

# (Re-)Constitutionalizing Duress and Necessity

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*The Supreme Court of Canada's decision in R v Ruzic established that the principle of moral involuntariness forms the constitutional basis for the duress and necessity defences. Scholars have contended that this principle is not only inconsistent with the legal requirements that the Court has developed for the duress and necessity defences, but also veils the moral distinctions which might otherwise form the bases of the defences. Ignoring the moral distinctions underlying an accused's act unjustly denies some accused a criminal defence, contrary to section 7 of the Canadian Charter of Rights and Freedoms. Declining to pigeonhole these defences into an excuse-justification dichotomy, the author instead proposes focusing on whether an accused's act falls into one of three readily definable categories—moral involuntariness, moral permissibility and moral innocence. Such a framework would permit the legal requirements for duress and necessity to develop in a manner which is commensurate with the moral qualities of an accused's act.*

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## Introduction

In its development of the duress and necessity defences, the Supreme Court of Canada has rejected the notion that these defences could be pleaded as justifications. In support of this position, Dickson CJ, writing for the majority in *Perka v R*, concluded that it would be improper for courts to use the common law to develop criminal defences in a manner that imposes their view of when a person is justified in violating the criminal law.<sup>1</sup> Such a task, he reasoned, is reserved solely for Parliament.<sup>2</sup> As a result, the duress and necessity defences have been preserved solely as excuses,<sup>3</sup> despite the Court recognizing that the defences logically fit into both the justification and excuse categories under appropriate circumstances.<sup>4</sup>

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1. [1984] 2 SCR 232 at 248, 13 DLR (4th) 1.

2. See *ibid.*

3. The Court applied a similar rationale in preserving the common law defence of duress as solely an excuse. See generally *R v Hibbert*, [1995] 2 SCR 973, 353 DLR (4th) 387 [cited to SCR] (noting that 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” at 1017).

4. See *Perka v R*, *supra* note 1 at 245–46.

With the Court's unanimous decision in *R v Ruzic*,<sup>5</sup> however, the legal landscape of Canadian criminal defences was fundamentally altered. The Court elevated the underlying principle for granting the excuse-based version of the defences of duress and necessity, referred to as the principle of "moral involuntariness", to the status of a principle of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms*.<sup>6</sup> As a result of this development, numerous scholars have reasoned that justification-based defences must also receive constitutional protection.<sup>7</sup> This argument has an intuitive appeal. As the Court has concluded that acts committed in a morally involuntary manner are wrongful,<sup>8</sup> it would be paradoxical to conclude that a justified or "rightful" act ought not to also receive constitutional protection.<sup>9</sup>

The Court has yet to consider whether a justificatory basis for the duress and necessity defences might be constitutionally protected under section 7 of the *Charter*.<sup>10</sup> As the Court recently recognized, however, the availability of criminal defences must be commensurate with the moral qualities of an accused's act.<sup>11</sup> As will be seen, the Court's conclusion that the moral involuntariness principle forms the basis of the duress and necessity defences has resulted in a number of strict prerequisites being placed upon an accused pleading duress or necessity. If the Court's failure to recognize a justificatory version of these defences results in an unjust conviction, the constitutionality of the defences will be questionable.<sup>12</sup>

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5. 2001 SCC 24, [2001] 1 SCR 687.

6. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

7. See e.g. Benjamin L Berger, "A Choice Among Values: Theoretical and Historical Perspectives on the Defence of Necessity" (2002) 39:4 *Alta L Rev* 848 at 863; Stanley Yeo, "Revisiting Necessity" (2010) 56:1 *Crim LQ* 13 at 15 [Yeo, "Revisiting Necessity"]; Alan Brudner, "Constitutionalizing Self-Defence" (2011) 61:4 *UTLJ* 867; Colton Fehr, "The (Near) Death of Duress" (2015) 62:1 *Crim LQ* 123. See also Paul B Schabas, "Justification, Excuse and the Defence of Necessity: A Comment on *Perka v. The Queen*" (1985) 27:3 *Crim LQ* 278 at 281–82; Donald Galloway, "Necessity as a Justification: A Critique of *Perka*" (1986) 10:1 *Dal LJ* 158 at 169 (for similar pre-*R v Ruzic* critiques of the Court's limited theoretical basis for the defences).

8. See *Perka v R*, *supra* note 1 at 249.

9. See *ibid* at 246 (the Court equates justifications with "rightful" acts).

10. As will be seen, the accused in *R v Ruzic* did offer an alternative constitutional principle for the duress defence—moral blamelessness. The accused's argument, as well as the Court's reasons for rejecting moral blamelessness as the sole principle underlying the defences, will be explained in detail in Part II, *below*. See *R v Ruzic*, *supra* note 5.

11. See most recently *R v Ryan*, 2013 SCC 3 at para 26, [2013] 1 SCR 14.

12. See Kent Roach, *Criminal Law*, 5th ed (Toronto: Irwin Law, 2012) at 320, 355–56.

The Court's decision in *R v Ruzic* has also resulted in a significant body of scholarship which questions the Court's development of the moral involuntariness principle. Two general critiques may be gleaned from the literature. The first stems from the Court's decision to include a proportionality requirement in both the duress and necessity defences. If voluntariness is the basis for these defences, it is unclear why the harm caused by an accused's act must always be proportionate to the harm averted.<sup>13</sup> A second critique questions the utility of the moral involuntariness principle's exclusive focus on the effect an accused's emotions has on her will.<sup>14</sup> By focusing only on the effect that emotion has on the will, the value of the emotions underlying the accused's response go unevaluated.<sup>15</sup>

The literature has built a strong case against the Court's current constitutional basis for the duress and necessity defences. Unfortunately, however, the literature offers few alternative constitutional principles to address the troublesome state of the defences. Three important questions remain unanswered. First, what constitutional principle might underlie a justification-based version of the duress and necessity defences? Second, is it possible to define moral involuntariness in a manner which addresses the criticisms raised in the literature? Third, are the moral involuntariness and justification principles able to provide an adequate constitutional framework for the duress and necessity defences?

To address each of these questions, I maintain that it is necessary to re-constitutionalize the defences along a continuum of principles: moral involuntariness, moral permissibility and moral innocence. The starting point for the analysis requires the Court to recognize that a constitutional basis must exist for justifications. In developing a justification-based version of the

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13. See Stephen G Coughlan, "Duress, Necessity, Self-Defence, and Provocation: Implications of Radical Change?" (2002) 7 Can Crim L Rev 147 at 157–58 [Coughlan, "Implications of Radical Change"], citing Bruce P Archibald, *The General Part of Canadian Criminal Law and Criminal Law Reform* [unpublished] 73 at 93; Don Stuart, *Canadian Criminal Law*, 3rd ed (Toronto: Carswell, 1995) at 475; Jeremy Horder, "Self-Defence, Necessity and Duress: Understanding the Relationship" (1998) 11:1 Can JL & Jur 143 at 160; among others, for a similar proposition. See also Zoë Sinel, "The Duress Dilemma: Potential Solutions in the Theory of Right" (2005) 10:1 Appeal: Rev Current L & L Reform 56 at 64 (for these authors, inserting a proportionality requirement shifts the analysis towards a utilitarian balancing of harms more commonly found in justification-based versions of the defences).

