The Constitutionality of Excluding Duress as a Defence to Murder

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ABSTRACT

The Supreme Court's decision in *R v Ruzic* constitutionalized moral involuntariness as a principle of fundamental justice under s. 7 of the *Charter*. Although the Court used this principle to strike down the imminence and presence requirements in the statutory duress defence, it left open the possibility that the lengthy list of excluded offences might also violate the moral involuntariness principle. The author maintains that various doctrinal and philosophical reasons support interpreting the moral involuntariness principle in a manner that allows duress to be pleaded for the offence of murder. Although it is possible that exclusion of murder could be justified under s. 1 of the *Charter*, such a finding would inevitably result in a separate challenge to the mandatory minimum punishment provisions for violating the prohibition against cruel and unusual punishment found in s. 12 of the *Charter*.

Keywords: Duress; Murder; *Charter*; Fundamental Justice; Moral Involuntariness; Cruel and Unusual Punishment

I. INTRODUCTION

The duress defence in Canada has both common law and statutory origins. S. 17 of the *Criminal Code of Canada*[1] provides a duress defence for anyone who "commits" a crime.[2] Those who act as a party to an offence, however, do not come within this statutory definition

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1 RSC 1985, c C-46, s 17 [*Criminal Code*].

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

of duress. As such, a party to a criminal offence must plead the common law defence as preserved under s. 8(3) of the *Criminal Code*.[3] Although the Supreme Court developed these defences differently at times, the Court's recent decision in *R v Ryan*[4] synthesized the various requirements for each version of the defence. The only remaining difference between the two defences rests in the list of offences excluded from the statutory defence. Whereas the common law defence is available for any crime, s. 17 of the *Criminal Code* excludes a list of offences, including the offence of murder.

The exclusion of murder and other offences from the statutory duress defence is arguably inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*.[5] The basis for this argument derives from the Supreme Court of Canada's decision in *R v Ruzic*.[6] In that case, the Court struck down the "imminence" and "presence" requirements of the statutory duress defence for violating George Fletcher's principle of "normative" or "moral" involuntariness.[7] The list of excluded offences nevertheless went unchallenged in *Ruzic*.[8] Perhaps due to the extreme and thus rare nature of the duress defence, a challenge to the exclusion of the murder offence took some time to come to fruition. However, two recent appellate cases — *R v Aravena*[9] and *R v Willis*[10] — both considered this issue.[11]

These courts, as with recent academic commentators,[12] come to different conclusions with respect to whether excluding murder from the

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3 *Ibid*. See also *Criminal Code*, *supra*, note 1.

4 2013 SCC 3 [*Ryan*].

5 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution, Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

6 2001 SCC 24 [*Ruzic*].

7 *Ibid*, citing George Fletcher, *Rethinking Criminal Law* (Boston: Little & Brown Company, 1978).

8 *Ibid*. The crimes she was charged with were not excluded under s. 17 of the *Criminal Code*.

9 2015 ONCA 250 [*Aravena*].

10 2016 MBCA 113 [*Willis*].

11 Both cases were denied leave to appeal. See *R v Aravena*, 2016 CarswellOnt 5400; *R v Willis*, 2017 CarswellMan 66.

12 See Frances Chapman & Jason MacLean, "'Pulling the Patches' of the Patchwork Defence of Duress: A Comment of *R. v. Aravena*" (2015) 62:4 Crim LQ 420; Don Stuart, "High Time for the Supreme Court or Parliament to Reform our Complex Duress Defence" (2017) 33 CR(7th) 313; Stephen Coughlan, "Doing the Right Thing: Duress as a Defence to Murder" (2017) 33 CR (7th) 317. Before the recent appellate jurisprudence, academics had typically found the exclusion of murder to violate the

statutory duress defence violates the moral involuntariness principle. The answer to this question turns primarily on the appropriate function of the proportionality element of the duress defence. The Supreme Court has found two roles for proportionality. First, an accused must prove that the harms caused and averted were proportionate in the utilitarian sense. Second, and regardless of whether utilitarian proportionality exists, the accused must show normal human fortitude in resisting the threat.[13]

I maintain that the second proportionality requirement does not categorically bar a moral involuntariness claim to a murder charge. This requirement merely provides that the accused's emotional response to a threat must meet society's expectations.[14] This is consistent with the role of the adjective "moral" in George Fletcher's moral involuntariness principle.[15] Allowing duress to be pleaded for a murder charge is also consistent with the fact that Fletcher never demanded utilitarian proportionality for a plea of moral involuntariness. Although such disproportionality is more likely to suggest an act is involuntary, Fletcher did not state that it was dispositive of a moral involuntariness claim.[16]

Views to the contrary were recently and cogently outlined in the Manitoba Court of Appeal's decision in *Willis*. Despite the court's elaborate reasoning, I maintain that allowing duress to be plead for committing murder is consistent not only with the common law application of the defence, but also the basic principles the Court has used to constitutionally structure the criminal law in other contexts. If there are legitimate policy concerns about the effects of allowing accused to plead duress to murder, those arguments should be considered under s. 1 of the *Charter*. If those arguments are meritorious — a position which I find unpersuasive but not implausible — then I maintain that those pleading

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moral involuntariness principle. See Martha Shaffer, "Scrutinizing Duress: The Constitutional Validity of Section 17 of the Criminal Code" (1998) 40 Crim LQ 444 at 469–70, 472–74; Colton Fehr, "The (Near) Death of Duress" (2015) 62:2 Crim LQ 123.

13 See *Ryan*, *supra* note 4 at paras 72–73.

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

15 *Ibid* at 111. See also Stanley Yeo, "Revisiting Necessity" (2010) 56:1 Crim LQ 13 at 20.

16 *Ibid* at 109–10, citing Fletcher, *supra* note 7 at 804 ("if the gap between the harm done and the benefit accrued becomes too great, the act is more likely to appear voluntary and therefore inexcusable") [emphasis added].

duress to murder are well-positioned to strike down the mandatory minimum punishment applicable to murder.[17]

The article unfolds as follows. Part II provides a review of the Supreme Court's jurisprudence detailing the parameters of the moral involuntariness principle. Part III then details the Manitoba Court of Appeal's reasons in *Willis* for finding that a murder committed under duress can never be morally involuntary. Part IV criticizes the court's understanding of the moral involuntariness principle in *Willis*. In my view, the court's position that the murder exclusion does not violate the moral involuntariness principle is inconsistent with the common law duress defence, the Supreme Court's guidance pertaining to the use of "reasonable hypotheticals," and the constitutional value that the law must uphold the sanctity of human life. In light of the potential that the murder exclusion could be upheld under s. 1, Part V concludes by showing why such a decision would inevitably result in the mandatory minimum punishment for murder violating s. 12 of the *Charter*.

