manitoba**LawJournal**

2021 Volume 44(4), Special Issue

Criminal Law Edition (Robson Crim)

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PUBLICATION INFORMATION

Copyright © 2021 Manitoba Law Journal
Cite as (2021) 44:4 Man LJ
Printed in Canada on recycled and acid-free paper.
Published annually on behalf of the Faculty of Law, University of Manitoba.
Annual Subscription Rate: Canada: $35.00 CDN; Foreign: $35.00 U.S.
Back issues available from: Manitoba Law Journal
4th Floor Robson Hall, Faculty of Law
University of Manitoba
Winnipeg, Manitoba R3T 2N2
E-mail: lawjournal@umanitoba.ca

ACKNOWLEDGEMENTS

Production of this issue has been supported by a major grant from the Social Sciences and Humanities Research Council program for Aid of Scholarly Journals.

The Manitoba Law Journal gratefully acknowledges the family of Shelley Weiss for the endowment of the Shelley Weiss Publications Office, which houses its ongoing operations at Robson Hall Law School at the University of Manitoba, and for the annual Shelley Weiss scholarship that is awarded to one or more student editors in their second year of our program.

We acknowledge the assistance and peer review administration of the editors and collaborators of www.robsoncrim.com/. For a list of our collaborators please visit: https://www.robsoncrim.com/collaborators.

We would also like to thank the *Manitoba Law Journal* Executive Editors for providing their endless support, constant encouragement, and expert editorial advice.

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2021 Volume 44(4), Special Issue

Criminal Law Edition (Robson Crim)
Defences and the Criminal Law

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CALL FOR PAPERS: Closes February 1, 2022
Manitoba Law Journal – Robson Crim, Special Issue

The Manitoba Law Journal in conjunction with Robsoncrim.com are pleased to announce our annual call for papers in Criminal Law. We invite scholarly papers, reflection pieces, research notes, book reviews, or other forms of written or pictorial expression. 44(4), 44(5), and 44(6) are the most recent Robsoncrim volumes published by the Manitoba Law Journal, and we have published papers from leading academics in criminal law, criminology, law and psychology, and criminal justice. We welcome academic and practitioner engagement across criminal law and related disciplines.

We invite papers that relate to **issues of criminal law and cognate disciplines** as well as papers that reflect on the following sub-themes:

- Intersections of the criminal law and the *Charter*
- Interpersonal violence and crimes of sexual assault
- Indigenous persons and the justice system(s)
- Gender and the criminal law
- Mental health and the criminal law
- Legal issues in youth court, bail, remand, corrections, and court settings
- Regulation of policing and state surveillance
- The regulation of vice including gambling, sexual expression, sex work and use of illicit substances

- Analyses of recent Supreme and Appellate court criminal law cases in Canada
- Comparative criminal law analyses
- Criminal law, popular culture, and media
- Empirical, theoretical, law and society, doctrinal and/or philosophical analyses of criminal law and regulation

We also invite papers relating to evidentiary issues in Canada's criminal courts including:

- Reflections on Indigenous traditions in evidence law (including possibilities)
- New developments in digital evidence and crimes
- Evidentiary changes in the criminal law
- Evidence in matters of national security
- Thresholds of evidence for police or state conduct
- Evolutions of evidence in the law of sexual assault or crimes against vulnerable populations
- Evidence in the context of mental health or substance abuse in or related to the justice system
- Use of evidence in prison law and administrative bodies of the prison systems
- Understandings of harms or evidence in corporate criminality
- Historical excavations and juxtapositions related to evidence or knowing in criminal law
- Cultural understandings of evidence and harm
- Discursive examinations of evidence and harm and shifts in understandings of harms by the justice system

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Submissions should generally be under 20,000 words (inclusive of footnotes) and, if possible, conform with the Canadian Guide to Uniform Legal Citation, 9th ed. (Toronto: Thomson Carswell, 2018) – the "McGill Guide". Submissions must be in Word or Word compatible formats and contain a 250-word or less abstract and a list of 10–15 keywords.

Submissions are due February 1, 2022 and should be sent to info@robsoncrim.com. For queries, please contact Professors Richard Jochelson or David Ireland, at this email address.

THE JOURNAL

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The Manitoba Law Journal (MLJ) is a publication of the Faculty of Law, University of Manitoba located at Robson Hall. The MLJ is carried on LexisNexis Quicklaw Advance, WestlawNext, and Heinonline. It is also included in the annual rankings of law journals by the leading service, the Washington and Lee University annual survey. The MLJ operates with the support of the SSHRC aid to scholarly journal grants program.

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The Slow Death of the Reasonable Steps Requirement for the Mistake of Age Defence

ISABEL GRANT*

ABSTRACT

This article examines the demise of the "all reasonable steps" requirement in s. 150.1(4) of the *Criminal Code* which limits an accused's ability to assert a mistaken belief in age as a defence to sexual offences against children where he has failed to take such steps. The article demonstrates that the Court of Appeal for Ontario in *R v Carbone* has rendered this requirement meaningless in Ontario. Even where the Crown has met its burden to prove beyond a reasonable doubt that the accused did not take "all reasonable steps" to ascertain age, the Crown must still go on and prove *mens rea* as to the fact that the complainant was under the age of consent. The article argues that, where there is no suggestion that a legislative provision is unconstitutional, courts should not use statutory interpretation to effectively read a legislative provision out of existence, especially where it was intended to protect children from sexual contact with adults.

I. INTRODUCTION

Adolescents face sexual violence at alarming rates in Canada. In 2012, 55% of complainants in police-reported sexual offences were under the age of 17 even though this group represented only 20% of the population.[1] As the Supreme Court of Canada has acknowledged in

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the sentencing context, the intersecting vulnerabilities of being young and female result in girls bearing a disproportionate burden of sexual violence against children.[2] The Court went out of its way to describe the particular risks (and stereotypes) facing adolescent girls[3] and to highlight the degree to which the legislative regime enacted to deal with these offences is focused on "the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children."[4]

But progress in sentencing is meaningless if judges consistently erect new barriers to effective prosecution of child sexual offences. This article addresses the latest such barrier imposed by the Court of Appeal for Ontario in *R v Carbone.*[5] In *Carbone*, the Court held that the requirement in the *Criminal Code* that an accused take "all reasonable steps" to ascertain the complainant's age before he can raise a defence that he mistakenly believed the child was at or above the age of consent (generally 16 in Canada) will no longer have any impact on the verdict in Ontario. Even where the Crown successfully proves beyond a reasonable doubt that the accused did not take "all reasonable steps", it must go on to prove that the accused knew the complainant was under the age of consent, or was wilfully blind or reckless with respect to that fact.

This article begins with a brief introduction to the mistake of age defence in Canada and the ways in which courts have slowly chipped away at its effectiveness. It then moves on to provide a brief review of the problematic decision of the Supreme Court of Canada in *R v Morrison*[6] to set up the more detailed analysis of the decision in *Carbone*, the final death

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their helpful comments on earlier drafts. This research was supported by a grant from the Social Sciences and Humanities Research Council.

1. See Statistics Canada, *Police-Reported Sexual Offences Against Children and Youth in Canada, 2012*, by Adam Cotter & Pascale Beaupré, Catalogue No 85-002-X (Ottawa: Statistics Canada, 28 May 2014) at 6. In 2016, 50% of all female complainants in police-reported sexual offences were under the age of 17, with the majority (34%) being between the ages of 12 to 17 years-old. That same year, 73% of all male complainants in police-reported sexual offences were under the age of 17, with 42% being under the age of 12 and 30% being adolescents. See Statistics Canada, *Victims of Police-Reported Violent Crime in Canada: National, Provincial and Territorial Fact Sheets, 2016*, by Mary Allen & Kylie McCarthy, Catalogue No 85-002-X (Ottawa: Statistics Canada, 30 May 2018) at 7.
2. See *R v Friesen*, 2020 SCC 9 at para 68.
3. *bid* at para 136.
4. *Ibid* at para 51.
5. 2020 ONCA 394 [*Carbone*].
6. 2019 SCC 15 [*Morrison* (SCC)].

knell for reasonable steps regarding age in Ontario. The article argues that the Court of Appeal for Ontario had a choice to make in *Carbone* and chose the path that fully undermined the "all reasonable steps" requirement.

Sexual assault is gendered across all ages and especially so in adolescence.[7] One study found that under the age of 11, girls experience sexual violence at a rate almost triple that of boys; for girls between the ages of 12 and 17, that rate jumps to nine times higher than for boys.[8] Indigenous girls,[9] girls with disabilities,[10] and girls in state care[11] are particularly vulnerable to sexual violence. Furthermore, sexual assault against boys peaks at a younger age than for girls. Specifically, sexual abuse against boys peaks under the age of 12,[12] whereas for girls sexual abuse peaks

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7 For example, from 2009 to 2014, 87% of all police-reported sexual assaults were committed against females and 98% of perpetrators charged were male. See Statistics Canada, *Police-Reported Sexual Assaults in Canada, 2009 to 2014: A Statistical Profile*, by Cristine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, 3 October 2017) at 19. This overrepresentation is also seen in adolescents. See Cotter & Beaupré, *supra* note 1 at 10 (which found that the rate of sexual assault peaks around the age of 14).

8 See Statistics Canada, *Police-Reported Violence Against Girls and Young Women in Canada, 2017*, by Shana Conroy, Catalogue No 85-002-X (Ottawa: Statistics Canada, 17 December 2018) at 6.

9 See British Columbia, Representative for Children and Youth, *Too Many Victims: Sexualized Violence in the Lives of Children and Youth in Care* (report) (Victoria: Representative for Children and Youth, October 2016) at 1. This report concluded that Indigenous girls in state care were more likely to experience sexual abuse than other girls but that the same was not true for Indigenous boys. See also Statistics Canada, *Victimization of Aboriginal People in Canada, 2014*, by Jillian Boyce, Catalogue No 85-002-X (Ottawa: Statistics Canada, 28 June 2016) at 10.

10 See Statistics Canada, *Violent Victimization of Women with Disabilities, 2014*, by Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 15 May 2018) at 9: Women with a disability at the time of the survey were more likely to have experienced sexual abuse at the hands of an adult before they reached 15 years of age (Chart 4). One in five (18%) women with a disability were touched in a sexual way by an adult before the age of 15, a proportion that was double that of women without a disability (9%). Likewise, 12% of women with a disability reported being forced into unwanted sexual activity by an adult before the age of 15, compared with 5% of women without a disability.