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

15. See *ibid* at 111.

defences, I assert that when the harm caused by an accused clearly outweighs the harm averted and the accused's conduct is otherwise reasonable, it is conceptually more consistent to conclude that an accused's conduct is justified. An accused who commits a justified or rightful act, I maintain, is morally innocent. To convict such an accused would therefore violate the principle of fundamental justice that the morally innocent should not be subjected to criminal sanction.<sup>16</sup>

Where the accused's conduct is wrongful, I agree with the Court in *R v Ružić* that it is sensible to excuse the accused's conduct only when the accused demonstrates that their conduct was morally involuntary.<sup>17</sup> 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 moral voluntariness. With respect to whether it is necessary to abandon the moral involuntariness principle for its inability to prevent suspect emotional responses from forming the basis of criminal defences, the Court recently addressed this issue in its decision in *R v Ryan*.<sup>18</sup> By deriving what is referred to as a "societal expectation" requirement from the moral involuntariness principle, the Court has ensured that offenders may not plead the duress or necessity defence if the emotional response is triggered for an unpalatable reason.

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 caused and averted may only be said to be proportionate, as the Court has defined that term, or where the harms are sufficiently abstract to prevent any definitive moral conclusion. In such scenarios, it is difficult to ascribe a justification or excuse rationale to an accused's conduct. As opposed to trying to pigeonhole such an accused's actions into a justification or excuse category, I maintain that the most that can be said is that society understands that the crime was committed under trying circumstances and it therefore views the act as permissible. The moral permissibility principle effectively constitutionalizes the Court's baseline requirements for a successful plea of the duress and necessity defences.

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16. See *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 515, 24 DLR (4th) 536.

17. *R v Ružić*, *supra* note 5 at para 31.

18. *Supra* note 11.

As is evident from this proposed conceptual framework, the degree of proportionality serves to differentiate the respective principles from one another. However, proportionality is not the only consideration in determining whether an accused can successfully plead the duress and/or necessity defences. Both defences also require a threat of some degree of harm, a temporal connection or imminence to that harm, and that no reasonable alternatives exist to avoid the harm.<sup>19</sup> The reason it is necessary to create a more robust constitutional framework for the duress and necessity defences is to better understand the relationship between proportionality and these other requirements. In my view, the degree of proportionality present must directly impact the stringency of these other prerequisites. As such, the degree of proportionality present will often influence whether an accused can successfully plead the duress or necessity defence.

The article unfolds as follows. Part I begins by reviewing the basic elements of the duress and necessity defences. In so doing, the Court's rationale for tying these elements to the moral involuntariness principle will be explained. Part II then provides a more in-depth description of the problems inherent in the Court's current conceptualization of the duress and necessity defences. By reviewing and expanding upon the pertinent criticisms found in the academic literature, this Part will lay the groundwork for Part III, wherein a reconstruction of the principles underlying the duress and necessity defences will be presented. The need to place the duress and necessity defences within a three-principle framework will then be justified by explaining how the relationship between each of the three principles, and the core requirements of the duress and necessity defences, will affect whether an accused may successfully plead the defences. I conclude by arguing that each of the three principles must be elevated to the status of principles of fundamental justice.

## I. The Duress and Necessity Defences

The defences of duress, necessity and self-defence exhaustively address circumstances where the accused is faced with a threat of harm to herself or another person, and must commit what is otherwise considered a criminal act to avoid the harm.<sup>20</sup> 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

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19. See *R v Ruzic*, *supra* note 5 at paras 85, 88, 96, 99.

20. See *R v Hibbert*, *supra* note 3 at 1012.

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.<sup>21</sup> 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.<sup>22</sup>

The excuse-justification distinction underlying each of the defences has also led to a unique emphasis on the respective elements of the defences. The duress and necessity defences derive their applicable elements from the principle of moral involuntariness. This principle—which the Court borrowed from Professor George Fletcher’s foundational work, *Rethinking Criminal Law*—requires that the criminal law not punish those who act without “free choice”.<sup>23</sup> Free choice, however, is not to be understood literally. Instead, it is to be understood as a lack of a “realistic choice”, which the Court in *Perka v R* concluded requires the accused to prove that her circumstances were “so emergent and the peril . . . so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable”.<sup>24</sup>

The Court has distilled a number of core requirements from the moral involuntariness principle. The principle’s focus on volition, for instance, is directly related to the requirement that the accused face a threat of a sufficient degree of harm. If an accused is threatened with a minor level of harm, it will be difficult to conclude that the accused was truly deprived of her will. Relatedly, if the threat is not at least temporally connected to the harm threatened, the accused will have time to consider pursuing alternative courses of action. An accused who does not pursue such an opportunity cannot later say that she had no other choice. Similarly, an accused who has a safe avenue of escape from the harm threatened cannot be said to be acting involuntarily. This follows as a refusal to take a safe avenue of escape represents a choice to remain in the circumstances that gave rise to the defence. This focus on choice also explains two other prerequisites, namely that the accused reasonably believed that the

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21. See Roach, *supra* note 12 at 317.

22. See *R v Hibbert*, *supra* note 3 at 1013.

23. *Perka v R*, *supra* note 1 at 249–50, citing George P Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown & Company, 1978) at 804–05.

24. *Supra* note 1 at 251.

threat would be carried out and that the harm threatened was not foreseeable to the accused.<sup>25</sup>

The Court has also derived one further element from the moral involuntariness principle—proportionality. This element consists of two separate requirements. The first requirement—the utilitarian proportionality requirement—requires that the accused demonstrate that “the harm threatened was equal to or greater than the harm inflicted by the accused”.<sup>26</sup> The second proportionality requirement—the societal expectation of proportionality requirement—asks whether the accused’s conduct is consistent with society’s expectation of how a reasonable person in the position of the accused would be expected to react.<sup>27</sup> The determination of the second requirement turns on whether the accused demonstrated a “normal” resistance to the harm threatened.<sup>28</sup>

The Court in *R v Ryan* recently sought to clarify the link between proportionality and moral involuntariness. Justice Cromwell, writing for the Court, maintained that “an individual cannot claim to have lost the ability to act freely when the harm threatened does not meet society’s threshold”.<sup>29</sup> In support of this view, the Court relies upon Professor Fletcher’s work, where the author concluded: “[I]f the gap between the harm done and the benefit accrued becomes too great, the act is more likely to appear voluntary and therefore inexcusable. . . . Determining this threshold is patently a matter of moral judgment about what we expect people to be able to resist in trying situations.”<sup>30</sup> Although the Court convincingly demonstrates that there is a moral element to the principle of moral involuntariness—an unsurprising result given the term’s use of the adjective “moral”—it is far from clear what the scope of the word “moral” is intended to convey. As will be argued, as moral involuntariness forms the conceptual basis for excuses, it is not sensible to include a utilitarian balancing of harms as a requirement within the defences. By so doing, the Court has unadvisedly permitted the moral involuntariness principle to venture into the realm of justifications.

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25. See *R v Latimer*, 2001 SCC 1 at paras 28–30, [2001] 1 SCR 3; *R v Ryan*, *supra* note 11 at para 55 (these general requirements are found in both the duress and necessity defences).

26. *R v Ryan*, *supra* note 11 at para 73.

27. See *ibid.*

28. See *ibid.*

29. *Ibid* at paras 62, 70.

30. *Ibid* at para 71 [emphasis in original].

## II. Deconstructing the Excuse-Justification Dichotomy

The claim that a proportionality requirement derives from the moral involuntariness principle has been heavily scrutinized in the literature. These critiques, I contend, must lead to the conclusion that the utilitarian proportionality requirement cannot be derived from the moral involuntariness principle. The societal expectation of the proportionality requirement can, however, be rationalized as part of the moral involuntariness principle. Before explaining this position in greater detail, it is necessary to provide a general review of the nature of excuses and justifications in Canadian criminal law.

