(Re)-Constitutionalizing Duress and Necessity

by

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Abstract

The Supreme Court of Canada’s decision in Ruzic established that the principle of moral involuntariness forms both the conceptual and constitutional basis for the duress and necessity defences. Scholars have contended that the moral involuntariness principle is not only inconsistent with the legal requirements the Court has developed for the duress and necessity defences, but also serves to veil the underlying values which might otherwise form the bases of these defences. The practical effect of ignoring the moral distinctions underlying an accused’s act is to unjustly deny some accused a criminal defence, contrary to s. 7 of the Charter. By re-constitutionalizing the defences along a continuum of principles—moral involuntariness, moral permissibility, and moral correctness—I argue that the law will be able to develop in a manner which permits the legal requirements for duress and necessity to be commensurate with the moral qualities of an accused’s act.
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1. Introduction

The Supreme Court of Canada’s unanimous decision in *R v Ruzic*\(^1\) changed the legal landscape of Canadian criminal defences. In that case, the Court elevated the underlying principle for granting the defences of duress and necessity, referred to as the principle of “moral involuntariness,” to the status of a principle of fundamental justice under s. 7 of the *Charter*.\(^2\) As a result, what began as a common law principle underpinning the rationale for the defences of duress and necessity\(^3\) had become a principle which Parliament could not violate, absent a justification under s. 1 of the *Charter*.

Professor Brudner has called the Court’s willingness to constitutionalize aspects of the general part of the *Criminal Code*\(^4\) a development “unique” to Canadian criminal law theory.\(^5\) Taking his cue from this development, Professor Brudner reasons that the justification-based defence of self-defence must also be constitutionally protected. His argument has an intuitive appeal. As the Court has concluded that acts committed in a morally involuntary manner are wrongful,\(^6\) it would be paradoxical to conclude that a justified or “rightful” act ought to not also receive constitutional protection.\(^7\) As such, it is reasonable to conclude that the Court will recognize that a constitutional basis exists for developing or expanding a justification-based defence without explicit statutory authority for so doing.

The above observations have significant implications for the law of Canadian criminal defences which legal scholars have yet to fully unpack. When developing the defence of necessity in *Perka v The Queen*,\(^8\) Chief Justice Dickson concluded that it would be improper for the courts to use the common law to develop criminal defences in a manner which imposes its view of when a person is justified in violating the criminal law. Such a task, Chief Justice Dickson reasoned, is

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\(^1\) 2001 SCC 24, [2001] 1 SCR 687 [*Ruzic*].
\(^2\) Being schedule B to the Canada Act 1982 (UK), 1982, c11.
\(^3\) See generally *Ruzic*, *supra* note 1 and *Perka v The Queen*, [1984] 2 SCR 232, 13 DLR (4th) 1 [*Perka*].
\(^4\) RSC 1985, c C-46.
\(^6\) See generally *Ruzic*, *supra* note 1 where the Court affirmed that offences committed under duress and necessity are “wrongful” but went on to constitutionalize the moral involuntariness principle which forms the basis of the excuse-based defences of duress and necessity.
\(^7\) See *Perka*, *supra* note 3 at 246 where the Court equates justifications with “rightful” acts.
\(^8\) *Perka*, *supra* note 3.
solely for Parliament. As a result, necessity was preserved as an excuse-based defence only, despite the Court recognizing that the defence logically fits into both the justification and excuse categories under appropriate circumstances. A similar rationale was used when developing the common law duress defence as solely excuse-based in R v Hibbert.

As a result of the Court’s institutional rationale for preserving duress and necessity as solely excuse-based defences, moral philosophy has, unfortunately, had only a minimal effect on the development of the defences. Yet, if the Charter must preserve a right to justificatory defences, the Court’s institutional rationale for prohibiting the common law to develop in a manner which preserves duress and necessity as both excuses and justifications becomes unprincipled. As the Court itself has recognized, the availability of criminal defences must be commensurate with the moral qualities of an accused’s act. If the Court not recognizing justificatory versions of a defence at common law results in a defence being unavailable or too strict in its requirements, the constitutionality of that defence will be questionable.

Alongside critiques concerning the Court’s unwillingness to address the moral distinctions between justification- and excuse-based rationales for duress and necessity, the Court has also been criticized for developing the defences exclusively within the moral involuntariness principle. Criminal law scholars have frequently critiqued the Court for conceptualizing the defences within the moral involuntariness principle yet requiring that an accused’s conduct be proportionate. If voluntariness is the basis for the defence, it is unclear why an accused’s act must always meet the Court’s definition of proportionality. Although proportionality may be a factor to consider in the overall analysis, inserting it as a stand-alone requirement shifts the analysis towards a utilitarian balancing of harms more commonly found within justification-based versions of the duress and necessity defences.

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9 Perka, supra note 3 at 248.  
10 Ibid at 245.  
13 Professor Kent Roach makes this point in Criminal Law, 5th ed (Toronto: Irwin Law, 2012) at 320 and 355-56.  
15 The Court’s proportionality test requires that accused demonstrate proportionality between harms as well as societal approval of the act in question. This definition will be explained in more detail below.  
16 Supra note 14.
Given this problematic conceptual framework for the defences of duress and necessity, it comes as no surprise that the defences have developed in an unsatisfactory manner. The phrase used by criminal law scholars to describe the state of the law is apt: the law is a mess.\textsuperscript{17} The aim of this paper is to utilize the principles of fundamental justice to offer a solution to the conceptual problems found in the duress and necessity defences. The starting point is to recognize that if it is possible to constitutionalize the theoretical basis for an excuse, a constitutional basis must also exist for justifications. To conclude otherwise, I argue, is to ignore the Court’s reasons in \textit{Perka} as to the philosophical underpinnings of necessity and, inferentially, duress.\textsuperscript{18} As will be discussed in greater detail below, the Court accepted that acts committed under duress and necessity can be committed in a justified manner. The Court’s reasons for rejecting justificatory versions of these defences were based solely on the institutional role of the courts.\textsuperscript{19} These reasons, I argue, are no longer sustainable in the \textit{Charter} age. In my view, where the harm caused is clearly outweighed by the harm averted, and the accused’s conduct is otherwise reasonable in the circumstances, it is conceptually more consistent to conclude that an accused’s conduct is justified. This principle, which I maintain is one of fundamental justice, is expressed as the right not to be convicted for morally correct conduct.

Where the accused’s conduct is wrongful, I agree with the Court in \textit{Ruzic} that it is sensible to excuse the accused’s conduct only when the accused demonstrates that his or her conduct was morally involuntary. Moral involuntariness, however, should not require proportionality between the harm caused and averted. This follows, I argue, as a result of the tenuous relationship between proportionality and voluntariness. In addition, I contend that conceptualizing duress and necessity within the moral involuntariness principle is problematic in its own right. This follows as the principle is incapable of critiquing the various types of emotions which may form the basis of a claim of moral involuntariness.\textsuperscript{20} As a result, it is my view that the definition of moral involuntariness must be more narrowly defined. By wedding moral involuntariness to the principle that criminal conduct must not be arbitrarily sanctioned or punished, I contend that the moral involuntariness principle may evoke a much more principled standard.

\begin{itemize}
  \item[18] As the Court concluded in \textit{Hibbert, supra} note 11 at 1011-14, it would be “highly anomalous” for the two defences to be developed with different juristic bases.
  \item[19] See \textit{Perka, supra} note 3 at 245.
  \item[20] The substance of this critique was written by Professor Benjamin Berger. It will be explained in detail below.
\end{itemize}
Finally, it is necessary to constitutionalize one further principle of fundamental justice to ensure a theoretically consistent approach to the duress and necessity defences. This principle, which I describe as “moral permissibility,” concerns situations where the harm averted and the harm caused may only be said to be proportionate as the Court has defined that term. In such scenarios, it is my view that it is difficult to ascribe a justification or excuse rationale to an accused’s conduct. Nevertheless, I argue that where proportionality is present it will often affect the moral qualities of the act and therefore may be used to relax the strict requirements of moral involuntariness. As I argue below, the moral permissibility principle effectively constitutionalizes the Court’s current requirements for a successful plea of the duress and necessity defences.

The paper unfolds as follows. In the first section, I provide a historical overview of the development of the defences of duress and necessity. The purpose of this overview is to demonstrate how the above conceptual problems have manifested in the basic legal requirements of the duress and necessity defences. In the second section, I then expand upon the argument that the ruling in Perka concerning the proper role of the courts in developing criminal defences must be abandoned. To conclude otherwise, I argue, not only ignores the way in which the Charter fundamentally altered the institutional role of the courts, but also conflicts with the Court’s conclusion that criminal defences must be developed in a manner which is commensurate with the moral qualities of the act.21 The above overview is designed to provide context for the third section where I defend the view that the excuse-justification dichotomy has been applied in a philosophically inconsistent manner. Although the Court accepts this conclusion at face value in Perka,22 it is necessary to delve more deeply into the moral philosophy to explain the basis for the three aforementioned principles. In the fourth section, I then outline the bases for the three principles and argue that each, when properly defined, must be elevated to the status of a principle of fundamental justice. I conclude by discussing how the legal framework offered in this paper will permit courts to satisfactorily address the various conceptual and practical problems with the duress and necessity defences.

21 Ryan, supra note 12 at para 26 [emphasis added]. For an explanation as to why justifications permit broader defences than excuses see Roach, supra note 13 at 320 and 355-56.
22 Perka, supra note 3 at 245.
2. Historical Development of Duress and Necessity

It is difficult to explain the defences of duress and necessity without a general understanding of how these defences relate to self-defence. The three defences exhaustively address circumstances where the accused is faced with a threat of harm to herself or another person, and must commit what is otherwise a criminal act to avoid the harm.\textsuperscript{23} Which defence is to be pleaded depends on the nature of the threat. If the act was committed in response to a threat from the victim, the accused pleads self-defence; if the threat arose from a third party, the accused pleads duress; and if the threat resulted from other circumstances, the accused pleads necessity.\textsuperscript{24} Given that the victim in the context of duress and necessity is an innocent, while the victim in the context of self-defence is a non-innocent aggressor, the defences have taken on different juristic foundations: self-defence as a justification and duress and necessity as an excuse.\textsuperscript{25}

All three defences as conceptualized in Canadian criminal law are made up of two basic requirements: the act must be both reasonable and proportionate.\textsuperscript{26} The excuse-justification distinction underlying each of the defences, however, has led to differing emphasis on the respective branches of the defences. The duress and necessity defences inform the reasonableness arm of each defence with the principle of “moral involuntariness.” As will be seen, applying this principle, the Court has held that the accused must not have had a “realistic choice” when committing the offence.\textsuperscript{27} Self-defence does not, however, require such a stringent restriction of choice before an accused is permitted to commit a criminal act. The act must simply be reasonable in the circumstances.\textsuperscript{28} Under all three of the defences, however, the Court has concluded that the harm caused by the accused’s act must be at least proportionate to the harm averted.\textsuperscript{29} With this general overview of the rationale behind the defences in place, it is

\textsuperscript{23} See Hibbert, supra note 11 at para 50.
\textsuperscript{24} See Roach, supra note 13 at 317.
\textsuperscript{25} See Hibbert, supra note 11 at para 50.
\textsuperscript{26} For an excellent overview of these foundational bases for the criminal defences discussed here, see Coughlan, supra note 14 beginning at 149.
\textsuperscript{27} Perka, supra note 3 at 249-50.
\textsuperscript{28} See the current s. 34 of the Criminal Code.
\textsuperscript{29} Although this has traditionally been true in the context of self-defence, it is notable that the new self-defence provisions declare proportionality to be one of numerous factors to consider in determining whether an act is reasonable in the circumstances. The Court has yet to provide guidance on the new self-defence provisions. However, one might interpret this as a codification of the longstanding rule that the accused is not required to measure “with exact nicety” the amount of force to be used.
now possible to provide a more detailed description of how the juristic foundation of the duress and necessity defences has influenced their development.