11 See Isabel Grant & Janine Benedet, "The 'Statutory Rape' Myth: A Case Law Study of Sexual Assaults Against Adolescent Girls" (2019) 31:2 CJWL 266 at 280–81.

12 See Cotter & Beaupré, *supra* note 1 at 10 (which found that in 2012 "[t]he peak age at which boys were victims of sexual offences was 8"). 73% of all male complainants in police-reported sexual offences in 2016 were under the age of 17, with the largest group, 42%, being under the age of 12. See Allen & McCarthy, *supra* note 1 at 7.

around the age of 14,[13] just the age where a mistake of age defence might be more plausible.

In fact, this gendered dynamic is clearly reproduced in the mistake of age case law. I examined 20 years of reported case law (between 2000 and 2020) across Canada on mistake of age defences, including all cases where there was an actual child complainant.[14] This review revealed 117 reported cases involving the defence. More than 96% of cases involved male perpetrators, with only four cases involving female perpetrators.[15] Similarly, 107 cases involved girls as complainants (91%), and 10 cases involved boys (9%), including one case where the 15-year-old complainant was "in the process of transitioning to becoming a male" and identified as male.[16] The

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[13] See Cotter & Beaupré, *supra* note 1 at 11: "[f]or girls, the rates of sexual offences generally increased with age before peaking at age 14".

[14] I excluded five cases involving Internet luring involving a police sting operation and thus no actual child victim. I also excluded cases where no outcome on the defence was reached.

[15] See *R v George*, 2017 SCC 38 [*George* (SCC)]; *R v Johnson*, [2001] NJ No 276, 52 WCB (2d) 456 [*Johnson*]; *R v Otokiti*, 2017 ONSC 5940 [*Otokiti*]; *R v Akumu*, 2017 BCSC 527 [*Akumu*].

[16] *R v WG*, 2018 ONSC 5404 at para 5. The complainant was described as identifying as a male at the time of the sexual offences. The defence was unsuccessful in this case on the basis that the accused had not taken all reasonable steps to ascertain the complainant's age. The other cases involving boys are *George* (SCC), *supra* note 15; *Johnson*, *supra* note 15; *R v TSH*, 2008 ABPC 281 [*TSH*]; *R c Lévesque*, 2011 QCCS 7093; *R v Angel*, 2019 BCCA 449 [*Angel*]; *R v Thompson*, 2017 NBCA 62; *R v Sohail*, 2018 ONCJ 566; *R v Crant*, 2018 ONSC 1479 [*Crant*]; *R v LFM*, 2015 BCPC 449 [*LFM*]. For all of the cases involving female complainants, see: *Otokiti*, *supra* note 15; *Akumu*, *supra* note 15; *Carbone*, *supra* note 5; *R v Normand*, 2014 ONSC 3861 [*Normand*]; *R v Crosdale*, 2018 ONCJ 800; *R v Jat*, 2019 SKQB 51; *R v Hope*, 2011 NLTD(G) 143 [*Hope*]; *R v John*, 2020 ONSC 3790 [*John*]; *R v ET*, 2010 ONSC 3913 (CanLII) [*ET*]; *LSJPA – 1731*, 2017 QCCQ 15023; *R v Abdulkadir*, 2018 ABPC 244; *R v A(D)*, 2011 ONCJ 130; *R v CGJ*, 2018 BCPC 216; *R v Ayer*, [2008] OJ No 3611, 2008 CanLII 46922; *R c Bourelle Vanasse*, 2020 QCCQ 2315; *R v PDB*, 2000 SJ No 348; *R v Purchase*, 2011 ABQB 643; *R v NW*, [2005] MH No 108, 4 WWR 304; *R v Dunchie*, 2007 ONCA 887; *R v Nakogee*, 2017 ONSC 4885; *R v Moazami*, 2014 BCSC 1727; *R v RKD*, 2012 ABPC 205; *R v Poirier*, 2011 ABPC 350 [*Poirier*]; *R v Singh et al*, 2020 MBCA 61; *R v HL*, 2017 ONSC 6205; *R v Saliba*, 2019 ONCA 22; *R v Kim*, 2004 BCCA 57 [*Kim*]; *R v Gonzales*, 2011 BCPC 353; *R v Skunk*, 2010 ONCJ 209; *R v DRD*, 2020 ABPC 46; *R v Konneh*, 2019 ABQB 3; *R v Silavi*, 2019 BCCA 366; *R v Duran*, 2013 ONCA 343 [*Duran*]; *R v Coburn*, 2019 NSPC 49 [*Coburn*]; *R v Wrigley*, 2018 NWTSC 67 [*Wrigley*]; *R v Chapais*, 2017 ONSC 120 [*Chapais*]; *R v MB*, 2017 ONSC 4163; *R v Ryder*, 2011 BCSC 133; *R v Beckford*, 2016 ONSC 1066; *R v Hubert*, 2016 BCPC 288; *R v Holloway*, 2013 ONCA 374 [*Holloway*]; *R v Arook*, 2016 ABQB 528; *R v Ekendia*, 2011 NWTTC 17; *R v Audet*,

gendered stereotypes underlying this defence are most evident in cases involving successful defences. There were only three reported cases involving boys where the defence was successful, and none involving complainants who were identified in the decision as transgender or nonbinary.[17] By contrast, there were 34 cases involving girls where the defence was successful and three additional cases where an appellate court overturned a conviction on the basis of errors regarding the defence. While these reported cases probably represent only a fraction of the actual cases involving the defence during this time period, it is notable that the gender breakdown is remarkably similar to statistics on sexual violence generally.

This article argues that while *Carbone* applies to all children under the age of consent, it will have its greatest impact on the most marginalized girls. This argument is not meant to trivialize sexual violence against boys or those who identify as gender nonbinary; both groups face significant harm from

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2020 ONSC 5039; *R v Azonwanna*, 2020 ONSC 1513; *R v Hudon*, 2010 OJ No 6023; *R v Merrlles*, 2016 SKCA 128; *R v Gashikanyi*, 2015 ABCA 1; *R v Piche*, 2018 ABQB 980; *R v Lefthand*, 2019 ABPC 127 [*Lefthand*]; *R v UHC*, 2015 NSPC 10; *R v DO*, 2017 ONSC 2027 [*DO*]; *R v E*, 2011 NUCJ 35 [*R v E*]; *R v Quinones*, 2012 BCCA 94; *R v (R)*, 2014 ONCJ 96 [*R v (R)*]; *R v Mabior*, 2010 MBCA 93; *R v MGB*, 2005 ABPC 215; *R v JM*, [2017] NJ No 223, 2017 NLTD(G) 110; *R v Budden*, 2014 NJ No 78; *R v Young*, [2010] NJ No 264, 2010 CarswellNfld 421; *R v Ross*, 2012 NSCA 56; *R v Hussein*, 2017 ONSC 2584; *R v GL*, 2014 ONSC 3403; *R v Dragos*, 2012 ONCA 538 [*Dragos*]; *LSJPA – 1728*, 2017 QCCQ 13555; *R v Tannas*, 2015 SKCA 61 [*Tannas*]; *R v Eichner*, 2020 ONSC 4602; *R v Ford*, 2017 ABQB 542; *R v Dichrow*, 2020 ABPC 58; *R c Vasiloff*, 2017 QCCQ 15612 [*Vasiloff*]; *R c Perreault*, 2019 QCCQ 6097; *R v Sims*, 2006 BCSC 651; *R v JTC*, 2013 NSPC 88; *R v TQBN*, 2016 SKQB 10 [*TQBN*]; *R v Nguyen*, 2017 SKCA 30 [*Nguyen*]; *R v Alfred*, 2020 BCCA 256 [*Alfred*]; *R v MacLean*, 2018 NLSC 209; *R v May*, 2017 ONCJ 167; *R v Craig*, 2013 BCSC 1562; *R v Gale*, 2012 BCPC 456; *R v MC*, [2011] NJ No 228, 95 WCB (2d) 543; *R v Garraway*, 2010 ONCJ 642; *R v Mangat*, 2018 ABCA 309; *R v Slater*, 2005 SKCA 87; *R v Chapman*, 2016 ONCA 310 [*Chapman*]; *R v Saliba*, 2013 ONCA 661 [*Saliba* (2013)]; *R v CJJ*, 2020 BCPC 2; *R v Cummer*, 2014 MBQB 62; *R v CJC*, 2018 NLCA 68; *R v KS*, 2018 ONSC 1988; *R v CIL*, 2019 ABPC 64; *R v Martinez*, 2020 ONCJ 303; *R v CGV*, 2017 ONCJ 850; *R c Héon*, 2019 QCCQ 5609; *R v Minzen*, 2017 ONCJ 127 [*Minzen*]; *R v Akinsuyi*, 2016 ONSC 2103; *R v Hall*, 2018 ABQB 459; *R v Powell*, 2016 ONSC 562; *R v Clarke*, 2016 SKCA 80; *R v Beaulieu*, 2016 ONCJ 280; *R v Moise*, 2016 SKCA 133; *R v Hoffart*, 2010 ABPC 122; *R v D(AJ)*, 2016 NSPC 74; *R v Ambrus*, 2014 ABPC 173; *R v Mastel*, 2011 SKCA 16; *R c Naud*, 2018 QCCQ 4480; *R v Lewis*, 2015 SKQB 291 [*Lewis*].

17 See *George* (SCC), *supra* note 15; *TSH*, *supra* note 16; *LFM*, *supra* note 16. The success rate for the defence was slightly higher among girl complainants, but with the small number of cases involving boys it is impossible to draw any conclusions from this finding.

sexual violence committed overwhelmingly by men,[18] and further study is warranted to identify the stereotypes that can undermine judicial decision making around these child victims. However, the cases under study predominantly involve male violence against girls and, as will be discussed below, the stereotypes invoked to support successful defences of mistaken belief in age are also uniquely gendered. These stereotypes sexualize girls and portray them as older and thus as sexually available to men.