### *A. Defining Justifications and Excuses*

The basic principles underlying justifications and excuses are obviously broad and open to significant debate among criminal law theorists.<sup>31</sup> For present purposes, however, it is unhelpful to review every possible way to conceptualize the duress and necessity defences. The goal here is much more modest—to test whether it is possible to make sense of the defences within the basic conceptual framework provided by the Court. To reiterate, the Court has concluded that moral involuntariness forms the sole conceptual basis for excusing a criminal act committed under duress or out of necessity. In its view, an individual who pleads such an excuse will deny responsibility for her wrongful conduct and claim that it would be unjust to convict her, as the conduct was morally involuntary.<sup>32</sup>

In considering the conceptual basis for justifications, the starting point is to recall the Court's conclusion in *Perka v R* that a justification-based defence connotes a rightful act. Those acting in a justified manner therefore accept responsibility for their actions but claim that it would be unjust to punish a rightful act.<sup>33</sup> To assess whether an act was rightful in instances where an accused pleads duress or necessity, it is generally agreed that the moral judgment arises

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31. See Kimberley Kessler Ferzan, "Justification and Excuse" in John Deigh & David Dolinko, eds, *Oxford Handbook of Philosophy of Criminal Law* (Oxford: Oxford University Press, 2011) 239 at 243 (for an excellent overview of the distinction).

32. See *Perka v R*, *supra* note 1 at 248–49.

33. See *ibid* at 246.

from a consequentialist balancing of the relevant harms at issue.<sup>34</sup> If the harm avoided by committing a criminal act while under duress or necessity is clearly outweighed by the harm caused, it is thought that the accused's conduct was rightful.<sup>35</sup>

The majority of the Court in *Perka v R* accepted that, from a philosophical standpoint, necessity—and by implication duress<sup>36</sup>—may operate as a justificatory defence based on utilitarian principles.<sup>37</sup> As Dickson CJC wrote in *Perka v R*, in circumstances where an accused pleads a justificatory version of duress or necessity, “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”.<sup>38</sup> Given the Court's institutional rationale for rejecting a justification-based duress and necessity defence, however, it was unnecessary for the Court to elaborate upon how to determine whether one harm outweighs another.<sup>39</sup> To better understand the Court's theoretical framework for the duress and necessity defences, it will prove useful to review the pertinent literature.

### *B. Academic Literature*

The categorization of the duress and necessity defences as solely excuses has drawn severe criticisms from Canadian academics. Theorists have criticized two aspects of the Court's conceptualization of the defences. The first area of criticism arises from the Court's inclusion of a proportionality requirement. The second area challenges whether the moral involuntariness principle provides an appropriate conceptual basis for the duress and necessity defences. These general criticisms are unpacked below.

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34. See Ferzan, *supra* note 31; *Perka v R*, *supra* note 1 at 247 (although in *Perka v R* Wilson J offered a differing justificatory conceptualization—one based on competing legal duties—her opinion is not only contrary to that expressed by the majority, it is also contrary to the generally accepted justificatory rationale for duress and necessity).

35. See *Perka v R*, *supra* note 1 at 246–47.

36. See *R v Hibbert*, *supra* note 3 (recall that the Court concluded that 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” at 1017).

37. *Perka v R*, *supra* note 1 at 246.

38. *Ibid* at 247–48.

39. See *ibid* at 246 (the Court lists a number of acts which would clearly qualify as a justification).

(i) Inconsistency Between the Proportionality Requirement and the Principle of Moral Involuntariness

In adopting the moral involuntariness principle as the theoretical basis for the duress and necessity defences, the Court has concluded that it is necessary for the accused to meet a strict proportionality requirement.<sup>40</sup> As discussed earlier, for an accused's conduct to be considered proportionate, not only must the harms at issue be of comparable gravity, the accused's conduct must also accord with society's expectation of how a reasonable person in the position of the accused should react.<sup>41</sup> Scholars have contended that both elements of the proportionality requirement are inconsistent with the principle of moral involuntariness.<sup>42</sup>

The problem with including a utilitarian proportionality requirement may be illustrated by considering the circumstances of an accused who faces a kill-or-be-killed situation. If the accused kills one person to preserve her life, the harms caused and averted are proportionate. However, if the accused must kill two or more people to ensure self-preservation, the result is disproportionate. Yet, the accused's will is constrained in the same manner, as the accused has no more or less of a realistic choice, as the choice between committing a crime or dying remains. To conclude that the first accused acted in a morally involuntary manner, while the second accused did not, imposes a moral requirement into the defences that is inconsistent with the Court's basic description of moral involuntariness. Moral involuntariness, after all, underlies excuses which by definition concern only wrongful but excusable conduct. A utilitarian balancing of harms forms the conceptual basis for the *justifications* of duress and necessity. As a result, numerous scholars have observed that the Court inserting a utilitarian proportionality requirement has resulted in the defences being treated "in terms more readily analyzable as . . . [a] justification".<sup>43</sup>

An overview of Professor Fletcher's discussion with respect to proportionality and its relationship to moral involuntariness demonstrates that the above criticism has merit.<sup>44</sup> Admittedly, Professor Fletcher did ascribe a

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40. See *R v Ruzic*, *supra* note 5 at para 47.

41. See *R v Ryan*, *supra* note 11 at para 73. See generally *R v Ruzic*, *supra* note 5.

42. See e.g. Coughlan, "Implications of Radical Change", *supra* note 13 at 158; Terry Skolnik, "Three Problems with Duress and Moral Involuntariness" (2016) 63:1&2 *Crim LQ* 124; Sinel, *supra* note 13; Yeo, "Revisiting Necessity", *supra* note 7.

43. Coughlan, "Implications of Radical Change", *supra* note 13 at 158.

44. Fletcher, *supra* note 23 at ch 10.

limited role to proportionality in determining whether an accused was acting in a morally involuntary manner. However, Professor Fletcher only asserted 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”.<sup>45</sup> The Court cited this passage approvingly in *R v Ryan*,<sup>46</sup> and derived therefrom that a utilitarian proportionality requirement flowed directly from the moral involuntariness principle.<sup>47</sup> Given the use of the words “more likely”, however, it would appear that Professor Fletcher was of the view that utilitarian proportionality is, at best, a factor which may be informative in determining whether an accused’s actions were morally involuntary.<sup>48</sup> To illustrate his point, Professor Fletcher provided an example wherein an accused is told to blow up a whole city or suffer a broken finger.<sup>49</sup> Under such circumstances, Professor Fletcher rightly posits that society would expect the accused to endure the harm.<sup>50</sup> Although extreme disproportionality *may* by itself render an act morally voluntary according to Professor Fletcher, it does not follow from this example or the passage quoted above that utilitarian proportionality is *always* to be weighted as a decisive or even a main factor. The kill-or-be-killed hypothetical scenario discussed in the preceding paragraph is illustrative of why this is so.

Terry Skolnik has asserted that a similar problem exists with the Court’s societal expectation aspect of the proportionality requirement. 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.”<sup>51</sup> For Skolnik, giving the societal expectation element of proportionality a decisive role in kill-or-be-killed situations makes the determination of whether an accused had a realistic choice inconsequential.<sup>52</sup> What matters under the Court’s conception of duress and necessity is only “whether the accused acted in a morally involuntary way that

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45. *Ibid* at 804 [emphasis added].

46. *Supra* note 11 at para 71.

47. *Ibid* at paras 71–72.

48. Fletcher, *supra* note 23 at 804.

49. *Ibid*.

50. *Ibid*.