(2.1) Necessity

The necessity defence has not been codified in Canadian law. Instead, it has arisen out of s. 8(3) of the Criminal Code, which permits the courts to preserve excuses and justifications available at common law. The Court provided its first recognition of the necessity defence in *Perka.* Chief Justice Dickson, writing for the majority, recognized that “the ‘defence’ of necessity in fact is capable of embracing two different and distinct notions,” namely, those of justification or excuse. Regardless, Chief Justice Dickson was adamant that the defence solely be categorized as an excuse. His reasons for so concluding are worth citing in full:

It is still my opinion 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”. The Criminal Code has specified a number of identifiable situations in which an actor is justified in committing what would otherwise be a criminal offence. To go beyond that and hold that ostensibly illegal acts can be validated on the basis of their expediency, would import an undue subjectivity into the criminal law. It would invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions. *Neither is a role which fits well with the judicial function.* Such a doctrine could well become the last resort of scoundrels and in the words of Edmund Davies L.J., it could ‘very easily become simply a mask for anarchy’.

In Chief Justice Dickson’s view, then, it is not for the courts to tell Parliament what is right and wrong. As such, if an accused were to plead necessity, the accused must concede the wrongfulness of his or her act. The law, it seemed, would have to develop with only limited reliance on moral philosophy.

In her dissenting reasons, Justice Wilson disagreed with Chief Justice Dickson’s categorization of the necessity defence as solely an excuse. In her view, his conclusion that “[n]o system of positive law can recognize any principle which would entitle a person to violate the law

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30 *Perka*, supra note 3.
31 *Ibid* at 245.
33 *Perka*, supra note 3 at 248 [citations omitted; emphasis added].
34 *Ibid* at 248-49.
35 *Ibid* at 268.
because…the law conflicted with some higher social value” was illogical. As Justice Wilson wrote:

This statement, in my view, is clearly correct [only] if the ‘higher social value’ to which the accused points is one which is not reflected in the legal system in the form of a duty. That is to say, pursuit of a purely ethical ‘duty’ such as, for example, the duty to give to charity, may represent an ethically good or virtuous act but is not within the realm of legal obligations and cannot therefore validly be invoked as a basis on which to violate the positive criminal law. This illustration exemplifies the essential proposition that although ‘a morally motivated act contrary to law may be ethically justified … the actor must accept the [legal] penalty for his action.”

Justice Wilson was therefore of the view that where an accused faced competing legal duties, and chose to fulfill one duty over another, the accused could be justified in so doing. For instance, she highlights the circumstance where an accused commits a crime for the purpose of rescuing an individual to whom that accused has a legal duty to protect. The issue in cases of competing duties is whether the accused “was right in pursuing the course of behaviour giving rise to the charge.” In determining whether the accused chose the “right” action, the proportionality between the harm caused and averted was the central criterion.

Although Justice Wilson was readily willing to utilize a justificatory analysis in the context of competing legal duties, she agreed with Chief Justice Dickson that the defence of necessity could not permit a justificatory defence if the law was broken in pursuit of a moral duty. For instance, an accused that broke the criminal law in a relatively minor way to save a human life would be culpable for the crime committed unless the conduct was otherwise proven to be morally involuntary. In such circumstances, the court could only consider the motives of the accused in imposing punishment.

After having circumscribed the role of the courts, Chief Justice Dickson went on to explain the theoretical basis for allowing a necessity defence. Adopting George Fletcher’s foundational work *Rethinking Criminal Law*, he concluded that the conceptual basis for the excuse-based defence

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36 Perka, *supra* note 3 at 274 [citations omitted].
37 Justice Wilson at 276 cites *R v Walker* (1979), 48 CCC (2d) 126 (Ont Co Ct) and *R v Instan*, [1893] 1 QB 450 as examples of circumstances where failure to fulfill a duty would be criminal.
38 *Perka, supra* note 3 at 279 [emphasis added].
39 *Ibid* at 278.
40 *Ibid* at 276.
41 *Ibid* at 278-79.
of necessity was found in the principle of “moral involuntariness.”

Underpinning this principle is the idea that the criminal law ought not to punish those who act without “free choice.” Free choice, however, is not to be understood literally. Instead, it is to be understood as a lack of a “realistic choice,” which at a minimum requires that “the situation must be so emergent and the peril… so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable.”

With the Court in Perka having decided to conceptualize the defence of necessity within the notion of moral involuntariness, the Court was in a position to begin developing the necessary prerequisites for a successful plea of the defence. In assessing whether an accused had a “realistic choice,” Chief Justice Dickson concluded that the accused must have been reacting to an “urgent situation of clear and imminent peril [where] compliance with the law is demonstrably impossible.” Further, the Court held that an accused’s actions would not be morally involuntary if the accused acted in a manner where the reasonable observer would clearly foresee the necessitous circumstances arising. Finally, despite the above legal requirements capturing the essence of the moral involuntariness principle, Chief Justice Dickson also concluded that the accused’s act would have to see the harm caused be less than the harm avoided.

Nearly two decades after the Perka decision, the Court revisited the necessity defence in R v Latimer. In so doing, the Court abandoned a number of the strict requirements set out in Perka, as well as explained the relevant standard upon which each element of the defence was to be analyzed. The Court concluded that the necessity defence required: (i) an urgent situation of “clear and imminent peril”; (ii) there be no reasonable legal alternative to breaking the law; and (iii) the harm averted and the harm caused be at least of comparable gravity. In setting out these elements of the defence, the Court subsumed into the first element of the defence the

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43 Perka, supra note 3 at 249-50 citing Fletcher, supra note 42 at 804-05.
44 Ibid.
45 Perka, supra note 3 at 251.
46 Ibid at 251-52.
47 Ibid at 256.
48 Ibid at 252-53. In so doing, Chief Justice Dickson appeared to rely on Fletcher’s conclusion 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.” I will discuss the merits of this conclusion below.
49 2001 SCC 12001 SCC 1, [2001] 1 SCR 3 [Latimer].
50 As shown below, the “demonstrably impossible” and “lesser evil” requirements were both modified.
51 Latimer, supra note 49 at paras 28-31.
requirement that the reasonable observer must not have been able to foresee the necessitous circumstance arising.\textsuperscript{52} In regards to the relevant standards upon which the above factors are to be assessed, the Court concluded that the first two factors are to be assessed on a modified objective standard which considers the issue from the vantage point of a reasonable person similarly situated to the accused, while the proportionality factor was to be judged on a strictly objective standard.\textsuperscript{53}

\section*{(2.2) Duress}

The defence of duress was labeled an excuse when it was enacted as part of the first \textit{Criminal Code} in 1892.\textsuperscript{54} In what is now s. 17 of the \textit{Criminal Code}, the defence is described as follows:

A person who commits an offence under compulsion by threats of immediate 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 conspiracy or association whereby the person is subject to compulsion, but this section does not apply [to a list of 22 offences].

Although the defence received relatively little attention from the Court for much of its existence,\textsuperscript{55} this came to an end in 1977 with the Supreme Court of Canada’s decision in \textit{R v Paquette}.\textsuperscript{56} Therein, the Court held that as the statutory defence of duress only applied to “a person that commits an offence,” the accused in \textit{Paquette}, who was only a party to the offences of murder and robbery, could not plead the statutory defence of duress. This interpretation freed the Court from applying the strict imminence and presence requirements in the statutory defence, and from barring the accused’s defence as a result of the offences at issue being among those excluded under s. 17 of the \textit{Criminal Code}.

After rejecting the applicability of the statutory defence, the Court observed that s. 7(3) (now s. 8(3)) preserved defences which were available at common law at the time of Canada’s adoption of its first \textit{Criminal Code}. Relying upon the English decision in \textit{Director of Public Prosecutions}...
for Northern Ireland v Lynch, the Court in Paquette was able to develop a common law defence of duress which did not include the strict requirements found in s. 17. In so doing, however, little was said about the prerequisites for pleading common law duress or the common law defence’s juristic foundation.

The common law version of the duress defence would soon arrive again at the Court in R v Hibbert, but this time in a post-Perka environment. In Hibbert, the Court sought to provide additional guidance in relation to two questions left unanswered in Paquette, namely, the conceptual origins of duress and the necessary elements for pleading the defence. As s. 17 labeled duress as an excuse, it would have been inconsistent to have developed the common law defence of duress as anything else. Moreover, as stated by the Court in Hibbert, 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.” As a result, the common law defence of duress was labelled an excuse with its underlying rationale also being tied to the moral involuntariness principle.

With its conceptual origin in place, the Court was well situated to expand upon the elements of the common law defence of duress. However, for reasons which will become obvious, before overviewsing the development of the duress defence outlined in Hibbert, it is prudent to first fast forward to a review of the Court’s decision in Ruzic six years after Hibbert, as well as the Court’s synthesis of the rulings in Hibbert and Ruzic in its recent decision in R v Ryan.

In Ruzic, the Court considered for the first time the implications of the Charter on the law of criminal defences. The Court steadfastly rejected arguments that Parliament making a criminal defence available meant such defences were owed any deference under Charter analysis. As such, the Court found that it was bound to consider the constitutional question put forward, being whether the imminence and presence requirements found in s. 17 of the Criminal Code were contrary to the principles of fundamental justice. In answering this question in the affirmative, the Court elevated the moral involuntariness principle adopted in Perka and Hibbert to the status

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58 Hibbert, supra note 11.
59 Ibid at para 54.
60 Ibid. This view was strongly influenced by Chief Justice Dickson’s decision in Perka outlined above to the effect that the courts are not to “second guess” Parliament’s decision to restrict the moral foundations of a defence.
61 Supra note 12.
62 Ruzic, supra note 1 at paras 20-26.
of a principle of fundamental justice.\textsuperscript{63} As the imminence and presence requirements were held to violate this principle,\textsuperscript{64} these aspects of s. 17 were struck down.\textsuperscript{65}

Although the Court based its decision on the moral involuntariness principle, the accused in \textit{Ruzic} had provided an alternative conceptual foundation for the duress defence. In the accused’s view, an act committed while in a morally involuntary manner is also morally blameless.\textsuperscript{66} Under this line of argument, an individual who commits a criminal offence while under duress (as described below) could not be blamed for committing the act as a result of the act not being realistically chosen by the individual.\textsuperscript{67} For the Court, however, the principle of moral blameworthiness could not be equated with that of moral involuntariness. Although the Court offered a number of doctrinal reasons for not equating the two terms,\textsuperscript{68} the Court relied heavily on the assertion that “morally involuntary conduct is not \textit{always} inherently blameless.”\textsuperscript{69}

After the Court’s constitutional ruling in \textit{Ruzic}, the Court went on to perform some major surgery on the statutory defence.\textsuperscript{70} The Court’s main operating tools were the elements of the common law defence developed in \textit{Hibbert}. Although it is arguable that the Court’s reconstruction of the statutory defence in \textit{Ruzic} led to inconsistencies between the statutory and common law defences, whatever disconnect there may have been is now a matter of legal history. This is because three years ago the Court in \textit{Ryan} synthesized the two defences. In so doing, the Court held that the following elements remained when undertaking analysis under the statutory defence:\textsuperscript{71} (i) there must be a threat of death or bodily harm directed against the accused or a third party; (ii) the accused must reasonably believe that the threat will be carried

\textsuperscript{63} \textit{Ruzic}, supra note 1 at para 47.
\textsuperscript{64} The facts of \textit{Ruzic} are exemplary. The accused, a resident of war-torn Yugoslavia, was told by an assassin during the Yugoslav Wars that if she did not import narcotics into Canada, her mother would be harmed. The accused had every reason to believe that such a threat could be fulfilled given the lawless state of Yugoslavia at the time of the offence. The threat was clearly of future harm, thus failing the strict imminence requirement. Moreover, as the threatening party was not present at the time the offence was committed, the imminence requirement was also not met.
\textsuperscript{65} \textit{Ruzic}, supra note 1 at para 90.
\textsuperscript{66} \textit{Ibid} at paras 32-41. The argument is most expansively explained in the Ontario Court of Appeal’s decision in \textit{R v Ruzic}, 164 DLR (4\textsuperscript{th}) 358, 128 CCC (3d) 97 [\textit{Ruzic ONCA}] at paras 77-86 citing \textit{R v Langlois}, 80 CCC (3d) 28, 19 CR (4\textsuperscript{th}) 87 [\textit{Langlois}] at 33 and Schaffer, infra note 77.
\textsuperscript{67} \textit{Ibid}.
\textsuperscript{68} See \textit{Ruzic}, supra note 1 at para 41. These will be explained in more detail later on in this paper.
\textsuperscript{69} \textit{Ibid} [emphasis added]. As the purpose of this section is limited to describing the defences, the merits of this rationale will be discussed in detail in later sections.
\textsuperscript{70} See Roach, supra note 13 at 362.
\textsuperscript{71} Please note that I have taken much of the following description of the defence of duress directly from my article “The (Near) Death of Duress” (2015) 62 Crim Law Qrt, 123 as found in section II.
out; (iii) the offence must not be on the list of excluded offences; and (iv) the accused cannot be a party to a conspiracy or criminal association such that the person is subject to compulsion. With the statutory defence stripped of its unconstitutional elements, however, the Court supplemented the interpretation and application of the statutory provision with elements from the common law as developed in Hibbert. In particular, the Court added the following three requirements: (i) there was no safe avenue of escape; (ii) there was a close temporal connection between the accused’s act and the harm threatened; and (iii) the harm averted was proportionate to the harm caused. The Court determined that all of these factors are measured on the modified objective standard.