II. THE MISTAKE OF AGE DEFENCE

In 1987, Parliament revised its structure of sexual offences against children and enacted a number of new offences such as sexual interference and invitation to sexual touching.[19] In these prosecutions, age is substituted for non-consent; once the Crown proves the young age of the complainant, it need not prove non-consent in order to obtain a conviction.[20] Prior to this new regime, a defence that an accused was mistaken about the complainant's age was expressly prohibited by the *Criminal Code*.[21] The 1987

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[18] Between 2009 and 2014, boys accounted for 50% of male victims of police-reported sexual assaults. See Rotenberg, *supra* note 7 at 13–14. In 2012, perpetrators of sexual assault against boys were overwhelmingly male, with only 2% of cases involving a female accused and a male victim. See Cotter & Beaupré, *supra* note 1 at 14. A Canadian study conducted by the Department of Justice reported that childhood sexual abuse can have "profound effects on a man's identity and sexual activity": Susan McDonald & Adamira Tijerino, "Male Survivors of Sexual Abuse and Assault: Their Experiences" (2013) at 7, online (pdf): *Department of Justice* <www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr13_8/rr13_8.pdf> [perma.cc/K2UJ-GJGJ]. See also Marie Choquet et al, "Self-Reported Health and Behavioral Problems Among Adolescent Victims of Rape in France: Results of a Cross-Sectional Survey" (1997) 21:9 Child Abuse & Neglect 823 at 831. A more recent American study found that boys who had experienced childhood sexual abuse were more than twice as likely as boys who had not experienced sexual abuse to have attempted suicide. See Shanta R Dube et al, "Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim" (2005) 28:5 Am J Prev Med 430 at 433. There is also evidence to suggest that children who identify as transgender or nonbinary face a high rate of sexual violence. See Karen Rosenberg, "Higher Prevalence of Sexual Assault Among Transgender and Nonbinary Adolescent Students" (2019) 119:8 American J Nursing 49. See also Andrea L Roberts et al, "Childhood Gender Nonconformity: A Risk Indicator for Childhood Abuse and Posttraumatic Stress in Youth" (2012) 129:3 Pediatrics 410 at 414.

[19] See *An Act to Amend the Criminal Code and the Canada Evidence Act*, SC 1987, c 24; *Criminal Code*, RSC 1985, c C-46, ss 151, 152 [*Code*].

[20] See *Code*, *supra* note 19, s 150.1(1).

[21] See *Criminal Code*, RSC 1970, c C-34, s 146 (1).

reforms included a new limited defence of mistaken belief in age in s. 150.1(4) to respond to criticisms that the previous offence was effectively one of absolute liability and thus risked being invalidated under s. 7 of the *Charter*.[22]

The mistaken belief in age defence enacted in s. 150.1(4) allows an accused to raise a mistaken belief that the complainant was at or above the age of consent, but the defence will only be successful where the accused has taken "all reasonable steps" to ascertain the complainant's age. This provision was modelled on the reasonable steps provision for consent for sexual offences against adults,[23] but there were some crucial differences. First, the reasonable steps provision dealing with consent in the context of adult complainants only requires the accused to take reasonable steps and not all reasonable steps. Second, the reasonable steps provision dealing with consent only requires the accused to take reasonable steps "in the circumstances known to the accused at the time".[24] Parliament clearly made the decision that a more stringent standard was warranted for child victims of sexual offences.

The purpose of the "all reasonable steps" requirement was to prevent adults from asserting that they were mistaken about the complainant's age where they had failed to do everything reasonably possible to avoid having sex with a child. The common law had allowed men to rely on mistaken beliefs in consent that were unreasonable so long as they were honestly held which was precisely why Parliament enacted reasonable steps provisions.[25] S. 150.1(4), like other reasonable steps provisions, modifies that common law position.

There are a number of reasonable steps provisions with respect to age in the *Criminal Code* that have been enacted since 1987, most of which require the accused to take "all reasonable steps" while others simply require "reasonable steps".[26] In 2008, Parliament raised the age of consent for most

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22 *Canadian Charter of Rights and Freedoms*, s7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See e.g. *R v Hess*, [1990] 2 SCR 906, 59 CCC (3d) 161; *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536.

23 See *Code*, *supra* note 19, s 273.2(b).

24 *Ibid*.

25 See *Pappajohn v The Queen*, [1980] 2 SCR 120 at 156, 111 DLR (3d) 1. See also *An Act to Amend the Criminal Code (Sexual Assault)*, SC 1992, c 38.

26 See e.g. *Code*, *supra* note 19, ss 150.1(4), (5), (6), 163.1(5) (requiring "all reasonable steps") and ss 171.1(4), 172.1(4), 172.2(4) (requiring only "reasonable steps").

sexual offences against children from 14 years of age to 16, but the age may be as high as 18 for certain offences[27] and as low as 12 where the accused is close in age to the complainant.[28] A large majority of the reported decisions involve adolescent girl complainants between the ages of 12 and 15, but there are at least five reported cases since 2000 involving girls as young as 11,[29] and one luring and child pornography case involving a 9-year-old girl where mistaken belief in age was raised.[30]

Courts have consistently interpreted reasonable steps provisions regarding age and consent as putting no burden of proof on the accused.[31] Rather, once the accused raises an air of reality that he was mistaken and that he had taken "all reasonable steps" to ascertain age, the burden of proof remains on the Crown to prove beyond a reasonable doubt that the accused did not take all reasonable steps.[32] Once the Crown has met that stringent burden, the accused is precluded from arguing that he had a mistaken belief.[33] In other words, the reasonable steps requirement puts a limit on

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27 *Ibid*, ss 153(2) (sexual exploitation), 163.1(1) (child pornography). Obtaining sexual services for consideration is subject to a higher penalty where sexual services are obtained from someone below the age of 18. See *ibid*, s 286.1(2).

28 *Ibid*, s 150.1(2).

29 See *Hope*, *supra* note 16; *Lefthand*, *supra* note 16; *Normand*, *supra* note 16; *John*, *supra* note 16; *ET*, *supra* note 16. The youngest male complainants in cases involving the mistaken belief in age defence in this time period were both 13 years of age. See *Crant*, *supra* note 16; *TSH*, *supra* note 16. The law is unclear as to whether an accused can argue mistaken belief to bring a complainant within the close in age exceptions rather than the age of consent. For example, can an 18-year-old male argue he mistakenly believed he was having sex with a 15-year-old (to bring him within the close in age exceptions) when in fact the complainant was 12? See Isabel Grant & Janine Benedet, "Confronting the Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law" (2019) 97:1 Can Bar Rev 1 at 14–15 [Grant & Benedet, "Mistake of Age"].

30 See *Otokiti*, *supra* note 15, where the female accused argued mistaken belief in age about a nine-year-old girl who was lured online.

31 See e.g. *R v Westman*, [1995] BCJ No 2124 at para 20, 28 WCB (2d) 440 (CA) [*Westman*]; *R v Osborne* (1992), 102 Nfld & PEIR 194 at paras 44–47, 17 WCB (2d) 581 (CA) [*Osborne*].

32 There was some lack of clarity as to whether the air of reality threshold applied only to the mistaken belief or whether it applied to having taken reasonable steps as well. It was settled in *R c Gagnon*, 2018 CMAC 1 at para 28, aff'd 2018 SCC 41 [*Gagnon* (CMAC)] that it applies to both. It is noteworthy that the accused must point to an air of reality for many defences, including some that go to *mens rea*, such as the intoxication defence. See *R v Cinous*, 2002 SCC 29 at para 57.

33 See e.g. *R v Morrison*, 2017 ONCA 582 at para 95 [*Morrison* (CA)]; *R v Levigne*, 2010 SCC 25 at para 36 [*Levigne*]. Justice Abella, who would have struck down the reasonable

when an accused could raise the defence of mistaken belief in age. The decision of the Supreme Court in *Morrison*, which was extended further in *Carbone*, has now brought this case law into question.

Isabel Grant and Janine Benedet have demonstrated the degree to which courts have gradually whittled away at the reasonable steps requirement.[34] First, the requirement that an accused take "all" reasonable steps has been effectively read out of s. 150.1(4), such that provisions requiring "all reasonable steps" are applied in the same way as those requiring only "reasonable steps".[35] Second, courts have read into s. 150.1(4) the requirement from the provision dealing with consent that an accused must only take reasonable steps in the circumstances that are known to him at the time,[36] despite the fact that Parliament clearly made a decision not to limit reasonable steps regarding age in this way. Third, as Grant and Benedet have demonstrated, some courts have held that the surrounding circumstances may require the accused to do absolutely nothing in order to satisfy having taken "all reasonable steps".[37] Sometimes, how the complainant looks or behaves is sufficient to obviate the need to take <u>any</u> steps at all, let alone "all reasonable steps."[38] These cases sometimes involve men whose mistakes are based on stereotyped beliefs about the sexual availability of girls who look or behave in certain ways rather than on actual knowledge of the complainant's age. A finding that these men have to do nothing to ascertain age legitimizes these stereotypes and acquits men on the basis of them. Together, these developments in statutory

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steps test in *Morrison* (SCC), *supra* note 6, agreed with the interpretation of the Court of Appeal for Ontario that once the Crown has met its burden of disproving reasonable steps beyond a reasonable doubt, the accused is precluded from raising the defence of mistaken belief in age. See *Morrison* (SCC), *supra* note 6 at para 207. See also Hamish Stewart, "Fault and 'Reasonable Steps': The Troubling Implications of *Morrison* and *Barton*" (2019) 24:3 Can Crim L Rev 379 at 381 (describing a reasonable steps provision as providing "an alternative route by which the Crown can prove the fault element of the offence").

34 See generally Grant & Benedet, "Mistake of Age", *supra* note 29.

35 See *Angel*, *supra* note 16 at para 46.

36 See e.g. *Morrison* (SCC), *supra* note 6 at para 105; *R v Thain*, 2009 ONCA 223 at para 37 [*Thain*]; *Dragos*, *supra* note 16 at paras 35–41; *R v Ghotra*, 2016 ONSC 1324 at paras 153–54; *R v Pengelley*, 2010 ONSC 5488 at paras 8–17 [*Pengelley*]; *R v E*, *supra* note 16 at paras 32, 96–97; *Tannas*, *supra* note 16 at paras 22, 25, 28.

