintain that the most serious excluded offence of murder is likely unconstitutional.[129] Repealing the statutory duress defence is, therefore, prudent as it is misleading in several ways.

If section 17 were to be repealed, the new defence of person provision could serve as a broader catch-all defence for duress, necessity, and self-defence. This follows because, unlike the old law of self-defence, the new provision is not restricted to the "use of force." Instead, it applies to the "act that constitutes the offence" so long as the accused's act is committed for the purpose of defending themselves or another person.[130] The provision further outlines a variety of factors relevant to all three defences that judges must consider in determining whether a defence ought to be granted. These include "the nature of the force or threat," "the extent to which the use of force was imminent," "whether there were other means available to respond to the potential use of force," "the person's role in the incident," as well as a variety of factors relevant to whether the harms threatened and averted were proportional.[131] As Stephen Coughlan contends, the language of this provision is capable of catching all instances of the common law defences of duress and necessity.[132]

Although I agree with Coughlan that the language of the defence of person provision is broad enough to capture the essence of the duress and necessity defences, it is unlikely to apply in narrow instances where the defending act constitutes an omission-based offence.[133] This follows given the narrow language used in section 34(1)(b) of the *Criminal Code*. In other defence provisions, Parliament is explicit about whether the defence applies to both act- and omission-based offences.[134] Relying solely on the defence of person provision's current wording would, therefore, exclude a

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[128] See Shaffer, *supra* note 101 at 472–73; Fehr, "The Constitutionality of Excluding Duress as a Defence to Murder", *supra* note 101 at 134; *Aravena*, *supra* note 101 at paras 85–86.

[129] See Shaffer, *supra* note 101 at 473; Fehr, "The Constitutionality of Excluding Duress as a Defence to Murder", *supra* note 101 at 134. But see contra *Willis*, *supra* note 101.

[130] *Criminal Code*, *supra* note 2, s 34(1)(b).

[131] *Ibid*, s 34(2).

[132] See Coughlan, "Rise and Fall", *supra* note 19 at 118.

[133] See Fehr, "(Near) Death", *supra* note 19 at 145–48.

[134] *Ibid* citing *Criminal Code*, *supra* note 2, ss 16(1), 607(6).

lengthy list of offences from its ambit.[135] Presumably, it would fall to the common law under section 8(3) of the *Criminal Code* to fill such gaps. This would create a similarly awkward divide between common law and statutory defences as currently exists in the context of the duress defence. It would be better if these defences were contained within a single provision by inserting the words "or omission" after the word "act" in section 34(1)(b) of the *Criminal Code*.

Replacing the statutory and common law duress and necessity defences with a modified version of the defence of person provision would be a prudent development as it would simplify the law of defences. Given the moral complexity inherent to criminal defences and the infrequency with which the criminal law is updated via legislation,[136] it is sensible for Parliament to pass legislation that allows courts to develop the law in line with current moral theory. The Canadian experience serves as a cautionary tale. The unwillingness of Parliament to overhaul its law of defences despite it widely being recognized to be out of date resulted in the Supreme Court perpetuating the idea that duress and necessity fit exclusively into the excuse category.[137] Similarly, the law of self-defence was statutorily labelled a "justification" for over a century despite the philosophy underlying that defence consistently being brought into question.[138] Leaving it to courts to ascribe a moral label to each type of defensive act would allow for the criminal law to better keep pace with moral philosophy.

Relying upon a broad piece of legislation to provide the defensive rationale for three of the more common criminal defences nevertheless raises a further question: why not simply rely upon the broader moral principles for all defences? Obviously, determining which acts qualify as defences or are simply relevant to disproving *actus reus* and *mens rea* is outside the scope of this article.[139] It is nevertheless likely that the continu-

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135 For a list of the relevant omission-based offences, see Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 128–30.

136 See Harris, *supra* note 42.

137 See Part I, *supra*.

138 *Ibid*. See *Criminal Code*, 55-56 Victoria 1892, c 29, s 45; *Criminal Code*, RCS 1985, c C-46, s 34(1) as it appeared on 9 March 2013 (both the first *Criminal Code* passed in 1892 and the *Criminal Code* until 2013 had substantively similar self-defence provisions that included justification).