When comparing the statutory and common law versions of the duress defence, the Court in Ryan concluded that the only differences were as follows: (i) the common law applies to parties, while the statutory defence applies to principals; and (ii) the statutory defence bars certain offences as well as accused that belong to a criminal association from pleading the defence. As to the latter difference, commentators have pointed out that the list of exclusions is not likely to withstand Charter scrutiny. As such, the current merger of the defences will likely continue.

(2.3) Contrasting Duress and Necessity

The above represents a basic overview of the defences of duress and necessity. However, as Professor Paciocco has observed, even with only a basic overview “it is easy to verify that the law [related to duress and necessity] is a mess.” For Professor Paciocco, if duress and necessity are both excuses which are grounded in the principle of moral involuntariness, the only difference being the source of the threat (a third party as opposed to some other circumstance), one would not expect any drastic differences between the defences. As Professor Paciocco has observed, the following inconsistencies between the defences were present post-Ruzic:

(a) Necessity is notionally available for any form of harm, while duress is only available for bodily harm;

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72 See Ryan, supra note 12 at para 43 for a summary of these elements.
73 See Ruzic, supra note 1 at para 56 discussing the elements from Hibbert, supra note 11.
74 See the discussion in Ruzic, supra note 1 at paras 56-67.
75 See Ryan, supra note 12 at paras 64 and 72.
76 Ibid at paras 82-83.
78 Paciocco, supra note 17 at 240-41.
(b) Necessity may be triggered with an honest and reasonable belief in a peril, while duress must see an actual peril arise;
(c) Necessity requires the accused to honestly and reasonably believe that the peril is certain to occur, while duress only requires an honest and reasonable belief that the threat is real;
(d) Where necessity requires an imminent risk, duress (as required under s. 7 of the Charter) requires only a temporal connection;
(e) The necessity defence measures proportionality on a strictly objective standard, where duress applies a modified objective standard; and
(f) Where necessity will not be made out if an objective observer could foresee the risk, the duress defence will not be made out only if the accused has actual knowledge of the risk ultimately incurred.79

Although the duress defence was arguably refined in Ryan so as to make the defence available where the accused has a reasonable belief in a peril, the other anomalies persist.80 Moreover, Professor Yeo has added to these criticisms. In his view, the requirement in Latimer regarding there being “no reasonable legal alternative” is undesirable. Surely, if an accused is faced with two options, committing a non-serious offence or committing a serious offence, the former course should be a prerequisite to raising a successful defence.81

For my purposes, these doctrinal criticisms provide a caution for developing the defences on a go forward basis. In particular, if the defences are to be grounded in different constitutional principles, it is prudent to learn from the historical development of the defences within the moral involuntariness principle and ensure that such drastic differences between the two defences are either justified or abandoned when reconstructing the legal framework for the defences. Before turning to how the defences might be reconstructed, however, it is necessary to first outline the constitutional basis for so doing.

79 Paciocco, supra note 17 at 240-41. See as well as section 11 of Professor Paciocco’s article.
80 It is noteworthy that the Court in Ryan, supra note 12 attempted to justify the differing standards upon which proportionality is measured between the two defences. In so doing, Justice Cromwell relied on the anomaly relating to temporality to explain the different standards upon which proportionality is measured. This explanation, found in a brief paragraph, is wanting: see para 74.
3. The Relationship between the *Charter* and Criminal Defences

As discussed above, the only barrier the Court recognized as preventing it from developing non-excusatory versions of the duress and necessity defences concerns the institutional role of the courts. Like any other aspect of a legal system, however, the role of the courts is subject to change. This point was implicitly made early on in the academic literature by Paul Schabas, who, in questioning the limited justificatory scope carved out for necessity by Justice Wilson in her reasons in *Perka*,[82] asked as follows:

But why stop here? If legal duties are recognized as a foundation for justification, then why not legal rights in the *Charter*, which are, after all, “the supreme law of Canada”? If an action which violates a criminal prohibition is done in defence of a constitutional value or right then the court can and should consider the act in light of the legally recognized value or rights and determine whether the act was justified in the circumstances.[83]

Professor Yeo, along with various other Canadian academics, has also argued that Chief Justice Dickson’s reasons for not recognizing a justification-based version of duress and necessity are unpersuasive.[84] For Yeo and others, the proper role of the courts post-1982 is to question state action and, if constitutionally required, to strike down laws.[85] Professor Berger perhaps best encapsulates the overarching spirit of this criticism when he observes as follows: “[i]t seems the height of institutional hubris to claim that under no circumstances can breaking the law and thereby pursuing a higher value be justified.”[86]

To have immediately acceded to this position, however, would have been to ignore the environment within which *Perka* was decided. Although not made explicit in *Perka*, to have permitted necessity to have been pleaded as a justification would have created significant confusion in the law of defences. This is primarily so given that the statutory defence of duress had been labelled an excuse. As the text of s. 8(3) of the *Criminal Code* only permits the common law development of criminal defences to the extent that they are not “inconsistent” with

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[82] One of conflicting duties imposed by the law: see *Perka*, *supra* note 3 at 274-79.
[83] Schabas, *infra* note 84 at 281-82. See also Yeo, *supra* note 81 at 15.
[84] In his article *supra* note 81 at part 2, Professor Yeo cites the following work in support of this proposition: Donald Galloway, “Necessity as a Justification: A Critique of Perka” (1986-87) 10 Dalhousie LJ 158 at 169; Paul Schabas, “Justification, Excuse and the Defence of Necessity: A Comment on Perka v. The Queen” (1985) 27 Crim Law Qrt 278 at 281-82; and Don Stuart, *Canadian Criminal Law*, 5th ed (Scarborough: Thomson, 2007) at 557.
the Criminal Code, s. 8(3) could not be used to change the juristic basis of the statutory duress
defence. As the Court correctly concluded that it would be “highly anomalous” for the duress
and necessity defences to have differing juristic origins, restricting necessity to an excuse-
based defence preserved some level of coherency in the law of defences.

It is also unclear if the Court in Perka had jurisdiction to develop a justification-based necessity
defence. As a plain reading of s. 8(3) reveals, only common law defences which already existed
at the time of the adoption of the Criminal Code were permitted to “continue in force.” I know of
no English common law necessity or duress decision where the defence was held to be a
justification before the enactment of the Criminal Code of Canada. As such, without any
argument concerning the then newly adopted Charter, the Court in Perka was in a double-bind:
not only did the Court face difficulties with maintaining some level of coherency in the law, it
arguably lacked jurisdiction to bring about the changes it recognized to be philosophically sound.
The reasons offered by Chief Justice Dickson, viewed in this light, reveal that it was not at all
prudent to develop the defence of necessity in a theoretically consistent manner when Perka was
written. Instead, Chief Justice Dickson planted the seeds for future argument to expand the
theoretical conception of the defences of duress and necessity by recognizing that from a
philosophical standpoint the defences may be pleaded as either a justification or an excuse.

The Court’s reasons in Ryan provide support for the above reading of the jurisprudence.
Although the Court in Ryan did not revisit its conclusion in Perka/Hibbert concerning the juristic
bases of the duress and necessity defences, the Court did conclude that it would be impermissible
to develop criminal defences in a manner which is incommensurate with the moral qualities of
the act. As Justice Cromwell held, “[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.” If an accused might otherwise be permitted a defence on justificatory
principles, but is barred from so doing due to the strict requirements of the excuse-based versions
of the defences, Justice Cromwell’s reasons in Ryan, viewed alongside the interpretation of

87 Hibbert, supra note 11 at 1011-14.
88 The case of Re A (Children) (Conjoined Twins: Surgical Separation), [2001] 2 WLR 480, was the first to adopt a
limited justificatory rationale. That case, however, was decided long after the Criminal Code of Canada was
adopted.
89 Ryan, supra note 12 at para 26 [emphasis added]. For an explanation as to why justifications permit broader
defences than excuses see Roach, supra note 13 at 320 and 355-56.
Perka/Ruzic provided above, may be used to argue that it is time to revisit the Court’s conclusion in Perka concerning the permissible role of the courts in developing defences.

With one exception, the issue of the proper juristic bases for the defences has lain dormant post-Ruzic. In R v Allen, the accused’s factum, relying on a preliminary version of my article “The (Near) Death of Duress,” contended that s. 17 of the Criminal Code was unconstitutional to the extent that it prohibited duress from applying to offences where the offence was committed in a justified manner. The starting point for this argument was to recognize that the Court’s conclusion in Ruzic that the Charter protects accused from conviction for wrongful conduct fundamentally altered the legal landscape of Canadian criminal defences. As set out at the beginning of this paper, it would be paradoxical to not also permit the constitutionalization of the principles underlying a justification-based defence. Unfortunately, the Court held that it was unnecessary to address this argument given other less intrusive means for permitting the accused to strike down the infringing portions of s. 17 and successfully plead duress. Although the Crown had originally appealed the decision, it later abandoned its appeal thereby preventing any further consideration of the issue in that case. As outlined in the next section, this is unfortunate as the case provided an excellent platform for the courts to re-assess an area of the law which has developed in a highly unsatisfactory manner.

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90 2014 SKQB 402, 318 CCC (3d) 335 [Allen].
91 Supra note 77.
92 The Court concluded that prohibiting the defence for the offences of robbery and assault with a weapon was contrary to the principle of fundamental justice that accused not be convicted for morally involuntary conduct. As such, it was not necessary to address the other Charter challenges: see para 89.
93 I am privy to this information as I “ghost-wrote” the trial-level factum and was later retained to argue the appeal. I will discuss the case in greater detail later on in this paper.
4. Deconstructing the Excuse/Justification Dichotomy

Although the question of when an act which constitutes a criminal offence may nevertheless be excused has been given significant consideration in Canadian criminal law, the question of when an act is justified or “rightful” has not. As discussed above, for reasons pertaining to the institutional role of the courts, the Court was reluctant to categorize duress or necessity as justificatory. Of equal importance, the previous law of self-defence did not need to consider the juristic foundations of self-defence as Parliament had explicitly labelled self-defence a justification. As a result, it is unsurprising that the meaning of the term “justification” has not been discussed by the Court except when contrasting it with the term “excuse.” With only limited judicial analysis upon which to draw, it is necessary to delve more deeply into the moral philosophy underpinning the rationale for a justificatory defence and how it relates to an excuse.

(4.1) The Philosophical Basis for Justifications

The basic principles underlying a justified act are obviously broad and open to significant debate amongst criminal law theorists. Nevertheless, as a starting point, the Court has taken the view that a justification-based defence connotes a “rightful” act. Although the Court has left the door slightly ajar as to whether an act committed under duress could prevent the state from proving whether an act is attributable to the actor, no circumstances of this sort have arisen in the jurisprudence. As such, I will proceed on the Court’s assumption that those acting in a justified manner accept responsibility for their actions but claim that the act was rightful. On the contrary, the Court is of the view that those who plead an excuse will deny responsibility for their wrongful act and claim that it would be unjust to convict the accused for the offence as a result of their conduct being morally involuntary.

To begin, it is useful to explain how theorists distinguish between justificatory versions of necessity/duress and self-defence in the core case. The starting point is to recall the general

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94 See the previous ss. 34-37 of the Criminal Code. It is notable that the new ss. 34 and 35 have removed the word “justification” from the defence of self-defence.


96 See Perka, supra note 3.

97 See Hibbert, supra note 11. In such a scenario, justifications are no longer viewed as prior to excuses, as the “excuse” would deny the elements of the offence were made out.
standing of the victim; an aggressor in the case of self-defence versus an innocent victim in the case of necessity and duress. As such, the circumstances which typically arise in cases of self-defence give rise to different competing interests. It is generally agreed that an accused is acting rightfully when repelling the force of an aggressor with a comparable amount of force. The right is considered to be inalienable as it is a right one possesses in the state of nature. As the purpose of the civil condition is to cure the defects of the state of nature, it would be contrary to one of the central purposes of the state to restrict the right in a typical case of self-defence.