37 See Grant & Benedet, "Mistake of Age", *supra* note 29 at 23–31.

38 See e.g. *Tannas*, *supra* note 16 at paras 27, 34–35; *R v LTP*, [1997] BCJ No 24 at para 20, 33 WCB (2d) 292 [*R v LTP*]; *R v Mastel*, 2010 SKPC 66 at paras 28–30 [*Mastel* (SKPC)].

interpretation have undermined Parliament's clear language and its intent to protect child victims from sexual activity with adults. All of this has been done without resort to the *Charter*. Thus, the "all reasonable steps" requirement in s. 150.1(4) had already been substantially weakened by the time of *Carbone*.

There is one final point worth making about the mistake of age defence. The mistake of age defence is only relevant where the complainant has agreed to participate in sexual activity with the accused. If the complainant did not agree to participate in sexual activity, it does not matter what belief the accused had about her age – that is sexual assault. However, in many of the reported cases, the complainant testified that such agreement was not given, and the accused testified that the complainant did agree to engage in sexual activity and that he thought she was above the age of consent. In 44 of the 117 reported cases (38%) involving a defence of mistaken belief, the complainant testified to a lack of agreement to participate in sex.[39] In more than one-third of the cases in which the defence of mistaken belief was ultimately successful, the complainant testified that no such agreement was present.[40] The mistake of age defence thus has the potential to shift the judicial narrative in these cases. It no longer becomes a question of has the Crown proven that the child did not agree to participate in sexual activity but rather, assuming she agreed to participate in sex, has the Crown negated that the accused took all reasonable steps to ascertain age. The complainant's allegations of non-consent may disappear from the case entirely.[41]

Before turning to the details of *Carbone*, it is necessary to briefly review the decision in *Morrison* – a 2019 decision of the Supreme Court of Canada which created the potential to further undermine reasonable steps provisions. Without *Morrison*, a decision scholars and courts have struggled

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39 This figure was slightly higher in cases involving female complainants (38%) than in cases involving male complainants (30%).

40 This was the case in 14 of the 37 cases in which the defence was successful, 12 involving girls as complainants and two involving boys.

41 See e.g. *Holloway*, *supra* note 16 at paras 12–14 (discussing the trial judge's failure to adequately consider whether there had been "consent" on the part of the complainant). The Court noted, at para 15, that "[a] finding that the sexual conduct was not 'forced' was not enough to determine whether, apart from the question of the complainant's age, there was a potentially operative consent."

to interpret, this issue would not have been considered in *Carbone* after years of clarity about how reasonable steps provisions operate.[42]

III. THE IMPACT OF *R V MORRISON*

At issue in *Morrison* were the evidentiary presumption and the reasonable steps provision associated with the crime of Internet luring of children in s. 172.1(3) and (4) of the *Criminal Code*, respectively. Internet luring in s. 172.1(1) is an unusual crime because it can be committed in two distinct ways, both defined by the same subsection of the *Criminal Code*. An accused can be convicted for luring an actual child online or for luring someone the accused believes to be a child, which usually arises in the context of an undercover police officer pretending to be a child. *Morrison* itself involved a police sting operation in which the 67-year-old accused was charged with luring an undercover police officer who was holding herself out as a 14-year-old girl. The luring jurisprudence lacked clarity on the fact that the *Criminal Code* set out different elements for the two different ways in which the crime could be committed.[43] Where the accused lures someone who is falsely holding herself out to be a child, the legislation requires that the accused "believe" he is communicating with a child. No such requirement of belief is set out in the legislation where the accused is luring an actual child, and principles of statutory interpretation would normally allow recklessness as sufficient *mens rea* in this situation.[44]

The reasonable steps provision in s. 172.1(4), the wording of which mirrors other reasonable steps provisions, does not acknowledge that this crime can be committed in different ways. There are differences between a man who asserts he wrongly believed he was talking to an adult (when he was in fact talking to a child), and a man who asserts he believed he was talking to an adult, and was in fact doing so, albeit an adult who was

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[42] See e.g. Isabel Grant & Janine Benedet, "Unreasonable Steps: Trying to Make Sense of *R v Morrison*" (2019) 67 Crim LQ 14 [Grant & Benedet, "Unreasonable Steps"]; Stewart, *supra* note 33; Don Stuart, "*R v Carbone*", Case Comment, (2020) 64 CR (7th) 1. Professor Stuart describes *Morrison* as a "lengthy, complex and perplexing" decision and urges the Supreme Court to reconsider its decision. He describes both *Morrison* and *Carbone* as "hard to follow or accept". See also *Angel*, *supra* note 16; *Carbone*, *supra* note 5.

[43] See *R v Legare*, 2009 SCC 56; *Levigne*, *supra* note 33.

[44] See *Regina v Buzzanga and Durocher*, 25 OR (2d) 705, 101 DLR (3d) 488 (Ont CA); *R v Sault Ste Marie (City)*, [1978] 2 SCR 1299, 40 CCC (2d) 353.

pretending to be a child. In the latter scenario, the provision is effectively requiring the accused to take reasonable steps to confirm that he is in fact talking to an adult before he can say he disbelieved a representation that he was engaging with a child. The mandatory evidentiary presumption in s. 172.1(3) complicated this analysis by presuming, where the person represented themselves as a child, that the accused believed he was talking to a child. In other words, in virtually every case involving an undercover officer, the accused was deemed to believe that he was communicating with a child unless he could raise evidence to the contrary, even though he was in fact communicating with an adult. In some cases, that evidence to the contrary was an accused arguing that he was role-playing, or that he believed he was talking to an adult who was pretending to be a child, for the purposes of sexual gratification.[45] The luring provisions were added to the *Criminal Code* in 2002,[46] and it appears that no thought was given to how the reasonable steps provision would actually work where the accused correctly believed he was talking to an adult.

The Supreme Court in *Morrison* was unanimous in striking down the evidentiary burden as contrary to s. 11(d) of the *Charter* and not saved by s. 1. The dissenting judgment of Justice Abella would have also struck down the reasonable steps provision under s. 7 of the *Charter*. However, Justice Abella was clear on how reasonable steps provisions work generally and on the fact that once the Crown had negated reasonable steps beyond a reasonable doubt, the accused cannot assert an honest but mistaken belief. Justice Abella would have invalidated the provision as violating an accused's right to full answer and defence because, in her view, it is almost impossible to ascertain identity on the Internet, let alone age, given the anonymous nature of online communications and the potential for deception. Further, according to Justice Abella, an accused who takes steps to ascertain age by, for example, asking the complainant for a photograph enhances his risk of being charged with luring because those very steps could be evidence of luring.[47] The approach of Justice Abella failed to recognize that talking to children online is only criminalized under s. 172.1 where it is done for the purpose of facilitating the commission of (almost always) a further sexual

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45 See e.g. *Morrison* (SCC), *supra* note 6 at para 24.

46 See *Criminal Law Amendment Act, 2001*, SC 2002, c 13, s 8.

47 See *Morrison* (SCC), *supra* note 6 at paras 220–23.

offence.[48] Merely talking to a child online about sex, where the accused has no purpose to facilitate a further offence, is not criminalized as Internet luring under s. 172.1. A man who is unable to ascertain the age of the person with whom he is speaking can simply desist from pursuing any further sexual purpose until he has a more meaningful opportunity to ascertain age.[49]

It is the judgment of Justice Moldaver for the majority that has led to considerable problems for other reasonable steps provisions. The majority avoided striking down the reasonable steps provision in s. 172.1(4) by effectively interpreting it out of existence for the crime of Internet luring. The majority held that, even where the Crown had proven beyond a reasonable doubt that the accused had not taken reasonable steps, the Crown would still have to prove beyond a reasonable doubt that the accused believed he was talking to a child.[50] This reasoning was largely driven by the requirement in s. 172.1(1) that, where the accused was not talking to an actual child, he must have *believed* he was talking to a child.

The majority repeatedly limited its analysis to the sting operation context where the accused's belief is an element of the offence.[51] It did so precisely because, in the police sting context, there is no actual child being harmed and the accused's moral blameworthiness lies in his belief that he is talking to a child.[52] For other sexual offences against actual children, recklessness is sufficient *mens rea*.[53] The sting context is unique because without a belief that he is talking to a child, the accused has done nothing wrong, at least if one assumes there is nothing wrong in role-playing the sexual abuse of children.[54]

Morrison rendered the reasonable steps provision for Internet luring meaningless. Grant and Benedet have argued that the decision leaves no

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48 Abduction of a person under the age of 14 is also included as one of the further offences in s. 172.1. See *Code*, *supra* note 19, s 172.1.

49 See Grant & Benedet, "Mistake of Age", *supra* note 29 at 31–35.

50 See *Morrison* (SCC), *supra* note 6 at paras 82–83.

51 *Ibid* at paras 49, 55, 81, 84–85, 95, 101.

52 *Ibid* at paras 13, 49, 55. See also *Morrison* (CA), *supra* note 33 at para 101.

53 See *Westman*, *supra* note 31 at paras 18–19; *Kim*, *supra* note 16 at paras 78–88; *Nguyen*, *supra* note 16 at para 14.

54 Grant and Benedet have argued that it is not harmless for men to condition a sexual response to the abuse of children. See Grant & Benedet, "Unreasonable Steps", *supra* note 42 at 25.

room for the reasonable steps requirement to have any impact on the verdict:

> If the trier of fact does not have a reasonable doubt that the accused believed the complainant was underage, he will be convicted. If the trier of fact has a reasonable doubt about the accused's belief, the accused is acquitted even though he did not take reasonable steps. Reasonable steps are irrelevant to the verdict, which depends entirely on whether the Crown can prove the accused believed he was talking to an underage child.[55]

The *Morrison* majority went out of its way to limit its judgment to Internet luring in the context of a police sting operation. The Court of Appeal for Ontario, therefore, had a choice in *Carbone* about whether to accept the majority at its word that *Morrison* was limited to the sting context or to undermine the "all reasonable steps" requirement in other *Criminal Code* provisions dealing with mistakes about age. It is to the decision in *Carbone* that this article now turns.