II. MORAL INVOLUNTARINESS

The moral involuntariness principle forms the philosophical basis for both the duress and necessity defences. As the Court explained in *Perka v The Queen*,[18] this principle requires that accused persons only be punished for conduct that was freely chosen.[19] Free choice, however, is not restricted to the physical meaning of the term. Instead, an accused person acts in a morally involuntary manner when they do not have a "realistic choice" but to commit an offence. As the Court observed in *Perka*, an accused lacks such choice when the threat is "so emergent and the peril… so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable."[20]

The Court in *Ruzic* distilled several requirements from the moral involuntariness principle. The principle's basis in volitional theory requires that the accused must face a threat of harm sufficient to deprive a

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17 See *Criminal Code*, *supra* note 1, s 231.

18 [1984] 2 SCR 232, SCJ No 40 [*Perka*].

19 *Ibid* at 249–50, citing Fletcher, *supra* note 7 at 804–05.

20 *Perka*, *supra* note 18 at 251.

person of their will.[21] Similarly, if the threat is not adequately close in time to the offence committed, the accused person's conduct will not be morally involuntary as there will be alternative courses of action available. Relatedly, an accused person who at any point is availed a reasonable opportunity to extricate themselves from the circumstance but refuses to do so cannot have acted in a morally involuntary manner. The emphasis on the reasonableness of the accused person's choice also explains two further elements of the duress defence: the accused must not have been able to foresee the harm threatened and must have a good reason for believing the threat will be carried out.[22]

The Court has also determined that a general proportionality requirement derives from the moral involuntariness principle. The first aspect of proportionality is utilitarian, requiring that "the harm threatened was equal to or greater than the harm inflicted by the accused."[23] The second proportionality requirement considers whether the accused person's choice to commit a crime is consistent with society's expectation of how a reasonable person would act.[24] As such, if the accused demonstrates normal resistance to the harm threatened and causes no more harm than averted, the proportionality element of the duress defence will be met.

Various authors have questioned whether the utilitarian proportionality requirement fits within the juristic foundation of duress as an excuse. The fact that an accused must cause more harm than averted when facing a death threat does not, by itself, render the choice "realistic."[25] An accused who faces the choice between dying or killing one or multiple persons is unlikely to have a realistic choice in either

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21 Although the degree of harm historically required was grievous harm or death, the Court reduced the requirement to "bodily harm." See *Ryan*, *supra* note 4 at para 55. Bodily harm is defined in the *Criminal Code*, *supra* note 1, s 2, as harm that is not "trivial or transient." It is unclear how such a low threshold of harm could deprive a person of their will. Elsewhere I suggest that this itself implies that the Court is using different moral principles in crafting the duress defence. See Fehr, "Duress and Necessity", *supra* note 14 at 121. As this article is restricted to the context of "kill-or-be-killed" scenarios, this issue need not be discussed further.

22 See *Ryan*, *supra* note 4 at para 55. The requirement that the accused person not have reasonably foreseen the threat is most obviously relevant where an accused joined a criminal organization.

23 *Ibid* at para 73.

24 *Ibid*.

25 See Fehr, "Duress and Necessity", *supra* note 14 at 109.

circumstance. To conclude otherwise "imposes a moral requirement into the [duress defence] that is inconsistent with the Court's basic description of moral involuntariness."[26] As moral involuntariness forms the conceptual basis for excuses, it by definition involves wrongful conduct. Requiring the accused to perform a "greater good," or at least cause no more harm than averted, treats the duress defence "in terms more readily analyzable as… [a] justification."[27]

Whether the utilitarian proportionality requirement properly fits into the excuse of duress is not necessary to resolve for present purposes.[28] To assess the constitutionality of the murder exclusion, a reasonable hypothetical scenario may be derived wherein an accused must commit a single act of murder to save their life. The utilitarian proportionality requirement, I maintain, is met in this circumstance. I also contend that the societal expectation branch of the proportionality element of the duress defence may be met when an accused commits a single act of murder to preserve themself. As I explain below, however, the Manitoba Court of Appeal has come to the opposite conclusion with respect to both of these questions.

III. *R v Willis*

The accused in *Willis* joined a criminal organization and was responsible for running multiple drug shipments to northern Manitoba. On one occasion, he was caught by police and lost the drugs in his charge. This resulted in the accused owing a large drug debt to the leader of his criminal organization.[29] The accused tried to pay the drug debt off over the following year by continuing to traffic drugs. However, he was

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26 *Ibid.*

27 *Ibid*, citing Stephen G Coughlan, "Duress, Necessity, Self-Defence, and Provocation: Implications of Radical Change?" (2002) 7 Can Crim L Rev 147 at 157–58. See also Terry Skolnik, "Three Problems with Duress and Moral Involuntariness" (2016) 63 Crim LQ 124; Zoë Sinel, "The Duress Dilemma: Potential Solutions in the Theory of Right" (2005) 10 Appeal: Review of Current Law & Legal Reform 56; Yeo, *supra* note 15.

28 I argue elsewhere that proportionality is only relevant to whether the accused may plead one of two justifications to an offence: moral permissibility or moral innocence. See Fehr, "Duress and Necessity", *supra* note 14. See also Colton Fehr, "Self-Defence and the Constitution" (2017) 43:1 Queen's LJ 85 [Fehr, "Self-Defence"]; Colton Fehr, "Consent and the Constitution" (2019) 42:3 Man LJ 217 [Fehr, "Consent"].

29 See *Willis*, *supra* note 10 at para 10.

unsuccessful in paying off his debt. As a result, the accused was shot at and beaten badly. Despite advice from family and friends, the accused refused to seek help from the police.[30] He maintained this opposition even after death threats were made to several of his relatives.[31] Eventually, the accused accepted the option of committing a murder to pay back his drug debt.[32]

A unanimous Manitoba Court of Appeal found that duress provides no defence for an accused who commits murder. In considering this question, the court began by delineating the boundaries of the debate. In its view, the hypothetical scenario where an otherwise innocent accused must commit murder to avoid death to themselves and/or loved ones is not realistic. As the court rightly observes, "[l]aws are to be constitutionally evaluated on the basis of reasonable hypotheticals, not on the basis of fantastic and remote situations."[33] In its view, the common duress scenario where a murder is committed involves a reprehensible person — such as the accused in *Willis* — not an innocent party with no responsibility for being under duress.[34]

With these restrictions in place, the court turned to the academic literature to consider whether a murder could ever be committed in a morally involuntary manner. Justice Mainella, writing for a unanimous court, relied heavily on the work of Matthew Hale.[35] In Hale's view, a person under duress ought to die before taking the life of an innocent person. The law, however, need not require that the person under duress tacitly accept death. Instead, excluding murder from the duress defence is consistent with the moral involuntariness principle for several interrelated

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30 *Ibid* at paras 11–12.