To assess whether an act was “rightful” in the case of duress and necessity requires considering the moral question in a different light. As opposed to asking whether the accused has a “right” to defend him or herself in the context of self-defence, the moral judgment in duress and necessity cases arises from a consequentialist balancing of the relevant harms at issue. If the harm avoided by committing a criminal act while under duress/necessity is outweighed by the harm caused, it is thought that the accused’s conduct was rightful. As Chief Justice Dickson wrote in Perka, in such circumstances, “it is alleged [that] the values of society, indeed of the criminal law itself, are better promoted by disobeying a given statute than by observing it.”

The broader point to be taken away here is that the Court accepted that from a philosophical standpoint, necessity, and by implication duress, may operate as justifications based on a utilitarian balancing of harms. This philosophical conceptualization is generally accepted as the underlying basis for duress and necessity as justifications. Although the above provides only a broad-brush picture of justifications, it is sufficient for drawing a line between justification- and excuse-based versions of duress and necessity. To bring this admittedly fuzzy line into focus, it will prove useful to review a number of the criticisms of the Court’s application of the excuse-justification dichotomy when developing the duress and necessity defences.

99 Stewart, supra note 98 at 905 provides an excellent overview of Kant and Hobbes’s writings which are often cited as the starting point for the analysis.
100 See Ferzan, supra note 95 and Perka, supra note 3 at 247.
101 See Perka, supra note 3 at 247.
102 Ibid at 247-48.
103 See generally, Ferzan, supra note 95. Although in her reasons in Perka, supra note 3, Justice Wilson expressed displeasure with the utilitarian principle, the majority does not agree with her on this point.
(4.2) Academic Literature

The categorization of the duress and necessity defences as solely excuses has drawn severe criticisms from Canadian academics. As will be seen, the Court has been heavily criticized for leaving unquestioned the complex moral judgments leading an accused to commit a criminal act. Moreover, the Court’s development of the duress and necessity defences within the moral involuntariness principle has been widely criticized for masquerading as a justification-based defence. By imposing a proportionality requirement, theorists question whether moral involuntariness actually forms the basis for the current application of the duress and necessity defences. The implications of these general criticisms are unpacked below.

(4.2.1) The Proportionality Problem: Part I

In adopting the moral involuntariness principle as the theoretical basis for the necessity and duress defences, the Court also required that the accused meet a strict proportionality requirement. For an accused’s conduct to be considered “proportionate,” not only does the accused have to objectively see the harms at issue be of comparable gravity, the accused’s conduct must also accord with society’s expectation of how the reasonable person in the position of the accused would be expected to react. As will be seen, both elements of the proportionality requirement are inconsistent with the principle of moral involuntariness.

As Professor Coughlan explains in his article “Duress, Necessity, Self-Defence, and Provocation: Implications of Radical Change?”, the basic “building blocks” of criminal defences may be divided into two categories: reasonableness and proportionality. In his view, the moral involuntariness principle is not concerned with requiring proportionality between the harm caused and averted. The issue is whether the accused’s act was morally voluntary. To illustrate the irrelevance of proportionality, consider the scenario where an accused faces a kill-or-be-killed situation. If the accused kills one person to preserve his or her life, the harms caused and averted are proportionate. However, if the accused must kill two or more people to ensure self-
preservation, the accused is left with no more or less a “realistic choice.” The accused’s will is constrained in the same manner as the choice between committing a crime or dying remains. As such, Professor Coughlan and numerous other academics have observed that although the duress and necessity defences have been firmly rooted in the moral involuntariness principle, the Court inserting a proportionality requirement has resulted in the defences being treated “in terms more readily analyzable as [a] justification.”

An overview of Fletcher’s discussion in regards to proportionality and its relationship with moral involuntariness demonstrates that the above criticism has merit. Admittedly, Fletcher did ascribe a limited role to proportionality in determining whether an accused was acting in a morally involuntary manner. As Fletcher argued: “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.” The Court cited this passage approvingly in Perka and derived from this passage that a proportionality requirement flows directly from the moral involuntariness principle. Given the use of the words “more likely,” however, it would appear that Fletcher was of the view that proportionality is at best a factor which may be informative in determining whether an accused’s actions were morally involuntary. The relative weight of this factor is related to the degree of separation between the harm averted and the harm caused. Admittedly, Fletcher does assert that proportionality may be decisive in some circumstances. To illustrate this point, Fletcher provided an example wherein an accused is told to blow up a whole city or suffer a broken finger. Under such circumstances, Fletcher rightly posits that society would expect the accused to endure the harm. Although for Fletcher extreme disproportionality may by itself render an act morally voluntary, this does not mean that proportionality always is to be weighted as a decisive or even a main factor. As such, by making proportionality a requirement, the Court veered from the basic conception of moral involuntariness developed by Fletcher.

Terry Skolnik has identified a similar problem with the Court’s “societal approval” aspect of the proportionality requirement. In his article “Three Problems with Duress and Moral

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110 Coughlan, supra note 14 at 158 citing Bruce Archibald, Don Stuart, and Jeremy Horder, amongst others, for a similar proposition.
111 Fletcher, supra note 42 at 804 [emphasis added].
112 Perka, supra note 3 at 252.
113 Ibid, supra note 3 at 252-53.
114 Ibid.
115 Ibid.
Involuntaryness,” Skolnik begins by taking issue with the Court’s reasoning that any proportionality requirement must factor into the moral involuntariness assessment in kill-or-be-killed scenarios. As Skolnik asserts:

[The] problem with such a requirement is that these types of questions have nothing to do with whether or not the accused had a realistic or fair choice. In the case where the accused is threatened at gunpoint to kill another or face a certain and imminent death, it seems disingenuous to treat their decision as a free choice…

For similar reasons, Skolnik finds it difficult to see why society’s disapproval of an accused’s conduct has anything to do with volition. As he observes, “[b]y incorporating the ‘societal expectation’ requirement into the proportionality analysis, proportionality is construed as a moral judgment of appropriateness rather than as a traditional evaluation of how the strength of the threat…impacts voluntarism.” For Skolnik, if either element of proportionality is given a decisive role in kill-or-be-killed situations, whether an accused had a “realistic choice” becomes inconsequential. What matters under this conception of duress and necessity is only “whether the accused acted in a morally involuntary way that society would condone; if not, morally involuntary conduct is treated as if it were voluntary.”

(4.2.2) The Proportionality Problem: Part II

The second problem with proportionality is that it clouds one’s understanding of the exact principle which was elevated to the status of a principle of fundamental justice under s. 7 of the Charter. As discussed earlier, the Court purported in Ruzic to elevate Fletcher’s moral involuntariness principle to the status of a principle of fundamental justice. If this were true, however, Professor Coughlan has persuasively argued that any of the proportionality elements of the defences of duress, necessity, and some forms of self-defence (acts where the defending act meets the Court’s definition of moral involuntariness) are imposed in violation of the moral involuntariness principle. His point is a powerful one. If Fletcher’s moral involuntariness

118 Skolnik, supra note 116 at 144.  
119 Ibid.  
120 Ibid.  
121 Ibid.  
122 Coughlan, supra note 14 at 199.
principle is a principle of fundamental justice under s. 7 of the Charter, it is unclear how any proportionality requirement came to be justified.

Professor Coughlan’s critique leads to two possibilities: (a) the Court imposed a proportionality requirement as a s. 1 justification; or (b) the Court constitutionalized a different principle entirely. To accept the first possibility is to accept that moral involuntariness, upon being elevated to the status of a principle of fundamental justice, was immediately limited under s. 1 of the Charter. Given that the Court has concluded that s. 7 may only be limited in circumstances such as “natural disasters, the outbreak of war, epidemics, and the like,”123 it is unlikely that the Court imposed a proportionality requirement under s. 1 of the Charter. Moreover, had this been the Court’s intent, one would expect the Court to have been explicit on this point. However, the Court makes no mention of s. 1 operating as a limit to the moral involuntariness principle in Ruzic. As such, the second option is more plausible: moral involuntariness was not adopted as the constitutional basis for the defences of duress and necessity. Instead, moral involuntariness with a proportionality requirement was adopted. As such, it is not sensible to refer to the principle adopted in Ruzic as moral involuntariness. Instead, it is sensible to refer to it by a different name. The name I ascribe to this principle—explained in detail below—is “moral permissibility.”

(4.2.3) The Proportionality Problem: Part III

The final issue with proportionality concerns the difficulty in making moral judgment where the competing interests are the same. In my view, application of the consequentialist rationale underpinning justificatory versions of the duress and necessity defences prevents any clear moral conclusion in such circumstances. Professor Stewart made a similar point in the context of discussing the constitutional basis of self-defence in his article “The Constitution and the Right of Self-Defence.”124 Therein, he relies upon a common hypothetical which sees an accused (who is in a perilous circumstance due to no fault of his own) kill an “innocent attacker” to preserve his life. As the lives of the accused and the attacker are of equal worth, Professor Stewart persuasively argues that a claim of justification seems too strong.125 However, as the accused is in the perilous circumstance due to no fault of his own, he also maintains that a claim of excuse

122 Stewart, supra note 98.
123 Ibid at 916-17.
seems too weak.\textsuperscript{126} It is difficult to claim the act is rightful because to do so requires putting the value of one innocent life over another. It is difficult to conclude the conduct was wrongful for the same reason. As such, the concepts of justification and excuse appear ill equipped to provide a definitive moral judgment.\textsuperscript{127}

Although Professor Stewart discussed his example in the context of self-defence, this reasoning is arguably more common in the context of the duress and necessity defences. Consider the core duress case where a person is in a perilous circumstance due to no fault of his or her own and is told to kill an innocent victim or be killed herself. Writing for the Ontario Court of Appeal in \textit{R v Aravena},\textsuperscript{128} Justice Doherty, providing a rare analysis of a similar factual scenario which arose in Canadian law,\textsuperscript{129} recently concluded as follows:

\begin{quote}
A \textit{per se} rule which excludes the defence of duress in all murder cases does not give the highest priority to the sanctity of life, but rather, arbitrarily, gives the highest priority to one of the lives placed in jeopardy. The availability of the defence of duress cannot be settled by giving automatic priority to the right to life of the victim over that of an accused.\textsuperscript{130}
\end{quote}

As with the hypothetical offered by Professor Stewart, Justice Doherty agrees that if both endangered parties are innocents and the harm sought to be avoided is identical, it would be arbitrary to place the life of one person over the other. Yet, the current conception of the duress defence would do just that, by dictating that the accused acted wrongfully and thereby permitting the accused only to plead an excuse. For the reasons offered by Professor Stewart and Justice Doherty, it is not at all clear that the accused acted wrongfully or rightfully in such a scenario as both the accused and the victim are equal in status.

\textbf{(4.2.4) The Problem of Unclean Hands}

In \textit{Perka}, Chief Justice Dickson had concluded that a person is not to be excluded from pleading the necessity defence simply for being engaged in criminal activities when the necessitous circumstances arose.\textsuperscript{131} As Chief Justice Dickson wrote in \textit{Perka}, “[a]t most the illegality…of the

\begin{flushleft}
\textsuperscript{126} Stewart, \textit{supra} note 98 at 916-17.  \\
\textsuperscript{127} Ibid.  \\
\textsuperscript{128} 2015 ONCA 250, 323 CCC (3d) 54 [\textit{Aravena}].  \\
\textsuperscript{129} Chief Justice Joyal has also recently considered a similar scenario in \textit{R v Willis}, 2015 MBQB 114, 318 Man R (2d) 209 [\textit{Willis}]. These two recent decisions are among a handful of decisions considering the constitutionality of committing murder under duress or necessity.  \\
\textsuperscript{130} \textit{Aravena}, \textit{supra} note 128 at paras 83-84.  \\
\textsuperscript{131} \textit{Perka}, \textit{supra} note 3 at 254.
\end{flushleft}
preceding conduct will colour the subsequent conduct in response to the emergency as also wrongful.” As such, if the accused was engaged in illegal conduct at the time the necessitous circumstance arose, society may rightly label the accused’s conduct as wrongful and require that the accused truly face moral involuntariness before committing a criminal act. However, it would be unjust to deny such an accused a defence when the conduct of the accused is truly morally involuntary.