51. Skolnik, *supra* note 42 at 144.

52. *Ibid*.

society would condone; if not, morally involuntary conduct is treated as if it were voluntary”.<sup>53</sup>

Skolnik’s criticism should not, however, lead to the conclusion that the societal expectation aspect of proportionality must be abolished. As Professor Stanley Yeo explains, the adjective “moral” must have some meaning.<sup>54</sup> In his view, the adjective

stipulates that social policy and values form an integral part of [the moral involuntariness] concept. The inquiry raised by ‘moral involuntariness’ is therefore whether, taking into account all relevant social policy considerations, the circumstances that [have an impact] on the defendant’s ability to choose freely a course of action, rendered him or her not criminally responsible.<sup>55</sup>

The challenge raised, then, is how to define the term “societal expectation”

#### (ii) The Challenge of Making Moral Judgments Involving Strong Competing Interests

A second problem with proportionality concerns the difficulty in making a moral judgment where the competing interests are the same. In my view, application of the utilitarian rationale underpinning justificatory versions of the duress and necessity defences will often obstruct coming to any clear moral conclusion. Professor Hamish Stewart made a similar point in the context of discussing the constitutional basis of self-defence. In his article, Professor Stewart relies upon a common hypothetical scenario which sees an accused (who is in a perilous circumstance due to no fault of her own) kill an “innocent attacker” to preserve her life.<sup>56</sup> 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.<sup>57</sup> However, as the accused is in a perilous circumstance due to no fault of her own, he also maintains that a claim of excuse seems too weak.<sup>58</sup> It is difficult to argue that the act is rightful because to do so requires putting the value of one innocent life over another. It is difficult to conclude that the conduct was wrongful for the same reason. As such, the

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53. *Ibid.*

54. Yeo, “Revisiting Necessity”, *supra* note 7 at 20.

55. *Ibid.*

56. Hamish Stewart, “The Constitution and the Right of Self-Defence” (2011) 61:4 UTLJ 899 [Stewart, “Self-Defence”].

57. *Ibid* at 916–17.

58. *Ibid.*

concepts of justification and excuse appear ill-equipped to provide a definitive moral judgment.<sup>59</sup>

Although Professor Stewart discussed his example in the context of self-defence, this reasoning is arguably better suited to 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 her own and is told to kill an innocent victim or be killed herself. Justice Doherty, writing for the Court of Appeal for Ontario in *R v Aravena*, recently provided a rare analysis of this type of factual scenario, concluding that

[a] *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.<sup>60</sup>

As with the hypothetical scenario offered by Professor Stewart, Doherty JA appears to agree 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.<sup>61</sup> Yet, the current conceptualization of the duress defence would do just that by dictating that the accused acted wrongfully, thereby permitting the accused to only plead an excuse. For the reasons offered by Professor Stewart and Doherty JA, it is not at all clear that the accused acted wrongfully or rightfully in such circumstances.

### (iii) Proportionality Distorts the Moral Involuntariness Principle of Fundamental Justice

The final problem with a utilitarian proportionality requirement is that it clouds one's understanding of the exact principle which was elevated to the status of a principle of fundamental justice under section 7 of the *Charter*. As discussed earlier, the Court purported, in *R v Ruzic*, to elevate Professor Fletcher's moral involuntariness principle to the status of a principle of fundamental justice. If this were true, however, Professor Stephen Coughlan has

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59. See *ibid.*

60. 2015 ONCA 250 at paras 83–84, 323 CCC (3d) 54. See also *R v Willis*, 2015 MBQB 114, 318 Man R (2d) 209 (where Joyal CJA recently considered a similar scenario). These two decisions are among a handful considering the constitutionality of committing murder under duress or necessity.

61. See *R v Aravena*, *supra* note 60 at para 65.

persuasively argued that any of the utilitarian proportionality elements of the defences of duress, necessity and self-defence (where the defending act meets the Court's definition of moral involuntariness) are imposed in violation of the moral involuntariness principle.<sup>62</sup> His point is a powerful one. If Professor Fletcher's moral involuntariness principle is a principle of fundamental justice under section 7 of the *Charter*, it is unclear how any utilitarian proportionality requirement came to be justified.

Professor Coughlan's critique leads to two possibilities: (a) the Court imposed a utilitarian proportionality requirement as a section 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 section 1 of the *Charter*. Given that the Court has concluded that section 7 may only be limited in circumstances such as "natural disasters, the outbreak of war, epidemics, and the like",<sup>63</sup> it is unlikely that the Court imposed a proportionality requirement under section 1 of the *Charter*. Moreover, had this been the Court's intent, one would expect the Court to have been explicit on this point. 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 utilitarian proportionality requirement was adopted. As such, it is not sensible to refer to the principle adopted in *R v 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".

#### (iv) The Problem of Unclean Hands

In *Perka v R*, Dickson CJC 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.<sup>64</sup> As Dickson CJC wrote in *Perka v R*, "[a]t most the illegality . . . of the preceding conduct will colour the subsequent conduct in response to the emergency as also wrongful."<sup>65</sup> 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

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62. Coughlan, "Implications of Radical Change", *supra* note 13 at 199.

63. *Re BC Motor Vehicle Act*, *supra* note 16 at 518.

64. *Supra* note 1 at 254.

65. *Ibid* at 254–55.

and require that the accused truly faced 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 v R* exemplify this point. The accused were importing marijuana into the United States via cargo ship. The accused's ship was damaged as a result of a storm, and, to avoid drowning, the accused and their crew were forced to dock at 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 were participating in criminal activity at the time the necessitous circumstances arose was irrelevant to determining whether the accused's act of bringing drugs onto Canadian shores was morally involuntary.<sup>66</sup>

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, Dickson CJC's reasons in *Perka v R* dictate that such a consideration will generally only be able to "colour" the moral standing of the accused. This is not to say, however, that an accused having joined a criminal association will go unpunished. Instead, the Court in *Perka v R* concluded only that the conduct committed as a result of the necessitous circumstance may still qualify as being morally involuntary.

#### (v) Lifting the "Veil of Voluntarism"

Professor Benjamin Berger provides a final critique of the Court's conception of duress and necessity, observing that by placing moral involuntariness as the standard for assessing the defences, the Court is only required to ask whether an accused's will was overborne by emotion.<sup>67</sup> In conducting the analysis in this manner, the Court has hidden the values underlying such judgments "behind the veil of the voluntarist account".<sup>68</sup> 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.<sup>69</sup> For Professor Berger, the danger with such an approach is that it permits morally suspect social norms to form the

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66. See *ibid* at 255–56.

67. Berger, "Voluntarism", *supra* note 14 at 103, 109.

68. *Ibid* at 111.

69. See *ibid* at 103.

basis of a criminal defence.<sup>70</sup> To correct this problem, he asserts 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.<sup>71</sup> By focusing on whether the accused's act is blameworthy, the values behind the emotional response would become central to the analysis.<sup>72</sup>

Relatedly, Professor Berger critiques the moral involuntariness principle for failing to explain a number of the legal requirements for duress and necessity outlined above. For instance, he contends that the use of an objective indicator to measure the factors relevant to the duress and necessity defences belies the voluntarist account as such an approach focuses not on the effect of the emotion on the accused's will, but rather on the effect that the emotion *should* have had on an accused similarly situated.<sup>73</sup> As Professor Berger observes, some moral foundation drives these criteria.<sup>74</sup> The notion of "realistic choice", as developed by the Court, is therefore deeply involved with making value judgments about appropriate behaviour for individuals in perilous circumstances.<sup>75</sup> As the duress defence is about more than the magnitude of the emotions one feels, but also the quality and legitimacy of those emotions, including such criteria is good.<sup>76</sup> The problem, Professor Berger suggests, is that the voluntarist account cannot reasonably embrace such requirements.

