

Self-Defence and the Constitution

Colton Fehr*

The new self-defence provisions enacted through the Citizen's Arrest and Self-Defence Act were meant to simplify the prior statutory scheme, which was frequently criticized for being unduly complex and internally inconsistent. Instead of imposing clearly defined requirements, the new provisions have adopted a non-exhaustive list of factors that courts must consider in determining whether the accused's defensive act was reasonable in the circumstances. This approach provides courts with woefully inadequate guidance. To aid courts in interpreting the new self-defence provisions, the author maintains that it will be necessary to parse the nuanced moral distinctions inherent in the law of self-defence. By constitutionalizing self-defence along a continuum of principles—moral involuntariness, moral permissibility and moral innocence—the factors relevant to self-defence can be applied in a manner which is commensurate with the moral qualities of the accused's act.

* BA (Saskatchewan), JD (Saskatchewan), LLM (Toronto), PhD candidate (Alberta).

Introduction

I. The New Self-Defence Provisions

II. Theories of Self-Defence

- A. *Utilitarian*
- B. *Autonomy*
- C. *The Self-Defence Provisions*

III. The Moral Basis for Criminal Defences

- A. *Justification*
- B. *Excuse*
- C. *Moral Permissibility*

IV. Interpreting the Self-Defence Provisions

- A. *The Core Case*
- B. *The Innocent Attacker*
- C. *The Justified Attacker*
- D. *Provocation*
 - (i) *Illegal Provocation*
 - (ii) *Retreat*
 - (iii) *Non-Illegal Provocation*
- E. *The Putative Defender*
- F. *Malicious Justification*
- G. *Disproportionate Force*
 - (i) *Aggregate Disproportionality*
 - (ii) *Individual Excessive Force*

Conclusion

Introduction

The previous self-defence provisions were frequently criticized for being unduly complex and internally inconsistent.¹ In a long overdue response, Parliament implemented new self-defence legislation with its adoption of the *Citizen's Arrest and Self-Defence Act*.² At the core of the new self-defence provisions is the deceptively simple requirement that the accused's conduct be "reasonable in the circumstances".³ Although section 34(2) requires courts to con-

1. See *R v McIntosh*, [1995] 1 SCR 686 at para 16, 21 OR (3d) 797; Don Stuart, *Canadian Criminal Law: A Treatise*, 2nd ed (Toronto: Carswell, 1987) at 413; Morris Manning QC & Peter Sankoff, *Manning, Menett & Sankoff: Criminal Law*, 4th ed (Markham, Ont: LexisNexis, 2009) at 531; Gerry Ferguson, "Self-Defence: Selecting the Applicable Provisions" (2000) 5:1 & 2 Can Crim L Rev 179; David M Paciocco, "Applying the Law of Self-Defence" (2007) 12:1 Can Crim L Rev 25. For perhaps the most exhaustive overview of these criticisms, see *R v Pandurevic*, 2013 ONSC 2978 at paras 9–16, 298 CCC (3d) 504.

2. SC 2012, c 9 [C.A.S.D.A.] (The C.A.S.D.A came into force as of 11 March 2013 and amended section 34–42 of the *Criminal Code*).

3. *Criminal Code*, RSC 1985, c C-46, s 34(1)(c) [*Criminal Code*].

sider a non-exhaustive list of factors in determining whether the accused's actions were reasonable, the provision is otherwise barren.⁴ Even the moral foundation of self-defence—traditionally thought to be a justification—has been removed.⁵

Some have concluded that the new self-defence provisions could be interpreted as being less generous than the old provisions in a variety of circumstances.⁶ Professor Paciocco aptly summarizes this view, explaining that under the new provisions: “The evaluative component of the defence is more fluid, and factors that would not have been contemplated under the repealed provisions are now available to the decision-maker.”⁷ Pro-conviction factors such as the role of the accused in the incident, as well as the failure of the accused to retreat, are now required considerations in cases of self-defence where they previously would not have been.⁸ Given the real possibility of a restrictive application of the new provisions, courts would do well to provide the defence with a cognizable moral and constitutional basis.

In a recent article in this Journal, I argued that constitutionalizing the duress and necessity defences within three principles—moral involuntariness, moral permissibility and moral innocence—provided a more principled foundation for these defences.⁹ Building upon the Supreme Court's moral framework for justifications and excuses, I argued that an accused may be justified as a result of her act being rightful. Such an accused, I maintained, is morally innocent. In circumstances where an accused's act is not clearly rightful or wrongful—either because the competing interests of the accused and the victim are equal, or because the competing interests are too abstract to balance in a meaningful way—I argued that the most that could be said about the accused's act was that it was morally permissible. If the accused's act was wrongful, however, I maintained that the accused must rely on the moral involuntariness principle, which I argued requires that the accused have no “realistic choice” but to commit a criminal act to preserve herself from life-threatening harm.

4. *Ibid.*, s 34(2).

5. *CASDA*, *supra* note 2, s 2. *Cf. Criminal Code*, RSC 1985, c C-46, ss 34–35, 37 as it appeared on 10 March 2013 [*Criminal Code*, 2013].

6. See e.g. David M Paciocco, “The New Defence Against Force” (2014) 18:3 *Can Crim L Rev* 269 at 295–97 [Paciocco, “The New Defence”]; *R v Williams*, 2013 BCSC 1774 at para 47, 2013 CarswellBC 2926 (WL Can).

7. Paciocco, “The New Defence”, *supra* note 6 at 295.

8. *Ibid.* See Part IV.D, *below*, for a discussion of the treatment of the role of the accused in the incident, which previously was restricted to the narrow definition of provocation, while failure to retreat also applied in a narrow subset of circumstances.

9. For my explanation of why each of these principles constitute a principle of fundamental justice, see Colton Fehr, “(Re-)Constitutionalizing Duress and Necessity” (2017) 42:2 *Queen's L.J.* 99 [Fehr, “(Re-)Constitutionalizing”].

The purpose of this article is to develop the law of self-defence within this continuum of principles. Although the moral innocence rationale explains the core case of self-defence—defined as an accused who uses necessary and proportionate force against another to protect a victim or herself from use of force—it quickly dissipates when factual nuances arise. Where the competing interests of the accused and the attacker are equal, or are clouded by other considerations such as provocation, disproportionality or misperceived threats, scholars have long questioned whether the accused’s defensive act is justified.¹⁰ I contend that the principles of moral permissibility and moral involuntariness can better explain the rationale for granting an accused a defence in these scenarios.

Although some scholars question the utility of interpreting the requirements for self-defence through a moral lens,¹¹ it should be recognized at the outset that this view is inconsistent with the Supreme Court of Canada’s jurisprudence. In *R v Ryan*, the Court recently reiterated that the moral foundation of an accused’s act must dictate the stringency of the requirements for successfully pleading a criminal defence.¹² I agree with the Court’s position, as it is consistent with the view that self-defence is a moral right, not merely a political or civil right. As I explain below, uncovering the moral rationale(s) underpinning self-defence will better aid courts in developing a principled basis for determining when the broad factors enumerated in the new self-defence provisions ought to place limitations on an accused’s defensive actions.

The article unfolds as follows. Part I begins by providing an overview of the new self-defence provisions. In so doing, I explain how application of the new provisions could result in the law of self-defence being at times more generous, and at times more restrictive. Part II then reviews the main moral theories underlying self-defence. The necessary conclusion, I contend, is that the new provisions have adopted a pluralistic theory, which requires that courts operating within a utilitarian framework balance the autonomy interests of the accused, the culpability of the aggressor and the need to uphold the social

10. See e.g. George P Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown & Company, 1978) at 762–63, 769 [Fletcher, *Rethinking*]; John Gardner & François Tanguay-Renaud, “Desert and Avoidability in Self-Defense” (2011) 122:1 *Ethics* 111 at 113; Jeff McMahan, “Self-Defense and the Problem of the Innocent Attacker” (1994) 104:2 *Ethics* 252 at 256; Kent Greenawalt, “The Perplexing Borders of Justification and Excuse” (1984) 84:8 *Colum L Rev* 1897 at 1907–11.

11. See Paciocco, “The New Defence”, *supra* note 6 at 274–75. See also Hamish Stewart, “The Constitution and the Right of Self-Defence” (2011) 61:4 *UTLJ* 899 (Professor Stewart explained: “I situate my claims about self-defence in a juridical tradition that understands law as a way of structuring the interactions of free and purposive persons rather than as a way of promoting an ‘all things considered’ view about what people should do” at 900).

12. 2013 SCC 3 at para 26, [2013] 1 SCR 14 [*Ryan* SCC].

order against the life and dignity interests of the attacker. Part III then outlines the moral innocence, moral permissibility and moral involuntariness principles in greater detail. Part IV concludes by utilizing this framework to rationalize the applicable legal requirements in a variety of controversial self-defence scenarios.

I. The New Self-Defence Provisions

Section 34 of the new self-defence provisions provides that an accused is “not guilty of an offence” if three conditions are met.¹³ First, the accused must have reasonable grounds to believe that force or a threat of force is being used against them or another person.¹⁴ The requirement of a “threat of force” being used against the accused diverges from the previous requirement of an “assault”.¹⁵ As Professor Paciocco observes, this change in wording serves two purposes. First, use of the broader term “force” ensures that an accused may act in defence of person if reasonable apprehension of any kind of force is present, not only where someone has technically been assaulted.¹⁶ Second, the broader wording abandons the previous requirement that the threatening party have the “present ability to effect his purpose”.¹⁷ Courts had previously strained this wording to avoid imposing an imminence requirement on accused.¹⁸

The reference to “another person” also expands the scope of the self-defence provisions. Under the old law, accused persons were restricted to protecting those under their protection.¹⁹ Although this standard was not defined in the *Criminal Code*,²⁰ it was commonly thought to include only family members and those to whom the accused owed a duty of care.²¹ So long as the accused has reasonable grounds to believe another person is being threatened with force, the law now permits citizens to act as good Samari-

13. *Criminal Code*, *supra* note 3, s 34.

14. See *ibid*, s 34(1)(a).

15. See *Criminal Code*, 2013, *supra* note 5, ss 34(1), 34(2), 35, 37.

16. See Paciocco, “The New Defence”, *supra* note 6 at 275. For the definition of assault, see *Criminal Code*, *supra* note 3, s 265.

17. See *Criminal Code*, *supra* note 3, s 265(1)(b).

18. See Paciocco, “The New Defence”, *supra* note 6 at 275–76, citing *R v Lavallee*, [1990] 1 SCR 852, 108 NR 321 [cited to SCR].

19. See Paciocco, “The New Defence”, *supra* note 6 at 276.

20. *Criminal Code*, 2013, *supra* note 5.