139 Whereas justifications and excuses concern the accused's reasons for committing a crime, procedural defences apply when the state ought to be barred from pursuing a prosecution. Defences such as entrapment, abuse of process, and (as I maintain elsewhere) *de minimis non curat lex* fit into this definition and may well be best explained by appealing to the Canadian constitutional principle of gross disproportionality. See generally Colton Fehr, "Why *De Minimis* is a Defence: A Reply to Professor Coughlan"

um of moral conduct encompasses other defences that broadly fit into the excuse/justification dichotomy. For instance, the Supreme Court has concluded that the mental disorder defence connotes morally involuntary conduct.[140] Although the juristic basis of consent is underdeveloped in Canada, I have argued elsewhere that where consent operates as a defence, it is captured by the moral permissibility principle.[141] If these and other justification- and excuse-based defences fit within the continuum of moral conduct, and the latter principles are constitutionalized, it would be unnecessary to preserve any justification- or excuse-based defences via the legislative process. Instead, courts could use the relationship between proportionality and the other evaluative factors relevant to these defences to determine whether an accused ought to be afforded a defence.

This approach would arguably prove more functional than the current approach to litigating criminal defences. Applying the continuum of moral conduct, it is simply necessary to use the proportionality of the accused's conduct to determine the *prima facie* moral basis of the defence and then pair that moral basis with its corresponding evaluative factors.[142] This is both a simpler and more exacting process than asking whether an act qualifies as a particular type of defence, such as self-defence, duress, or necessity, and then trying to develop the legal criteria for pleading each defence by fitting them into the justification and excuse categories. As this approach has led to endless jurisprudential debate, it may be preferable to skip such discussion and simply let the driving moral factor—proportionality between the harms caused and averted—dictate the strictness of the evaluative factors relevant to the defence.

Relying solely on a continuum of moral conduct is further preferable as the current approach to criminal defences not infrequently results in courts relying upon other less transparent or heavy-handed legal devices to avoid entering a conviction. The former type of gaps that I am thinking of are most regularly exposed during jury trials when a jury decides to nullify a charge. Although the Supreme Court has explicitly endorsed this

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(2021) 67:1 McGill LJ 1; Colton Fehr, "Reconceptualizing *De Minimis Non Curat Lex*" (2017) 64:1/2 Crim LQ 200. I tend to think that automatism, intoxication, and alibi fit into the category of "defences" that really operate to deny that an offence occurred and thus are not truly defences.

140 See *R v Bouchard-Lebrun*, 2011 SCC 58 at para 51.

141 See generally Colton Fehr, "Consent and the Constitution" (2019) 42:3 Man LJ 217.

142 I use the term "*prima facie*" as sometimes an accused will fail to meet the evaluative elements of the defence which would render their conduct criminal.

practice,[143] it is curious that judges do not employ their moral compasses in a similar manner as jurors. A judge's conscience is at least subject to appellate review and, given the requirement that judges provide reasons for their decisions, such a judicial practice renders the moral rationale underlying the verdict knowable.

The Supreme Court's most recent jury nullification case is illustrative. In *R v Krieger*,[144] the accused suffered from severe, chronic pain that was significantly alleviated by marijuana. As such, he grew enough marijuana for himself and others in similar pain who also were not legally allowed to obtain their medicine. Krieger was subsequently charged with possession and trafficking in marijuana contrary to the *Controlled Drugs and Substances Act*.[145] Despite clearly having committed these offences, several jurors stated that they could not in good conscience convict Krieger.[146] The reasoning behind these pleas is broadly as follows: it is not fair to convict a person for consuming and sharing medicine necessary to alleviate a severe medical condition when the state strictly prohibits such use without good reason.