31 *Ibid* at para 13.

32 *Ibid*.

33 *Ibid* at para 39.

34 *Ibid*.

35 *Ibid* at paras 46–67, citing Matthew Hale, *Historia Placitorum Coronæ: The History of the Pleas of the Crown*, Vol I (London: Professional Books, 1971). See also William Blackstone, *Commentaries on the Laws of England*, 16th ed, Vol 4 (London: Strand & J Butterworth and Son, 1825) at 21; James Fitzjames Stephen, *A History of the Criminal Law of England*, Vol 2 (London: MacMillan and Company, 1883) at 106–07; William Holdsworth, *A History of English Law*, Vol 8 (London: Methuen & Co & Sweet and Maxwell, 1966) at 444.

reasons, the first of which is because the law permits the accused to act in self-defence and kill the threatening party.[36]

The court in *Willis* nevertheless recognized that sometimes self-defence would not be possible because the threatening party is not at the scene of the crime.[37] In such a circumstance, it maintained that the accused person ought to pursue an alternative option: seek help from law enforcement.[38] As Justice Mainella observed, "it is difficult to see why [in the modern age] it would ever be demonstrably impossible for our threatened party to not turn to the police, as opposed to resorting to the murder of an innocent party."[39] The court continues, observing that "[t]he police would have the capacity to locate the site where the hostage was located by conducting a police investigation."[40] The court further asserts that "[t]he police will have resources, and possibly knowledge about the hostage-taker, beyond that of the ordinary person."[41] Relying on the work of Benjamin Cardozo and Jerome Hall, the court finds that these considerations make "the choice to balance life against life… an unreasonable one… because of the uncertainty that such choice ever has to be made."[42]

The court's reliance on a citizen's ability to call for help is unconvincing. It is unrealistic to expect the accused person to contact the police as they are unlikely to have access to their cell phone or other digital devices. A kidnapper with any foresight would take away the device and ensure that it was not giving off trackable signals. This may be accomplished by turning the device off, removing the battery, or placing it in an area or place where it could not receive a signal.[43] Police will have

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36 See Hale, *supra* note 35 at 51. See also *Willis*, *supra* note 10 at para 117.

37 See *Willis*, *supra* note 10 at para 118 citing *R v Ruzic* (1998), 164 DLR (4th) 358 at para 51, 128 CCC (3d) 97 (ONCA).

38 *Ibid* at para 119.

39 *Ibid* at para 121. Justice Mainella implies, at para 119, that modern technology provides a means for distinguishing the reasonableness of seeking help when Hale was writing from the present.

40 *Ibid.*

41 *Ibid.*

42 *Ibid* at para 120–23, citing Benjamin Cardozo, *The Choice of Tycho Brahe* (New York: Fallon Publications, 1947) at 390; Jerome Hall, *General Principles of Criminal Law*, 2nd ed (Clark: Lawbook Exchange, 2010) at 447–48.

43 For a review of how to block/prevent phone signals, see Colton Fehr, "Digital Evidence and the Adversarial System: A Recipe for Disaster?" (2018) 16:2 CJLT 437 at 446–47.

significantly more difficulty locating an accused in such circumstances, assuming the police are aware that the person is missing in the first place.

Even if the accused is not able to find help, the court in *Willis* further endorses Hall's argument that there is always the "off chance" that the threatening party might have a change of heart and decide not to follow through with the threat.[44] As the court observes, "[t]here is logic to this idea because, unlike a peril emanating from nature like a tidal wave or blizzard, it is reasonably foreseeable that even a tyrant may retreat from his or her threat based on a reassessment of his or her best interests."[45] Given such uncertainty, it is at least possible that the accused and/or the innocent victim will be released by the threatening party. The court's failure to cite any circumstances where such a result occurred, however, renders the option of relying on the goodwill of the threatening party precarious at best.

Finally, even if the law demands that the accused die as opposed to committing murder, the court in *Willis* maintains that this requirement is consistent with the moral involuntariness principle. As Justice Mainella observes, "[i]t is difficult to see how a certain death is a proportionate response to an uncertain threat from another."[46] In other words, given the epistemic uncertainty relating to whether the threatening party would kill in response to the accused's refusal to commit murder, it is questionable whether there is proportionality between the harm caused and averted. There is also uncertainty as to whether the threatening party would keep their word and release the accused person if commission of the crime demanded is not completed.[47] Both of these uncertainties arguably militate in favour of requiring the accused to risk death as opposed to commit certain murder.

Yet, measuring proportionality by requiring the accused to take into consideration what is unknowable has never been an element of the law of duress. It is inherent in any successful duress claim that the threat was legitimate, and there was no good reason to think the threatening party would not follow through with the threat.[48] As such, demanding a

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44 See *Willis*, *supra* note 10 at para 123, citing Hall, *supra* note 42 at 447.

45 *Ibid*.

46 *Ibid* at para 158.

47 *Ibid*. In *Willis*, for instance, the drug debt was not forgiven.

48 See *Ryan*, *supra* note 4 at para 55. If the threat was illegitimate or unlikely to be carried out, the duress claim will automatically fail.

significantly higher standard in the murder context is inconsistent with the manner in which the utilitarian proportionality requirement is applied in other contexts. Barring a sound policy reason — best considered at the s. 1 stage of the *Charter* analysis — it is imprudent to reject duress as a defence to murder based on a highly questionable assumption that the result feared might not come to fruition.

The court in *Willis* also implies that the societal expectation element of the duress test could not be met by an accused person who commits murder. The argument appears to be that the accused would not meet society's expectations because their conduct violates an invaluable moral principle: the sanctity of life.[49] This principle requires that innocent life not be taken "based on concern for the intrinsic value of life and also respect for the dignity of every human being."[50] Justice Mainella correctly observes that "the sanctity of life principle… is one of the few generally accepted cultural norms by people of all beliefs and backgrounds."[51] The principle's central importance suggests that society would expect even those acting under duress to respect the sanctity of human life principle. However, as I explain in more detail below, this argument incorrectly assumes the sanctity of life principle is automatically violated when an accused commits murder under duress.