IV. THE DECISION IN *R V CARBONE*

A. Background

The accused in *Carbone* was convicted at trial of invitation to sexual touching. The evidence presented by the Crown was that three 14-year-old girls reached out to the accused on Facebook asking him if he would give them tattoos in exchange for sex. They negotiated that one of the girls would give him "a blow job" before he did the tattooing and another would have intercourse with him after he finished the tattoos.[56] The complainant, HJ, testified that soon after she arrived at the accused's home, she went upstairs with Carbone, performed oral sex on him, and then each of the girls was given a tattoo. HJ testified that when she was performing oral sex, she saw that the accused had a tattoo on his penis. While the accused did spend some time alone with HJ's friend KM afterwards, KM refused to testify and thus there was no evidence about what happened after the tattooing. Later that evening, HJ received a Facebook message from someone she assumed to be the accused saying, "H. that was amazing. Best I ever had. Gold medal."[57] HJ also testified that the accused did not ask her how old she was, nor whether she had permission from her parents to get a tattoo. Another

55 *Ibid* at 28 [citations omitted].
56 See *Carbone*, *supra* note 5 at para 6.
57 *Ibid* at para 11.

girl, AG, confirmed much of HJ's testimony and added that HJ had told the accused the true ages of the girls, although that was not part of HJ's testimony.

The 31-year-old accused also testified. He operated a licensed tattoo parlour out of his home where he lived with his fiancée.[58] He testified that the girls had approached him to exchange sex for tattoos, but that he had told them each tattoo would cost $35 and that he had staunchly rejected their offers.[59] He testified that he was never alone with any of the girls and that his fiancée came home after he had tattooed the first two girls, a fact which the girls denied. When he demanded money from the girls, they told him their mother would come by later and pay him. When the mother did not appear, the accused testified that he called HJ and told her that if she did not pay him, he would contact her parents and go to the police.[60] He testified that HJ assured him that she would pay him by Friday. On Friday morning, the police arrived at Carbone's home and arrested him. He testified that he initially thought he was being arrested for tattooing underage girls.[61] While the girls testified that he did not ask their age, he testified that they told him on Facebook they were 16 and that he had seen a permission slip signed by somebody he assumed to be a parent, although he could not produce it.[62] He admitted that he did think it was strange that three girls the same age would have the same mother, but he did not ask any questions about this.[63] He testified that he was not able to produce any of the Facebook messages "because his fiancée had destroyed them after he was arrested."[64]

After his fiancée testified to corroborate his account, the defence recalled the accused at which point he mentioned for the first time that he had told the girls that he had a tattoo "on his 'crotch'" because one of the girls was worried the tattoo was going to hurt. He said he wanted to reassure her that where she was getting tattooed would be less painful than the one on his crotch had been.[65]

58 *Ibid* at para 16.
59 *Ibid* at paras 17–18.
60 *Ibid* at para 22.
61 *Ibid*.
62 *Ibid* at paras 21, 23–24.
63 *Ibid* at para 21.
64 *Ibid* at para 18.
65 *Ibid* at paras 25–26.

The trial judge convicted the accused. The judge believed beyond a reasonable doubt that the accused had agreed to give the complainant a tattoo in exchange for oral sex, that the complainant had performed oral sex on him, and that the accused had not taken the requisite "all reasonable steps" to assert a defence of mistaken belief in age.[66]

The Court of Appeal ordered a new trial primarily on the basis that the trial judge had made a number of errors regarding burden of proof. The trial judge stated that he was "not convinced" by the accused's testimony that a financial arrangement was made for the tattoos;[67] "not persuaded" that the Facebook message received by HJ after the events was not sent by the accused;[68] "not satisfied beyond a reasonable doubt" that the accused saw a permission slip;[69] and "not persuaded" by the fiancée's testimony that he had not negotiated to exchange tattoos for sex.[70] The Court of Appeal acknowledged that the occasional mistake on burden of proof has to be seen in the context of the correct instructions earlier in the judge's reasons, but decided that it had to allow the appeal because the facts to which these mistakes related were central to the accused's defence and contrary to the requirements of *R v W(D)*[71] regarding burden of proof and credibility. The Court of Appeal could have left the matter there and allowed a new trial on burden of proof errors alone, but it decided to go on and clarify the impact of *Morrison* on the reasonable steps provision in s.150.1(4).[72]

B. The "All Reasonable Steps" Issue

The trial judge in *Carbone*, prior to the decision in *Morrison*, convicted the accused because the Crown had proven beyond a reasonable doubt that the accused had not taken all reasonable steps to inquire into the complainant's age as was the law at that time. This has been the approach

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66 *Ibid* at para 29.
67 *Ibid* at para 31.
68 *Ibid.*
69 *Ibid.*
70 *Ibid.*
71 [1991] 1 SCR 742, [1991] SCJ No 26.
72 The Court rejected the arguments related to a s. 11(b) trial within a reasonable time and clarified that the crime of invitation to sexual touching does not require that the accused initiated the communication or activity, but rather that he said something that amounted to an invitation. The Court agreed that the trial judge wrongly implied that the Crown had to prove that oral sex happened, but that this error did not disadvantage the accused. See *Carbone*, *supra* note 5 at paras 58, 61–63.

taken by appellate courts across the country for years,[73] and the Supreme Court of Canada had confirmed this approach in *R v George*.[74] Once *Morrison* was released, however, the defence in *Carbone* argued on appeal for the first time that the reasoning in *Morrison* should be extended to invitation to sexual touching such that, even where the Crown has proven beyond a reasonable doubt that the accused failed to take "all reasonable steps" to ascertain the age of the complainant, the Crown must go on to prove that the accused knew or was wilfully blind to the complainant's young age.

The Court of Appeal agreed with the Crown that the context of Internet luring could be distinguished from invitation to sexual touching. The statutory provisions dealing with Internet luring must be able to address the unique challenges of dealing with those who use the Internet to exploit children and to facilitate police intervention before further sexual offences have taken place. The luring legislation allows police to intervene not only based on an underage complainant but also based on the accused's belief about the complainant's age, thus allowing for sting operations to identify predators before they lure actual children. Because there is no harm to an actual child in the sting context, a "stringent subjective standard" of *mens rea* is required.[75] The mistake of age defence and the corresponding "all reasonable steps" provision for sexual offences against actual children require a less stringent *mens rea* requirement. The Court of Appeal did acknowledge that the reasonable steps provision has no role left to play in the context of Internet luring,[76] but it explicitly held that this analysis could not be extended to reasonable steps provisions for other offences against actual children.

However, the Court of Appeal accomplished exactly the same result by returning to the *Morrison* majority's brief discussion of the decision in *George* and concluding that the Crown now has a new additional *mens rea* requirement before an accused can be convicted. The unanimous Supreme Court of Canada judgment in *George*[77] had confirmed that the reasonable steps requirement modifies the *mens rea* requirement for the crime of sexual interference. In other words, an honest belief that the complainant was

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73 See e.g. *Duran*, *supra* note 16 at para 51; *Saliba* (2013), *supra* note 16 at paras 26–28; *Tannas*, *supra* note 16 at paras 21–24; *Nguyen*, *supra* note 16 at para 4.

74 See *George* (SCC), *supra* note 15 at para 8.

75 *Carbone*, *supra* note 5 at para 100.

76 *Ibid* at para 91.

77 *Supra* note 15.

above the age of consent is only a defence where the accused has taken all reasonable steps. Once the Crown disproves beyond a reasonable doubt that the accused took all reasonable steps, there is no room for an accused to assert an honest mistaken belief in age.

Ms. George was acquitted of sexual interference at trial on the basis that a the trial judge had a reasonable doubt that she had taken "all reasonable steps" to ascertain age before having sex with an underage male friend of her son.[78] The Court of Appeal overturned that acquittal on the basis that information the accused gained while having sex with the complainant could not constitute reasonable steps and that the trial judge had drawn improper inferences about the appearance of the complainant.[79] The Supreme Court of Canada reinstated the acquittal on the basis that the Court of Appeal should not have interfered with the trial judge's assessment of the evidence. Nonetheless, the Supreme Court of Canada confirmed the widely held understanding of the reasonable steps provisions requiring the Crown <u>either</u> to negate the mistaken belief <u>or</u> to negate the all reasonable steps requirement:

> [T]o convict an accused person who demonstrates an "air of reality" to the mistake of age defence, the Crown must prove, beyond a reasonable doubt, <u>either</u> that the accused person (1) did not honestly believe the complainant was at least 16 (the subjective element); <u>or</u> (2) did not take "all reasonable steps" to ascertain the complainant's age (the objective element) […]. [80]
>
> [and]
>
> It is a criminal offence to sexually touch a child who is 14 years of age or more but younger than 16 when you are five or more years their senior, even if you honestly believe they are older than 16, unless you have taken "all reasonable steps" to ascertain their age; nothing more is required […].[81]

George is unequivocal on how the "all reasonable steps" provision limits the defence of mistaken belief. However, there were two paragraphs about *George* in *Morrison* – which were completely unnecessary for a decision on Internet luring in the sting context – that bring this finding in *George* into doubt. The majority in *Morrison* effectively rewrote *George* by saying that even where the Crown has disproven all reasonable steps to ascertain age beyond a reasonable doubt, a conviction is not inevitable because the

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78 See *R v George*, 2016 SKCA 155 at para 19.

79 *Ibid* at paras 41–46, cited in *George* (SCC), *supra* note 15 at para 12.

80 *George* (SCC), *supra* note 15 at para 8 [citations omitted; emphasis added].

81 *Ibid* at para 26 [citations omitted].