21. See Kent Roach, “A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions” (2012) 16:3 Can Crim L Rev 275 at 284 [Roach, “Preliminary Assessment”].

tans.²² The new self-defence provisions will therefore supplement the current section 27 of the *Criminal Code*, which permits individuals to use reasonably necessary force to prevent the commission of personal or property offences likely to cause imminent and serious harm.²³

The second element of self-defence requires that the act that constitutes the offence be committed for the purpose of defending the threatened party from a threat or use of force.²⁴ As under the old self-defence provisions, the threat itself must reasonably be thought to be unlawful.²⁵ The provision diverges from the previous law through its inclusion of the phrase “act that constitutes the offence”.²⁶ The plain wording of this phrase makes it clear that the defence has been broadened to include acts other than assaults.²⁷ As Professor Roach observes, this change is sensible as it permits an accused who commits a criminal act in order to avoid harm from another person to plead a more flexible defence.²⁸ For instance, an accused who steals a car to avoid being assaulted may now plead self-defence as opposed to the much stricter defence of necessity.²⁹

The final and most important element under the new self-defence provisions requires that the defending act be “reasonable in the circumstances”.³⁰ In considering the reasonableness of the accused’s act, the courts have been provided with a non-exhaustive list of nine factors:

- (a) the nature of the force or threat;
- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
- (c) the person’s role in the incident;
- (d) whether any party to the incident used or threatened to use a weapon;

22. *Ibid.*

23. This provision applies as long as the person committing the crime could be arrested without a warrant. See *ibid* at 284.

24. See *Criminal Code*, *supra* note 3, s 34(1)(b).

25. *Ibid*, s 34(3).

26. *Ibid*, s 34(1)(b).

27. See Paciocco, “The New Defence”, *supra* note 6 at 276.

28. Roach, “Preliminary Assessment”, *supra* note 21 at 279–80.

29. *Ibid* (as the threat does not come from the victim [the owner of the car], self-defence has traditionally not been applicable in these circumstances). See also Kent Roach, *Criminal Law*, 5th ed (Toronto: Irwin Law, 2012) at 317 [Roach, *Criminal Law*]. Whether this phrase will be interpreted so broadly as to encroach on the necessity and duress defences is yet to be seen. 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 [Coughlan, “Rise and Fall”]; Colton Fehr, “The (Near) Death of Duress” (2015) 62: 1 & 2 Crim LQ 123 [Fehr, “Near Death”]. This point will be reviewed below. For the elements of necessity, see *R v Latimer*, 2001 SCC 1 at paras 28–31, [2001] 1 SCR 3.

30. *Criminal Code*, *supra* note 3, s 34(1)(c).

- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- (f.1) any history of interaction or communication between the parties to the incident;
- (g) the nature and proportionality of the person's response to the use or threat of force; and
- (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.³¹

This list of factors preserves the core considerations of self-defence, as necessity (required force), proportionality (commensurate force) and the presence of provocation continue to dominate the analysis.³² However, as a review of each category will reveal, the fact that no individual factor is dispositive will result in both a broader and more restrictive law of self-defence.

Beginning with necessity, it is notable that this consideration has only rarely been applied strictly.³³ As a result, Professor Paciocco usefully describes this factor as “reasonable necessity”.³⁴ This follows as the reasonableness of the accused's choice to act in self-defence is not a strict imminence requirement. Instead, it is informed by the vulnerability of the accused, as well as the predictability of the apprehended force coming to fruition.³⁵ The vulnerability of the accused is informed by a variety of the factors outlined in section 34(2): the nature of the threat³⁶ (including whether the threat was imminent or there were reasonable avenues of escape³⁷), whether the victim possessed a weapon³⁸ or had a distinct advantage in size or capabilities,³⁹ as well as the relationship and history of violence between the relevant parties.⁴⁰ The latter factor is also relevant to the ability of the accused to perceive a threat. This consideration was most clearly implicated in the Court's decision in *R v Lavallee*, where it was concluded that a battered woman's ability to predict the severity of her batterer's impending assault is learned through previous cycles of violence.⁴¹

31. *Ibid*, s 34(2).

32. See Paciocco, “The New Defence”, *supra* note 6 at 286–92.

33. In limited circumstances, such as when the accused provoked the attack, the accused was required to flee before resorting to force. See *Criminal Code*, 2013, *supra* note 5, s 35.

34. Paciocco, “The New Defence”, *supra* note 6 at 287.

35. *Ibid* at 287–88.

36. *Criminal Code*, *supra* note 3, s 34(2)(a).

37. *Ibid*, s 34(2)(b).

38. *Ibid*, s 34(2)(d).

39. *Ibid*, s 34(2)(e).

40. *Ibid*, s 34(2)(f)–(f.1).

41. *Supra* note 18 at 878–82.

Compared to the previous law, the reasonable necessity factor in the new self-defence provisions may lead to a more generous application of self-defence in a narrow subset of circumstances. Under the previous section 34(2), an accused was only permitted to cause grievous bodily harm or death if she reasonably believed that she could not otherwise preserve herself from the same. Necessity was therefore applied relatively strictly in this circumstance. As Professor Roach observes, the flexible standard in the new provisions is not so demanding, and as such will likely result in more pleas of self-defence being left to the jury.⁴²

Proportionality has also traditionally not been applied strictly in the self-defence context. Where the force did not consist of life-threatening harm, the law required that the force used be necessary to stop the threat.⁴³ Even where life-threatening use of force was perceived to be required by the accused, the Court did not mandate that the accused weigh her actions with “exact nicety”.⁴⁴ It is unlikely that the reference to proportionality in section 34(2)(g) will narrow this standard. Indeed, the inclusion of other factors broadly relevant to proportionality, such as whether a party possessed a weapon⁴⁵ or had a physical advantage,⁴⁶ as well as the relationship and history of violence between the relevant parties,⁴⁷ suggest that the contextual approach to proportionality will continue to be applied.

The final important consideration in determining the merits of an accused’s self-defence claim is the presence of provocation. Previously, provocation was defined under section 36 as any act that provokes an assault due to “blows, words or gestures”.⁴⁸ Courts tended to apply a high standard, requiring an accused to use blows, words or gestures that were intended to elicit an assault or would almost certainly provoke an assault.⁴⁹ Where provocation was present, it would prohibit the accused from acting in self-defence where the impending assault was not serious, and impose stricter imminence requirements when the threatened harm rose to more serious

42. Roach, “Preliminary Assessment”, *supra* note 21 at 289–90.

43. See Paciocco, “The New Defence”, *supra* note 6 at 291–92.

44. *R v Kong*, 2006 SCC 40 at paras 213–16, [2006] 2 SCR 347, rev’g on other grounds 2005 ABCA 255, 371 AR 90.

45. *Criminal Code*, *supra* note 3, s 34(2)(d).

46. *Ibid*, s 34(2)(e).

47. *Ibid*, ss 34(2)(f)–(f.1).

48. *Criminal Code*, 2013, *supra* note 5, s 36.

49. Paciocco, “The New Defence”, *supra* note 6 at 289–90, citing *R v Nelson* (1992), 8 OR (3d) 364, 71 CCC (3d) 449 (CA); *R v Merson* (1983), 4 CCC (3d) 251, 1983 CanLII 226 (BCCA).

levels.⁵⁰ Section 34(2)(a) may operate more strictly as courts must now consider any role the accused, as well as the victim, had in the incident.⁵¹

A variety of other circumstances may also lead to a stricter application of the new self-defence provisions. Consider the old section 34(1), which entitled an accused who did not provoke the attack to a defence so long as the accused reasonably believed that the force used was necessary.⁵² Strict proportionality could not be imposed. Under the new provisions, an absence of proportionality could limit the accused's defence if the trier of fact found this factor was determinative in the circumstances.⁵³ Second, the old section 34(2) entitled accused, even those who provoked the attack,⁵⁴ to cause serious bodily harm if they reasonably believed that they could not preserve themselves without causing such harm. Provocation was not a relevant consideration, nor was a strict proportionality requirement imposed. Under the new provisions, the trier of fact may impose such requirements and thereby narrow the defence.⁵⁵ Finally, similar conclusions may be drawn by comparing the prior section 37 with the new provisions. Section 37 required only that the act be proportionate and that the accused reasonably believed that force was necessary.⁵⁶ Under the new provisions, it is possible that the presence of provocation may outweigh even a reasonably necessary and proportionate use of force.⁵⁷

II. Theories of Self-Defence

Although criminal law scholars agree that an accused acting in self-defence is generally justified in so doing, they nevertheless disagree as to why the actions of a particular accused are justified.⁵⁸ To understand the constitutional

50. Paciocco, "The New Defence", *supra* note 6 at 290. For the previous sections 34 and 35, see *Criminal Code*, 2013, *supra* note 5, ss 34–35. Note though that the Court's interpretation of section 34(2) in *McIntosh* had the opposite effect as it rendered section 35's "retreat" requirement moot for those using lethal harm. See *McIntosh*, *supra* note 1 at paras 40–41.

51. Paciocco, "The New Defence", *supra* note 6 at 290.

52. *Ibid* at 295, citing *R v Paive*, 2005 SCC 22 at para 20, [2005] 1 SCR 339.

53. See Paciocco, "The New Defence", *supra* note 6 at 295–96. Although the new provisions do not make any one factor determinative—instead requiring a holistic analysis—this does not mean that a single factor cannot be of such importance that it by itself outweighs all the other factors. I use "determinative" here in the latter sense. See generally *Cormier v R*, 2017 NBCA 10, 348 CCC (3d) 97.

54. See *McIntosh*, *supra* note 1 at para 40.

55. Paciocco, "The New Defence", *supra* note 6 at 296.

56. *McIntosh*, *supra* note 1 at para 44.

57. Paciocco, "The New Defence", *supra* note 6 at 296–97.

58. See Alan Brudner, "Constitutionalizing Self-Defence" (2011) 61:4 UTLJ 867 at 869–70; Stewart, *supra* note 11 at 905; Roach, "Preliminary Assessment", *supra* note 21 at 280–81;

basis of self-defence, it is therefore necessary to outline a number of the main theories underlying the defence and stake my claims with respect to their relative merits. As I contend below, a pluralistic theory of self-defence not only provides the most cognizable theory of self-defence, it also provides the most rational explanation for the structure of the new self-defence provisions.