IV. CONSTITUTIONALITY OF THE MURDER EXCLUSION

There are several doctrinal and philosophical reasons for allowing the duress defence to be pleaded by those who commit murder. As I explain below, the conclusion that duress may be pleaded by a principal charged with murder is consistent with the Supreme Court's duress jurisprudence relating to party liability, use of "reasonable hypotheticals" in *Charter* jurisprudence, and the broader constitutional value that the law should uphold the sanctity of human life. Although concerns about accused

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49 I say "implies" and "appears to be" because the court is not clear where its criticism relating to the sanctity of life fits within the Court's conception of moral involuntariness. The "societal expectation" proportionality requirement seems to me like the most natural fit.

50 See *Willis*, *supra* note 10 at para 144.

51 *Ibid.* See also *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519 at 585, SCJ No 94 (the idea that human life is inviolable is a "generally held and deeply rooted belief"); *Carter v Canada (AG)*, 2015 SCC 5 at para 63.

feigning a duress defence may prove legitimate, this concern is only relevant as a potential s. 1 justification for breaching *Charter* rights.

A. Principal and Party Liability

The most obvious reason why duress ought to be available for committing murder is that the defence is available under the common law for those who are parties to the offence of murder. As the Court observed in *R v Paquette*,[52] s. 17 of the *Criminal Code* only applies to those who "commit" an offence. As parties to an offence aid, abet,[53] counsel,[54] form a common intention,[55] or serve as an accessory after the fact,[56] the murder exclusion in the statutory duress defence does not apply. As a result, parties are allowed to plead the less restrictive common law defence of duress to a murder charge.[57] As Don Stuart aptly observes, "[s]ince the Canadian law of parties recognizes no difference in culpability and punishment between a principal and an accessory it is arbitrary to continue with a duress defence to murder if you are an accessory but not if you are a principal."[58]

B. Reasonable Hypotheticals

The court's conclusion in *Willis* that it would be "unreasonable" to invoke a hypothetical scenario in which a person commits murder under duress is difficult to square with the Supreme Court's jurisprudence. Importantly, the Court in *Ruzic* illustrates the moral involuntariness principle with a kill-or-be-killed scenario. Unlike a murder committed in a physically involuntary manner, the Court recognizes that the accused person retains control over their bodily movements. As with the physically involuntary actor, however, the Court concludes that the accused person's "will is overborne, this time by the threats of another [as] [h]er conduct is not, in a realistic way, freely chosen."[59]

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52 *Paquette*, *supra* note 2.

53 See *Criminal Code*, *supra* note 1, s 21(1).

54 *Ibid*, s 22(1).

55 *Ibid*, s 21(2).

56 *Ibid*, s 23(1).

57 See generally *Paquette*, *supra* note 2.

58 See Stuart, *supra* note 12. For authority that parties and principals are equally culpable and thus equally liable to mandatory minimum punishments, see *R v Briscoe*, 2010 SCC 13 at para 13.

59 See *Ruzic*, *supra* note 6 at para 44.

Although the court in *Willis* acknowledges the fact that the Supreme Court used a murder to illustrate the moral involuntariness principle,[60] it fails to adequately explain why this fact is not decisive in answering the question of whether excluding murder from the duress defence violates s. 7 of the *Charter*. Justice Mainella admits that the Court's example in *Ruzic* is "reasonably foreseeable."[61] This admission, however, must be read alongside his earlier conclusion that any reasonable hypothetical scenario must involve a nefarious actor.[62] As the Court in *Ruzic* did not clarify whether its hypothetical accused person was in any way responsible for being in their circumstance, the court in *Willis* must be assumed to have added this factual gloss.

It should be noted at the outset that Justice Mainella is correct that the Supreme Court's decision in *Ruzic* to employ a duress scenario involving a murder does not mean that the Court resolved the question of whether excluding murder from the duress defence is constitutional. The Court in *Ruzic* clearly stated that the appeal "does not concern the constitutional validity of the list of excluded offences."[63] Yet, the court in *Willis* cannot rely on this fact to support its view that the murder exclusion does not violate the moral involuntariness principle.[64] In making this argument, the court overlooks the fact that questions of constitutionality involve consideration of not only whether a right is infringed, but also whether it is justified under s. 1. Given the explicit reference to a morally involuntary murder in *Ruzic*, it is much more reasonable to assume the Court had in mind some justification for banning duress claims to murder as a possible rationale for preserving the exclusion of the duress defence for murder charges.[65]

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60 See *Willis*, *supra* note 10 at paras 114–16.

61 *Ibid* at para 116.

62 *Ibid* at para 39.

63 *Ibid* at para 115, citing *Ruzic*, *supra* note 6 at para 19. See also *Ryan*, *supra* note 4 at para 84.

64 *Willis*, *supra* note 10 at para 115.

65 These policy reasons will be reviewed below. Although the Court has traditionally concluded that s. 7 rights can be justified "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, [and] epidemics" (see *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] 2 SCR 486 at para 85, 24 DLR (4th) 536), the Court arguably relaxed this view in *Canada (AG) v Bedford*, 2013 SCC 72 at para 129 ("[d]epending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could

Justice Mainella nevertheless concludes that the example cited by the Court in *Ruzic* is not determinative because of the various options — self-defence, escape, risk of death — available to an accused person who is forced to choose whether to commit murder.[66] This argument is confused, regardless of how one interprets the Court's use of murder to illustrate the moral involuntariness principle. If the Court's example is read broadly, then it is reasonable to conclude that the Court rejected Hale's view that murder cannot be committed in a morally involuntary manner. Assuming the Court in *Ruzic* agrees with Hale's view, then it is necessary to find a principled exception to explain the Court's reliance on a murder to illustrate the moral involuntariness principle. Although Hale is not explicit on this point, Justice Mainella finds that Hale's view ought to be premised on the fact that the person pleading duress is a nefarious actor.[67] If this assumption were rejected, the Court's use of murder to illustrate the moral involuntariness principle could reasonably be assumed to involve a non-nefarious actor. As I explain in more detail below, this is a reasonable interpretation as it is significantly more difficult to conclude that a non-nefarious actor who kills under duress violates the proportionality elements of the duress defence.