Crown would still have to prove George knew the complainant's age. Here is that confusing passage from *Morrison* in full:

> Given that the complainant was legally incapable of consenting, Ms. George's sole defence was that she believed, albeit mistakenly, that the 14-year-old complainant was at least 16 years old. In those circumstances, if the trier of fact were to find or have a reasonable doubt that Ms. George honestly believed the complainant was at least 16, she would be entitled to an acquittal. Put differently, if the Crown hoped to obtain a conviction, it had to overcome her defence of mistaken belief.
>
> Against this backdrop, the passage in question at para. 8 of *George* explains that there were two alternate ways by which the Crown could negate the defence of mistaken belief in age once the air of reality test had been met. First, the Crown could prove that the accused did not honestly believe the complainant was at least 16; or, second, the Crown could prove that the accused did not take "all reasonable steps" to ascertain the complainant's age. While the Crown had to prove at least one of these propositions to negate the defence of mistaken belief, doing so would not, from a legal perspective, inevitably lead to a conviction. As a legal matter, to obtain a conviction for sexual interference or sexual assault of a person under the age of 16, the Crown had to go further and prove beyond a reasonable doubt that the accused believed the complainant was under 16. As a practical matter, once Ms. George's sole defence was negated, her conviction was a virtual certainty.[82]

With the emphasized part of this passage, the *Morrison* majority risked undermining all of the *Criminal Code's* reasonable steps provisions regarding age. It did not indicate that it was overruling the unanimous decision in *George* or even that *George* had misstated the law. Ought we to take this passage as the *Morrison* majority implicitly undoing years of appellate jurisprudence, including its own clear language in *George*, on reasonable steps provisions in the context of mistaken beliefs in age? This is precisely what the Court of Appeal for Ontario concluded in *Carbone*, holding that the Crown disproving all reasonable steps is no longer sufficient to negate a mistaken belief in age defence:

> As I read the above-quoted passage, it is no longer, strictly speaking, correct to define the required *mens rea* with respect to the complainant's age by reference, only to the absence of reasonable steps to determine the complainant's age. There is a *mens rea* requirement that focuses exclusively on the accused's state of mind. The Crown is required to prove the accused believe the complainant was underage. The requisite proof is not provided by the Crown's negation of the defence created by s. 150.1(4).[83]

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82 *Morrison* (SCC), *supra* note 6 at paras 87–88 [emphasis added].

83 *Carbone*, *supra* note 5 at para 120.

Unlike the passage quoted from *Morrison* which speaks only of actual belief, the Court in *Carbone* did concede that recklessness about the complainant's age will be a sufficient mental state under these offences. But the fact remains that the requirement that the accused take "all reasonable steps" has no impact on the verdict. If the accused raises an air of reality that he was mistaken about the complainant's age and that he took all reasonable steps, the Crown must prove beyond a reasonable doubt that he did not take all reasonable steps, but doing so does not result in conviction. The Crown must go on and prove a subjective fault requirement beyond a reasonable doubt. Rather than a path to conviction, the reasonable steps provision is transformed into one more hurdle for the Crown. If the Crown is unable to disprove reasonable steps beyond a reasonable doubt, the accused is acquitted. If the Crown is able to disprove reasonable steps beyond a reasonable doubt, the inquiry moves on to did the accused know, or was he wilfully blind or reckless as to the age of the complainant before obtaining a conviction.

The Court of Appeal did recognize that it had opened the door to acquittals for those who never bother to think about age but go ahead and engage in sexual activity with a child regardless. What follows looks a bit like a new description of recklessness, referred to as "reckless indifference", to deal with those who simply do not think about age. The Court described reckless indifference as follows:

> An accused who never turns his mind to the complainant's age can properly be described as reckless with respect to the complainant's age in most circumstances. Indifference to the age of the person targeted by sexual activity is a choice by an accused to treat the complainant's age as irrelevant to his decision to engage in the sexual activity. In most circumstances, the age of the young person will have obvious relevance, bearing in mind the clear responsibility which the law places upon adults who choose to engage in sexual activity with young persons: […]
>
> Reckless indifference describes a subjective state of mind. <u>It reflects a choice to treat age as irrelevant and to assume the risk associated with that choice</u>. While this may describe a relatively low level of recklessness, there is nothing in the nature of the conduct engaged in which would warrant any level of risk taking or preclude the imposition of criminal liability based on a reckless indifference to the complainant's age: […][84]

However, even this definition of "reckless indifference" requires a choice to treat age as irrelevant and a subjective awareness of the risk. The person who simply does not think about age is not reckless. The Court also

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[84] *Ibid* at paras 126–27 [citations omitted; emphasis added].

acknowledged that usually the failure to take reasonable steps will make it difficult for the accused to claim that he believed the complainant was of the required age. There will be "few situations in which a person who engages in sexual activity with an underaged person and does not take reasonable steps to determine the age of that person, will not be found to have been at least reckless as to the true age of the complainant."[85] The Court acknowledged that it had complicated the job of trial judges and juries for these crimes. It set out the following steps to follow. If these instructions appear complicated, imagine explaining steps two and three to a jury:

> Step 1: The trial judge will first determine whether there is an air of reality to the s. 150.1(4) defence, that is, is there a basis in the evidence to support the claim the accused believed the complainant was the required age and took all reasonable steps to determine the complainant's age.
>
> Step 2: If the answer to step 1 is no, the s. 150.1(4) defence is not in play, and any claim the accused believed the complainant was the required age is removed from the evidentiary mix. If the answer at step 1 is yes, the trial judge will decide whether the Crown has negated the defence by proving beyond a reasonable doubt, either that the accused did not believe the complainant was the required age, or did not take all reasonable steps to determine her age. If the Crown fails to negate the defence, the accused will be acquitted. If the Crown negates the defence, the judge will go on to step 3.
>
> Step 3: The trial judge will consider, having determined there is no basis for the claim the accused believed the complainant was the required age, whether the Crown has proved the accused believed (or was wilfully blind) the complainant was underage, or was reckless as to her underage status. If the answer is yes, the trial judge will convict. If the answer is no, the trial judge will acquit.[86]

The first step is clear and relates to the judge's role in determining whether the defence has met the air of reality threshold to point to some evidence that the accused was mistaken about the complainant's age and that he took all reasonable steps to ascertain it. The second step addresses whether the Crown is able to disprove beyond a reasonable doubt either the mistaken belief or the "all reasonable steps". Where things get complicated is step 3. Even if the Crown proves beyond a reasonable doubt either that the accused was not mistaken or that he did not take all reasonable steps to ascertain age, the Crown in Ontario now has an additional burden to prove

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85 *Ibid* at para 130.

86 *Ibid* at para 129.

that the accused knew that the complainant was under the age of consent or was wilfully blind or reckless with respect to that fact. There is no mention of "reckless indifference" in this third step, thus suggesting that it is simply synonymous with recklessness and that the Court was not attempting to develop some new modified form of recklessness.

The Court was explicit that it is the two paragraphs from *Morrison* about *George*, unnecessary for the decision in *Morrison*, that have undermined constitutionally valid criminal legislation:

> The treatment of *George* by the majority in *Morrison* makes it clear that the Crown cannot prove the requisite *mens rea* for offences set out in s. 150.1(4) by disproving the defence created by that section. To convict, the Crown must prove the accused had the requisite state of mind with respect to the complainant's underage status.[87]

Again, the Court reiterated that there will be "few situations"[88] where the accused will be able to raise such a reasonable doubt about his knowledge/recklessness that the girl was underage.

> While one can imagine circumstances in which the failure to advert to the age of the complainant should not be characterized as a decision to treat the age of the complainant as irrelevant and take the risk, those circumstances will seldom occur in the real world. For practical purposes, those rare circumstances, in which the failure to turn one's mind to the age of the complainant does not reflect the decision to take a risk about the complainant's age, will be the same rare circumstances in which the reasonable steps inquiry in s. 150.1(4) will be satisfied even though the accused took no active steps to determine the complainant's age.[89]

As will be discussed in more detail below, the Court acknowledged in this passage that, unsurprisingly, the cases where this new additional *mens rea* requirement will be most likely to lead to acquittal will be those where courts have already done the most to undermine the "all reasonable steps" requirement in the past, holding that the accused <u>need do nothing</u> to satisfy taking "all reasonable steps".[90] In other words, acquittals will be most likely the accused has made assumptions about a child's age based on what she looks like, how she behaves, or the circumstances in which he finds her without having done anything to ascertain age.

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87 *Ibid* at para 128.
88 *Ibid* at para 130.
89 *Ibid* at para 131.
90 For sources and further discussion of this topic, see fn 104–18 and accompanying text.

C. Analysis

Carbone effectively renders the "all reasonable steps" provision in s. 150.1(4) irrelevant to whether an accused is convicted in Ontario. Instead, it makes the "all reasonable steps" requirement an additional hurdle for the Crown to negate to avoid an acquittal, even though doing so will not lead to conviction. An accused can no longer be convicted on the basis that he failed to take all reasonable steps to ascertain the age of the complainant. Instead, for the accused who did nothing to ascertain a child's age, the Crown must prove at least recklessness with respect to the fact that the complainant was underage.

While the approach in *Carbone* could be said to logically flow from the obscure passage about *George* in *Morrison*, it was not the only possible interpretation. The Court of Appeal for British Columbia took a different path in *Angel*[91] when it declined to apply *Morrison* to the crime of sexual interference against an actual child. The Court in *Angel* correctly highlighted the fact that the majority in *Morrison* limited its judgment to the context of a police sting operation where an actual belief about age is required by the legislation. Sexual interference, by contrast, always involves an actual child, and knowledge is not required:

> In the context of a police sting operation where there is no child who is under the legal age, as in *Morrison*, the offence depends on the accused's belief that he is communicating with an underage person. In contrast, the offence [sexual interference] in s. 151 does not engage the accused's belief as to the complainant's age as an element of the offence in the absence of the mistake of age defence being raised.[92]

The Court in *Angel* differentiated *Morrison* as follows. The problem in *Morrison* was that the elements of the defence of mistake did not line up with the elements of the crime of Internet luring. The defence was founded on the Crown negating an objective test, whereas the offence explicitly required an actual belief. Therefore, disproving the defence was not sufficient to prove the offence. In sexual interference, by contrast, recklessness is sufficient and therefore disproving the defence will inevitably lead to conviction.[93] However, most importantly, the Court in *Angel* acknowledged that the all reasonable steps requirement "imports an

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91 *Supra* note 16.

92 *Ibid* at para 31 [emphasis in original].