A. Utilitarian

The first and most common rationale for self-defence in Anglo-American law is utilitarian.⁵⁹ Although this theory takes on a variety of forms, its most persuasive form maintains that the accused (X) is justified because the interests of the attacker (Y) are devalued as a result of Y's culpability in attacking X.⁶⁰ In other words, if the interests of X or Y must prevail, society would choose the interests of the innocent party. As such, if X's defensive force was not excessive when compared to the harm threatened by Y, then Y's culpability in attacking X serves as the main basis upon which X can stake a higher moral claim.⁶¹ A comparison of the relative merits of the actors' interests leads to the conclusion that X acted rightfully in attacking Y, and therefore is morally innocent.⁶²

As Professor Fletcher observes, there are several problems with the utilitarian rationale. First, it ignores the sanctity of life principle.⁶³ In short, Fletcher is not convinced that Y's life can ever be devalued given the equal worth of human life.⁶⁴ Second, the theory arguably breaks down when one considers an act of self-defence against an "innocent aggressor". If the aggressor attacks due to no fault of her own—a circumstance which I will review in detail below—the accused cannot rely on the aggressor's guilt to

Malcolm Thorburn, "Justifications, Powers, and Authority" (2008) 117:6 Yale LJ 1070; John Gardner, "Justification Under Authority" (2010) 23:1 Can J.L. & Jur 71; John Gardner, "Justifications and Reasons" in *Offences and Defences: Selected Essays in Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) 91 at 91–92. See also *R v Hibbert*, [1995] 2 SCR 973 at para 50, 99 CCC (3d) 193.

59. See George P Fletcher, "Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory" (1973) 8:3 Israel LR 367 at 377 [Fletcher, "Proportionality"]; Fletcher, *Rethinking*, *supra* note 10 at 859.

60. See e.g. Gardner & Tanguay-Renaud, *supra* note 10 at 114.

61. *Ibid.*

62. For an excellent overview of the literature suggesting that culpability is the main factor driving the moral conclusion that the accused acted justifiably, see Boaz Sangero, *Self-Defence in Criminal Law* (Oxford: Hart, 2006) at 44–49.

63. Fletcher, *Rethinking*, *supra* note 10 at 857–58.

64. *Ibid.*

devalue her interests.⁶⁵ Finally, theorists observe that the balancing process inherent in the utilitarian approach is complicated by two types of epistemic uncertainty: first, whether the aggressor will follow through with the harm threatened, and second, whether the aggressor is actually known to be culpable.⁶⁶ As there is no self-evident way to balance these uncertainties, the utilitarian rationale is said to be of limited worth.⁶⁷

B. *Autonomy*

The second rationale for self-defence places the autonomy of the attacked person as the foundation of the defence.⁶⁸ As Professor Fletcher explains: “If a person’s autonomy is compromised by the intrusion, then the defender has the right to expel the intruder and restore the integrity of his domain.”⁶⁹ The underlying rationale for this theory derives solely from the inherent right of the individual to life and autonomy.⁷⁰ So long as the initial attack may be categorized as “wrongful”, the autonomy theory posits that the victim acts rightfully in repelling the attack.⁷¹ The aggressor’s culpability is irrelevant to the analysis. What matters is the objective nature of the aggressor’s intrusion.⁷²

This focus on autonomy is also problematic. As the autonomy of the accused is the only relevant interest, the main criticism against this rationale is that there is no requirement that the force used be proportionate to the force threatened.⁷³ Professor Fletcher himself observed the disparate role for proportionality in legal systems that had adopted the autonomy rationale for self-defence, such as Germany and the former Soviet Union.⁷⁴ Yet, the mere fact that someone commits a wrongful assault against one’s person does not intuitively make *any* subsequent use of violence by the accused rightful, permissible or even excusable. It is for this reason that proportionality has taken on an important guiding function in Anglo-American law.

65. Fletcher, “Proportionality”, *supra* note 59 at 378.

66. Fletcher, *Rethinking*, *supra* note 10 at 858–59.

67. *Ibid.*

68. *Ibid.* at 860.

69. *Ibid.*

70. For a good summary of the basic theory, see Sangero, *supra* note 62 at 60.

71. *Ibid.* at 61.

72. Fletcher, *Rethinking*, *supra* note 10 at 862.

73. *Ibid.* at 370, 387ff. See also Sangero, *supra* note 62 at 54, 62.

74. Fletcher, “Proportionality”, *supra* note 59 at 381–84. See also Sangero, *supra* note 62 at 62–63.

The autonomy theory has also been criticized for being incapable of providing a moral rationale for defence of others.⁷⁵ Professor Fletcher admitted this deficiency, and as a result sought to rely on a different basis for justifying defence of others: upholding the legal order.⁷⁶ This consideration posits that the attacked person acts as a representative of society who, by acting in self-defence, acts as the “protector of society, public order and the legal system”.⁷⁷ The accused, whether by acting in self-defence or defence of another, achieves this goal by deterring others from committing similar acts, as well as by deterring the aggressor from doing the same in the future.⁷⁸ As a strong right of self-defence will encourage others to resist aggressors, it is desirable from a socio-legal perspective to support accused persons who act in self-defence as it strengthens the sense of security of the citizenry.⁷⁹

C. The Self-Defence Provisions

Given the various critiques of the two predominant theories of self-defence, it may be more prudent to base any theory of self-defence on a combination of the above approaches. As Professor Sangero observes, the three factors described above—the culpability of the victim, the autonomy of the accused and the socio-legal order—are all important to determining whether an accused is justified in acting in self-defence.⁸⁰ In his view: “[Self-]defence is, simultaneously, a defence both of the autonomy of the person attacked and of the socio-legal order, by means of essential and reasonable defensive force against the aggressor who is criminally responsible for [the] attack.”⁸¹ By balancing all of these factors within a utilitarian framework, Professor Sangero posits that the moral rationale for self-defence can be more completely developed.⁸²

This approach is consistent with the new self-defence provisions. As is evident from the above review, a reasonable perception of the victim’s culpability is relevant as it automatically engages the right of self-defence. Indeed, if the accused knew that the victim was using lawful force, section 34(3) automatically prevents the accused from pleading self-defence.⁸³ As for the autonomy of the individual, this consideration is implicit in the factors outlined in section 34(2).

75. See Sangero, *supra* note 62 at 65.

76. *Ibid.*, citing Fletcher, *Rethinking*, *supra* note 10 at 869.

77. Sangero, *supra* note 62 at 68.

78. *Ibid.*

79. *Ibid.*

80. *Ibid.* at 93.

81. *Ibid.* at 99.

82. *Ibid.* at 93.

83. *Criminal Code*, *supra* note 3, s 34(3).

Broadly speaking, allowing an accused to use reasoned force to protect her interests is permitted because of the inherent worth of each person. Finally, the socio-legal order has explicitly been given increased importance. As discussed earlier, the old section 37 only permitted defence of others to be pleaded if the person being threatened was under the accused's protection.⁸⁴ The new provisions have broadened the defence by permitting accused to aid anyone reasonably thought to be threatened with use of force.⁸⁵

This pluralistic understanding of self-defence also permits courts to avoid many of the undesirable aspects of the utilitarian and autonomy theories of self-defence. By focusing on factors other than the autonomy of the accused, disproportionate uses of force may be prohibited. Moreover, express consideration of the socio-legal order provides a more intuitive rationale for permitting defence of others. Although the weighing of all of these factors within a utilitarian framework will still result in courts balancing factors with epistemic uncertainty, this is likely unavoidable given the broad interests applicable to claims of self-defence. Moreover, as I explain below, the moral permissibility principle can help alleviate this concern to some extent. By admitting that a definitive moral conclusion may not be possible in some circumstances, application of the factors relevant to claims of self-defence may be adjusted to account for this more nuanced moral conclusion.

III. The Moral Basis for Criminal Defences

In developing the moral basis for criminal defences, the Court has relied heavily upon Professor Fletcher's foundational work, *Rethinking Criminal Law*.⁸⁶ As my goal here is to make sense of the new self-defence provisions within the basic conceptual framework provided by the Court, I will take the Court's reliance on Fletcher's work as a point of departure. As I find the framework to be inadequate, however, I will explain the need for a third operative principle: moral permissibility.

A. Justification

As Professor Fletcher explains, those who plead justifications admit the act in question, but claim that the act was rightful.⁸⁷ Building upon this rationale in

84. For an excellent overview, see Paciocco, "The New Defence", *supra* note 6 at 276.

85. *Criminal Code*, *supra* note 3, s 34(1)(b).

86. Fletcher, *Rethinking*, *supra* note 10. The Court has affirmed its adoption of Fletcher's work on multiple occasions. See e.g. *Perka v R*, [1984] 2 SCR 232 at 249–50, 13 DLR (4th) 1.

87. Fletcher, *Rethinking*, *supra* note 10 at 759.

Perka v R, Dickson CJC observed that by acting pursuant to a justification, “the values of society, indeed of the criminal law itself, are better promoted by disobeying a given statute than by observing it”.⁸⁸ As discussed above, in determining whether an act of self-defence was rightful, the moral judgment most reasonably derives from a balancing of the relevant harms and benefits at issue. If this balance favours the accused, the accused’s act is deserving of respect and praise rather than blame.⁸⁹ It follows that the victim is not justified in resisting the justified actor, and others acquire a right to assist if they so choose.⁹⁰

In constitutional terms, a variety of authors have argued that justificatory defences are captured by the principle of fundamental justice that those who commit morally innocent acts must not receive criminal sanction.⁹¹ The Court in *R v Ruzić*, however, undermined this conclusion by confusingly asserting that a defensive act could never be “blameless”.⁹² Given the Court’s conclusion that justifications connote *rightful* conduct, such a sweeping statement is demonstrably untrue. As numerous authors have observed, it is paradoxical to conclude that a rightful act can also somehow be considered morally blameworthy.⁹³

As such, it is necessary to read the Court’s conclusion in *Ruzić* more narrowly. As the Court’s reasons were concerned with the excuse-based rationale for the duress and necessity defences, these comments should be limited to the context of excuse-based defences. As excuses by definition concern only *wrongful* acts, the accused must have some degree of blame for committing the act, even if it is ultimately excused. If this more restrictive reading was adopted, there would be ample room to constitutionalize justification-based defences within the principle of fundamental justice that the morally innocent not receive criminal sanction.

88. *Supra* note 86 at 247–48.

89. Fletcher, *Rethinking*, *supra* note 10 at 799.

90. *Ibid* at 761–62.

91. See Stephen G Coughlan, “Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?” (2002) 7:2 Can Crim L Rev 147 at 188 [Coughlan, “Implications”]; Benjamin L Berger, “Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences” (2006) 51:1 McGill LJ 99 at 118; Fehr, “(Re-)Constitutionalizing”, *supra* note 9 at 102–03. This principle was elevated to the status of a principle of fundamental justice. See *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536. I have also used the principle of gross disproportionality to explain the constitutional basis for justification-based defences. See Fehr, “Near Death”, *supra* note 29 at 139–41.