The Supreme Court's jurisprudence defining reasonable hypothetical scenarios in *Charter* jurisprudence bolsters this view. As the Court observed in *R v Nur*,[68] for a hypothetical scenario to be "reasonable," the scenario must be "reasonably foreseeable."[69] Such a scenario is one that is not "marginally imaginable" or "far-fetched."[70] Applying this standard, it is not difficult to foresee some innocent party being kidnapped and told to commit a heinous crime such as murder. Although scenarios where accused are compelled to commit murder do not arise often, this is because the duress defence itself constitutes a relatively rare defence in the Canadian criminal justice system.[71] Viewed in this light, it is my view that

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establish that a s. 7 violation is justified under s. 1 of the *Charter* cannot be discounted").

66 See *Willis*, *supra* note 10 at para 116. These arguments were reviewed above in Part III.

67 *Ibid* at para 39.

68 2015 SCC 15.

69 *Ibid* at paras 49–61.

70 *Ibid* at para 56, citing *R v Goltz*, [1991] 3 SCR 485, 24 DLR (4th) 536.

71 This view is anecdotal. However, as a person who has prosecuted and now teaches criminal law, the duress defence has always struck me as the rarest of defences.

an otherwise innocent accused being forced to commit a murder is "reasonably foreseeable."

The conclusion that a non-nefarious actor might be compelled to commit murder does considerable damage to the court's position in *Willis*. The court's insistence that murder cannot be committed under duress relies upon the inverse rationale of a self-defence claim. The accused in the core case of self-defence — wherein an accused person kills in response to an unlawful and unprovoked attack — is justified because the victim brought harm upon themself. Similarly, if the accused's predicament arises because of prior wrongful conduct then they are also responsible for being in that circumstance.[72] This key fact is implicitly used by the court in *Willis* to find a lack of proportionality between committing murder or sacrificing one's own life.[73] This argument has some force. In the self-defence context, the aggressor's reduced life interest makes it reasonable to find the accused justified in killing in self-defence.[74] In the duress context, the nefarious-acting accused person's life interest is similarly reduced, thereby rendering their choice to kill disproportionate. As I explain in more detail below, however, if the assumption that the accused is a nefarious actor is removed, the argument that there is disproportionality when one commits murder under duress collapses.

C. Sanctity of Life

Although the sanctity of life principle is a widely endorsed moral principle, it does not require that duress be prohibited as a defence to murder. As Justice Doherty observes in *Aravena*, "[a] *per se* rule which excludes the defence of duress in all murder cases does not give the highest priority to the sanctity of life, but rather, arbitrarily, gives the

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72 As the Supreme Court observes in the necessity context, a person's criminal conduct colours their related succeeding actions as also wrongful. See *Perka*, *supra* note 18 at 254.

73 I can see no other reason why the Court would insist that only a non-innocent actor could "reasonably" be thought to commit murder under duress.

74 For a review of the various rationales for self-defence, see Fehr, "Self-Defence", *supra* note 28 at 93–97. Although there are alternatives to this "utilitarian" understanding of self-defence, more modern theorists also incorporate this rationale into pluralistic understandings of self-defence. See generally Boaz Sangero, *Self-Defence in Criminal Law* (Oxford: Hart, 2006), 44–46. Sangero describes the profound impact that the aggressor's culpability plays in the history of self-defence.

highest priority to one of the lives placed in jeopardy."[75] In other words, excluding murder from the duress defence explicitly places the life interests of the victim above those of the accused. Such a conclusion may be appropriate where the accused is in some way responsible for being in their circumstance. The court in *Willis*, however, conveniently assumes away any situation where an accused is under duress due to no fault of their own.

The Court's attempt in *Willis* to contrast murders committed under duress with those committed in self-defence does not provide a persuasive reason to reject duress as a defence to murder. Relying on the Supreme Court's decision in *R v Hibbert*,[76] Justice Mainella observes that "[t]he law distinguishes necessity and duress from self-defence because in the latter, the victim is 'the author of his or her own deserts.'"[77] As the court in *Willis* later concludes:

> In my view, the gap between the harm inflicted and the benefit accrued by the act of murder is cavernous. That conclusion, together with the important rights of the innocent person to personal autonomy and life as well as society's interest in withholding the right to balance life against life, except in a case of self-defence, when the decision will affect the interests of the decision-maker, satisfies me that the trial judge was correct in deciding that the act of murdering an innocent person can never satisfy the proportionality requirement of moral involuntariness.[78]

In other words, the court in *Willis* suggests that killing in self-defence cannot violate the sanctity of life principle because the victim is a non-innocent aggressor. Although the latter statement is generally true, this is not always the case. As such, it is necessary to consider whether a bright-line rule based on the nature of the threat the accused faces ought to dictate which offenders can plead a defence to murder.

The oft-cited "innocent attacker" scenario is the obvious counter to the generalization that the victim is always the "author of his or her own deserts" in claims of self-defence.[79] In this scenario, an accused person is faced with a life-threatening attack from a person who has become an automaton due to no fault of their own. This may occur, for instance, if

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75 See *Aravena*, *supra* note 9 at para 83.

76 [1995] 2 SCR 973, SCJ No 63 [*Hibbert*].

77 See *Willis*, *supra* note 10 at para 105, citing *Hibbert*, *supra* note 76 at para 50.

78 *Ibid* at para 167 [emphasis added].

79 For a review of the general literature debating this scenario, see Fehr, "Self-Defence", *supra* note 28 at 105–06.

the accused is subject to somnambulism,[80] a psychological blow,[81] or some form of involuntary intoxication.[82] If the accused knows that the victim is in such a state, their choice to kill the victim to preserve their life is materially indistinguishable from an accused killing out of duress where the person is placed under duress due to no fault of their own. As both the "innocent attacker" in the self-defence scenario and the accused in the kill-or-be-killed duress scenario are innocent actors, the court in *Willis* cannot rely on a bright-line distinction between self-defence and duress to support its argument for excluding murder from the duress defence.

The "justified attacker" scenario is illustrative of a self-defence situation where the accused cannot respond by killing their aggressor despite the accused's life being immediately threatened. George Fletcher gives the example of a person who is being raped and uses life-threatening force against the rapist. If the rapist responds by killing the rape victim, he is acting in self-defence.[83] Although the self-defence claim is preceded by a clearly wrongful act, it is notable that the Court has determined that this fact is not itself sufficient to prevent a moral involuntariness claim. As explained earlier, a moral involuntariness claim, by definition, admits that the act was wrongful. Moreover, as the Court observed in *Perka*, the wrongness of the act resulting in the accused being in a morally involuntary scenario — here the wrongful act being the rape — does not render the act inexcusable.[84] The rapist's actions are therefore arguably morally involuntary as he causes death out of legitimate fear for his life.[85]

Despite the accused killing his aggressor in response to life-threatening force, it is doubtful that he would be afforded a claim of self-defence.[86] Although there is a crude proportionality between the harm caused and

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80 See *R v Parks*, [1992] 2 SCR 871, 95 DLR (4th) 27.