Although I agree with Professor Berger that it is unprincipled to ignore the value of the emotions underlying an accused's conduct, the societal expectation aspect derived from the moral involuntariness principle can serve a function which addresses his concerns. As discussed earlier, the adjective "moral" must be given some meaning. At the same time, however, the term must operate within the broader purposes of excuse-based defences, namely, to excuse wrongful conduct. Interpreting the term "moral" as a screening device for emotional responses deemed wrongful by society does not, however, intrude on the proper function of the moral involuntariness principle. Instead, it dictates that the emotion underlying the accused's conduct is unacceptable from a societal

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70. *Ibid* at 111.

71. *Ibid* at 119.

72. See *ibid*.

73. *Ibid* at 108.

74. *Ibid* at 109.

75. See *ibid*.

76. See *ibid* at 110.

perspective which, in turn, prevents an accused from successfully pleading the duress and necessity defences.

Turning to Professor Berger's suggestion that moral blamelessness could serve as the sole conceptual basis for the duress and necessity defences, I must again respectfully disagree. To begin, this argument was explicitly rejected by the Court in *R v 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 LeBel J's view, morally involuntary conduct is "not *always* intrinsically free of blame".<sup>77</sup> As a result, moral involuntariness cannot be equated with moral blamelessness.<sup>78</sup>

In support of this conclusion, LeBel J invoked the oft-cited example of the lost alpinist.<sup>79</sup> Although LeBel J is not explicit about this point, it is important that attention be placed on the word "lost". In assessing the merits of LeBel J's conclusion, it is necessary to consider why the alpinist is lost. Did she wander off due to self-induced impairment? Did she lose her map due to carelessness? Has she severely overestimated her abilities as a cartographer? Under these scenarios, can she be said to be *entirely* free of blame for her circumstances? If not, it is reasonable to conclude that she is not *entirely* free of blame when she breaks into a cabin to preserve herself. In my view, this is a reasonable way of explaining LeBel J's conclusion in *R v Ruzic* that "conduct that is morally involuntary is *not always intrinsically* free of blame".<sup>80</sup>

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.<sup>81</sup> 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 be reasonable to conclude that the conduct was not only blameless (the survivors cannot be faulted for being in their perilous circumstances), but that it was rightful (life clearly outweighs property).

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77. *R v Ruzic*, *supra* note 5 at para 39 [emphasis added].

78. See *ibid* at paras 33–41.

79. See *ibid* at para 40.

80. *Ibid* at para 39 [emphasis added].

81. Piers Paul Read, *Alive* (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).

Although LeBel J's conclusion that not all morally involuntary acts are morally blameless is reasonable,<sup>82</sup> it should be highlighted that LeBel J later confusingly asserts in *R v Ruzic* that defending acts could *never* be considered blameless.<sup>83</sup> In so concluding, LeBel J 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 *R v Ruzic*.<sup>84</sup> 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".<sup>85</sup> As Professor Coughlan observes, it would be paradoxical to conclude that defending acts considered rightful are also somehow morally blameworthy.<sup>86</sup> For similar reasons, Professor Berger has "reject[ed] the Court's contention in *R v Ruzic* that moral blameworthiness is established when the constituent elements of the offence are proven".<sup>87</sup> 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 morally blameless.

### C. Summary

It is prudent at this juncture to summarize the main conclusions arrived at in this section. The following may be deduced from the above discussion: (a) imposing a utilitarian proportionality requirement on the moral involuntariness principle fundamentally alters the nature of the constitutionalized principle; (b) as a result, the Court's current legal test for duress and necessity is better captured by a principle which requires such 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 come to definitive moral conclusions where the harms caused and averted are truly proportionate.

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82. See *R v Ruzic*, *supra* note 5 at para 39.

83. *Ibid* at para 41.

84. *Ibid*.

85. See Coughlan, "Implications of Radical Change", *supra* note 13 at 188.

86. *Ibid*.

87. Berger, "Voluntarism", *supra* note 14 at 118.

From the above conclusions, I will argue that moral involuntariness must be preserved as the rationale for excuses, albeit in a somewhat restricted manner. I further maintain that justification-based versions of the duress and necessity defences must also be recognized if the law is to properly 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 often be reasonably contested. In my view, all that can be said in such scenarios is that the accused's act was morally permissible. These principles, I maintain, must affect the availability of the duress and necessity defences.

### III. (Re-)Constitutionalizing Duress and Necessity

With the above overview of the literature in place, I am now in a position to expand upon the three principles which I have claimed are relevant to the duress and necessity defences: moral involuntariness, moral permissibility and moral innocence. After refining the role of each principle with respect to the duress and necessity defences, I will outline the argument supporting my claim that each principle must be elevated to the status of a principle of fundamental justice under section 7 of the *Charter*.

#### *A. Refining the Principles*

As should be clear from the above discussion, any reconstruction of moral involuntariness must begin by removing the utilitarian aspect of the proportionality 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 the harm caused is equal to or less than the harm averted, the principle at issue is fundamentally altered. As I will explain when discussing the moral permissibility and moral innocence principles, the existence of proportionality alters the moral considerations applicable to an accused's act, which in turn affects the legal requirements for pleading the duress and necessity defences.

Second, to address the concerns raised by Skolnik, it is necessary to clarify the role of the societal expectation aspect of the moral involuntariness principle.

Although it should be recognized that this requirement flows directly from the moral involuntariness principle, a difficult question remains: how does one determine whether society would approve of excusing an accused's otherwise criminal conduct? In my view, the most appropriate avenue of inquiry is to consider the circumstances under which society deems it appropriate to restrict the application of the criminal law. As Dickson CJC concluded in *Perka v R*, the notion that it is arbitrary to punish an accused who acts without free will carries considerable weight in Anglo-American legal thinking.<sup>88</sup> The question, then, is whether in any given case the application of the criminal law would be arbitrary. This would require asking if any of the readily accepted purposes of criminal law, such as denunciation and deterrence, would be furthered by applying the criminal law to an offender who claims to have acted in a morally involuntary manner.

This interpretation of the term “moral” is also capable of addressing Professor Berger's critique of the moral involuntariness principle. The following example is illustrative. An accused is told by X that she must either make homosexual advances on Y or must kill Y. If she fails to do either, X will kill the accused. If the accused's will was overborne as a result of “homosexual panic”,<sup>89</sup> the question arises—would society excuse the accused's murder of Y? I think not. Even if the accused's emotional response resulted in her 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 basic Canadian values, permitting the accused to be convicted for murder is not arbitrary; instead, it denounces the accused's underlying reasons for succumbing to the pressure and seeks to deter others from fostering such values.

Finally, it is necessary to ensure that application of the moral involuntariness principle applies only to wrongful conduct. To illustrate why this is necessary, consider the classic self-defence case involving an attacker attempting to take an accused's life. In this scenario, the accused's act of killing the attacker

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88. *Supra* note 1 at 250. In support of this view, Dickson CJC cites Hobbes, Kant and Fletcher. *Ibid* at 241, 250. Justice Wilson also cites Kant's work in support of this view. *Ibid* at 272.

89. See Berger, “Voluntarism”, *supra* note 14 at 112–13 (for a similar example relying on the factual background in *R v Fraser* (1980), 26 AR 33, 15 Alta LR (2d) 25 (CA)). Although *R v Fraser* is a provocation case, Professor Berger correctly notes that loss of will is the underlying basis for both a provocation defence and moral involuntariness. If moral involuntariness only concerns 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. Berger, “Voluntarism”, *supra* note 14 at 112, n 47.

to preserve her life would be justified under self-defence. 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.<sup>90</sup> If moral involuntariness is not explicitly restricted to wrongful acts, the principle clearly ventures into the conceptual space of justifications. This result is contrary to the Court's basic description of the moral involuntariness principle.