92. 2001 SCC 24 at para 41, [2001] 1 SCR 687 (it is notable that the authors listed at note 91, *above*, have all interpreted this paragraph in this way).

93. See Coughlan, “Implications”, *supra* note 91 at 188; Berger, *supra* note 91 at 118–19; Fehr, “(Re-)Constitutionalizing”, *supra* note 9 at 131.

B. Excuse

In contrast to a justification, an accused pleading an excuse admits the wrongfulness of her conduct.⁹⁴ Such actors nevertheless claim to have acted in a “normatively” or “morally involuntary” manner.⁹⁵ This principle, developed by Professor Fletcher,⁹⁶ forbids punishing those who act without free choice.⁹⁷ Free choice is not, however, defined literally. As Professor Fletcher observes, an accused lacks free choice if there is no realistic choice available to the accused but to commit a criminal offence.⁹⁸ As the Court in *Perka* concluded, such a scenario arises if the circumstances were “so emergent and the peril . . . so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable”.⁹⁹

In its application of the moral involuntariness principle, the Supreme Court has not applied a strictly objective standard.¹⁰⁰ This is sensible given the Court’s conclusion that moral involuntariness forms the jurisprudential basis for excuses. As the act is admitted to be wrongful, it is reasonable for the law to take into consideration human frailties that might understandably affect the accused’s perceptions. Although the law will not consider self-imposed limitations on one’s ability to perceive a threat, such as use of drugs or alcohol,¹⁰¹ considerations such as intellectual impairment,¹⁰² anxiety disorders,¹⁰³ as well as a history of abuse,¹⁰⁴ have been considered in determining the reasonableness of the accused’s defensive actions.

In its development of the moral involuntariness principle, the Supreme Court has also required that the accused’s conduct be socially permissible.¹⁰⁵ This element derives from the adjective “moral”. The Court’s conclusion that

94. Fletcher, *Rethinking*, *supra* note 10 at 759.

95. *Ibid* at 802–03. See generally *Ruzic*, *supra* note 92 (where the Court accepted this rationale as the basis of excuses).

96. Fletcher, *Rethinking*, *supra* note 10 at 759–813.

97. *Perka*, *supra* note 86 at 249–50, citing Fletcher, *Rethinking*, *supra* note 10 at 804–05.

98. *Ibid*.

99. *Ibid* at 251.

100. See generally *Ruzic*, *supra* note 92; *Latimer*, *supra* note 29. The one exception is the proportionality requirement in the defence of necessity which is assessed from a strictly objective viewpoint. See *Latimer*, *supra* note 29 at para 34.

101. See *R v Reilly*, [1984] 2 SCR 396, 13 DLR (4th) 161. For an illustrative application of the moral involuntariness principle, see *R v Ryan*, 2011 NSCA 30 at paras 123–26, 301 NSR (2d) 255.

102. See *Nelson*, *supra* note 49.

103. See *R v Charlebois*, 2000 SCC 53, [2000] 2 SCR 674.

104. See generally *Lavallee*, *supra* note 18.

105. See *Ryan* SCC, *supra* note 12 at para 60.

the adjective requires the act as a whole to be socially acceptable, however, is unsupportable. Moral involuntariness applies to *wrongful* conduct, which by definition is not socially approved. In developing a preferable definition of the adjective, Professor Yeo explains that: “The inquiry raised by ‘moral involuntariness’ is therefore whether, taking into account all relevant social policy considerations, *the circumstances that impacted on the defendant’s ability to choose freely* . . . rendered him or her not criminally responsible.”¹⁰⁶ This consideration, then, does not assess the permissibility of the act as a whole, but rather the permissibility of the emotions underlying the accused’s involuntariness claim.¹⁰⁷

The Supreme Court’s development of the moral involuntariness principle is also problematic for other reasons. As numerous authors have observed, the Court’s conclusion that the principle incorporates a proportionality requirement is inconsistent with the moral basis of the defence.¹⁰⁸ For these authors, inserting a proportionality requirement shifts the analysis towards a utilitarian balancing of harms belonging to justificatory versions of criminal defences.¹⁰⁹ If the moral involuntariness principle excuses *wrongful* acts, it is counterintuitive to apply this principle to acts where our intuitions suggest the act was rightful or at least permissible due to the harm caused being proportionate to or clearly outweighed by the harm averted.¹¹⁰

Finally, the Supreme Court’s jurisprudence has allowed an accused to plead duress if the accused was threatened with a low degree of bodily harm and to plead necessity with no restrictions as to the level or type of harm threatened.¹¹¹ In my view, it is difficult to understand why the moral involuntariness principle applies to acts that cause such low levels of harm. As the defence is conceptualized as a deprivation of the will, it is mystifying to conclude

106. Stanley Yeo, “Revisiting Necessity” (2010) 56:1 & 2 Crim LQ 13 at 20 [emphasis added].

107. For my more detailed defence of this view, see Fehr, “(Re-)Constitutionalizing”, *supra* note 9 at 114–16. This is in response to the criticisms in Professor Berger’s article. Berger, *supra* note 91 at 103, 109, 111–12.

108. See Fehr, “(Re-)Constitutionalizing”, *supra* note 9 at 109. For a similar proposition, see Coughlan, “Implications”, *supra* note 91 at 157–58 (which cites Bruce Archibald, Don Stuart and Jeremy Horder, amongst others). See also Zoë Sinel, “The Duress Dilemma: Potential Solutions in the Theory of Right” (2005) 10 Appeal 56 at 64.

109. For my broader endorsement of this argument, see Fehr, “(Re-)Constitutionalizing”, *supra* note 9.

110. I have expanded on my criticism of the inclusion of proportionality in the moral involuntariness principle in more detail elsewhere. In so doing, I contend that making this a *requirement* misreads Professor Fletcher’s conception of the moral involuntariness principle. See Fehr, “(Re-)Constitutionalizing”, *supra* note 9 at 110.

111. The necessity defence applies to any act, while duress may be applied to any threats of “bodily harm,” defined as harm that is more than transient or trivial. See *Ryan SCC*, *supra* note 12 at paras 59–60; *Latimer*, *supra* note 29.

that a person's will has been overborne by the threat of facing transient or trivial harm.¹¹² Although the Court in *Ryan* concluded that trivial bodily harms would not engage the moral involuntariness principle,¹¹³ it did not explain how anything less than the traditional standard of "serious" or "grievous" bodily harm could realistically engage an individual's will.

The above observations lead to the conclusion that a distinction needs to be drawn between moral involuntariness and whatever principle underlies the defences of duress and necessity as developed by the Supreme Court. The main difference between an accused who commits a crime involving proportionate harms and one that commits a crime that causes a greater evil than that averted is the moral nature of the accused's act. In the latter scenario, the accused's act is considered wrongful. It is reasonable to require an extreme threat be present before excusing the wrongful conduct. If the harms are not disproportionate, it becomes much more difficult to claim that the accused's will must be deprived before she is permitted to commit an offence.¹¹⁴ Indeed, this is precisely how the Court justified relaxing the harm thresholds in the duress and necessity defences.¹¹⁵ As an analytical tool, then, I suggested that a necessary first step in determining whether an accused's act should be judged based on the moral involuntary principle or some other principle is to assess the proportionality of the accused's act.

Regardless of the proportionality of the accused's act, I also contended that an accused's act may be "coloured" wrongful by the illegal nature of the conduct that ultimately resulted in the morally involuntary circumstance arising.¹¹⁶ As I read the Court's decision in *Perka*, in situations where the morally involuntary circumstance arose because of the accused's illegal actions, "society may rightly label the accused's conduct as wrongful and require that the accused truly faced moral involuntariness before committing a criminal act".¹¹⁷ If an act is not coloured wrongful or rendered wrongful as a result of disproportionality between the harms caused and averted, it is necessary to apply other principles to determine the merits of an accused's defence.

112. Fehr, "(Re-)Constitutionalizing", *supra* note 9 at 121.

113. *Ryan* SCC, *supra* note 12 at para 61.

114. *Ibid.*

115. *Ibid* at para 59.

116. *Perka*, *supra* note 86 at 254.

117. Fehr, "(Re-)Constitutionalizing", *supra* note 9 at 113–14, citing *Perka*, *supra* note 86 at 254. The Court in *Perka* stated that: "At most the illegality . . . of the preceding conduct will colour the subsequent conduct in response to the emergency as also wrongful. *But that wrongfulness is never in any doubt.*" *Supra* note 86 at 254 [emphasis added]. It might be argued that the italicized portion stands for the proposition that *colouring* an act as wrongful was not endorsed by the

C. Moral Permissibility

Although the moral innocence and moral involuntariness principles provide a satisfactory moral foundation for a variety of defensive acts, a number of theorists question whether the description of justifications and excuses described by Fletcher is able to adequately address the relevant moral principles inherent in criminal defences.¹¹⁸ As Professor Ferzan observes, in a variety of circumstances, it may not be possible to determine whether an act is right or wrong.¹¹⁹ If the moral foundation of an act is exceedingly difficult to categorize, it may therefore be better to rely upon a more general notion of societal permissibility as the basis for granting an accused a defence.¹²⁰

Elsewhere I have expressed my agreement with this approach.¹²¹ In circumstances where the competing interests are the same, or are so abstract that it is exceedingly difficult to come to a distinct and meaningful moral conclusion, I argue that the most that can be said about the accused's actions is that they were morally permissible. A permissible act is not justified in the sense that the act was rightful. Instead, the accused is acquitted because the state cannot prove that the act was wrongful.

This principle occupies a position between the moral innocence and moral involuntariness principles described above. The question therefore arises as to whether morally permissible conduct falls within the ambit of "justification", as Professor Dressler argues,¹²² or "excuse", as Professor

Court. If one reads this sentence in isolation from the rest of the judgment, this suggestion has some force. However, it is important to ask why the Court said that "wrongfulness is never in doubt". As Dickson CJC explained, necessity can never be a justification because it is outside of the Court's authority to create justification-based defences, and exclusively within Parliament's authority, to decide when what is otherwise a criminal act can be justified. See *Perka*, *supra* note 86 at 248 (the Court's statement that "wrongfulness is never in any doubt" is derived from this basic premise).

118. Gardner & Tanguay-Renaud, *supra* note 10 ("[p]erhaps different cases of self-defense fall under different headings, in which case 'the moral position of the self-defender' is actually several different moral positions, calling for several partly or wholly divergent explanations" at 113). See also McMahan, *supra* note 10 ("the right of self-defense does indeed have multiple independent [moral] foundations" at 256).