The rationale likely underpinning the jury's nullification of Krieger's charges could readily fit into the continuum of moral conduct. Krieger's decision to alleviate human suffering far outweighs any detriment caused to society by his limited trafficking in marijuana. As Krieger and his colleagues had no legal means to obtain marijuana, it was also reasonable in the circumstances to grow it strictly for medicinal purposes. Put differently, Krieger's conduct fits squarely into the "moral innocence" rationale as the harms averted are clearly greater than the harms caused, and his actions were otherwise a reasonably necessary response to a threat to his and others' physical well-being. It is nevertheless likely that the Supreme Court's inflexible approach to the necessity defence deterred Krieger from pleading necessity. In addition to requiring proportionality between the harm caused and averted, the Court requires an accused to prove that the threat was imminent, perilous, and that there was no reasonable means to avoid the threat.[147]

The Court's leading necessity case is illustrative of the challenges Krieger would have faced. In *Latimer*, the accused maintained that his

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[143] See most recently *R v Krieger*, 2006 SCC 47 at para 27 ("juries are not entitled *as a matter of right* to refuse to apply the law—but they do have the *power* to do so when their consciences permit of no other course") [*Kreiger*].

[144] *Ibid* at para 4.

[145] SC 1996, c 19, ss 4–5 as it appeared on 31 December 2002.

[146] See *Krieger*, *supra* note 143 at para 14.

[147] See *Latimer*, *supra* note 47 at paras 38–40.

daughter's severe cerebral palsy made it necessary to kill her to avoid any further suffering. The Supreme Court concluded that the clear disproportionality between the harm threatened (further suffering) and the harm caused (death) prevented Latimer from pleading necessity.[148] More importantly, the degree of harm threatened was insufficiently imminent and perilous to qualify as morally involuntary.[149] This followed because his daughter's condition did not pose a pressing threat to her life and there were other medical means to alleviate her suffering.[150] Finally, Latimer's defence failed because there were reasonable alternatives to killing his daughter. Not only could he have done more to help his daughter live with her disease, he could have also relied on the aid of a local group home to better manage her pain.[151]

Krieger's defence would readily meet the proportionality requirement and, given the lack of alternatives to treat his condition, he would have no difficulty meeting the imminence and absence of escape elements of the necessity defence. Krieger would nevertheless fail to meet the sufficient peril requirement. As with Latimer's daughter, the accused's condition was not life threatening.[152] Unlike Latimer, however, Krieger could contend that the proportionality element ought to have relaxed the threshold of harm requirement. As I explained earlier, the proportionality principle drives the moral reasoning underlying an accused's defence and, where present, it ought to *at least* relax any threshold of harm requirement. As the "debilitating" effects of Krieger's illness can readily be framed as "bodily harm," I see no reason why he could not have proven that his conduct was morally permissible, even though a more robust analysis of the moral foundations of his defence may well render his conduct morally innocent.

Relying solely on the moral principles underlying defences could also prevent another problematic tendency: judges employing judicial review to strike down laws because they catch conduct that is "instrumentally irrational." As the Supreme Court explained in *Canada (Attorney General)*

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148 See *ibid* at para 40–41.

149 See *ibid* at para 38.

150 See *ibid* at para 38. The Court also observed that consenting to a feeding tube would have allowed Latimer's daughter to take more effective pain medication (*ibid* at para 39).

151 See *ibid* at para 39.

152 See *Krieger*, *supra* note 143 at para 4 (describing the unnamed condition as "debilitating"). As the Court noted in *Latimer*, *supra* note 47 at para 38, "[a]cute suffering can constitute imminent peril, but in this case there was nothing to her medical condition that placed Tracy [Latimer's daughter] in a dangerous situation where death was an alternative."

v Bedford,[153] the principles of fundamental justice require that laws not be arbitrary, overbroad, or grossly disproportionate. In essence, these principles require that laws do not have illogical or unduly harsh effects as they apply to even a single person.[154] Applying these principles in *Bedford*, the Court found that the effects of laws prohibiting sex workers from setting up bawdy houses wherein it is significantly safer to work or from screening clientele in public for signs of intoxication or violence were grossly disproportionate to the nuisance abatement objectives of these laws.[155] Similarly, a law prohibiting sex workers from hiring safety staff was overbroad because the law contradicted its objective of protecting sex workers from exploitation.[156]