This inconsistency is made more explicit when the other lawful option of the accused from the preceding hypothetical scenario is taken into consideration. Imagine that the accused has now become a pacifist, and therefore chose not to use violence and died as a result. I again see no reason to conclude that the person did not also act *rightfully*.<sup>91</sup> As such, the accused is not choosing between right and wrong. The accused chooses among available rightful actions. Applying the moral involuntariness principle to her scenario therefore becomes even more perplexing. The term "morally involuntary" implies that an accused technically had a choice to act in a morally correct manner, but due to extreme pressure it was unrealistic to expect the accused to do anything other than commit a wrongful act. If there was no choice between right and wrong, it is not sensible to speak of moral involuntariness.

A similar rationale applies in the context of the principle I have labelled "moral permissibility". As discussed earlier, this principle seeks to constitutionalize the Court's baseline requirements for the duress and necessity defences. As should by now be clear, the duress and necessity defences developed by the Court have two general requirements: (a) moral involuntariness, and (b) utilitarian proportionality. If it is reasonable to conclude that an accused who meets these basic requirements of the Court's current conception of the duress and necessity defences cannot have their conduct be clearly labelled as wrongful or rightful, it is difficult to view such an accused's choice to commit the criminal act as a clear choice to commit a moral wrong. For the reasons expressed above, if there is no clear choice between right and wrong, it is not sensible to speak of moral involuntariness.

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90. Coughlan, "Implications of Radical Change", *supra* note 13 at 198–99.

91. See Michael Plaxton, "John Gardner's Transatlantic Shadow" (2013) 39:1 Queen's LJ 329. Plaxton has observed that "the criminal law does not care whether an attacked person uses force against another in self-defence. The attacked party *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." *Ibid* at 332 [emphasis in original].

By drawing a distinction between moral permissibility and moral involuntariness, it is also possible to explain the Court's pull towards including a utilitarian-based proportionality requirement in the duress and necessity defences. Although such a requirement has no place within the moral involuntariness principle, it may be used to relax the strict requirements derived from this principle. The Court illustrated precisely this point in *R v Ryan*. Writing for the Court, Cromwell J recognized that as opposed to imposing a proportionality requirement, courts have traditionally required that the type of bodily harm to trigger duress be "serious" or "grievous".<sup>92</sup> As proportionality has been imposed as an additional requirement by the Court, Cromwell J determined that requiring a high threshold level of harm was unnecessary.<sup>93</sup> 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",<sup>94</sup> was required to satisfy the harm requirement of the duress defence.

Although Cromwell J'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 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.<sup>95</sup> If the Court's broadening of the availability of the defence in *R v 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.

The utilitarian proportionality requirement shifts the focus of the Court's conception of duress and necessity. By significantly relaxing the involuntariness aspect of the defence, it is only reasonable for the Court to require that an accused provide some other reason for restricting application of the criminal law. The utilitarian proportionality requirement provides such a reason. As discussed earlier, if an accused can demonstrate that she caused no more harm than she averted, it will often be difficult to conclude that the accused acted wrongfully. If the other requirements of the duress defence are met—the accused was threatened with some bodily harm; the threat and harm threatened were temporally connected; the accused reasonably believed that the threat would be carried out; no safe avenue of escape from that harm

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92. *R v Ryan*, *supra* note 11 at para 59.

93. *Ibid.*

94. *Ibid* at paras 59–60.

95. *Ibid* at para 61 (the Court recognized this problem).

was present; the harm threatened was not foreseeable to the accused; and, the harm caused met societal expectations<sup>96</sup>—it is sensible to grant the accused a defence. Importantly, however, the defence is not granted because the conduct was right or wrong. It is granted because society views the act as permissible in the circumstances and is willing to withhold application of the criminal law.

A further reason to adopt the moral permissibility principle is related to Professor Stewart and Doherty J's conclusion that it is difficult to categorize truly proportionate conduct as wrongful.<sup>97</sup> In the hypothetical scenarios these authors rely on, the competing interests are known. However, in many cases of duress and necessity, the competing interests are not truly known. If the competing interests are sufficiently vague, it will be difficult for the trier of fact to come to a definitive moral conclusion. The factual foundation in the Court's decision in *R v Ruzic* is illustrative of this problem.

Marijana 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, her mother would be harmed or killed. The threat appeared to be that the accused's mother would be "harmed", but given that the threatening party was employed as an assassin, one might speculate that the harm threatened could include death. The accused had every reason to believe that the 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 illegally importing narcotics, among other less serious offences.<sup>98</sup>

The competing interests in *R v 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 and that she had no realistic choice other than to commit the offence. However, in weighing the competing harms at issue, there is significant room to debate

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96. See *R v Ruzic*, *supra* note 5 at paras 49, 85, 87–88, 96, 99; *R v Ryan*, *supra* note 11 at para 55.

97. See Stewart, "Self-Defence", *supra* note 56; *R v Aravena*, *supra* note 60.

98. See *R v Ruzic*, *supra* note 5 at paras 2–7.

whether the accused's actions were rightful or wrongful. The very nature of the harm caused by drug trafficking 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. Ms. Ruzic's participation in trafficking was, after all, relatively negligible. When this harm is weighed against the vague nature of the harm threatened against Ms. Ruzic's mother, it is difficult to come to a certain moral conclusion.

The scenario in *R v Ruzic* may be usefully contrasted with one of the justificatory scenarios cited approvingly in *Perka v R*. Therein, Dickson CJC devised a hypothetical scenario involving an accused who commandeers a vehicle to drive a dying patient to the hospital.<sup>99</sup> In this scenario, the competing interests are relatively clear—life versus property. There can be no doubt that life is the paramount interest. Although such a conclusion seems intuitive, one might rely on the fact that property is not a constitutionally protected interest, while life is among the constitutional principles afforded the most protection.<sup>100</sup> In *R v Ruzic*, such a clear division of interests is not possible. As a result, the moral judgment is not at all self-evident.

Turning to the moral innocence principle, I have suggested that an accused who commits a justified or rightful act is morally innocent. This follows because an accused who acts rightfully cannot simultaneously be blamed for their conduct. Instead, such an accused is deserving of praise.<sup>101</sup> A blameless and praiseworthy actor is morally innocent if anyone is. Making such a determination in the context of the duress and necessity defences turns largely on weighing the proportionality between the harms caused and averted. If the harm averted is clearly greater than the harm caused, the accused's conduct should be assessed based on justificatory principles. So long as the accused's actions are otherwise "reasonable in the circumstances", it is philosophically more consistent to conclude that the accused was justified.

This proposed framework for justification-based duress and necessity defences must drastically alter the applicable prerequisites of the current duress and necessity defences. As a result of the heightened proportionality requirement, the other requirements applicable to the defence must be replaced by a contextual analysis of whether the accused's act was reasonable in the circumstances. The rationale for this conclusion reveals itself when

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99. See *Perka v R*, *supra* note 1 at 246.

100. See *Charter*, *supra* note 6, s 7.

101. See *Perka v R*, *supra* note 1 at 276.

comparing the justificatory version of duress and necessity to the only other recognized justificatory defence—self-defence. As a basic review of the justification of self-defence illustrates, the defence does not require nearly as stringent a restriction of choice as the defences of duress and necessity. Instead, if an accused believes on reasonable grounds that force or a threat of force is being used against her or another person, the accused may repel that force so long as the force used is reasonable in the circumstances.<sup>102</sup> As such, the accused's reaction to the perceived harm need not be the only imaginable response.<sup>103</sup> Factors such as the degree of harm threatened, the imminence of the threat, potential avenues of escape and the person's role in the incident are only required to be balanced against one another in determining whether the accused's response was reasonable.<sup>104</sup>

This relaxed standard is a direct result of the moral distinction between justifications and excuses. As the Court explained in *R v Ryan*, “[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.”<sup>105</sup> The justification-based defences of duress and necessity proposed here would simply seek to apply this rationale to the law of duress and necessity. Applying a contextual approach to the justifications of duress and necessity would surely make the defences more readily available. This follows as the degree of harm threatened, whether the threat was temporally connected to the harm threatened, and the potential avenues of escape would no longer be strict requirements; instead, these considerations would be factors in determining the reasonableness of the accused's choice to break the law.