119. Kimberly Kessler Ferzan, "Justification and Excuse" in John Deigh & David Dolinko, eds, *Oxford Handbook of Philosophy of Criminal Law* (Oxford: Oxford University Press, 2011) 239–42.

120. *Ibid.* See also Joshua Dressler, "New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and *Rethinking*" (1984) 32:1 UCLA L Rev 61.

121. Although my views were expressed in the context of duress and necessity, much of the same rationale applies. See Fehr, "(Re-)Constitutionalizing", *supra* note 9 at 103.

122. Dressler, *supra* note 120 at 64.

Fletcher maintains.¹²³ In my view, morally permissible acts are better thought of as a distinct type of justification. As Professor Ferzan observes, given that criminal law is meant to prohibit moral wrongs, there must be room for justification to include both rightful and permissible conduct.¹²⁴ Whether this position is persuasive, however, has little practical effect for present purposes. As I explain in the remainder of this article, the relevant impact of the distinction between rightful and permissible conduct is its ability to inform courts as to how to apply the various factors outlined in section 34(2) of the new self-defence provisions.

IV. Interpreting the Self-Defence Provisions

Most prominent theorists, including Professor Fletcher, admit that it is difficult, if not impossible, to pigeonhole individual defences into excuse or justification categories—self-defence is no exception.¹²⁵ In its own way, then, the vague nature of the new self-defence provisions is a blessing in disguise, as it provides courts with the opportunity to develop a theory of what the Constitution demands of the law of self-defence. As I contend below, the three principles introduced above—moral innocence, moral permissibility and moral involuntariness—provide a principled framework for applying the new self-defence provisions.

A. *The Core Case*

The core case of self-defence is most commonly cited as a justified act of self-defence in the sense referred to by Professor Fletcher. In this scenario, an accused uses necessary and proportionate force against an aggressor to protect another person or themselves from an aggressor's unlawful use of force. For reasons discussed earlier, the culpability of the aggressor, the autonomy interests of the accused and the interests of the socio-legal order all weigh heavily in favour of the accused. The security interests of the aggressor are therefore significantly outweighed, at least where the harm to the victim is not life-threatening.

123. George P Fletcher, "Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?" (1979) 26:6 UCLA L Rev 1355 at 1357–58 [Fletcher, "Intolerable Conditions"]. See also Fletcher, *Rethinking*, *supra* note 10 at 759.

124. Ferzan, *supra* note 119 at 242.

125. Fletcher, *Rethinking*, *supra* note 10 at 762–63, 769; Gardner & Tanguay-Renaud, *supra* note 10 at 113; McMahan, *supra* note 10 at 256; Greenawalt, *supra* note 10 at 1897.

Where the accused has to kill the aggressor, the sanctity of life principle has been invoked as a bar to any claim of rightful action. This position is most fervently defended by pacifists as a moral objection to any killing being justified. According to extreme proponents of this view, life is such an important interest that it cannot be justifiably taken, even in the core case of self-defence.¹²⁶ For many pacifists, this conclusion derives from the assertion that it is never necessary to resort to violence to preserve one's life as there are always peaceful ways to resolve conflicts.¹²⁷ This observation is, however, plainly false.¹²⁸ There will always be situations where there is no realistic choice but to cause life-threatening harm to save one's life. As a result, Professor Gorr observes that: "Extreme pacifists aside, virtually everyone agrees that it is sometimes morally permissible to engage in . . . 'private defense'."¹²⁹

Non-pacifist theorists have also questioned whether the taking of human life can ever be considered "rightful". As Professor Dressler contends, the significant weight attached to human life makes such a conclusion difficult:

[D]o we as a society consider the intentional taking of human life, even of an aggressor, morally good? Or do we only tolerate it as nonwrongful? If we believe the latter is the case, and if Fletcher is correct about justification [being restricted to only rightful conduct], then we must treat self-defense as unjustifiable, or we must accept an intuition—that the actor's conduct was morally good—that we may not hold.¹³⁰

For Professor Dressler, the moral permissibility rationale may provide a better explanation for the accused's defence.¹³¹ As this rationale does not claim that the act was rightful, it leaves ample room to admit the equal worth of each life. All that is being said is that if the accused must choose between the two lives, we understand why the accused chooses to preserve her life.

The problem with this argument is the assumption that the only relevant interests are physical.¹³² Even assuming that the life interests of the accused and

126. See Jan Narveson, "Pacifism, Ideology and the Human Right of Self-Defence" (2002) 1:1 Hum Rts J 55 at 55.

127. *Ibid* at 56.

128. *Ibid* at 55–57.

129. Michael Gorr, "Private Defense" (1990) 9:3 Law & Phil 241 at 241. Even self-identifying pacifists have concluded that it is possible for a justification to exist for killing in self-defence. Theorists instead debate the merits of certain theories of justification which lead to this result. See e.g. Cheyney C Ryan, "Self-Defense, Pacifism, and the Possibility of Killing" (1983) 93:3 Ethics 508 at 508, 520.

130. Dressler, *supra* note 120 at 84.

131. *Ibid*.

132. For a good example of this critique, see Sanford H Kadish, "Respect for Life and Regard for Rights in the Criminal Law" (1976) 64:4 Cal L Rev 871.

the attacker are equal, each interest arguably negates the other. As Doherty JA argues, to conclude otherwise “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”.¹³³ Given the important socio-legal order interests upheld by self-defence, however, there is an undefeated reason to favour the accused’s life and security interests over those of the attacker. As the Court has concluded that justification connotes a rightful act, and the previous law of self-defence was applied pursuant to this justificatory principle, there is no reason to believe that the core case of self-defence will receive any different treatment under the new provisions.

B. The Innocent Attacker

The case of the innocent attacker is perhaps the most frequently cited conundrum in the literature discussing the moral foundations of self-defence. The following example is illustrative. Suppose that X learns that Y was drugged by Z to the point of becoming an automaton. As a result of a delusion, Y then attempts to kill X. Given her delusional state, Y is incapable of stopping her attack on X. As the latter knows Y is acting involuntarily, it is unfair to say that Y deserves any use of force against her person. Yet, X has also done nothing wrong and therefore does not deserve any force being applied to her person. If X defends herself, what is her moral position?

As alluded to above, the utilitarian rationale of self-defence has been criticized for being unable to explain why use of force against the innocent attacker is justified. As Professor Stewart argues, given the neutral claims X and Y have vis-à-vis each other, a claim of X’s innocence is too strong.¹³⁴ However, as X is not to blame for being forced to choose between the lives of two innocents, a claim of excuse is too weak.¹³⁵ Even the socio-legal order does not weigh in favour of attacking the innocent aggressor. As Jerome Hall explains, the injury caused by the innocent aggressor to the social order is tantamount to that of an attack by a wild animal.¹³⁶ As it cannot be deterred by prohibiting the act, the socio-legal order derives no benefit from justifying the accused’s attack on the innocent aggressor.

Professor Fletcher, a main proponent of the autonomy theory of self-defence, recognized the challenge of placing the autonomy of the defender above

133. *R v Aravena*, 2015 ONCA 250 at para 83, 323 CCC (3d) 54.

134. Stewart, *supra* note 11 at 916–17.

135. *Ibid.*

136. Jerome Hall, *General Principles of Criminal Law*, 2nd ed (Indianapolis: The Bobbs-Merrill Company, 1960) at 436.

that of the innocent attacker.¹³⁷ He appears to resolve this issue by asserting that Y is acting pursuant to an excuse. As excuses by definition concern wrongful acts, X is still justified in ensuring her autonomy interests prevail.¹³⁸ Yet, such an assertion relies on the assumption that Y's act was wrongful. As should be evident from the above, I have considerable difficulty understanding why Y acted in a wrongful manner. If a person is an automaton, how can any blame be cast on that person for the act committed? In resolving this controversy, it is therefore better to admit that a definitive moral conclusion is not possible in the innocent attacker scenario. As there is no definitive argument suggesting that X acted wrongfully, however, the criminal law must permit her to act in self-defence.¹³⁹

From this review, a number of conclusions may be drawn with respect to the application of the new self-defence provisions. First, in this unique circumstance, it would seem that the accused must take any reasonable avenue of escape available to her so as to preserve the interests of both innocent parties. Only if the act is reasonably necessary can the accused use force, as to conclude otherwise would devalue the legitimate and undefeated interests of the attacker. Second, it would also seem reasonable, as with the core case, to limit use of life-threatening harm to cases where the same type of harm is threatened by the innocent attacker. To do otherwise would impermissibly place the life interests of the accused above that of the innocent attacker.

C. *The Justified Attacker*

Another variation of the core case is where the accused is attacked by a justified attacker. Professor Fletcher uses a vivid hypothetical scenario to illustrate the moral tensions implicit in this case. Consider an accused who, while being raped, pulls out a razor and tries to kill the rapist. The rapist, realizing that he will incur a fatal wound if he withdraws, chokes the victim to death.¹⁴⁰ The victim is surely justified in defending herself if we assume the harm is life threatening.¹⁴¹ However, what of the rapist? In considering the implications of the illegality of the accused's preceding conduct, Dickson CJ wrote in *Perka* that: "At most . . . the preceding conduct will colour the subsequent conduct

137. Fletcher, *Rethinking*, *supra* note 10 at 862–63.

138. *Ibid* at 869–70.

139. See generally Fehr, "(Re-)Constitutionalizing", *supra* note 9.

140. Fletcher, "Intolerable Conditions", *supra* note 123 at 1359–60.

141. Rape constitutes a threat of serious bodily harm, which in the circumstances is arguably life-threatening. See *R v McCraw*, [1991] 3 SCR 72, 66 CCC (3d) 517. I deal with the scenario where the victim knows the threat is not life-threatening below.

in response to the emergency as also wrongful.”¹⁴² It does not, however, provide a bar to a defence.¹⁴³ Given the dire circumstances of the rapist, the rapist’s act of murder arguably is morally involuntary as the choice of life or death made any other choice unrealistic.

To be clear, the rapist would certainly be convicted for committing rape, as the rape was committed in a morally voluntary manner. However, the murder fits into the definition of moral involuntariness described earlier, as what deprives the rapist of his will is the threat of death. This is fundamentally different from a scenario where what deprives the accused of her will is an improper emotional response, such as “homosexual panic”.¹⁴⁴ When such an unpalatable emotional response underlies the morally involuntary act, we do not excuse the accused’s act as the accused is responsible for harbouring biases that society does not tolerate. However, as the rapist’s *response* is compelled only by the threat of death, it falls within the normal parameters of moral involuntariness thereby providing the accused with a constitutional right to a defence.