The facts in Perka exemplify this point. The accused was importing marijuana into the United States via cargo ship. While so doing, the accused’s ship was damaged as a result of a storm. To avoid drowning, the accused and his crew were forced to dock in Vancouver Island. Upon so doing, the accused were found by the authorities who subsequently discovered drugs aboard their ship. The accused were charged with importing drugs into Canada, and ultimately plead the necessity defence at trial. Chief Justice Dickson held that the fact that the accused was participating in criminal activity at the time of the necessitous circumstances was irrelevant to determining whether the accused’s act of bringing drugs onto Canadian shores was morally involuntary.

This limitation is most obviously applicable to circumstances where an accused commits a crime as a member of a criminal association. As opposed to preventing such an accused from pleading duress or necessity in all circumstances, Chief Justice Dickson’s reasons in Perka dictate that such a consideration will generally only be able to “colour” the moral standing of the accused. In such circumstances, the accused’s subsequent conduct committed under duress or necessity will be rendered wrongful. The fact that an accused was part of a criminal association may be punished accordingly. However, the conduct committed as a result of the necessitous circumstances may still be morally involuntary if the necessitous circumstance was not clearly foreseeable to the accused.

**(4.2.5) Lifting the “Veil of Volunteerism”**

A final critique of the Court’s conception of duress and necessity which warrants consideration is found in Professor Berger’s article “Emotions and the Veil of Volunteerism: The Loss of

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132 *Perka, supra* note 3 at 254.
133 *Ibid* at 255-56.
Therein, Professor Berger observes that by placing moral involuntariness as the standard for assessing the defences of duress and necessity, the Court only requires that it be asked whether an accused’s will was overborne by emotion. In conducting the analysis in this manner, the Court has hidden the values underlying such judgments “behind a veil of voluntarism.” In other words, the effect of focusing on moral involuntariness is to withdraw moral judgment from its rightful place at the heart of thinking about criminal law. For Professor Berger, the danger with such an approach is that it permits morally suspect social norms to form the basis of a criminal defence. To correct this problem, Professor Berger suggests that the better course of action would have been to reject moral involuntariness and accept moral blamelessness as the principle of fundamental justice underpinning the duress and necessity defences. By focusing on whether the accused’s act is blameworthy, the values behind the emotional response would become central to the analysis.

Professor Berger also critiques the moral involuntariness idiom for failing to explain a number of the legal requirements for duress and necessity outlined above. In addition to recognizing a number of the aforementioned problems with proportionality, he also criticized the Court for imposing an objective standard for assessing whether an accused meets the elements of the defences. The use of an objective indicator belies the voluntarist account as it cares not about the effect of the emotion on the will of the accused, but rather the effect that the emotion should have had on an accused similarly situated. For Professor Berger, there is only one reasonable conclusion: “some moral foundation [is] driving these requirements.” Indeed, the notion of “realistic choice” as framed by the Court is deeply involved with making value judgments about appropriate behaviour for individuals in perilous circumstances. As Professor Berger observes, “the defence of duress is about the quality or legitimacy of the emotions that one feels, not just

135 Ibid at 103 and 109.
136 Ibid at 111.
137 Ibid at 103.
138 Ibid at 111.
139 Ibid at 118.
140 Ibid at 119.
141 Ibid at 108.
142 Ibid at 109.
143 Ibid.
their magnitude.”

Although the duress and necessity tests as framed by the Court capture this quality, the moral involuntariness principle does not.

The criticisms outlined by Professor Berger are also connected to further problem with proportionality. As discussed, the proportionality requirement read into the duress and necessity defences operates as a requirement in its own right. If the harms are not of comparable gravity, the accused’s defence will fail. But what if the harm averted by the accused’s act clearly exceeds the harm caused? Moreover, what if the accused chose to commit a criminal act to achieve what is generally agreed to be a greater good? The Court has effectively rendered these considerations inconsequential in the legal analysis under the duress and necessity defences. Indeed, the Court has explicitly concluded that such considerations have no bearing on criminal responsibility.

As any law which permits the conviction of an accused who acted in a morally correct manner is unjust, Professor Berger’s argument that moral considerations must underlie the duress and necessity defences becomes even more salient.

Although I agree with Professor Berger that it is unprincipled to ignore moral considerations when assessing criminal defences, I respectfully disagree with his proposed solution. To begin, using moral blamelessness as the sole underlying principle for duress and necessity was explicitly rejected by the Court in Ruzic. Justice LeBel’s rationale for rejecting moral blamelessness as the principle underlying the duress and necessity defences is, for the most part, persuasive. In Justice LeBel’s view, morally involuntary conduct is “not always intrinsically free of blame.” As such, moral involuntariness cannot be equated with moral blamelessness. In support of this conclusion, Justice LeBel invoked the oft-cited example of the lost alpinist. Although Justice LeBel is not explicit about this point, it is important that attention be placed on the word “lost.” In assessing the merits of Justice LeBel’s conclusion, the academic literature does not consider why the alpinist is lost. Did he wander off due to self-induced impairment? Did he lose his map due to carelessness? Has he severely overestimated his abilities as a cartographer? Under these scenarios, can he be said to be entirely free of blame for his

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144 Berger, supra note 134 at 110.
145 See Berger, supra note 134 for a critique of Justice Wilson’s reasons in Perka. It follows from the majority’s focus on involuntariness that an accused who chose to commit an act will automatically be excluded from pleading moral involuntariness.
146 Ruzic, supra note 1 at para 39 [emphasis added].
147 Ibid at para 41.
148 Ibid at para 40.
circumstances? If not, it is perhaps reasonable to conclude that he is not entirely free of blame when he breaks into the cabin to preserve herself. In my view, this is a reasonable way of explaining Justice LeBel’s conclusion in *Ruzic* that “conduct that is morally involuntary is not always intrinsically free of blame.”

Compare the lost alpinist with the stranded alpinist. The tragic circumstance of the survivors of Uruguay Air Force Flight 571 as documented by Piers Paul Read in his novel *Alive* provides an excellent hypothetical scenario. If the survivors were on the verge of death due to the elements and had come across a cabin, weighing the property interests of the cabin owner against the value of their lives, which were in jeopardy due to no fault of their own, it would appear reasonable to conclude that when weighing the competing interests, the conduct was not only blameless (they cannot be faulted for being in their perilous circumstances), but that it was rightful (life clearly outweighs property).

Although Justice LeBel appears to recognize that some morally involuntary acts can be blameless, it should be highlighted that Justice LeBel later confusingly asserts in *Ruzic* that defending acts could never be considered blameless. In so concluding, Justice LeBel relied heavily on the fact that the Court had “never taken the concept of blamelessness any further than [the] initial finding of guilt” and that it would have been inappropriate for the Court to have done so in *Ruzic*. This reasoning is difficult to reconcile with the fact that the Court has consistently asserted that self-defence declares conduct to be “justified” or “rightful.” As Professor Coughlan observes, it would be paradoxical to conclude that defending acts considered “rightful” are also somehow morally blameworthy. For similar reasons, Professor Berger has “rejected the Court's contention in *Ruzic* that moral blameworthiness is established when the constituent elements of the offence are proven.” As such, if the Court maintains that self-defence connotes rightful and therefore blameless conduct, it is demonstrably untrue that defending acts cannot be considered something other than morally involuntary.

149 *Ruzic*, supra note 1 at para 39 [emphasis added].
150 (New York: Avon Books, 1974). The survivors of a plane crash were in a circumstance similar to the lost alpinist due to no fault of their own.
151 *Ruzic*, supra note 1 at para 39.
153 *Ibid*.
154 Coughlan, supra note 14 at 188. See also *Ryan*, supra note 12.
155 *Ibid*.
156 Berger, supra note 134 at 118.
Even though it is reasonable to conclude that moral blamelessness ought not to form the basis for the defences of duress and necessity, the thrust of the argument espoused by Professor Berger still has significant weight. As fear of removing moral considerations from criminal defences is at the heart of Professor Berger’s critique, it is necessary to make conceptual space for other principles that are more morality focused. It need not follow, however, that the constitutional protection afforded by moral involuntariness be retracted completely. As Professor Berger observes, the moral involuntariness principle’s main challenge is to delineate what level and type of threat is sufficient to make an accused’s action morally involuntary. As I will explain below, the moral involuntariness principle may be refined in a manner which satisfies Professor Berger’s queries.

(4.3) Summary

It is prudent at this juncture to summarize the conclusions arrived at in this section. The following may be deduced from the above discussion: (a) imposing a proportionality requirement into the moral involuntariness principle fundamentally alters the nature of the principle constitutionalized; (b) as a result, the Court’s current legal test for duress and necessity is better captured by a principle which requires proportionality; (c) moreover, relying exclusively on an excuse-based rationale for the duress and necessity defences inhibits the criminal law’s ability to act as moral arbitrator; (d) as such, the law should be able to consider the effect of committing an act in a manner where the harm caused is clearly outweighed by the harm averted; and finally (e) it should be recognized that it is difficult to definitively come to definitive moral conclusions where the harms caused and averted are truly proportionate.

From the above conclusions, I will argue that moral involuntariness must be preserved as the rationale for excuses, albeit in a greatly restricted manner. I further maintain that justification-based versions of the duress and necessity defence must also be recognized if the law is to serve its function as moral arbitrator. However, it is my view that this two-principle framework—which mimics the traditional excuse/justification dichotomy—is unsatisfactory. Where harms are proportionate, it will often be difficult to definitively come to a moral judgment. Although society may agree that the accused must be afforded a defence, the moral underpinnings of that defence can be reasonably contested. In my view, all that can be said in such scenarios is that the

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157 It is notable here that the Court has never retracted a principle of fundamental justice.

158 Berger, supra note 134 at 111.
accused’s act was permissible. This principle of moral permissibility, I maintain, currently underpins the duress and necessity defences as defined by the Court.
5. (Re)-Constitutionalizing Duress and Necessity

From the preceding discussion, it is my view that there are three principles which are relevant to the duress and necessity defences: moral involuntariness, moral permissibility, and moral correctness. The rationale underlying each principle will be expanded upon before explaining the basis for elevating each principle to the status of principles of fundamental justice under s. 7 of the 

Charter.

(5.1) Refining the Principles

As should be clear from the above discussion, any reconstruction of moral involuntariness must begin by removing proportionality as a requirement. This is not to say that proportionality is not a factor to be considered in determining whether a duress or necessity defence is available to an accused. However, it should be recognized that where there is proportionality as the Court has defined that term, the principle at issue is fundamentally altered. As I will explain in significant detail below, the existence of proportionality not only alters the moral considerations applicable to an accused’s act, it must also affect the legal requirements for pleading the duress and necessity defences.

A second refinement to the moral involuntariness principle arises from the criticisms outlined by Professor Berger. To address his concerns, it is my view that the moral involuntariness principle must require that an accused not only be deprived of his or her will, but also that utilizing the criminal law to sanction the accused’s conduct be incapable of serving broader purposes of the criminal law such as denunciation and deterrence. As Chief Justice Dickson observed in Perka, the notion that it is arbitrary to punish an accused who acts without free will carries considerable weight in Anglo-American legal thinking. To assume that it is pointless to punish all morally involuntary conduct, however, is to ignore the cautions provided by Professor Berger. As he warns, to focus only on the notion of free will runs the risk of hiding suspect social norms behind a “veil of volunteerism.”

The following example is illustrative. Consider an accused that is told by X that he must either permit Y to make homosexual advances on him or must kill Y. If he fails to do either, X will kill

159 Perka, supra note 3 at 250. In support of this view, Chief Justice Dickson cites Fletcher (250), Hobbes (241), and Kant (241). Justice Wilson also cites Kant’s work in support of this view (272).
the accused. If the accused’s will was overborne as a result of “homosexual panic,”\(^{160}\) the question arises: should society excuse the accused’s murder of Y? I think not. Even if the accused’s emotional response resulted in his will being overborne, this emotional response is deeply infected by the view that homosexuality is somehow base or despicable. Given that this prejudicial view is contrary to various fundamental Canadian values, permitting the accused to be convicted for murder is not arbitrary; instead, it sanctions the underlying reasons of the accused for committing the murder. It is scenarios such as these which Professor Berger rightly criticizes. However, by imposing the additional requirement that an accused’s conduct must also be pointless to sanction before it can be considered morally involuntary, his concerns are readily addressed.