93 *Ibid* at para 45.

objective element"[94] into the recklessness analysis for sexual interference. Thus, while the Court of Appeal is equating the "all reasonable steps" test with recklessness, it is recklessness modified by an objective component that is mandated by the all reasonable steps requirement in s. 150.1(4):

> The judge was required to consider the all reasonable steps requirement to determine the availability of the defence. By doing so in this context, he was also assessing whether the Crown had satisfied its burden of proving the requisite *mens rea* of the offence — i.e., that the appellant's subjective belief was not objectively reasonable, and was therefore reckless. Therefore, once the trial judge concluded that the appellant had failed to take all reasonable steps to ascertain the complainant's age, there was no need to explicitly revisit the essential elements of the offence. At that point, the judge was satisfied that the Crown had met its burden of proving that the mistake of age defence did not apply. At the same time, the culpable fault element for sexual interference was established: the appellant intended to touch the complainant for a sexual purpose and was recklessly indifferent as to his age.[95]

This approach makes more sense where one reads in the requirement that the accused must only take steps in the circumstances known to the accused at the time, which the Court in *Angel* appears to do, because that adds the necessary subjectivity into the test.[96]

The Court in *Angel* made explicit that it was concerned about the possibility of extending *Morrison* beyond the narrow context of the sting operation because it had the potential to undermine decades of sexual assault law reform enacted to prevent acquittals based on unreasonable mistaken beliefs:

> More precise reasoning by the Supreme Court of Canada than exists in *Morrison* is required before it can be extended to the interrelationship of the *mens rea* requirement and mistake of age defence, as they pertain specifically to the offence of sexual interference under s. 151 of the *Code*. This is particularly the case where, as noted above, Moldaver J. restricted his analysis to the context of Internet luring where there is no actual underage child [...][97]

Thus, the Court of Appeal for British Columbia managed to maintain a meaningful role for s. 150.1(4). Once the Crown proves beyond a

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94 *Ibid* at para 48.

95 *Ibid* at para 49.

96 *Ibid* at para 58 (although the Court is not entirely clear on this point). See also *Morrison* (SCC), *supra* note 6 at para 105 (where Justice Moldaver reads this requirement into the reasonable steps provision in s. 172.1(4)); *Thain*, *supra* note 36 at para 37; *Dragos*, *supra* note 16 at paras 32, 41; *Pengelley*, *supra* note 36 at para 9.

97 *Angel*, *supra* note 16 at para 51 [citations omitted].

reasonable doubt that the accused was not mistaken or did not take all reasonable steps, conviction will follow.

While *Angel* is cited for the principle that recklessness is sufficient *mens rea* for sexual interference,[98] there is no mention in *Carbone* of the different approach to reasonable steps in *Angel*. The objective component mandated by s. 150.1(4) disappears from the analysis. The Supreme Court of Canada has denied leave to appeal in *Angel*,[99] and it is unlikely the Crown will seek leave to appeal in *Carbone*.[100] Regardless, the result is that we are left with an "all reasonable steps" requirement for age in British Columbia but not in Ontario.

The Court of Appeal for Ontario purported to limit its decision by imposing a minimalist interpretation of recklessness, stating that it will often be enough to show that the accused did nothing to ascertain age. But the fact remains that someone who never considers the possibility that he is dealing with a child is entitled to an acquittal. Recklessness is a subjective mental state and an honest belief, however unreasonable, that the complainant is older than 16 is inconsistent with a finding of recklessness unless one reads in the objective component as acknowledged by the Court of Appeal for British Columbia in *Angel*.[101] Recklessness requires a subjective awareness of the risk; wilful blindness requires an actual suspicion that such is the case and the deliberate closing of one's mind to the possibility because one does not want to know.[102] The Supreme Court of Canada in *R v Zora*[103] has confirmed that recklessness is a subjective standard requiring the accused "[perceive] a substantial and unjustified risk".[104] Further, despite its efforts, the Court of Appeal cannot bind future trial judges on findings of fact. A trial judge who finds that the accused never thought about age would be correct in rejecting a finding of recklessness.

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98 See *Carbone*, *supra* note 5 at para 124.

99 See *Angel*, *supra* note 16, leave to appeal to SCC refused, 2020 CanLII 29401.

100 As of 21 October 2021, it was not reported on the Supreme Court of Canada website or elsewhere that leave to appeal has been sought by the Crown. Because the trial judge's errors on burden of proof were so clear in *Carbone*, an appeal on the reasonable steps issue would be unlikely to impact the order for a new trial.

101 See *R v Sansregret*, [1985] 1 SCR 570 at 584, 1985 CanLII 79 [*Sansregret*] (where the Court makes clear that a finding of recklessness is inconsistent with a finding of honest mistaken belief).

102 *Ibid*.

103 2020 SCC 14.

104 *Ibid* at para 109.

Parliament has decided that the failure to take "all reasonable steps" to find out how old a child is before engaging in sexual activity is a blameworthy mental state. If one reads in "in the circumstances known to the accused" as the courts have done, this mental state has a clear subjective component, but it also has an objective component mandated by s. 150.1(4) requiring that all steps that are reasonable be taken. This approach differs from the traditional common law understanding of recklessness as to age because it allows for a conviction where an accused has done nothing to inform himself about the complainant's age, based on his knowledge of the circumstances, or where he has not taken all the steps considered reasonable. Parliament is free to depart from the common law and has done so in s. 150.1(4). Again, no court has found this level of fault to be unconstitutional.[105]

The Court in *Carbone* suggested that the only cases where this new *mens rea* requirement will make a difference are those where courts have already held that the accused need not take any steps in order to satisfy having taken "all reasonable steps."[106] These cases involve courts disregarding clear Parliamentary language to instead rely on stereotyped beliefs about the sexual availability of the most marginalized girls.[107] Not thinking, or making

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[105] Most of the cases involving *Charter* challenges to this provision focus on s. 150.1(1), which removes the defence of consent where the complainant is under the age of consent. However, many of these cases confirm the constitutionality of s. 150.1 as a whole in the analysis. See e.g. *Osborne*, *supra* note 31; *R v Hann*, 1992 CanLII 7133 (NL CA), 75 CCC (3d) 355; *R v AB*, 2015 ONCA 803. In a rare case where a s. 7 violation was found to be a reasonable limit under s. 1, a Quebec court also upheld s. 150.1. See *Protection de la jeunesse–436*, 1989 CarswellQue 1232 (CQ (Youth Div), [1990] RJQ 1481. However, this case was decided before courts had determined that the reasonable steps requirement did not put a burden of proof on the accused. In *Morrison* (SCC), *supra* note 6 at para 215 Justice Abella makes the following comment about the constitutionality of reasonable steps provisions generally:

> I see nothing constitutionally suspect about reasonable steps requirements generally. These requirements are intended to "enhance protections for youth" in the mistake of age context [...] and preclude reliance on stereotypes and assumptions in the consent context [citations omitted].

[106] See *Carbone*, *supra* note 5 at para 130.

[107] See Grant & Benedet, "Mistake of Age", *supra* note 29 at 24. See e.g. *Mastel* (SKPC), *supra* note 38 at paras 20–30; *Tannas*, *supra* note 16 at para 35; *R v LTP*, *supra* note 38 at para 27; *R v (R)*, *supra* note 16; *Poirier*, *supra* note 16; *Osborne*, *supra* note 31; *Chapman*, *supra* note 16; *TQBN*, *supra* note 16; *Lewis*, *supra* note 16; *R v K (RA)*, [1996] NBJ No 104, 1996 CarswellNB 67; *Coburn*, *supra* note 16; *Chapais*, *supra* note 16; *Minzen*, *supra* note 16; *Wrigley*, *supra* note 16; *DO*, *supra* note 16; *Vasiloff*, *supra* note 16. It is

assumptions about a girl's age based on the size of her breasts;[108] her associating with older people;[109] her jogging[110]or hitchhiking at night;[111] the fact she knew how to perform oral sex[112] or her portrayal as the sexual aggressor;[113] or the fact that she was drinking alcohol, taking drugs, or smoking cigarettes,[114] should never have satisfied taking "all reasonable steps". Such stereotypes tell us nothing about a particular girl's age. They operate disproportionately against girls who are already marginalized through their chaotic family lives,[115] risk-taking behaviours,[116] or previous experience with sex which may well have been abusive because of their young ages.[117] Lacking parental supervision, abusing drugs or alcohol, knowledge of sex, or even breast development are not reliable indicators of being at or above the age of consent, nor are they steps to ascertain age. It is notable that Indigenous girls are disproportionately impacted by sexual assault and by racist stereotypes about their sexual availability that may feed into an accused making the argument that the circumstances removed his statutory obligation to take "all reasonable steps" to ascertain age.[118]

A finding that doing nothing could ever satisfy taking "all reasonable steps" was already a deliberate distortion of Parliament's unequivocal language in s. 150.1(4). But it was a distortion judges could choose to avoid by giving some content to the "all reasonable steps" requirement. The Crown in Ontario now faces a bigger problem in proving beyond a reasonable doubt that the accused made a subjective choice to disregard age

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noteworthy that all of these cases involve girls as complainants and none of the three cases involving boys as complainants had a similar statement.

108 See e.g. *R v E*, *supra* note 16 at paras 72, 107–08.

109 See e.g. *Vasiloff*, *supra* note 16 at para 23; *Tannas*, *supra* note 16 at para 33; *Wrigley*, *supra* note 16 at para 18; *TQBN*, *supra* note 16 at para 48.

110 See e.g. *DO*, *supra* note 16 at para 17.

111 See e.g. *Chapman*, *supra* note 16 at paras 3, 53.

112 See e.g. *Mastel* (SKPC), *supra* note 38 at paras 28, 30.

113 See *DO*, *supra* note 16 at para 17; *Chapman*, *supra* note 16 at para 52.

114 See e.g. *Tannas*, *supra* note 16 at para 8; *Vasiloff*, *supra* note 16 at para 23; *TQBN*, *supra* note 16 at para 51.

115 See e.g. *Tannas*, *supra* note 16 at para 6.

116 See e.g. *Chapman*, *supra* note 16 at paras 3, 5.

117 See e.g. *Mastel* (SKPC), *supra* note 38 at para 28.

118 See Tracey Lindberg, Priscilla Campeau & Maria Campbell, "Indigenous Women and Sexual Assault in Canada" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 87. See also Robyn Bourgeois, "Colonial Exploitation: The Canadian State and the Trafficking of Indigenous Women and Girls in Canada" (2015) 62:6 UCLA L Rev 1426 at 1442.

where he has done nothing to ascertain it. The Court of Appeal has opened up the likelihood that men who never consider they are having sex with a child, because they have relied on such stereotypes to inform themselves, will now be entitled to an acquittal even where they have failed to take any steps to ascertain that child's age. An honest belief, even if based on stereotypes, racism, or misogyny, is still an honest belief that can undermine a finding of recklessness and entitle a man to an acquittal after *Carbone*, unless the Crown can prove the more onerous standard of wilful blindness.[119] The fact that it will be the most vulnerable girls who are most directly impacted should concern us all. Our society has deeply embedded preconceptions about what is a real sexual assault against a teenage girl, particularly for girls who are mischaracterized as the aggressors in sexual interactions with older men.[120]

D. Extending *Carbone* to Mistaken Beliefs in Consent

The reasoning in *Carbone* could also be relied on by defence counsel to argue that the reasonable steps requirement in the consent context for cases involving adult complainants should be undermined in the same way. The Supreme Court of Canada decision in *R v Barton*[121] strongly supports the assertion that where there is no air of reality to the defence of mistaken belief or where the Crown has negated reasonable steps, there can be no defence of mistaken belief in communicated consent for an accused charged with sexual assault against an adult. The *Barton* Court made clear that where no reasonable steps were taken, there is no defence:

> Section 273.2(b) imposes a precondition to the defence of honest but mistaken belief in communicated consent — no reasonable steps, no defence. It has both objective and subjective dimensions: the accused must take steps that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time […]. Notably, however, s. 273.2(b) does not require the accused to take "all" reasonable steps, unlike the analogous restriction on the defence of mistaken belief in legal age imposed under s. 150.1(4) of the *Code*. […][122]

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[119] See *Sansregret*, *supra* note 101.