It may be retorted that the “societal approval” element of the Supreme Court’s moral involuntariness principle would resolve this difficulty. As this element assesses whether society would view the accused’s entire act as approved, it is not difficult to bar the rapist from pleading moral involuntariness. As explained earlier, however, it is not philosophically sound to develop moral involuntariness in this manner. Asking whether the entire act was “socially approved” takes the analysis some distance from assessing the effect a circumstance had on the accused’s will.¹⁴⁵ If anything, it seems to be another way of asking whether the conduct was permissible.¹⁴⁶ Yet, if I am right that (i) permissible conduct is not wrongful; (ii) excuses only apply to wrongful conduct; and (iii) moral involuntariness underlies self-defence, duress and necessity when pleaded as excuses, it follows that including a socially approved requirement transforms the moral involuntariness principle into a different principle altogether.

142. *Perka*, *supra* note 86 at 254.

143. *Ibid* at 256 (only if the threat was clearly foreseeable will it bar the defence).

144. Fehr, “(Re-)Constitutionalizing”, *supra* note 9 at 119, citing Berger, *supra* note 91 at 112–13.

145. See Fehr, “(Re-)Constitutionalizing”, *supra* note 9 at 110–11; Terry Skolnik, “Three Problems with Duress and Moral Involuntariness” (2016) 63: 1 & 2 *Crim LQ* 124 at 144.

146. See generally Fehr, “(Re-)Constitutionalizing”, *supra* note 9. It is for this reason that I maintain that the Court’s development of the duress and necessity defences elements asks not whether the conduct was morally involuntary, but rather whether the conduct was morally permissible.

If this conclusion has force, it leads to an awkward development when compared to the law of duress. Section 17 of the *Criminal Code* currently prohibits those who commit murder while under duress from pleading the defence.¹⁴⁷ It would therefore follow that those pleading the excuse of duress based on a claim of moral involuntariness are not permitted to plead duress to a murder charge, while an accused who pleads moral involuntariness in the self-defence context may successfully plead a defence.

Yet, careful attention to the moral distinctions between these two scenarios leads to the conclusion that the complete ban in section 17 will not withstand constitutional scrutiny,¹⁴⁸ while a limitation of the moral involuntariness principle would be constitutional in the case of the rapist. In the core case of duress, the accused is forced to choose between her life and that of another due to no fault of her own as her choice is compelled by another person. In this scenario, the accused's interests are identical to those of the innocent attacker. It is therefore reasonable to conclude that such an accused acts in a morally permissible manner.¹⁴⁹ As morally permissible conduct is by definition non-wrongful conduct, it is difficult to see how the state could justify a full prohibition against pleading duress for murder charges.

Where the accused's act is coloured wrongful—as is the case of the rapist acting in self-defence—the accused may only plead moral involuntariness. Given the horrific nature of the rapist's act, it seems intuitively justifiable to convict the accused for both the rape and the murder. Although this constitutes a limitation of the moral involuntariness principle, it is minimally impairing if it applies only in the context of an accused who places the victim in a life-or-death scenario, and due to the victim's rightful choice to defend herself, must kill the victim to preserve himself from death. Absent legislation from Parliament, however, the courts will be unable to impose such a limitation of the moral involuntariness principle, as section 1 of the *Canadian Charter of Rights and Freedoms* demands that any limitation of a Constitutional right be “prescribed by law”.¹⁵⁰

147. *Criminal Code*, *supra* note 3, s 17. See generally *Ruzic*, *supra* note 92.

148. For the context of whether murder is constitutionally excluded from the duress provisions, see *R v Willis*, 2016 MBCA 113, 344 CCC (3d) 443; *Aravena*, *supra* note 133. For a summary of the academic commentary, see Fehr, “Near Death”, *supra* note 29.

149. For a more detailed outline of this argument, see Fehr, “(Re-)Constitutionalizing”, *supra* note 9 at 111–12.

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

D. Provocation

Accused persons who provoke the aggressor and, as a result, must act in self-defence to avoid harm or death provide another clear moral problem. Although the old provisions drew complex distinctions between assaults that were provoked and those that were not, the new provisions simply make the accused's role in the incident a mandatory consideration. To develop a principled approach for determining when the accused's role should alter the necessary requirements for pleading self-defence, it is necessary to consider three distinct scenarios: the provocative accused who (i) commits illegal provocation; (ii) retreats; and (iii) commits non-illegal provocation.

(i) Illegal Provocation

As discussed above, the Court concluded in *Perka* that only illegal conduct colours an accused's subsequent criminal act wrongful.¹⁵¹ As such, it would follow that illegal provocation—in particular, blows, which constitute assaults under section 265 of the *Criminal Code* or illegal threats, which violate section 264.1—would colour subsequent assaults committed by the accused in self-defence as also wrongful. As wrongful acts can only be excused, then arguably the accused must prove that her conduct was morally involuntary.

This conclusion would be more restrictive than under the previous self-defence provisions. Consider the Court's interpretation of section 34(2). If the accused faced life-threatening harm, lethal force that was reasonably necessary to preserve the accused from grievous harm or death was justifiable, regardless of whether the accused had provoked the attack or had a reasonable avenue of escape.¹⁵² Such a broad defence, however, is not encompassed by either of the currently accepted moral bases for criminal defences. As the accused admits a reasonable avenue of escape, the accused is not acting in a morally involuntary manner. And as the accused bears culpability for bringing about the attack and refusing to retreat, any conclusion that the accused acts rightfully is tenuous at best.

If the accused is to have a constitutional defence, it is important to observe at the outset that the Court's conclusion in *Perka* that a subsequent act may be coloured wrongful by a preceding act, and therefore may only be excused, was

151. *Supra* note 86 at 254.

152. The Court in *McIntosh* drew this conclusion despite the section's heading reading "Self Defence against Unprovoked Assault". *Supra* note 1.

developed in the context of the duress and necessity defences.¹⁵³ The key difference between those defences and self-defence is that the victim in the latter case bears some degree of responsibility for the force being used against her person. In the duress and necessity defences, the victim is innocent.¹⁵⁴ As such, in the context of self-defence, the accused's culpability must be balanced against the unnecessary escalation of violence brought on by the victim.

Balancing the relevant degree of blame for each actor must also be informed by the fact that the accused remains criminally liable for her illegal provocation. It is only the permissibility of the subsequent defensive act in response to the victim's aggression that is at issue. With respect to that act, if the victim escalates the situation by resorting to life-threatening violence, the victim's autonomy interests must be significantly devalued, as such a response is grossly disproportionate to the initial provocation. Yet, the accused's refusal to back down encourages violence in a circumstance where the accused is responsible for bringing about the circumstance. This not only shows disregard for the victim's autonomy, but is also counterproductive from a societal perspective. Although the right thing for the accused to do is retreat, the blameworthiness of the victim for unnecessarily escalating the violence makes it difficult to conclude that the accused's *subsequent* use of force in self-defence is clearly wrongful. As balancing all of the relevant interests makes a definitive moral conclusion extremely difficult, it is sensible to conclude that the accused's choice to act in self-defence is morally permissible.

How would application of the moral permissibility rationale affect the legal requirements for self-defence? If retreat is not imposed as a legal requirement, the reasonable necessity factor cannot provide a meaningful restriction. And as provocation is permitted in this circumstance, the only other relevant consideration is proportionality. Where two accused are effectively choosing to fight to the death, proportionality of harm caused is obviously rendered moot. However, proportionality of the *means used* to cause any harm may result in a meaningful limitation. This interpretation is consistent with Parliament's choice to make proportionality considerations such as use of a weapon, disparity in physical size and capabilities and the relationship between the parties, mere factors relevant to self-defence. This rationale might therefore dictate the result in a case where an accused provoked the victim, chose to stand her ground despite the victim's life-threatening harm, but was outsized by the

153. *Perka*, *supra* note 86 at 254–55.

154. See *Hibbert*, *supra* note 58 at para 50.

victim. If the accused, upon reasonably perceiving her life to be in jeopardy, resorted to use of a weapon, her act would be impermissible as a result of her having used a disproportionate means to defend herself.

(ii) Retreat

The moral question is cast in a different light if the accused availed herself of a reasonable avenue of escape before resorting to force. In my view, by retreating, the accused will have reset the circumstances. If the provoked party continues, she will be acting with excessive, unnecessary and vengeful force, which itself constitutes a serious infringement of the accused's autonomy interests. As society does not condone such conduct, the socio-legal order consideration also turns more starkly against the victim. As the accused is still criminally liable for the initial illegal and provocative assault, it is reasonable to consider the accused's retreat as effectively resetting the circumstance. If true, it would follow that the accused's subsequent use of force would be rightful so long as she used force commensurate with that permitted in the core case.

(iii) Non-Illegal Provocation

As the accused's "role in the incident" is an explicit factor in the current section 34(2),¹⁵⁵ cases of non-illegal provocation are now also relevant to claims of self-defence.¹⁵⁶ The scope of this consideration will be difficult for courts to determine. Again, however, the framework offered above may provide interpretive guidance. Under this approach, any act by the accused would have to taint the moral nature of the accused's defensive act to be relevant to a claim of self-defence. Under the old law, conduct that intended to elicit an assault or would almost certainly provoke an assault was considered provocation.¹⁵⁷ As these acts are not themselves necessarily illegal, they do not, per the reasons of Dickson CJC in *Perka*, colour any subsequent act

155. *Criminal Code*, *supra* note 3, s 34(2)(c).

156. *Ibid*, s 34(3). Non-illegal provocations, such as those used in the examples in this section, are not to be confused with legal provocations at issue in section 34(3). The latter refer to acts that an accused has a right to undertake, and actions defending against these acts bar a plea of self-defence. For example, defending oneself against a lawful arrest is not a valid claim of self-defence.

157. See Paciocco, "The New Defence", *supra* note 6 at 289–90, citing *Nelson*, *supra* note 49 and *Merson*, *supra* note 49.

wrongful.¹⁵⁸ Yet, if the accused's words or gestures were intended to provoke an assault, it is much less clear that the accused is morally innocent. If this standard was met, the accused's conduct differs little from the accused who uses force to provoke an assault, as the intent behind each act is to coax the victim into a fight. As such, a similar requirement as in the stand-your-ground and retreat circumstances discussed above—depending on the nature of the accused's reaction—should be required before concluding that the accused's conduct was justified.