Finally, it is necessary to refine the moral involuntariness principle to require that the accused’s act be determined by the trier of fact to be wrongful. This change is necessary if moral involuntariness is to be afforded its own conceptual space. To illustrate this point, it is necessary to consider the potentially far-reaching application of the Court’s current conception of the moral involuntariness principle. Consider an attacker trying to take an accused’s life. In this scenario, the accused’s act of killing the attacker to preserve his or her life would be justified under self-defence doctrine. Yet, as Professor Coughlan observes, one could reasonably conclude that the accused’s act is also morally involuntary as the accused is faced with a true kill-or-be-killed scenario.\(^{161}\) The accused’s other lawful option would see the accused, now a pacifist, choose not to use violence and die as a result. However, I see no reason to conclude that the pacifist did not also act rightfully. Indeed, the pacifist’s conduct may be even more praiseworthy than that of the accused who acts in self-defence.\(^{162}\) As such, an accused in such a self-defence scenario is not choosing between right and wrong. The accused chooses among available rightful actions. If all an accused can do by acting within the scope of the law is act rightfully, it is highly questionable whether the label of moral involuntariness is appropriate.

\(^{160}\) As moral involuntariness concerns only the effect of emotions on an accused’s will, it is possible that emotions such as prejudice against a minority could deprive an accused of their will. Professor Berger uses a similar example in his article supra note 134 at 112-13 relying on the factual background in \textit{R v Fraser}, 1980 ABCA 328, 55 CCC(2d) 503 [\textit{Fraser}]. Although \textit{Fraser} is a provocation case, Professor Berger correctly notes that the underlying basis for a provocation defence is the same as moral involuntariness: loss of will (see 112, in particular footnote 47).

\(^{161}\) Coughlan, \textit{supra} note 14 at 198-99.

\(^{162}\) See Michael Plaxton, “John Gardner’s Transatlantic Shadow” (2013) 39 Queen’s L J 329 at 332, where he observes as follows: “[T]he criminal law does not care whether an attacked person uses force against another in self-defence. The attacked party \textit{may} use force, but if she does not—for example, because she is a committed pacifist—the criminal law has nothing to say about it. Indeed, we may regard her forbearance as praiseworthy.”
A similar rationale applies in the context of the moral permissibility principle. If it is reasonable to conclude that an accused who meets the baseline requirements of the Court’s current conception of the proportionality requirement cannot have their conduct be clearly labelled as a wrongful act, it is also difficult to view such an accused’s choice to commit the criminal act as a clear choice to commit a moral wrong. As such, where proportionality is present, it is also not sensible to speak of moral involuntariness.

With the above conceptual space carved out for the moral involuntariness principle, it is now possible to explain in greater detail the basis for the moral permissibility principle. As discussed earlier, this principle seeks to constitutionalize the Court’s baseline requirements for the duress and necessity defences. The difficult issue with which the Court has not grappled in any meaningful way is how to rationalize the moral judgment implicit in these legal requirements.

To recapitulate, the duress and necessity defences have two general requirements: proportionality and an absence of a “realistic choice.” The proportionality branch of the legal test requires that (a) the harm caused and averted are of comparable gravity; and (b) the accused live up to society’s expectation of normal resistance to harm. The latter branch of the proportionality test limits the type of harm which can trigger duress or necessity. Illustrating this point in Ryan, Justice Cromwell wrote as follows: “inflicting quite minor harm in reaction to the threat of quite minor harm might fulfill the ‘equal or lesser harm’ requirement, but would certainly not constitute a situation where society would be ready to excuse the act as morally involuntary.”163 The aspects of the test relating to “realistic choice” generally require that the accused be threatened with a harm which is imminent/temporally connected and not have had a reasonable avenue of escape from that harm. These factors, as with the proportionality requirements, are all measured on at least a modified objective standard.164

By focusing on objective tests and requiring proportionality, moral considerations drive the underlying criteria of duress and necessity.165 But what is the moral message being sent by these criteria? In my view, observations made by Professor Stewart cited earlier are perceptive. As he reasoned, it is difficult to categorize proportionate conduct as wrongful. This is especially so

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163 Ryan, supra note 12 at para 61 [emphasis added].
164 Recall that all factors except the proportionality test for the necessity defence are measured on this standard. The latter is measured on the stricter objective standard.
165 See Berger, supra note 134 at 109.
where the accused had no realistic alternative but to commit the criminal act. However, given that harm is passed on to another innocent, it is also difficult to categorize the action as rightful where the harms are proportionate. This follows as the accused and the victim will often both be in the circumstance due to no fault of their own.

If Professor Stewart’s observations have force, it must be conceded that people will reasonably disagree as to the moral foundation of the types of acts described by him. Until our theory of morality progresses significantly further, it is difficult to come to any definitive moral conclusion. As such, it is my view that a more restrained moral principle is needed. The moral permissibility principle serves precisely this purpose. The only judgment it purports to pass is that society can agree that it is unjust to punish accused where the baseline elements of the duress and necessity tests are met. As such, the act is not right or wrong: it is merely permissible.

The factual foundation in Ruzic provides another lens through which to question the salience of the excuse/justification distinction. Ms. Ruzic, a resident of then war-torn Yugoslavia, was verbally, physically, and sexually harassed for a period of approximately two months by someone whom she believed to be an assassin during the Yugoslav Wars. Within this context, Ms. Ruzic was told that if she did not import a number of packages of heroin into Canada, her mother would be harmed or killed. The threat appears to be that the accused’s mother would be “harmed,” but given that the threatening party was employed as an assassin, one might assume the harm threatened could include death. The accused had every reason to believe that such a threat could be fulfilled given the lawless state of Yugoslavia at the time of the offence. As such, she complied with the demand. Upon landing in Toronto, she was arrested for illegal importation of narcotics, among other less serious offences.166

The competing interests in Ruzic are highly abstract. On the one hand, there is a threat of an undisclosed type of harm to an innocent person for whom the accused has significant affection. On the other hand, the accused is told to directly participate in an industry which causes significant suffering to those it exploits, and which in many cases is responsible for the deaths of these individuals. As Ms. Ruzic was ultimately granted the defence of duress, the Court implicitly concluded that the harms were of comparable gravity. However, in weighing the competing harms at issue, there is significant room to debate whether the accused’s actions were

166 See Ruzic, supra note 1 at paras 2-7.
rightful or wrongful. The very nature of the harm caused by the drug industry is complicated by the imprecise ability to measure the harm caused to persons made victims thereof. It is also complicated with concerns of how to apportion blame for such negative consequences, given Ms. Ruzic’s relatively negligible participation in the industry. Given the undefined nature of the harm to Ms. Ruzic’s mother, the moral judgment being passed is by no means certain. All that can be agreed upon, in my view, is that Ms. Ruzic should be permitted to plead the defence of duress.

The *Ruzic* case may be usefully contrasted with one of the justificatory scenarios cited approvingly in *Perka*. Therein, Chief Justice Dickson devised a hypothetical wherein an accused commandeers a vehicle to drive a dying patient to the hospital.\(^\text{167}\) In this scenario, the competing interests are clear: life versus property. There can be no doubt that life is the paramount interest. Although such a conclusion seems intuitive, one might also rely on the fact that property is not a constitutionally protected interest, while life is among the constitutional principles afforded the most protection.\(^\text{168}\) As seen above, in *Ruzic* such a clear division in interests is not possible. As a result, the moral judgment is not at all self-evident. As will be discussed in greater detail below, it is this type of clarity which I would require for an accused to plead a justificatory version of the duress and necessity defences.

Given the above, the proposed “morally permissible” principle would effectively constitutionalize the duress and necessity defences. I say this with two caveats. First, as discussed in Part 2.3 of this paper, there are a number of anomalies between the current duress and necessity defences which should be addressed. Given the abundance of academic work currently in existence on this topic—Professor Paciocco’s work cited earlier providing an excellent synthesis thereof—it would take little effort to address these anomalies within the legal framework proposed here. Second, the current duress and necessity defences do not permit the fact that an accused committed a criminal act to avoid a clearly greater harm to affect the legal analysis. For reasons expressed above, the constitution must make room for justification-based versions of these defences. As such, the conceptual space for the moral permissibility principle must be limited in its application to cases where the harms averted and caused are proportionate as the Court has defined that term.

\(^{167}\) *Perka*, *supra* note 3 at 246.

\(^{168}\) See for instance section 7 of the *Charter*.
Turning then to the term “justification,” I have argued that justifications in a consequentialist form must receive constitutional protection. As the Court has concluded that justifications connote “rightful” conduct, the applicable principle should focus on this moral judgment. In the context of duress and necessity, such an analysis centers upon the proportionality between the harms caused and averted. Where the harm averted by the accused’s criminal act is clearly greater than the harm caused, the accused’s conduct should be considered “morally correct” so long as the accused’s actions are otherwise reasonable in the circumstances. This principle may be thought of as a particular manifestation of the principle of fundamental of justice that the morally innocent not be deprived of their liberty. If an accused’s act is considered rightful, it must follow that the accused is also morally innocent.

Using these three distinct principles as the basis for duress and necessity resolves a number of the criticisms identified above. First, utilizing these principles addresses Professor Coughlan’s concern that elevating moral involuntariness to a principle of fundamental justice rendered unconstitutional all of the proportionality requirements of the defences of duress, necessity, and self-defence. Under my conceptualization of the moral involuntariness principle, I find it difficult to imagine a scenario in which it is pointless to punish a wrongful act other than a scenario where the accused effectively faces a “life or death” choice. By requiring such extreme pressures to make an accused’s conduct morally involuntary, the only proportionality requirement which could be affected by constitutionalizing moral involuntariness would concern similar “life or death” scenarios. However, as proportionality is a requirement under any other conception of duress, necessity, or self-defence where the accused is faced with a “life or death” scenario, constitutionalizing moral involuntariness as I define the term would not have the spillover effect described by Professor Coughlan.

Second, my distinction between moral permissibility and moral involuntariness also addresses Skolnik’s question as to why society’s disapproval of an accused’s conduct has anything to do with volition. For the reasons outlined by Skolnik, I agree that societal approval of an accused’s conduct is irrelevant to moral involuntariness. However, it is my view that societal approval is a legitimate, if not central, consideration in determining whether an accused’s act was morally permissible. The moral permissibility principle being separated from the moral involuntariness principle therefore accomplishes two of the Court’s seemingly competing goals without jettisoning basic principles of moral philosophy. It does so by: (a) offering a defence to accused
who commit a wrongful act in a truly morally involuntary manner; and (b) providing a conceptual basis to support the Court’s pull towards requiring a distinct type of proportionality for the duress and necessity defences.

Third, by using proportionality as a means to distinguish between moral involuntariness and moral permissibility, the confusion surrounding the exact nature of the principles constitutionalized is readily explainable. This requires recognizing that the principle the Court constitutionalized (moral involuntariness) and the principles applicable to the Court’s conception of duress and necessity (moral permissibility/moral correctness) are distinctive. This is an important step towards providing a principled framework for the operation of the duress and necessity defences. As will be discussed in the next section, by constitutionalizing each of these three principles, the law will be well positioned to explain the connection between the moral qualities of the act and the legal requirements derived therefrom.

Finally, by dividing the analysis in the manner I have proposed, the law will be able to refrain from making explicit moral judgments where it is unclear and exceptionally difficult to come to any meaningful agreement as to why an accused committed a moral wrong. Perhaps more importantly, the law will also be permitted to approve of an accused’s conduct where the harm averted is clearly greater than the harm caused. In other words, the above conceptual framework puts morality back where it belongs: at the heart of our thinking about the criminal law.

With the above overview in place, it is prudent to summarize the basic requirements for each principle. The above three principles, as they apply in the context of the duress/necessity defences, may be expressed as follows:

**Morally Involuntary (Excused):** (a) the harm caused by the accused’s conduct was clearly disproportionate to the harm averted; or (b) was otherwise “coloured” wrongful; and (c) the purposes of the criminal law cannot be furthered by convicting and punishing the accused.

**Morally Permissible:** (a) the harm caused was of comparable gravity to the harm averted; (b) the harm caused is permissible from a societal perspective; and (c) the accused did not have a realistic choice but to commit a criminal act.

**Morally Correct (Justified):** (a) the harm caused was clearly outweighed by the harm averted; and (b) the accused’s actions were reasonable in the circumstances.
With the basis for these three principles underlying the duress and necessity defences outlined, it is necessary to consider in more detail the way in which differing legal requirements may be derived from each principle. In so doing, it will become clear how the moral qualities of an accused’s act will directly impact whether an accused will be able to successfully plead the duress or necessity defence.