In opposing the applicants' *Charter* challenge, the Crown maintained that the laws did not "cause" any of the impugned effects on sex workers. In its view, sex workers "choose" their line of business and therefore they are responsible for any negative effects that accrue from choosing what is an inherently dangerous occupation.[157] In rejecting this line of argument, the Supreme Court concluded that "while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so."[158] Citing the factual findings of the application judge, Chief Justice McLachlin concluded for a unanimous bench that "[w]hether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, [sex workers] often have little choice but to sell their bodies for money."[159] In her view, although these sex workers "may retain some minimal power of choice… these are not people who can be said to be truly 'choosing' a risky line of business."[160]

Chief Justice McLachlin's statement that some sex workers, commonly labelled "survival sex workers,"[161] are deprived of a "realistic choice"

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153 2013 SCC 72 at para 96 [*Bedford*].

154 See *ibid* at paras 111–23 (more specifically, a law is arbitrary if there is no connection between its objective and effects; overbroad if the law catches some conduct that has an effect that is contrary to the law's objective; and grossly disproportionate if the effects of the law are too harsh when compared to the importance of the law's objective).

155 See *ibid* at paras 130–36, 146–59.

156 See *ibid* at paras 137–45.

157 See *ibid* at paras 79–84.

158 *Ibid* at para 86.

159 *Ibid*.

160 *Ibid*.

161 This term is, for present purposes, synonymous with involuntary sex work. For literature describing this term in more detail, see Erica Kunimoto, "A Critical Analysis of Canada's Sex Work Legislation: Exploring Gendered and Racialized Consequences"

whether to engage in sex work tracks the language used in *Perka* and *Ruzic* to describe the moral involuntariness principle.[162] The findings of fact underpinning these conclusions turned on the persistent and serious threats posed to sex workers by both pimps and johns.[163] Yet, if a sex worker has no ability to choose her work, it seems probable (given the "alarming amount of violence" faced by sex workers)[164] that she also has no "realistic choice" whether to commit a safety-based offence such as screening her clientele for signs of danger or work from indoor establishments.[165] Given the important safety objectives underlying a sex worker's decision to break the law and the limited basis for criminalizing aspects of sex work,[166] it is also arguable that her defence would be based in the moral permissibility or moral innocence principle. If true, then those sex workers who commit these offences would have a constitutionally protected defence. It would therefore be inappropriate to conclude that the sex work laws "caused" harm to that category of sex workers.[167]

This conclusion has the potential to substantially alter the analysis in *Bedford*. If the only sex workers who are impacted by the law are those who truly "choose" to partake in sex work, it is possible that the Crown's argument that the sex work laws do not "cause" harm would be persuasive.[168] At the very least, this reframing of the relevant harms seems highly relevant to any potential section 1 argument to uphold the sex work

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(2018) 10:2 Stream 27 at 28 citing Shawna Ferris, "Working from the Violent Centre: Survival Sex Work and Urban Aboriginality in Maria Campbell's *Halfbreed*" (2008) 34:4 English Studies in Canada 123. For literature questioning the usefulness of drawing such a distinction, see Monica O'Connor, "Choice, Agency Consent and Coercion: Complex Issues in the Lives of Prostituted and Trafficked Women" (2017) 62 Women's Studies International Forum 8 at 14–15; Maddy Coy, "This Body Which is Not Mine: The Notion of the Habit Body, Prostitution and (Dis)embodiment" (2009) 10:1 Feminist Theory 61 at 73.

[162] See *Perka*, *supra* note 22 at 250; *Ruzic*, *supra* note 9 at para 29.

[163] See *Bedford*, *supra* note 153 at paras 7–14. The trial judge provided a more detailed account of the evidence, and her findings of fact were ultimately upheld. See generally *Bedford v Canada*, 2010 ONSC 4264.

[164] See *Bedford*, *supra* note 153 at para 64.