It is not difficult to imagine less serious roles being played by an accused. For instance, an accused who makes an argument about the rules during a chess match, and is met with force, played a role in the incident. Yet, arguing about applicable rules does not taint the moral nature of the accused's subsequent defensive act, and therefore should not be relevant to any subsequent act of self-defence. However, an accused who curses at another person out of anger may provoke an attack in the lay sense of the word. If the accused's act was not intended to provoke an assault, and was met with violence, should the accused's conduct alter the basic requirements for self-defence outlined in the core case?

In my view, it should not. The moral permissibility principle is a broad principle that attempts to encompass all cases of moral ambiguity. Naturally, moral ambiguity can arise for more or less serious reasons. As seen above, non-illegal provocation can fall into either category. Where it is not aimed at eliciting an assault, the victim's grossly disproportionate response seriously undermines her autonomy interests. As such, the accused's autonomy interests are held in a much better light. Although we do not condone using insulting words, the response is so disproportionate that the socio-legal order is seriously undermined if we require the accused to retreat or use anything other than reasonably necessary force, as this encourages hotheadedness. Obviously, the right thing for the accused to have done is not use hurtful words. However, applying the relevant considerations to self-defence, it would, in my view, be unfair to the accused to require her to modify the basic right to self-defence as a result of a minor insult.

E. The Putative Defender

Accused persons who plead putative self-defence—instances where the defender wrongly but reasonably believes she is going to be assaulted—are

158. *Supra* note 86 at 254–55.

also frequently challenged as being non-justificatory instances of self-defence.¹⁵⁹ Professor Stewart summarizes the issue well:

[There is a] general debate about whether conduct is legally justified only if it [is] the right thing to do all things considered or if it may also be justified if it appears to be the right thing to do. On the former view, [A's] conduct is merely excused because, all things considered, [A] should not have killed [B], as [B] was not, in fact, threatening his life. On the latter view, [A's] conduct is justified because, from an objective point of view, it appeared to be the right thing to do.¹⁶⁰

In other words, some theorists contend that the accused's act is wrong because the accused did not achieve a net social benefit. Such an accused at best may be excused given the reasonableness of the mistake.¹⁶¹ Other theorists maintain that given the accused truly intended to act rightfully, it is overly consequentialist to focus exclusively on the result.¹⁶²

This debate is longstanding and complex, and there is little utility in reviewing it in detail here.¹⁶³ For present purposes, it seems tenable, based on the unfortunate consequences of the putative defender's actions, to conclude that the act was not rightful. In common parlance, acting rightfully implies that the act resulted in a rightful outcome. However, there is considerable appeal to the argument that the moral determination should at least be influenced by the accused's reasonable beliefs. As Professor Andrew Botterell contends:

[Objectivists argue] that [the] Victim makes a *rational* error in acting on the basis of her reasonable and justified belief that Aggressor means to do her harm. And yet [it] is hard to see what the source of such an error is. [The] Victim is not making an epistemic mistake since, as [an objectivist] allows, her belief is both reasonable and justified: she is epistemically faultless. Nor is she making a mistake of practical rationality, since she is surely not at fault for *acting* on the basis of her reasonable beliefs.¹⁶⁴

Yet, it is also possible that in many scenarios the accused could have taken further steps to ascertain the nature of the threat. Consider the commonly cited scenario where a plainclothes police officer is detaining a criminal, and the accused attacks the officer with the mistaken belief that she is unlawfully assaulting the criminal. The objectivist might ask: before attacking the officer, could you not have asked "why are you assaulting this person?"

159. See Stewart, *supra* note 11 at 907–08.

160. *Ibid* at 909.

161. See Fletcher, *Rethinking*, *supra* note 10 at 762–69; Gardner & Tanguay-Renaud, *supra* note 10 at 119.

162. See Stewart, *supra* note 11 at 909; Brudner, *supra* note 58 at 893.

163. For an excellent overview, see Ferzan, *supra* note 119 at 244–51.

164. Andrew Botterell, "A Primer on the Distinction between Justification and Excuse" (2009) 4:1 *Philosophy Compass* 172 at 184 [emphasis in original].

Until there is good reason to side with either argument, an alternative solution is to admit that the limitations of moral philosophy do not permit clear moral conclusions to be drawn in the putative defender scenario. This conclusion could be rectified with the Supreme Court's prior jurisprudence if justifications included permissible acts. In *R v Pétel*, the Court concluded that putative defenders are justified despite clear language to the contrary.¹⁶⁵ Section 34(2), which applied to instances of lethal force being used, permitted a reasonable belief in the existence of the threat to form the basis of a justification.¹⁶⁶ The wording of section 34(1), however, used the words “*is* unlawfully assaulted”,¹⁶⁷ suggesting that an actual assault was required to be justified. Despite this plain wording, the Court extended the putative self-defence justification to acts of non-lethal force.¹⁶⁸ Although the legal analysis under the new self-defence provisions should still focus on the reasonableness of the accused's perceptions, it may be better to rely upon the permissible nature of the act to uphold it as a justification.

This conclusion also provides a response to those who believe that justifications must be asymmetrical. For these scholars, symmetrical justification is philosophically undesirable as it sacrifices normative closure to permissible violence.¹⁶⁹ In other words, as the criminal law is action guiding, it must be able to tell third parties whom they should help, should they so choose. This provides the basis for the argument that the putative defender logically must act wrongfully and therefore can only be excused. If only one party may act rightfully, surely it is the victim of the attack who through no fault of her own faces *actual* force from the accused. Yet, if justifications are placed in a hierarchy between permissible and rightful acts, the criminal law could still serve its action-guiding purpose, as the law would dictate that epistemically privileged third parties help those who are *more* justified, in other words, those who act rightfully over those who act permissibly.

F. Malicious Justification

A situation related to the putative defender scenario concerns the circumstance where the accused's act results in a desirable outcome, but was

165. [1994] 1 SCR 3, 87 CCC (3d) 97.

166. *Criminal Code*, 2013, *supra* note 5, s 34(2).

167. *Ibid*, s 34(1) [emphasis added].

168. See generally *Pétel*, *supra* note 165.

169. See Brudner, *supra* note 58 at 892.

committed for wrongful reasons. For instance, consider an individual (X) who shoots another person (Y) for racist reasons, but it turns out that Y was in fact on her way to detonate a bomb in a crowded public area. If the objective consequences of the act are controlling, then X's act must be deemed justified, as a balancing of the relevant harms would lead to the conclusion that the accused acted rightfully. Section 34(1)(b) of the new self-defence provisions, which requires that the accused commit the defensive act "for the purpose of defending or protecting themselves",¹⁷⁰ would therefore violate the moral innocence principle.

The writing of Professor Robinson supports this constitutional argument.¹⁷¹ In his view, just as a wrongful consequence may not be justified by the actor's rightful motive (the putative defender is therefore only excused), a rightful consequence is not unjustified by a wrongful motive.¹⁷² This consequentialist view, he argues, leads to the conclusion that X's use of force against Y should be viewed as good, and epistemically privileged individuals should still aid X, as the net result is good for society.¹⁷³ For Professor Robinson, however, the fact that the act is justified does not mean that X escapes punishment.¹⁷⁴ In his view, X's wrongful purpose for attacking the accused requires that X be found guilty of committing an impossible attempt.¹⁷⁵

The argument offered by Professor Robinson is problematic. In essence, he finds that reasonable mistakes about the circumstances render the putative defender's act unjustified, yet an unreasonable risk with respect to whether the victim was culpable can be ignored outright.¹⁷⁶ From a moral perspective, it is difficult to understand why the purpose of an accused's act—which requires moral deliberation—is irrelevant to justification, while the accused's luck in directing her anger towards a seemingly innocent though culpable victim—which concerns a morally blameworthy disposition—should be controlling. It is for this reason that the dominant position in the literature is that a subjective belief in the justifying circumstances is required.¹⁷⁷

170. *Criminal Code*, *supra* note 3, s 34(1)(b) [emphasis added].

171. Paul H Robinson, "The Bomb Thief and the Theory of Justification Defenses" (1997) 8:3 *Crim LF* 387.

172. For a useful summary of Robinson's argument, see Ferzan, *supra* note 119 at 246–47, citing Paul H Robinson, "Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offences" (2003) 4 *Theor Inq L* 367.

173. Ferzan, *supra* note 119 at 246–47.

174. *Ibid.*

175. *Ibid.*

176. *Ibid* at 246.

177. See e.g. Greenawalt, *supra* note 10 at 1907–08, n 30.

This conclusion is also consistent with the theory of self-defence that I have argued is derived from the new self-defence provisions. This follows as none of the relevant considerations for granting self-defence weigh in favour of the malicious justified actor. The socio-legal order is not upheld in any meaningful sense, as the basis for the justification—the consequence—occurred by sheer chance. Moreover, the autonomy interests of the accused were never put in jeopardy by the victim, and as a result the victim’s culpability cannot be the source of the accused’s higher moral claim. All that supports the claim is the luck of the result, and given that the result is driven by an emotional response that society abhors, concluding that the act is rightful, permissible or excusable lacks a strong moral basis.

G. Disproportionate Force

Accused persons who act in excessive self-defence have traditionally been denied the defence.¹⁷⁸ As I contend below, the merit of this conclusion depends both on the nature of the proportionality at issue, and the interests that one considers relevant to claims of self-defence. By considering disproportionality in the self-defence context in both its aggregate and individualized forms, I contend that limited accused persons may commit disproportionate yet morally correct or morally permissible acts.

(i) Aggregate Disproportionality

The most obvious example of an accused committing a disproportionate act in self-defence involves an accused who kills multiple attackers to preserve herself. As Professor Ferzan observes, if it is correct to assume that the aggressor’s life is devalued *vis-à-vis* the life of the accused, “there must be a point at which the aggregation of multiple culpable aggressors outweighs the defender’s interests”.¹⁷⁹ If this were true, this balancing of harms would lead to the conclusion that the accused’s conduct would be wrongful. Applying the principles that I maintain underpin the defences of duress, necessity and self-defence, it would follow that the accused would be forced to plead moral involuntariness, which would only apply if she was unable to preserve herself without killing the group of attackers.

178. See *R v Faid v*, [1983] 1 SCR 265 at 271, 2 CCC (3d) 513. See also Sangero, *supra* note 62 at 92 (where the author posits that disproportionate force should never excuse, but instead should be restricted to a sentencing consideration).

179. Ferzan, *supra* note 119 at 253.

This view, however, arguably misstates the issue. If an accused acts in self-defence on two separate occasions, causing death each time, the aggregate loss does not mean she was not justified the second time. Self-defence is not a card that, once played, is gone forever. It is instead an enduring right. If an accused is attacked by multiple aggressors at the same time, repelling each individual aggressor might therefore be better thought of as multiple individual acts of self-defence, in which case each aggressor's life must be weighed against that of the accused. Under this argument, the accused would be justified in killing multiple aggressors for the same reason the accused in the core case is justified in killing a single aggressor.