(5.2) Deriving Legal Requirements from the Principles

As outlined above, defence elements may usefully be divided into two categories: those concerning the proportionality and reasonableness of the accused’s act. The core considerations relevant to duress and necessity are readily divided into these categories:

- **Reasonableness**: existence of a threat of harm; temporality/imminence of harm; alternatives to avoid harm.

- **Proportionality**: weighing harms caused and averted; society’s expectations of normal resistance to committing crime.

To be sure, there are numerous other requirements applicable to the duress and necessity defences. For instance, without considering constitutional implications, it is necessary that an accused not have committed a lengthy list of offences or have been part of a criminal association to avail themselves of duress.\(^{169}\) Moreover, there are also differences concerning the standards by which these factors are measured—objective, subjective, or modified objective—when considering the defences. Although these differences are important, they must be set aside here. At this point, I want to focus on the broader question of how the core requirements interact with each other when the moral parameters of an act are altered.

As seen above, moral involuntariness concerns conduct which is wrongful but may nevertheless be excused as a result of the morally involuntary nature of the accused’s criminal act. Moral involuntariness, however, is intimately connected to arbitrariness in using the criminal law to sanction an accused’s conduct. For an accused to meet these requirements, proportionality is an irrelevant consideration. As a result, however, much more is demanded under the reasonableness branch of the analysis. Not only must the accused be deprived of his or her will, the harm averted must be so serious as to truly make sanctioning the accused’s conduct arbitrary. As such,

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\(^{169}\) See the authorities cited in footnote 76 for the argument that the exclusion of the various offences is contrary to the principles of fundamental justice.
withdrawing the proportionality requirement has a direct effect on what must be required under the reasonableness branch of the test. This consideration significantly differentiates moral involuntariness from both the morally permissible and morally correct principles.

Morally permissible conduct, on the other hand, requires that the accused prove proportionality as the Court has defined that term, in addition to the accused not having had a realistic choice but to commit an offence. The additional proportionality criteria cast a different moral light on the accused’s actions. In turn, these additional criteria affect the availability of the defence. To illustrate this point, it is necessary to review aspects of the Court’s reasons in Ryan. Writing for the Court, Justice Cromwell provided a general overview of the duress defence with a mind towards clearing up a number of its inconsistencies. In so doing, Justice Cromwell recognized that as opposed to imposing a proportionality requirement, courts had traditionally required that the type of bodily harm to trigger duress be “serious” or “grievous.”\(^\text{170}\) As proportionality had been imposed as an additional requirement by the Court, Justice Cromwell determined that a high threshold level of harm is unprincipled.\(^\text{171}\) As such, the requirement that the bodily harm avoided be “serious” or “grievous” was removed from the duress defence. In its place, only bodily harm, defined as harm which “interferes with the health or comfort of the person and that is more than merely transient or trifling,”\(^\text{172}\) was required to trigger consideration of the defence. The relationship between reasonableness and proportionality is again evident. Stricter proportionality requirements led to the relaxation of the level of harm required under the reasonableness branch of the defence.

Although Justice Cromwell’s conclusion is sensible, it does create its own anomaly under the Court’s conception of duress. If duress is based on moral involuntariness, one is left to question how incurring a level of harm as low as “bodily harm” could deprive a person of their will. One might reasonably be perplexed in considering how committing harm which is only “more than merely transient or trifling” to avoid a similar harm could ever constitute moral involuntariness as defined by the Court.\(^\text{173}\) If the Court’s broadening the availability of the defence in Ryan is to have practical effect, it is more sensible to focus on whether society would permit an accused to be spared criminal sanction than on volition.

\(^{170}\) Ryan, supra note 12 at para 59.
\(^{171}\) Ibid.
\(^{172}\) Ibid at paras 59-60.
\(^{173}\) The Court recognizes this problem in Ryan, supra note 12 at para 61.
Concerning morally correct conduct, the greatest emphasis is on proportionality. The harm averted must *clearly* outweigh the harm caused. In such circumstances, the act is considered rightful. A rightful act, it follows, is one which not only meets but exceeds society’s standards.\(^\text{174}\)

The way in which the moral quality of the act affects the legal analysis was illustrated by the Court in *Ryan* when comparing requirements under the duress defence to those under self-defence. For Justice Cromwell, the different moral qualities of acts committed under self-defence compared to those applicable to duress (when applied as an excuse) lead to more relaxed legal requirements.\(^\text{175}\) In particular, as a result of the moral distinction, Justice Cromwell noted that a person acting in a justified manner in self-defence does not have to demonstrate that he or she had no reasonable avenue of escape.\(^\text{176}\)

Likewise, if the competing interest facing an individual pleading duress were to lead to a justificatory rationale being applicable, I see no reason why the reasonable avenue of escape requirement ought not to be similarly relaxed. In *Allen*, an exemplary circumstance arose. The accused was charged with assault with a weapon and robbery, both offences for which the defence of duress is prohibited under s. 17 of the *Criminal Code*. After attending a party, he sought a ride home from a number of the attendees of the party. Instead of being driven home, he was berated, abused, sexually assaulted, and had his life threatened if he did not commit a series of robberies. Before committing the first robbery, he was told that if he tried to get away, the threatening parties would “come in shooting and leave no witnesses.” Despite having a number of safe avenues of escape during the first two robberies,\(^\text{177}\) he committed the robberies with little to no harm to the victims and brought the proceeds back to the threatening parties, who he had every reason to believe would (and did) continue their perverse exploitation of the accused. As I argue in “The (Near) Death of Duress,” it is entirely unclear why the accused, who sought to avoid placing the store workers’ lives at risk, acted wrongfully. If anything, the interests at stake weigh clearly in favour of committing the robbery given that the accused’s choice to not avail

\(^{174}\) *Perka, supra* note 3 at 246

\(^{175}\) *Ryan, supra* note 12 at para 26.

\(^{176}\) *Ibid.*

\(^{177}\) During the first robbery, a cab was available at one point. In a subsequent robbery of a hotel, the hotel clerk offered the accused a safe room to stay at. All the accused had to do was walk over to an elevator and board. Out of legitimate fear for himself and the staff, he decided not to avail himself of these options.
himself of a reasonable avenue of escape has a significant element of self-sacrifice. As such, it is unclear why Mr. Allen ought to have been required to take those avenues of escape.\(^{178}\)

With the above overview in place, it is clear how the different moral qualities of an act place emphasis on different aspects of the reasonableness/proportionality elements of the duress and necessity defences. It takes little imagination to see how an accused may be unjustly barred from pleading a defence if the moral qualities of an act are ignored.\(^{179}\) As such, it is imperative that the defences be aligned with the moral qualities of the various types of acts which can be committed under duress or necessity. The only question remaining is whether the basis for each of these principles may be elevated to the status of a principle of fundamental justice.

### (5.3) The Principles of Fundamental Justice

Section 7 of the Charter provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Before assessing whether the three principles described above are principles of fundamental justice, it is necessary to first review the Court’s jurisprudence interpreting this term.

#### (5.3.1) Defining the Principles of Fundamental Justice

The Court has affirmed on numerous occasions that the principles of fundamental justice “are to be found in the basic tenets of our legal system.”\(^{180}\) Although the principles of fundamental justice are exemplified by the legal rights found in section 7-14 of the Charter, these principles may also be found in “presumptions of the common law [as well as]… international conventions on human rights.”\(^{181}\) The unifying theme behind the principles of fundamental justice concerns their integral relationship to the proper function of law in a well-governed society.\(^{182}\) As such, principles of fundamental justice must be essential to the basic beliefs upon which Canada is founded. These beliefs include “a belief in ‘the dignity and worth of the human person’ (preamble to the Canadian Bill of Rights…) and on ‘the rule of law’ (preamble to

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\(^{178}\) Although the trial court found that the accused’s options did not constitute safe avenues of escape, the reasoning is questionable. Regardless, for the purposes of my argument, it would take little effort to modify the factual scenario so as to permit the conclusion that the accused had clear avenues of escape.

\(^{179}\) Professor Roach makes a similar observation supra note 13 at 320 at 355-56.

\(^{180}\) Ruzic, supra note 1 at para 28 citing BC Motor Vehicle Act, supra note 123 at 503 and 512.

\(^{181}\) BC Motor Vehicle Act, supra note 123 at 503 and 512.

\(^{182}\) Ibid at 512.
As a result, the principles of fundamental justice need not be restricted to concerns related to procedural fairness, but may also include substantive legal principles. Distilling the above considerations, the Court has concluded that for a principle to be of fundamental justice, it must be able to fulfill three criteria: it must be (i) a legal principle, (ii) upon which there is some consensus that the principle is “vital or fundamental to our societal notion of justice,” and (iii) which is sufficiently precise to be applied in a manner which yields predictable results.

The purpose behind requiring the principles of fundamental justice to be legal principles which are definable with some precision is relatively straightforward. By requiring the principles to be legal principles, the principles of fundamental justice are able to avoid the “judicialization” of policy matters. The requirement that the principle be sufficiently precise ensures that “vague generalizations about what our society considers to be ethical or moral” do not become the basis for striking down otherwise validly enacted laws. By so requiring, the principle provides meaningful guidance to legislatures, courts, and the public when assessing the permissible scope of the law governing Canadians.

The requirement that there be sufficient “societal consensus” that the principle is vital to the legal system is much more complex. Broadly stated, this requirement considers the “shared assumptions upon which our system of justice is grounded.” As discussed above, these assumptions “find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens” and are principles which “[s]ociety views…as essential to the administration of justice.” As a result of this framework, “a strictly empirical investigation into societal views cannot be decisive in determining whether a particular principle is or is not a principle of fundamental justice; the decisive question is what role the principle

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183 *BC Motor Vehicle Act*, supra note 123 at 512.
184 *Ibid* at 509.
186 *Ibid*.
189 *Ibid*.
190 *Ibid*. 
plays in a legal order that is committed to the values expressed in the Charter.”\(^{191}\) As the Court concluded in *BC Motor Vehicle Act*, those principles are respect for human dignity and the rule of law.\(^{192}\) It is whether a principle is integrally related to these broader purposes which determines whether sufficient societal consensus exists to conclude that a principle is of fundamental justice.\(^{193}\)

(5.3.2) Moral Involuntariness

As discussed earlier, the Court concluded in *Ruzic* that moral involuntariness is a principle of fundamental justice. As a result of the academic criticisms outlined above, I have argued that it is necessary to alter the focus of the principle in two ways. First, an accused’s act must be demonstrably wrongful before the principle is applicable. Second, for an act to be morally involuntary, the accused must not only have committed the act without free will, but the reasons behind this emotional response must make it pointless to utilize the criminal law against an accused. If an accused’s emotional response is based on an unacceptable prejudice, it ought to be rejected as forming the basis of a defence.

Although moral involuntariness was clearly accepted as a legal principle in *Ruzic*, it may be contended that the principle as defined by the Court is insufficiently precise. Whatever merit such a contention might have, it is my view that I have made the principle more precise than in its current form. The principle as constitutionalized by the Court defined moral involuntariness as sometimes containing an aspect of blameworthiness, being related to the notion of excuse, and a principle which considers the circumstances of the accused and their capacity to avoid committing the criminal act.\(^{194}\) I have narrowed a number of these considerations. By requiring that the accused’s actions be considered wrongful, the accused’s actions will always be blameworthy and as a result can only ever be excused. Moreover, by requiring the accused to prove that none of the legitimate objects of criminal law may be furthered, the moral involuntariness principle is wedded to an already accepted principle of fundamental justice: laws


\(^{192}\) *Ibid* at 108.

\(^{193}\) *Ibid* at 108-09.

\(^{194}\) For an overview of this criticism, see Stanley Yeo, “Challenging Moral Involuntariness as a Principle of Fundamental Justice” (2002) 28 Queen’s LJ 335 at 345.
must not operate in an arbitrary manner. As such, courts applying the moral involuntariness principle as developed here will be able to use a more exacting analytical framework.

The societal consensus requirement is also easily met. In Ruzic, the Court concluded that moral involuntariness, as with its sister principle physical involuntariness, arise from the critical importance of autonomy in determining criminal liability. Autonomy is rightly described by the Court as a “fundamental organizing principle of criminal law.” As Justice LeBel writes in Ruzic, the requirement of voluntariness “is rooted in respect for individual autonomy and free will and acknowledges the importance of those values to a free and democratic society.” To not recognize moral involuntariness as a defence to a criminal act would therefore run counter to the very purpose of the Charter: upholding the dignity of its citizens. As a result of the above reasoning, it is my view that moral involuntariness in the narrower sense described in this paper is readily categorized as a principle of fundamental justice.