81 See *Rabey v The Queen*, [1980] 2 SCR 513, 114 DLR (3d) 193.

82 See *R v King*, [1962] SCR 746, 35 DLR (2d) 386. It is notable that the intoxication would have to be "involuntary" as otherwise one might impute some blame to the victim for being in the state that ultimately resulted in them be murdered. The attacker would not be "innocent" in such a scenario.

83 See George Fletcher, "Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?" (1979) 26 UCLA L Rev 1355 at 1359–360.

84 See *Perka*, *supra* note 18 at 254 ("[a]t most... the preceding [illegal] conduct will colour the subsequent conduct in response to the emergency as also wrongful").

85 See Fehr, "Self-Defence", *supra* note 28 at 106–08.

86 *Ibid.* It is notable that I came to the opposite conclusion earlier. Further reflection has convinced me to change views.

averted at the moment of the killing, the accused's actions would fail a different element of a moral involuntariness claim: foreseeability. In other words, it is possible that the act was not morally involuntary because it was "reasonably foreseeable" that the victim would act in self-defence.[87] Such a distinction would be consistent with *Perka*, as the accused could not reasonably foresee a massive storm forcing him to illegally dock at a Canadian port with drugs aboard his ship. It is therefore sensible to conclude that the accused in *Perka* ought not be prohibited from pleading moral involuntariness based on the preceding illegal conduct. In the self-defence scenario, however, the nature of the accused's preceding wrongful act made it reasonably foreseeable that the victim would exercise her right to ward off the accused's attack using any force necessary.[88]

The point of contrasting these self-defence scenarios with committing murder under duress is to illustrate that moral claims cannot be satisfactorily distinguished based only on the type of defence an accused pleads. To the contrary, moral claims derive from the nature of the threat and the interaction between the accused person and the victim. If this more open-ended approach to criminal defences is meritorious,[89] then it makes little sense to categorically claim that one type of accused can claim a defence to murder while another cannot. It is far more sensible to assess the circumstances of each case and properly weigh the competing moral considerations in determining whether a defence ought to be afforded based on the facts of the individual case. Only by employing such an approach can a court arrive at a meaningful conclusion as to whether a defensive act is consistent with the sanctity of life principle.

D. Section 1 of the *Charter*

S. 1 of the *Charter* allows any law that violates rights to be upheld if the violation is proportionate to the law's ability to forward its objective.[90] A proportional law must first have a pressing and substantial objective.

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87 This point was overlooked in previous work. See Fehr, "Self-Defence", *supra* note 28 at 106–08.

88 For my argument as to why the rape victim would have a plausible self-defence claim, see Fehr, "Self-Defence", *supra* note 28 at 118–19.

89 I have made such an argument in considerable detail elsewhere. See generally Fehr, "Duress and Necessity", *supra* note 14; Fehr, "Self-Defence", *supra* note 28; Fehr, "Consent", *supra* note 28.

90 See *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

The actual effects of the law must then be rationally connected to the impugned law's objective, minimally impairing of that objective, and appropriately balance its salutary and deleterious effects. As the Crown is the party seeking to uphold a law that is violative of *Charter* rights, it bears the burden of proving a law's proportionality on a balance of probabilities.[91]

In determining the objective of excluding murder from the statutory defence of duress, the trial court in *Willis* found that the law's objective is "[t]he expression of society's disapprobation for murder—the most heinous crime known to law; [and] [t]he maintenance of the strictest disincentive to cooperate with criminal threats."[92] The former aim is tautological, as it merely asserts the desirability of the law without explaining its purpose. The latter objective, however, reveals a legitimate and pressing policy aim as any law that attempts to deter a heinous crime possesses an unquestionably important purpose.

The Manitoba Court of Appeal went further and determined that "the rule's aim is to prevent one descending into the moral quicksand of trying to determine whose life is more important (or less important) in a given context, when they have an inherent bias as to who should live and who should die."[93] This objective is inconsistent with the guidance provided by the Supreme Court for determining objectives under ss. 1 and 7 of the *Charter*. As the Court has repeatedly observed, determining a law's objective requires ensuring that the objective of a law is pitched at the appropriate level of generality. To find that a law forwards some "animating social value" or to restate the objective of the law in synonymous terms with the legislative text are therefore to be avoided.[94] Relatedly, the objective must be stated in a manner that is "both precise and succinct" but also captures "the main thrust of the law."[95]

In my view, the court's statement of the objective of the murder exclusion from the duress defence is pitched as broadly as possible and in no way attempts to decipher the policy goal of the law. Preventing accused

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91 *Ibid* at 135–42.

92 See *R v Willis*, 2015 MBQB 114 at para 81.

93 See *Willis*, *supra* note 10 at para 106.

94 See *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 27 [*Safarzadeh-Markhali*]; *R v Moriarity*, 2015 SCC 55 at para 28 [*Moriarity*].

95 See *Safarzadeh-Markhali*, *supra* note 94 at paras 26, 28; *Moriarity*, *supra* note 94 at para 29.

persons from making difficult moral choices about the value of life effectively restates the prohibition in s. 17 of the *Criminal Code*. In other words, it says nothing about the policy objective the law seeks to forward. It merely states that the objective of the law is to prevent people from making a particularly difficult moral choice, which is identical in substance to the wording of the impugned exclusion.

The trial court's determination that the objective of the statutory duress defence is to deter people from committing murder is much more realistic. Despite the pressing nature of this objective, the law arguably fails the rational connection stage of the s. 1 test. As Stephen Coughlan concedes in his defence of the prohibition against pleading duress to murder, "given the right incentive — saving our own life, saving the lives of our children — virtually all of us would do it."[96] If it is unlikely anyone will follow s. 17 of the *Criminal Code* in a kill-or-be-killed scenario — because the prospect of facing the criminal law can only serve as a realistic deterrent for the living — it is arguable that the Crown could not prove that the impugned exclusion is rationally connected to its objective.[97]

It is nevertheless possible that the Crown could show that some people would be deterred from committing murder in a duress scenario. For instance, it is reasonable to believe that a mother who is told to kill her child or be killed would choose the latter option. As the rationale connection branch of the s. 1 test does not require that the law furthers its objective in all circumstances, this counterexample is arguably sufficient to prove that the law bears a sufficient connection to its objective to pass this stage of the s. 1 test.