This argument is sensible when contrasted with the analogous duress and necessity scenarios. In the core case, the accused is required to commit some harm or be killed. If the harm caused is greater than the life of the accused, the accused's act is wrongful and therefore can only be excused. The important distinction between these cases and multiple aggressor self-defence cases is in the nature of the harm caused. In the duress and necessity cases, the harm caused is an all-or-nothing proposition, as there is no way for those harmed to avoid the harm, or for the accused to avoid imposing anything but the full harm demanded by the threatening party. In the context of self-defence, each aggressor is an autonomous actor, and may therefore preserve themselves by retreating. It is the aggressor's autonomy in the circumstances that makes it sensible to weigh each aggressor's life against the accused's life, not the accused's life against the group of aggressors.

This view is made more sensible when considering a less extreme example. Consider an accused (X) who is threatened by a group of people (Y+) with bodily harm. The threat of bodily harm, defined as harm which "interferes with the health or comfort of the person and that is more than merely transient or trifling",¹⁸⁰ is not serious. As I explain elsewhere: "One might reasonably be perplexed in considering how committing harm that is only 'more than merely transient or trifling' to avoid a similar harm could ever constitute [a deprivation of the will]".¹⁸¹

If Professor Ferzan's position is correct, the harm caused by X is considered wrongful as a result of its disproportionality when compared to the harm done to Y+. The accused's act must therefore be excused, but the constitutional basis for an excuse is not present. This result is plainly unjust.

180. *Ryan SCC*, *supra* note 12 at para 60.

181. Fehr, "(Re-)Constitutionalizing", *supra* note 9 at 121. See also *Ryan SCC*, *supra* note 12 at para 61 (where the Court recognized this inconsistency).

Our intuition tells us that the accused is the victim, and as she used only reasonably necessary force against *each individual*, each of whom could have avoided the harm by retreating, the harm caused is reasonable in the circumstances. If this position is correct, it should be recognized that the force of its reasoning derives from the choice of each aggressor to follow through with the overall attempt to harm the accused.

(ii) Individual Excessive Force

As Dickson CJC concluded in *R v Faid*: “Where a killing has resulted from the excessive use of force in self-defence the accused loses the justification provided under [the old] s. 34.”¹⁸² Moreover, Canadian law has never recognized a partial justification for excessive self-defence, which in many jurisdictions lowers the conviction from murder to manslaughter.¹⁸³ The exclusion of all pleas of excessive self-defence, however, has not been constitutionally tested. As Professor Coughlan observes, there may be circumstances where the accused ought to have a defence, despite the lack of proportionality between the harm caused and avoided. In the context of self-defence, he offers a scenario wherein the accused is sexually assaulted in a “non-violent” manner.¹⁸⁴ If the accused has no other way of avoiding the assault, can she kill her rapist in response?

The accused has two potential defences. As Professor Coughlan contends, the first is moral involuntariness.¹⁸⁵ Unfortunately, when Professor Coughlan details this argument, he presents an accused who is threatened with aggravated sexual assault.¹⁸⁶ Such a scenario clearly meets the threshold for threats that engage the moral involuntariness principle.¹⁸⁷ However, as the harm is serious enough that an accused would reasonably believe that her life is in jeopardy, the victim’s response is roughly equivalent to the harm threatened. This scenario is therefore more consistent with the core case of self-defence.

But say the accused knows the harm will not endanger her life, yet still constitutes a gross invasion of her rights, such as in the case of a penile penetrative

182. *Supra* note 178 at 271.

183. See generally Stanley Yeo, “Revisiting Excessive Self-Defence” (2000) 12:1 *Current Issues in Criminal Justice* 39. Although Canada recognizes, under section 232, a right to a reduction from murder to manslaughter for provocation, acts of excessive self-defence have generally not provided a defence. See *Criminal Code*, *supra* note 3, s 232; *Faid*, *supra* note 178 at 271; Roach, *Criminal Law*, *supra* note 29 at 340.

184. Coughlan, “Implications”, *supra* note 91 at 199–200.

185. *Ibid* at 199–204.

186. *Ibid* at 204.

187. See e.g. *Criminal Code*, *supra* note 3, s 273(1). Section 273(1) reads: “Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.” *Ibid*.

sexual assault. As the accused's life is not endangered, the act of killing the rapist is arguably not morally involuntary. Yet, it does not seem unreasonable to think that the accused should receive a defence. A more promising explanation requires that courts consider a number of relevant harms to the social order that are not present in other cases of excessive self-defence. The elephant in the (court)room is the harm done to the social fabric by requiring the rape victim, who is disproportionately female, to endure violence by the usually male rapist.¹⁸⁸ This perpetuates a prejudice that the law has fought vehemently to eradicate. Although the harm done by the victim is excessive, the underlying prejudices that are forwarded by requiring the woman to endure the violence are so parasitic that society might reasonably permit the criminal law to grant the accused's defence.

A similar argument could be made with respect to the constitutional basis for granting a battered woman a defence to a charge of murder. As Professor Roach observes, cases of battered women killing their abusers before such force becomes necessary "bear some resemblance to an excuse that accommodated human frailties as opposed to a justification that would apply to rightful conduct".¹⁸⁹ Others have expressed broad agreement with this conclusion.¹⁹⁰ At the same time, however, Wilson J concluded in *R v Lavallee* that those perceptions are reasonable given the battered woman's heightened ability to sense the severity of the violence to be used by the batterer.¹⁹¹ As discussed under the putative defender heading, epistemic uncertainty is part and parcel of moral permissibility; mistakes are therefore tolerable if they are reasonable. The main "fault" of the battered woman is her refusal to leave her batterer and seek help. Her choice to stay is, however, significantly offset by the moral condemnation society directs toward the batterer for having created such circumstances. Although the right thing for the accused to do is leave the batterer and press criminal charges, the complexity of the competing interests again makes it difficult to come to a distinct moral conclusion. In this circumstance, it may be preferable to conclude that the battered woman acts in a morally permissible manner, not that her act was wrongful but morally involuntary.

188. For Ontario, see Ministry of the Status of Women, "Statistics: Domestic Violence", (4 March 2015), online: <www.women.gov.on.ca/owd/english/ending-violence/domestic_violence.shtml>.

189. Roach, "Preliminary Assessment", *supra* note 21 at 281.

190. See Botterell, *supra* note 164 at 177. See also Cathryn Jo Rosen, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill" (1986) 36:1 Am U L Rev 11.

191. *Supra* note 18 at 873–78.

Conclusion

With its adoption of the new self-defence provisions, Parliament has abandoned the unnecessary complexities and contradictions present in the old provisions. In so doing, however, courts have been provided with inadequate guidance for determining self-defence claims. In particular, the vagueness of the “reasonableness” standard makes the new provisions difficult to apply with any consistency. To make this standard intelligible, it is therefore necessary for courts to rely upon the moral principles that underlie claims of self-defence. This approach is not only philosophically sound, it accords with the most recent direction from the Court in *Ryan*, wherein it concluded that the availability of defences must be commensurate with the moral qualities of the accused’s act.¹⁹²

Unfortunately, the Supreme Court’s moral framework for criminal defences has proven incapable of addressing the complex moral issues inherent in criminal defences. Although it is prudent to preserve the distinction between excuses and justifications, it must be recognized that it is not always possible to come to the distinct moral conclusions underlying the excuse-justification framework adopted by the Court. A more nuanced moral framework requires courts to categorize an accused’s conduct within one of the principles of moral involuntariness, moral permissibility or moral innocence. By so doing, courts will be better equipped to determine when the reasonable necessity and proportionality requirements in the new self-defence provisions ought to be applied more or less strictly.

Placing the emphasis on the moral nature of the accused’s act leads to a final point that is implicit in this article, as well as its predecessor.¹⁹³ Although scholars commonly question the merits of distinguishing between excuse and justification,¹⁹⁴ few have turned their criticism towards the distinction between the defences themselves.¹⁹⁵ Generally, these defences all impose, to varying degrees, similar requirements of reasonable necessity and proportionality.¹⁹⁶ If the moral character of the accused’s act dictates how these factors are to be

192. *Ryan* SCC, *supra* note 12 at para 26.

193. Fehr, “(Re-)Constitutionalizing”, *supra* note 9.

194. See Coughlan, “Implications”, *supra* note 91 at 157 (citing Don Stuart and Kent Greenawalt as authors who take this view).

195. See Greenawalt, *supra* note 10 (“[i]nstead of introducing sharp distinctions between justification and excuse in the definition of specific defenses, a jurisdiction might adopt general and abstract definitions of justification and excuse that would cut across specific defenses that themselves did not sharply distinguish the two general grounds of defense” at 1913).

196. See Coughlan, “Implications”, *supra* note 91 at 149–50.

applied, perhaps it is more sensible to focus on defining the moral principles underlying criminal defences, and less on a rigid categorization of each defence based on the nature of the threat against the accused.

The new self-defence provisions, supplemented by a judicial interpretation of the constitutional principles applicable to criminal defences, are well-suited to provide a unified provision for duress, necessity and self-defence. Professor Roach,¹⁹⁷ Professor Coughlan,¹⁹⁸ and I¹⁹⁹ have observed that as the provisions apply to “the act that constitutes the offence”, they are broad enough to encompass situations of duress and necessity. Although the wording of the provision may need to be altered slightly,²⁰⁰ and the duress provision in section 17 would need to be repealed or struck down,²⁰¹ there is no reason why the new provisions could not serve as a broader defence of person that applies to acts of duress, necessity and self-defence. Not only would this simplify the complex web of jurisprudence and statutory law that currently makes up these defences, it would turn judges’ focus to the real issue when an accused pleads these defences: the moral nature of the accused’s reasons for committing a criminal offence.

197. Roach, “Preliminary Assessment”, *supra* note 21 at 279–80.

198. Coughlan, “Rise and Fall”, *supra* note 29 at 115–25.

199. Fehr, “Near Death”, *supra* note 29 at 145–48.

200. For instance, the wording of the provision would need to be changed to include omission-based offences, see *ibid.* Section 34(1)(a) may also need to clarify that “force” includes threats of force from natural occurrences. See *Criminal Code*, *supra* note 3, s 34(1)(a).

201. Other scholars and I have argued that it would be desirable to strike down section 17 in its entirety. See generally Fehr, “Near Death”, *supra* note 29 at 145–48 (and the literature cited therein). If repealed, the statutory defence would override any common law defences. See *Criminal Code*, *supra* note 3, s 8(3).