(5.3.3) Moral Permissibility

As discussed above, the moral permissibility principle seeks to constitutionalize duress and necessity in the manner in which these defences have been applied to accused persons under Canadian law. The moral permissibility principle therefore concerns scenarios where: (a) the harm caused and averted are of comparable gravity; (b) the harm averted is of the type which society would tolerate breaking the criminal law to avoid the harm; and (c) the accused was deprived of a “realistic choice” as to whether to commit the criminal offence. This latter consideration requires that the accused demonstrate that there was (i) a threat of harm; (ii) which is imminent/temporally connected; and (iii) from which there is no reason avenue of escape.

The first question is whether the principle may be defined as a “legal principle.” In my view, the moral permissibility principle meets this requirement as it aptly captures the Court’s basic requirements for duress and necessity. As the above review of the Court’s jurisprudence on duress and necessity revealed, the Court has gone to great lengths to ensure that both the duress and necessity tests are guided by the above considerations. With the Court’s decisions in Perka, Latimer, and Hibbert, the Court used s. 8(3) of the Criminal Code to preserve the necessity and

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195 See most recently Carter v Canada (Attorney General), 2015 SCC 5, [2015] 1 SCR 331 at paras 83-84 [Carter].
196 Ruzic, supra note 1 at para 45.
197 Ibid.
198 Ibid.
duress defences in this form. Moreover, in Ruzic, the Court utilized the Charter to reconstruct a profoundly different statutory duress defence in accordance with the above requirements. The Court’s jurisprudence is therefore a testament to the importance of the above requirements to the duress and necessity defences.

To put my position plainly, moral permissibility is but a label for a legal principle which has already been firmly established in the Court’s case law. As discussed earlier, where the basic elements of the duress and necessity defences are met, it will often be extremely difficult to come to a conclusive moral judgment. The lack of recognition of the moral permissibility principle, I suggest, arises from the Court not having had the opportunity to adequately parse the differences between the manner in which the moral qualities of an act affect the development of a defence, despite the Court having recognized this to be fundamental to deriving legal requirements for criminal defences.\footnote{Ryan, supra note 12 at para 26.}

If moral permissibility is a legal principle, it must further be asked if the principle is capable of being defined with the requisite level of precision. As the Court has concluded, to constitute a principle of fundamental justice, a legal principle must be more than “broad” or “vague generalizations about what society may think is moral.”\footnote{Rodriguez, supra note 187 at 591.} In my view, the effect of limiting the analysis in the manner proposed in this paper is to again make the principle more precise than in its previous manifestation. “Moral involuntariness,” as the Court defined that term, encompassed scenarios where (a) the harm averted was clearly more grave than that caused; (b) the harms were of comparable gravity; (c) scenarios which required societal approval for an act to be considered proportionate; and (d) applied to any degree of harm (at least in the case of necessity). For reasons explained above, these requirements are not sensibly included as requirements when considering whether an act is morally voluntary. Moreover, where the harm averted is clearly greater than the harm caused, it is unprincipled to impose strict requirements in relation to the reasonableness of the accused’s action. In my view, however, all of these factors (except the first) are central to determining whether an act is morally permissible. By constitutionalizing the duress and necessity defences as defined by the Court (with the caveat that the proportionality requirement be limited to considerations of comparable gravity) the principle carves out its own conceptual space in relation to moral involuntariness and, as

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\item \footnote{Ryan, supra note 12 at para 26.}
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discussed below, in relation to morally correct or justified acts committed under duress or necessity.

Turning to the societal consensus consideration, the overview of the Canadian literature concerning the different conceptual origins of duress and necessity has shown that it is far from agreeable that an act is justified or excused where the harm caused and averted are proportionate in the sense described by the Court. If sufficient consensus is what matters, it is my view that the consensus lies in the fact that society views accused acting under duress and necessity as defined by the Court as permissible and therefore not warranting criminal sanction. As such, the morally permissible principle advocated for here better captures the applicable moral judgment upon which society actually agrees to grant the accused the duress or necessity defence.

(5.3.4) Moral Correctness

Concerning the morally correct principle, I argued earlier that this principle arises from the principle of fundamental justice that morally innocent individuals not be deprived of their liberty. As the Court held in *BC Motor Vehicle Act*, the idea that the innocent not be punished is “founded upon a belief in the dignity and worth of the human person and on the rule of law.”²⁰¹ It is therefore tied to the inherent value of the individual which the constitution is designed to protect. Given the moral correctness principle’s strong connection to the readily accepted principle of fundamental justice that the morally innocent not be convicted, it is my view that there would be sufficient consensus that individuals acting in what I have defined as a “morally correct” manner ought not be subjected to criminal sanction.²⁰²

Moreover, given the principle’s focus on proportionality—a consideration which the Court has not had difficulty placing at the centre of principles of fundamental justice in the past—²⁰³ the principle is not too vague to be intelligible to the courts and public. Although there may be some legitimate concern surrounding the idea of weighing competing harms, these concerns may be assuaged. Developments in the German criminal law are particularly germane.²⁰⁴ Pursuant to s. 34 of the German Penal Code (*Strafgesetzbuch*), German case law has seen a justificatory

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²⁰¹ *BC Motor Vehicle Act*, *supra* note 123 at 503.
²⁰² From this principle one would deduce that preventing self-defence to operate as a defence or limiting its scope too significantly would be unconstitutional.
²⁰³ The gross disproportionality principle, which received its status as a principle of fundamental justice in *Malmo-Levine*, *supra* note 185, is a prime example.
²⁰⁴ Pun intended.
rationale applied not only where destruction of property is committed to protect higher interests, such as life, but also has been used in limited circumstances as a defence to inflicting harm on persons. In determining the nature of the defence in either type of scenario, proportionality is the main criterion. Whether the harm averted by an accused’s act “clearly outweighs” the harm caused has been determined by taking into consideration, \textit{inter alia}, the following:

(a) Abstract value of the respective interest (the right to life and physical integrity, for example, is—generally speaking—more important than property interests);
(b) Intensity of the danger and the degree of harm caused or threatened to the respective interests;
(c) Individual meaning of the respective interests to the persons concerned;
(d) Chances of saving the respective interests;
(e) Causation of/voluntary exposure to the danger by the actor or victim; and
(f) Special duties to take on dangers inherent in the actor’s profession (e.g., soldiers, firemen).

As is readily apparent from this list of considerations, weighing the relevant interests is a highly fact specific determination that is somewhat abstract. Nevertheless, such a framework has been applied successfully in the German context. Given the Court’s willingness to allow proportionality to be central to other principles of fundamental justice, I see no reason to conclude that a framework similar to that developed by the Germans could not form part of the constitutional basis for the duress and necessity defences.

Finally, one might further contend that the moral correctness framework advocated for permits an “undue subjectivity” to infiltrate the law which, if true, could readily undercut all three requirements concerning whether moral correctness is a principle of fundamental justice. Indeed, this was one of the reasons Chief Justice Dickson cautioned against adopting a justificatory framework for necessity in \textit{Perka}. However, as Professor Yeo has responded, it is for the courts, not the individual accused, to decide what values may outweigh others. Although determining the comparative weight of competing harms is a challenging exercise, it is also one which courts apply on a regular basis in their general application of law. Moreover, the

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205 Kai Ambos and Stefanie Bock, “Germany” at 227 in Alan Reed and Michael Bohlander (eds) \textit{General Defences in Criminal Law: Domestic and Comparative Perspectives} (Surrey: Ashgate Publishing, 2014 ) at 233-34. For instance, an accused inflicting bodily harm on a person to prevent them from driving while impaired by alcohol has been concluded to be justified.
206 \textit{Ibid} at 235.
207 \textit{Ibid}.
208 \textit{Ibid}.
209 See \textit{Perka}, supra note 3.
210 Yeo, \textit{supra} note 81.
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framework advocated for here would only permit a justificatory defence of duress and necessity where it is clear that the harm committed outweighed the harm averted. If this standard is not met, the defences would operate in accordance with the moral permissibility and moral involuntariness principles. With this clear delineation in place, it is my view that the courts should not hesitate to recognize moral correctness as a principle of fundamental justice.
6. Conclusion

The Court’s conceptual basis for the defences of duress and necessity has been severely critiqued by Canadian academics. Although these critiques are well-grounded in moral philosophy and basic principles of constitutional law, I have endeavoured to show how these critiques ignore the considerable difficulties and limitations facing the Court when developing the conceptual bases for the duress and necessity defences. Foremost among these obstacles was the inability of the Perka Court to consider the effect of the Charter on the development of criminal defences. Moreover, given the wording of s. 8(3) of the Criminal Code, it is questionable whether the Court had jurisdiction to develop the common law defences as justifications. Even if these considerations were not present, to develop the common law defence of duress or the necessity defence as a justification when Parliament had explicitly labelled the statutory defence of duress as an excuse would have caused significant confusion in the law of defences. Finally, underlying all of these considerations is the controversial political background within which the necessity defence had a decade earlier first been considered: that of abortion.\footnote{See generally \textit{R v Morgentaler}, [1976] 1 SCR 616, 53 DLR (3d) 161 \cite{Morgentaler}.} Given this political context, permitting the necessity defence to be pleaded as a justification had the potential to send a profound political statement. As a result of these considerations, I have argued that it was not at all prudent for the Court to develop the defences in a theoretically consistent manner when Perka was decided. However, as numerous academics have rightly observed, developments in our understanding of the purpose of the Charter provide an excellent basis upon which to re-visit the juristic bases of the duress and necessity defences.

At least in part due to the restrictive theoretical basis developed for the necessity defence in Perka, arguments before the Court have only attempted to constitutionalize a single principle—moral involuntariness or moral blameworthiness—as underpinning the duress and necessity defences. This has proven to be problematic as the moral distinctions underlying the duress and necessity defences are far too complex to be captured by a single principle. This is evident by the fact that the Court has utilized moral involuntariness as the conceptual basis for the duress and necessity defences, yet developed the legal tests for the defences with criteria which are wholly inconsistent with that principle, such as proportionality. As numerous scholars have argued, there is a moral foundation driving the Court’s inclusion of requirements such as proportionality as
this factor often guides whether an act may be considered justified or merely excused. Inclusion of additional requirements such as proportionality not only changes the moral foundation of the defence, but as I have shown above, it also has a practical impact on the legal requirements an accused must prove to successfully plead the duress or necessity defences.

Although the Court has yet to develop the duress and necessity defences in a manner which permits the defences to be available in a manner which is commensurate to the moral qualities of the act, basic considerations related to moral philosophy and its relationship to the Charter suggest the Court should be open to such argument. However, it is up to litigants to argue that the duress and necessity defences must, as a matter of constitutional imperative, be developed in a manner which parses the moral distinctions inherent in these defences. By abandoning the excuse-justification dichotomy, and instead focusing on when an accused’s act falls into the more readily definable categories of moral involuntariness, moral permissibility, and moral correctness, I have set out a roadmap to bring a significantly greater degree of coherence to the law of duress and necessity. If these principles were to receive constitutional protection, it is my view that the duress and necessity defences would have firm conceptual and constitutional bases upon which to develop in a principled manner.
References

Statutes


*Criminal Code of Canada*, RSC 1892, c 29.

*Criminal Code of Canada*, RSC 1985, c C-46.

Cases


*Re A (Children) (Conjoined Twins: Surgical Separation)*, [2001] 2 WLR 480.


*R v Aravena*, 2015 ONCA 250, 323 CCC (3d) 54.


*R v Fraser*, 1980 ABCA 328, 55 CCC(2d) 503.


*R v Langlois*, 80 CCC (3d) 28, 19 CR (4th) 87 (QBCA).


R v Paquette, [1977] 2 SCR 189, 70 DLR (3d) 129.

R v Ruzic, 164 DLR (4th) 358, 128 CCC (3d) 97 (ONCA).


R v Walker (1979), 48 CCC (2d) 126 (Ont Co Ct)).

R v Willis, 2015 MBQB 114, 318 Man R (2d) 209.

Articles


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“Justifying Self-Defense” (2005) 24 Law & Phil 711;


Books