The exclusion of murder from the statutory duress defence is nevertheless unlikely to qualify as a minimal impairment of the moral involuntariness principle. As the Ontario Court of Appeal observes in *Aravena*, there are two main policy reasons why a court might uphold the complete ban of duress to a murder charge. The first is that such a ban is necessary to uphold the sanctity of life principle. As explained above, however, this argument misconstrues the relationship between the sanctity of life principle and the duress defence. The second and more plausible

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96 See Coughlan, *supra* note 12 at 317. Notably, the court in *Willis*, *supra* note 10 at para 126 was not prepared to accept this point. However, it is also notable that the court observed that the point was not argued at trial or on appeal.

97 See *S v Goliath* (1972), 3 S Afr LR 1(A) at 480. For similar reasoning, see also *Aravena*, *supra* note 9 at para 77.

justification is based on the need to ensure accused persons – and, in particular, criminal organizations – cannot feign the duress defence as a means for getting away with murder.[98]

The problem with the latter argument is that it is entirely speculative. As the Court observes in *Aravena*, "[w]e are unaware of any data or commentary suggesting that the availability of this defence has created problems in the enforcement or administration of the criminal law."[99] The Court continues, "[n]or do we know of any such data in various civil jurisdictions in which duress is an accepted defence to murder or in those common law jurisdictions which have expanded duress to murder by statute."[100] For instance, the Court notes that France and Germany do not exclude duress as a defence to murder, and no evidence suggests that the availability of duress has resulted in more organized murders.[101] Similarly, despite 11 American states allowing duress as a defence to murder, no correlation with increased murders has been found.[102] As such, the available evidence strongly militates against the Crown being able to justify the exclusion of murder from the duress defence.

It is nevertheless notable that the lack of empirical evidence that a defence is likely to be feigned has not prevented the Supreme Court from justifying other infringements of *Charter* rights. In the automatism context, the Court has used the potential for feigning a defence to justify reversing the burden of proof despite violations of s. 7 and s. 11(d) of the *Charter*.[103] Justifying a complete prohibition on pleading a defence is, however, much more draconian than increasing the burden of proof for proving a defence. In the latter scenario, at least the accused can still plead their defence.[104] On the other hand, it may be argued that feigning duress is

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98 See *Aravena*, *supra* note 9 at paras 75–79.

99 *Ibid* at para 79.

100 *Ibid*, citing Payam Akhavan, "Should Duress Apply to All Crimes? A Comparative Appraisal of Moral Involuntariness and the Twenty Crimes Exception Under Section 17 of the *Criminal Code*" (2009) 13 Can Crim L Rev 271 at 277–78, 282–84.

101 *Ibid*.

102 *Ibid*, citing Wayne LaFave, *Substantive Criminal Law*, 2nd ed, Vol 2 (St Paul: Thomson West, 2003) at 81 (the relevant states are Alaska, Arkansas, Connecticut, Delaware, Hawaii, New York, North Dakota, Pennsylvania, South Dakota, Texas and Utah).

103 See *R v Daviault*, [1994] 3 SCR 63, 118 DLR (4th) 469 [*Daviault*]; *R v Stone*, [1999] 2 SCR 290, 173 DLR (4th) 66.

104 In reality, however, it is notable that the need to call expensive expert evidence practically prevents many accused from pleading automatism. See Colton Fehr,

easier than feigning automatism. The latter involves convincing expert doctors of the merits of one's claim,[105] while the former requires something closer to good acting. Without empirical evidence showing that this risk is realistic, however, it is my view that the complete ban on pleading duress to murder ought not be upheld under s. 1 of the *Charter*.

V. Mandatory Minimum Punishment for Murder

An increasingly popular solution for resolving the dilemma of whether to allow duress to be pleaded for murder is to prohibit the defence but allow duress to serve as a sentencing factor.[106] As the person who commits murder under duress arguably is significantly less blameworthy than a typical murderer, it would be prudent to allow a judge to reduce the sentence to account for the fact that a murder was committed under duress. This focus on blameworthiness raises two further questions. First, is the accused person being disproportionately stigmatized when convicted of murder? Second, is the mandatory minimum punishment imposed for murder contrary to the prohibition against cruel and unusual punishment under s. 12 of the *Charter*?

Terry Skolnik implies an affirmative answer to the first question. As he observes, "the accused would… be stigmatized as a murderer despite their lesser moral blameworthiness given the particular circumstances."[107] This arguably violates the principle of fundamental justice that the *mens rea* for an offence must be proportionate to the blameworthiness of the accused's actions.[108] Yet, intentional killing for other reasons — such as compassion — have not affected the stigma analysis. Although not directly argued at the Supreme Court, it is doubtful that Robert Latimer's choice to kill his severely disabled and suffering daughter out of mercy had any impact on the stigma attached to his decision to kill.[109] If true, it seems plausible that a decision to kill out of fear ought not lead to a violation of

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"Automatism and the Burden of Proof: An Alternative Approach" (2020) 25 Can Crim L Rev 115.

105 See *Daviault*, *supra* note 103 at para 67 (noting that expert testimony is required to make out an intoxication and other automatism defences).

106 See Skolnik, *supra* note 27 at 143.

107 *Ibid*, citing *R v Vaillancourt*, [1987] 2 SCR 636, SCJ No 83 (QL).

108 See *Vaillancourt*, *supra* note 107 at 653–54; *R v Martineau*, [1990] 2 SCR 633 at 645, SCJ No 84; *R v Logan*, [1990] 2 SCR 731 at 743–44, SCJ No 89.