[165] See Fehr, *Constitutionalizing Criminal Law*, *supra* note 13 at 98–99; Colton Fehr, *Judging Sex Work: Bedford and the Attenuation of Rights* (Vancouver: UBC Press, 2024) at 133–56 [Fehr, *Judging Sex Work*].

[166] To be clear, I am not suggesting that sex work or any aspect of it can be criminalized because it is "immoral." Such actions may be criminalized to further other criminal law objectives, such as upholding public health and safety.

[167] See Fehr, *Constitutionalizing Criminal Law*, *supra* note 13 at 98–99; Fehr, *Judging Sex Work*, *supra* note 165 at 133–56.

[168] I am not convinced of this point as sex work was legal at the relevant time. The laws therefore impacted someone performing a legal means of employment. See *Bedford*, *supra* note 153 at para 87.

laws, as the laws no longer cause harm to the most vulnerable sex workers but only to those who have the ability to choose whether to exit the profession. Although the Crown did not seriously contend that the laws were justifiable infringements under section 1,[169] including the law of defences within the analysis would have allowed it to potentially remove the harms caused to the most vulnerable and marginalized sex workers impacted by the law. This seems highly relevant to whether the impugned laws struck a proportionate balance between their objectives and their impact on *Charter* interests.[170]

The current structure of criminal defence's inability to simplify the manner in which the moral underpinnings of criminal defences are assessed is likely responsible in part for such observations being overlooked. As opposed to structuring the law of defences to assess scenarios wherein a law may apply in a problematic manner, the Supreme Court decided to employ individualistic means-ends reasoning to challenge the constitutionality of criminal laws. This approach is perplexing for two reasons. First, assessing the reasons of individual defendants for committing an offence is the function of criminal defences. Second, the Court's conception of the instrumental rationality principles requires employing the judiciary's heaviest hand vis-à-vis state legislation: the power of judicial review. In my view, the Court would act more legitimately if it preserved legislation in these types of scenarios by carving out a more robust role for criminal defences under the *Charter* and then considering whether the law gave rise to an unconstitutional effect despite the availability of any criminal defences.

Conclusion

The Supreme Court's interpretation of the new defence of person provision in *Khill* confirmed what moral philosophers have long contended: self-defence may constitute an excuse or justification in readily identifiable scenarios. This recognition opens the door to applying similar understandings of moral philosophy to other defences associated with the terms justification and excuse. Parliament's decision to circumscribe the duress defence under section 17 of the *Criminal Code* as an "excuse" nevertheless prevents courts from using the common law to develop the duress and necessity defences in a coherent manner. Unfortunately, constitutionalizing the moral principles underlying excuse- and justification-based defences is unlikely to result in section 17 of the *Criminal Code* being struck down.

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169 See *ibid* at paras 161–63.

170 See generally Fehr, *Judging Sex Work*, *supra* note 165 for a more detailed review of this argument.

Interpreting the term "excuse" broadly enough to incorporate morally permissible conduct in large part prevents such a result. Although it is possible to plead a truly justificatory version of duress and necessity, it is not clear that any justificatory defence would not also overlap with one or more of the other principles underlying criminal defences. Thus, although section 17 of the *Criminal Code* may result in some accused receiving a poor moral rationale for their defence, they will nevertheless be acquitted, thereby avoiding any possible constitutional challenge.

Constitutionalizing criminal defences may nevertheless serve a broader purpose. Given the strong relationship between the presence of proportionality and the stringency with which the other evaluative factors are applied, it may be simpler to apply these moral principles in determining whether an accused ought to be afforded a defence. Debates about which defence to apply and whether a defence is an "excuse" or "justification" have run their course and proven to cause confusion in the law. Perhaps more importantly, applying broader moral principles also encourages judges to apply defences to scenarios that tend to fall between the cracks of the traditional logic of criminal defences. Adopting a constitutional conception of criminal defences therefore would serve to increase the breadth and coherence of criminal defences, even if that conception is currently incapable of striking down the main provision responsible for judicial inability to develop criminal defences in a coherent manner.