Using these three distinct principles as the basis for the duress and necessity defences resolves a number of the criticisms identified above. First, this conceptual framework addresses Professor Coughlan's concern that elevating moral involuntariness to a principle of fundamental justice renders unconstitutional all of the utilitarian proportionality requirements found in the defences of duress, necessity and self-defence. The meaning given to the terms “moral” and “involuntariness” prevent such a result. As discussed earlier, the term “moral” requires that the values underlying the accused's

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102. See *Criminal Code*, RSC 1985, c C-46, s 34(1).

103. See Steve Coughlan, “The Rise and Fall of Duress: How Duress Changed Necessity Before Being Excluded by Self-Defence” (2013) 39:1 *Queen's LJ* 83 at 89.

104. See *Criminal Code*, *supra* note 102, s 34(2).

105. *Supra* note 11 at para 26. See also Roach, *supra* note 12 at 320, 355–56 (for an explanation as to why justifications permit broader defences than excuses).

emotional response be pointless to sanction. The term “involuntariness” requires that the accused not have had a realistic choice but to commit the criminal act. I find it difficult, if not impossible, to imagine a scenario in which it is pointless to sanction a wrongful yet involuntary 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, by drawing a distinction between moral permissibility, moral involuntariness and moral innocence, it is possible to rationalize the Court’s inclusion of a utilitarian proportionality requirement within the duress and necessity defences. Although utilitarian proportionality is not required to prove that an act was morally involuntary, it serves an important function in both the moral permissibility and moral innocence conceptions of the defences. With respect to moral permissibility, proportionality is used as a way of justifying the relaxed degree of harm required to engage the defences. As for the moral innocence principle, proportionality is the driving factor behind the conclusion that an accused’s act may be justified.

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 criminal law.

### *B. Deriving Legal Requirements from the Principles*

As I have suggested above, a number of the core considerations relevant to the duress and necessity defences must be modified in response to changes in the moral foundations of an accused’s act. Three key conclusions were drawn: (a) utilitarian proportionality cannot be a requirement derived from the moral

involuntariness principle; (b) the imposition of a utilitarian proportionality requirement in the duress and necessity defences resulted in a lower degree of harm being required to engage the duress and necessity defences; and, (c) where an accused proves that the harm averted was clearly greater than that caused, the traditional requirements applicable to the duress and necessity defences must be relaxed. In light of these conclusions, it is prudent to summarize the basic requirements implicit in each principle:

- Morally Involuntary (Excused): (a) the accused's conduct was wrongful, which may be proven by showing (i) the harm caused was clearly disproportionate to the harm averted, or (ii) the accused's conduct was coloured wrongful; and (b) the accused's conduct was morally involuntary as I have defined that term.
- Morally Permissible: the accused's conduct meets the baseline requirements of the duress and necessity defences as described by the Court.
- Morally Innocent (Justified): (a) the harm caused was clearly outweighed by the harm averted; and (b) the accused's actions were reasonable in the circumstances.

If these requirements were to be accepted as forming the basis of the duress and necessity defences, the defences would be able to develop in a manner which is commensurate to the moral qualities of an accused's act. In an effort to solidify the standing of these three principles, the remainder of this article will contend that each principle must be elevated to the status of principle of fundamental justice.

### *C. 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.”<sup>106</sup> Before assessing whether the three principles described above are principles of fundamental

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106. *Supra* note 6, s 7.

justice, it is necessary to first review the Court's jurisprudence interpreting this term.

(i) Defining the Principles of Fundamental Justice

The Court has affirmed that the principles of fundamental justice “are to be found in the basic tenets of our legal system”.<sup>107</sup> Although the principles of fundamental justice are exemplified by the legal rights found in sections 7 to 14 of the *Charter*, these principles may also be found in “presumptions of the common law [as well as] . . . international conventions on human rights”.<sup>108</sup> The unifying theme behind the principles of fundamental justice concerns their integral relationship to the proper function of law in a well-governed society.<sup>109</sup> 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 the . . . *Charter*)”.<sup>110</sup> As a result, the principles of fundamental justice need not be restricted to concerns related to procedural fairness and may also include substantive legal principles.<sup>111</sup>

Distilling the above considerations, the Court has concluded that for a principle to be one of fundamental justice, it must be able to fulfill three criteria: it must be (a) a legal principle; (b) upon which there is some consensus that the principle is “vital or fundamental to our societal notion of justice”; and, (c) which is sufficiently precise to be applied in a manner which yields predictable results.<sup>112</sup>

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.<sup>113</sup> The requirement that the principles be sufficiently precise ensures that “vague generalizations about what our society considers to be ethical or moral” do

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107. *R v Ruzic*, *supra* note 5 at para 28, citing *Re BC Motor Vehicle Act*, *supra* note 16 at 503, 512.

108. *Re BC Motor Vehicle Act*, *supra* note 16 at 503, 512.

109. See *ibid* at 512.

110. *Ibid* at 503.

111. See *ibid* at 509.

112. See *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 at para 113, [2003] 3 SCR 571 [*Malmo-Levine*].

113. See *ibid* at paras 112–13.

not become the basis for striking down otherwise validly enacted laws.<sup>114</sup> By so requiring, the principle provides meaningful guidance to legislatures, courts and the public when assessing the permissible scope of the laws 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”.<sup>115</sup> 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.”<sup>116</sup> 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 plays in a legal order that is committed to the values expressed in the *Charter*.”<sup>117</sup> As the Court concluded in *Re BC Motor Vehicle Act*, those principles are respect for human dignity and the rule of law.<sup>118</sup> If a principle is integrally connected to these broader purposes, sufficient societal consensus will exist to conclude it is a principle of fundamental justice.<sup>119</sup>

(ii) Moral Involuntariness

Although moral involuntariness was clearly accepted as a legal principle in *R v Ružić*, it may be contended that the principle as defined by the Court is insufficiently precise. As Professor Yeo has observed, 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 broadly considers the circumstances of the accused and their capacity to avoid committing the criminal act.<sup>120</sup> Whatever merit such a

114. *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 591, 107 DLR (4th) 342.

115. *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 8, [2004] 1 SCR 76.

116. *Ibid*.

117. Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 109.

118. See *ibid* at 108.

119. See *ibid* at 108–09.

120. See Stanley Yeo, “Challenging Moral Involuntariness as a Principle of Fundamental Justice” (2002) 28:1 Queen’s LJ 335 at 345 (for an overview of this criticism).

contention might have, it is my view that I have made the principle *more* precise than its current form. 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, not justified. Moreover, by requiring the accused to prove that none of the legitimate objects of criminal law may be furthered, the moral involuntariness principle is, in a way, wedded to an already accepted principle of fundamental justice: laws must not operate in an arbitrary manner.<sup>121</sup> As such, courts applying the moral involuntariness principle as developed in this article will be able to use a more exacting analytical framework.

The societal consensus requirement is also easily met. In *R v Ruqzic*, the Court concluded that moral involuntariness, as with its sister principle physical involuntariness, arises from the critical importance of autonomy in determining criminal liability.<sup>122</sup> Autonomy is rightly described by the Court as a “fundamental organizing principle of our criminal law”.<sup>123</sup> As Lebel J wrote in *R v Ruqzic*, 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”.<sup>124</sup> 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 here, is readily categorized as a principle of fundamental justice.