109 See generally *R v Latimer*, 2001 SCC 1 [*Latimer*].

the principle requiring proportionality between fault and moral blameworthiness. As both actors made the choice to kill, the fact that this choice was particularly difficult should not overshadow the conscious choice each actor made. Even if this argument is not persuasive, it is difficult to see how this alternative s. 7 challenge would impact the s. 1 analysis if it were successful. If the Court were inclined to uphold the exclusion of murder from the duress provisions to ensure it is not used as a pretext for murder, it is unlikely that a further violation of the principles of fundamental justice would significantly impact the s. 1 analysis.[110]

If the exclusion of murder from the statutory duress defence is upheld under the *Charter*, it almost certainly will lead to a different *Charter* violation relating to the mandatory minimum punishment for murder. It is indisputable that an accused who kills under duress is far less blameworthy than a typical murderer. The latter accused person does not kill out of *mala fides* but instead out of desperation, either to preserve themselves or a loved one. It should follow that imposing the same mandatory minimum punishment of life imprisonment for each offender imposes a grossly disproportionate punishment on those who kill under duress.[111]

Justice Molloy came to a similar conclusion in *R v PC*.[112] As she observes, "a person who commits murder under a 'kill or be killed' compulsion does not come close to sharing the same moral blameworthiness as a person who kills another of his own volition and for his own purposes."[113] Although Justice Molloy maintains that it would be reasonable to convict both offenders for murder, she finds that it would be necessary to deal with the offenders "in a dramatically different fashion at the sentencing stage."[114] As the constitutionality of the statutory duress defence was not at issue in *PC*, Justice Molloy's comments were *obiter*. Her

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110 As the Supreme Court does not typically find multiple *Charter* violations before preceding to a s. 1 analysis, it is not clear how, if at all, multiple *Charter* violations affect the s. 1 analysis. Even if it ought to have some effect, the fact that the constitutional violations at issue — proportionality between stigma and fault and moral involuntariness — both are concerned with the accused's overall blameworthiness suggests this overlap ought not significantly impact the s. 1 analysis.

111 For a summary of the gross disproportionality standard for assessing a claim under s. 12 of the *Charter*, see *R v Boudreault*, 2018 SCC 58 at para 45.

112 2012 ONSC 5362.

113 *Ibid* at para 37 [emphasis added].

114 *Ibid* [emphasis added].

comments nevertheless constitute a rare judicial consideration of sentencing an accused person who commits murder while under duress. If Justice Molloy is correct that a "dramatically different" sentence ought to be imposed for those who commit murder under duress, it is highly likely that imposing a mandatory life sentence on such offenders would constitute cruel and unusual punishment contrary to s. 12 of the *Charter*.

It is notable that the accused in *R v Latimer*[115] similarly challenged the mandatory minimum punishment for murder.[116] However, the accused was unable to provide a reasonable hypothetical scenario where a person would be convicted of murder despite acting in a morally involuntary manner. Such an argument was impossible because the Court did not rule out the possibility of pleading duress to murder under the common law necessity defence.[117] Only if the Court came to the opposite conclusion would it be necessary to consider whether the mandatory minimum punishment for murder violated s. 12 of the *Charter*. As the Court found that the accused's offence was committed in a morally voluntary manner,[118] his mandatory life sentence was found to be consistent with the *Charter* despite the accused's decision to kill being motivated by mercy.[119]

If the mandatory minimum punishment for murder were found to violate s. 12 of the *Charter*, it would become necessary to consider Parliament's options to reply to such a decision. In several American states, duress is considered a "partial" defence to murder.[120] As with the provocation defence in s. 232 of the *Criminal Code*, it is possible that Parliament could respond by allowing duress to reduce the charge from murder to manslaughter.[121] This would be a suitable approach because in

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115 *Latimer, supra* note 109.

116 *Ibid* at paras 72–90.

117 *Ibid* at para 41.

118 *Ibid* at para 42.

119 *Ibid* at para 85 ("On the one hand, we must give due consideration to Mr. Latimer's initial attempts to conceal his actions, his lack of remorse, his position of trust, the significant degree of planning and premeditation, and Tracy's extreme vulnerability. On the other hand, we are mindful of Mr. Latimer's good character and standing in the community, his tortured anxiety about Tracy's well-being, and his laudable perseverance as a caring and involved parent. Considered together we cannot find that the personal characteristics and particular circumstances of this case displace the serious gravity of this offence").

120 See *Willis*, *supra* note 10 at para 73, citing Minnesota Statute § 609.08 and § 609.20(3); Wisconsin Statute § 939.46; and New Jersey Statute § 2C: 2-9.

121 For a review of the provocation defence, see *R v Tran*, 2010 SCC 58.

most cases, a conviction for manslaughter does not result in a mandatory minimum punishment. However, a mandatory minimum punishment is imposed if a firearm is used during any killing.[122] Although this punishment is less than the mandatory minimum punishment for murder,[123] it could still pose problems under s. 12 of the *Charter* depending on what punishment courts determine is suitable for killing under duress.[124]

The better option may therefore be to provide a specific exemption for accused persons who commit murder under duress as a subsection in the current mandatory minimum punishment for murder. Assuming it is constitutional to stigmatize an accused that kills under duress as a murderer, it would be prudent to explicitly allow judges to have discretion in sentencing those who kill under duress. Judges may use the detailed guidance provided under the sentencing provisions of the *Criminal Code* in devising a suitable sentence. This would allow judges to inform their sentencing judgments with the complex and competing considerations that render allowing duress to be plead as a defence to murder so controversial.

VI. CONCLUSION

The Manitoba Court of Appeal's decision in *Willis* provides an important discussion on a central issue of criminal law theory: the limits of the moral involuntariness principle. Although the court finds that murder cannot realistically be committed in a morally involuntary manner, there are persuasive doctrinal and philosophical reasons for rejecting this view. As such, I conclude that that the current statutory duress defence violates s. 7 of the *Charter*. I also find that there are no convincing policy reasons to uphold excluding murder from the duress defence under s. 1 of the *Charter*. Not only are the vast majority of accused persons unlikely to be deterred by the impugned law, there is also no credible evidence to suggest that allowing defendants to plead duress for murder will result in any criminal defendants feigning a duress defence.

If I am wrong on the question of whether the exclusion of murder from the statutory duress defence is compliant with s. 7 or justifiable

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122 See *Criminal Code*, *supra* note 1, s 236(a).

123 Four years imprisonment as opposed to a life sentence.

124 As there is no jurisprudence on this point, I am reluctant to state my views here.

under s. 1 of the *Charter*, it becomes necessary to consider whether the mandatory life sentence for murder would violate the prohibition against cruel and unusual punishment. I answer this question in the affirmative. If Parliament were to respond to such a ruling, legislating a general exemption to the mandatory minimum punishment for murder would provide a better course of action than allowing duress to serve as a means for reducing murder to manslaughter. The latter option, depending on the nature of the manslaughter committed, has the potential to re-raise questions relating to the constitutionality of other mandatory minimum punishments. By simply providing an exemption for murders committed under duress, sentencing judges would be able to craft principled sentences using the detailed guidance provided in the *Criminal Code*.