### (iii) Moral Permissibility

As discussed above, the moral permissibility principle seeks to constitutionalize duress and necessity in the manner in which these defences have been developed under Canadian law. 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. The Court's jurisprudence has gone to great lengths to ensure that both the duress and necessity tests are informed by proportionality and an absence of realistic choice. With the Court's decisions in *Perka v R*, *R v Latimer* and *R v Hibbert*, the Court used section 8(3) of the *Criminal*

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121. See most recently *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 83–84, [2015] 1 SCR 331.

122. *Supra* note 5 at para 45.

123. *Ibid.*

124. *Ibid.*

*Code* to preserve the necessity and duress defences in this form. Moreover, in *R v Ruzic*, the Court utilized the *Charter* to reconstruct a profoundly different statutory duress defence in accordance with the above requirements. Not only did the Court strike down the requirements that the harm be imminent and that the threatening party be present—replacing these factors with the temporality and reasonable avenue of escape criteria—the Court also added a proportionality requirement to the statutory defence. In addition, the Court modified the statutorily provided subjective standard applicable to assessing the various factors relevant to the duress defence.<sup>125</sup> The Court’s jurisprudence is therefore a testament to the importance of the current requirements to the Court’s conception of 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 jurisprudence. The lack of recognition of the moral permissibility principle, I suggest, arises from the Court not having had the opportunity to adequately parse the moral distinctions inherent in the duress and necessity defences. The moral permissibility principle therefore provides a means to constitutionalize the elements of the duress and necessity defences which the Court clearly views as playing a significant role with respect to these defences.

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. In my view, the effect of limiting the analysis in the manner proposed in this article 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; and, (c) applied to any degree of harm (in the case of necessity) or bodily harm (duress). For reasons explained above, these requirements are not sensibly included as requirements when considering whether an act is morally voluntary. 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 narrow conceptual space in relation to moral involuntariness and, as discussed below, in relation to justified acts committed under duress or necessity.

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125. See generally *ibid* (the Court instead assesses the accused’s conduct from the vantage point of the reasonable offender similarly situated).

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 an accused's actions, which meet the baseline requirements of the duress and necessity defences, 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 can actually agree to grant the accused's defence.

(iv) Moral Innocence

Concerning the principle that an accused must not be convicted for rightful conduct, 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 *Re 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”.<sup>126</sup> It is therefore tied to the inherent value of the individual which the Constitution is designed to protect. Given the fundamental role that the moral innocence principle plays in the criminal law, it is my view that there would be sufficient consensus that individuals acting in what I have defined as a rightful manner ought not to be subjected to criminal sanction.

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<sup>127</sup>—the principle is not too vague to be intelligible to the courts and public. Even if there were concerns surrounding the idea of weighing competing harms, these concerns may be assuaged. Developments in the German criminal law are particularly germane.<sup>128</sup> Pursuant to section 34 of the German Penal Code (*Strafgesetzbuch*), German case law has seen a justificatory rationale applied not only where destruction of property is committed to protect higher interests, such as life, but has

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126. *Supra* note 16 at 503 [citation omitted].

127. See especially *Marmo-Levine*, *supra* note 112 (in which the gross disproportionality principle received its status as a principle of fundamental justice).

128. Pun intended.

also been used in limited circumstances as a defence to inflicting harm on persons.<sup>129</sup> 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, *inter alia*, the following:

- abstract value of the respective interests (the right to life and physical integrity, for example, is—generally speaking—more important than property rights);
- intensity of the danger and the degree of harm caused or threatened to the respective interests;
- individual meaning of the respective interests to the persons concerned;
- chances of saving the respective interest;
- causation of/voluntary exposure to the danger by the actor or victim; and
- special duties to take on dangers inherent in the actor's profession (e.g., soldiers, firemen).<sup>130</sup>

As is readily apparent from this list of considerations, weighing the relevant interests is a highly fact-specific determination which is somewhat abstract.<sup>131</sup> Nevertheless, such a framework has been applied successfully in the German context.<sup>132</sup> 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 innocence principle advocated for permits an "undue subjectivity" to infiltrate the law which, if true, could readily undercut all three requirements relevant to determining if the principle is one of fundamental justice. Indeed, this was one of the reasons Dickson CJC cautioned against adopting a justificatory framework for necessity in *Perka v R*.<sup>133</sup> However, as Professor Yeo has responded, it is for the courts, not the individual accused, to decide which values may outweigh others.<sup>134</sup> 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

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129. See Kai Ambos & Stefanie Bock, "Germany" in Alan Reed et al, eds, *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Farnham, UK: Ashgate, 2014) 227 at 233–34 (for instance, an accused inflicting bodily harm on a person to prevent them from driving impaired was found to be justified).

130. *Ibid* at 234 [footnote omitted].

131. See *ibid*.

132. See *ibid*.

133. *Supra* note 1 at 248.

134. Yeo, "Revisiting Necessity", *supra* note 7.

general application of the law. Moreover, the framework advocated for here would only permit justificatory defences 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 limited scope carved out for the duress and necessity defences to operate within the moral innocence principle, it is my view that the courts should not hesitate to expand the duress and necessity defences to include justificatory versions of each.

## Conclusion

Since the Court's decision in *Perka v R*, critics have argued that the conceptual basis for the duress and necessity defences is unduly narrow. Not only has the Court restricted the juristic basis of the defences to the realm of excuses, it has also developed the defences with criteria normally applicable to justification-based versions of the defences, namely, proportionality. Since *R v Ruzic*, however, the door has been open to challenge this limited conceptual basis for the duress and necessity defences. As outlined in the introduction, if an accused has a constitutional right not to be convicted for even limited wrongful conduct, it would be paradoxical if a rightful act did not also receive constitutional protection. To conclude otherwise is tantamount to permitting the morally innocent to be convicted. By tying the justificatory versions of the duress and necessity defences to the principle of fundamental justice that the morally innocent not be convicted, the constitutional basis for the defences of duress and necessity is therefore significantly improved.

Although critics have maintained that the moral involuntariness principle should not form any part of the constitutional basis for the duress and necessity defences, I have endeavoured to show how the principle may serve an important, albeit more restricted, role. By restricting the moral involuntariness principle's function to that of excusing truly wrongful conduct, the principle is able to provide the basis for a defence where the purposes of criminal law are not furthered by convicting an accused for wrongful conduct. This interpretation not only provides the moral involuntariness principle with a clearly defined role, it also ensures that the effect of constitutionalizing the principle does not have the undesirable spillover effects identified by Professor Coughlan.

The moral involuntariness and moral innocence principles are, however, incapable of providing the constitutional basis for the duress and necessity

defences. The Court is willing to allow an accused to plead duress and necessity in circumstances where the harm averted clearly does not deprive an accused of her will, suggesting that moral involuntariness cannot be the only principle underlying the duress and necessity defences. Moreover, readily definable scenarios may prevent courts from coming to the distinct moral conclusions underlying both excuses and justifications. As a result, a more restricted moral principle is needed to rationalize the basic requirements of the duress and necessity defences as developed by the Court. The moral permissibility principle serves precisely this purpose.

As a result of abandoning the current conceptualization of the duress and necessity defences, and instead focusing on whether an accused's act falls into the more readily definable categories of moral involuntariness, moral permissibility and moral innocence, a significantly greater degree of coherence can be brought to the duress and necessity defences. More importantly, the conceptual framework offered in this article makes it possible to ensure that the legal requirements which are imposed on an accused are connected to the moral qualities of the accused's act. By so doing, accused persons are not at risk of being unjustly convicted. If these three principles were to receive constitutional status, the duress and necessity defences would stand on much firmer ground.