[120] See e.g. *R v E*, *supra* note 16 at para 93.

[121] 2019 SCC 33 [*Barton*].

[122] *Ibid* at para 104 [citations omitted; emphasis added]. *Barton* also endorsed Professor Elizabeth Sheehy's statement that the purpose of the reasonable steps provision dealing with consent was to criminalize sexual assault perpetrators whose mistaken belief in consent is based on "self-serving misogynist beliefs." See Elizabeth A Sheehy, "Judges

Barton, like *Morrison*, was written by Justice Moldaver and released barely two months after *Morrison*. Yet *Barton* does not even cite to *Morrison* let alone adopt its reasoning. *Barton* should have settled that *Morrison* was not intended to limit the reasonable steps requirement in the context of consent.

However, despite this clear statement in *Barton*, Justice Bennett, writing for the Court Martial Appeal Court of Canada in *R v MacIntyre*,[123] relied on *Morrison* and *Barton* to undermine the reasonable steps requirement in the context of consent. At issue in *MacIntyre* was whether the Crown had to prove that the accused knew the complainant was not consenting, even where there was no air of reality to the assertion that he had taken reasonable steps to ground a defence of mistaken belief. While the *Morrison* Court had gone out of its way to stress the uniqueness of the sting context for Internet luring, Justice Bennett focused on the similarities between sexual assault against an adult and Internet luring in the police sting context and held that:

> The real core of… [Justice Moldaver's] reasoning was that substituting a defence for an element of an offence offends the "bedrock principle of criminal law" that the Crown must prove the essential elements of an offence beyond a reasonable doubt.[124]

She went on to hold that the Crown must still prove the *mens* rea for sexual assault even where the accused had failed to raise an air of reality about reasonable steps. To justify this step, Justice Bennett relied largely on statements about the *mens rea* for sexual assault taken from cases where mistaken belief in consent was not at issue.[125] This decision in *MacIntyre* came just one month after *Barton*, and while it does refer to *Barton*, it does so selectively without mentioning the above-cited passage. There is no

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and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 483 at 492. I would argue that the reasonable steps test in the context of age is similarly intended to prevent men from relying on mistaken beliefs in age that are based on self-serving misogynistic beliefs about the sexual availability of children and especially girls.

123 2019 CMAC 3 [*MacIntyre*].

124 *Ibid* at para 54 [citations omitted].

125 See *R v Handy*, 2002 SCC 56; *R v JA*, 2011 SCC 28; *R v Skedden*, 2013 ONCA 49. Note that the Court in *JA* did discuss the reasonable steps provision but only in the context of attempting to determine legislative intent about advanced consent. The question at issue in *MacIntyre, supra* note 123 was not discussed in *JA*.

reference in *MacIntyre* to *R v Gagnon*,[126] where the Supreme Court of Canada unanimously upheld a finding by the Court Martial Appeal Court of Canada that if there is no air of reality to reasonable steps, the defence of mistaken belief in consent cannot go to the trier of fact.[127]

The Supreme Court of Canada denied leave to appeal in *MacIntyre*, and the decision has not yet been relied on by other appellate courts.[128] The clear inconsistency of *MacIntyre* with the unequivocal language in *Barton*, and its failure to cite relevant Supreme Court authority, should give other courts pause before following the decision.

V. CONCLUSION

The result of *Carbone* is to undermine, at least in Ontario, an important provision enacted by Parliament in 1987 as part of a legislative scheme designed to protect children from sexual contact with adults. The "all reasonable steps" requirement in the context of age plays an important role in preventing especially adult men from being acquitted for having sex with children where they failed to take all reasonable steps to ascertain the child's age.

Courts are empowered to strike down legislation when it violates the *Charter*. When it does not, supremacy of Parliament is supposed to mean something; legislation should not be effectively interpreted out of existence as the courts have done in *Morrison* for s. 172.1(4) of the *Criminal Code*, in *Carbone* for s. 150.1(4), and in *MacIntyre* for s. 273.2(b). Courts should instead do their best to give effect to Parliament's intent in enacting legislation to protect children from sexual contact with adults. Parliament has made taking "all reasonable steps" a statutory requirement, and no court

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126 2018 SCC 41, aff'g 2018 CMAC 1 [*Gagnon* (SCC)].

127 The majority of the Court Martial Appeal Court of Canada in *Gagnon* (CMAC), *supra* note 32 at para 28 had stated: "Parliament decided that the honest but mistaken belief defence is only available to the accused if the accused took reasonable steps, under the circumstances, to ascertain the complainant's consent for each sexual act in the course of their activities." The Supreme Court of Canada agreed with this statement. Note that the Supreme Court of Canada in its very brief reasons in *Gagnon* (SCC), *supra* note 126 also reaffirmed its decision in *George* (SCC), *supra* note 15.

128 See *MacIntyre*, *supra* note 123, leave to appeal to SCC refused, 2020 CanLII 229. As of 21 October 2021, CanLII reports that *MacIntyre* has been cited in four other cases. See *R v MF*, 2020 ONSC 5061 at paras 77–85; *R c Bitemo Kifoueti*, 2020 QCCQ 5773 (on a different issue); *R c Paul*, 2020 QCCQ 13677 at para 90; *R v Jerace*, 2021 BCCA 94 at pra 38 (citing *MacIntrye* for illustrative purposes only).

has ever held that requiring an accused to raise an air of reality about such a requirement is unconstitutional. Instead, it has been interpreted out of existence only to be finally laid to rest in Ontario by the Court of Appeal in *Carbone*.[129]

One can only hope that other provincial appellate courts, and the Supreme Court of Canada, will follow the approach of the Court of Appeal for British Columbia in *Angel* which takes the *Morrison* Court at its word and allows the "all reasonable steps" provision to have some role in prosecutions for sexual abuse against children.[130] It is not too much to ask that adults be required to do everything reasonably possible to find out how old a child is before seeking out sexual activity with that child. Nor is it too much to ask that our courts, where there is no issue of constitutionality, respect legislative provisions enacted by Parliament to protect children from sexual violence.

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129 The decision in *Carbone* came only weeks after the Court of Appeal for Ontario in *R v Sullivan*, 2020 ONCA 333, this time relying on s. 7 of the *Charter*, struck down s. 33.1 of the *Criminal Code*, enacted explicitly to protect the equality rights of women and children to be free of violence from men who are extremely intoxicated. In *Sullivan*, at paras 56-57, the Court found that the *Charter* had no meaningful place to consider the safety and equality of women and children; instead, the security and equality rights of women and children were relegated to "societal interests" only to be considered under s. 1 of the *Charter*. S. 1 has never been used by an appellate court to uphold a violation of s. 7 in the criminal law context leaving women and children with no rights even when criminal laws are enacted for their protection.

130 The Court of Appeal for British Columbia has recently also rejected a challenge to the constitutionality of substituting young age for non-consent in s. 150.1. See *Alfred*, *supra* note 16.

The Troubled History of the Defence of Duress and Excluded Offences: Could the Reasoned Use of Mitigation on Sentencing Prevent Duress from (Further) Becoming Archaic, Gendered, and Completely Inaccessible?

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ABSTRACT

One of the most controversial, and least discussed, elements of the defence of duress is the list of excluded offences that appears in s. 17 of the Canadian *Criminal Code.* In the seminal cases of *R v Ruzic* and *R v Ryan*, the Supreme Court refused to address the excluded offences and left the discussion to "another day." This article examines the historical development of the defence through the earliest case law and the writings of Sir James Fitzjames Stephen who was one of the first theorists on duress and a major figure in drafting the *Criminal Code.* Stephen's dislike of the defence of duress seems to be the only reason for the statutorily restrictive defence. This article traces the few cases following *Ryan* using a historic lens and current perspective to determine what is next for the embattled defence, including the place for duress and mitigation upon sentencing.

Keywords: Sir James Fitzjames Stephen; Duress; History; Mitigation; Sentencing; Defence; *Ryan*; Gender, Excluded Offences; Domestic Violence; *Ruzic*; Comparative Law

> If… someone is really threatened with death or serious injury unless he does what he is told to do is the law to pay no heed to the miserable agonising plight of such a person? For the law to understand not only how the timid but also the stalwart may in a moment of crisis behave is not to make the law weak but to make it just. In the calm of the courtroom measures of fortitude or of heroic behaviour are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and the well-disposed.[1]

I. DURESS: AN OVERVIEW

A. Introduction

The purpose of criminal law is to formulate rules which satisfy our nation's broad sense of justice.[2] Laws are created through legislative and judicial interactions and the general progression of societal norms. While the development of laws may be a lengthy process, laws are nonetheless products of broad movements.[3] However, when it comes to the criminal defence of duress, centuries of growth have failed to produce a

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1 *Director of Public Prosecutions for Northern Ireland v Lynch*, [1975] UKHL 5 at 670, [1975] AC 653, Lord Morris of Borth-y-Gest [*Lynch*].

2 Paul H Robinson, "Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine" (1985) 71:1 Va L Rev 1 at 1, online (pdf): <scholarship.law.upenn.edu/faculty_scholarship/623> [perma.cc/XZ3J-S39Y].

3 Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law*, (Oxford, UK: Oxford University Press, 2012) at 42, states that one of the most important concepts in law is that "doctrines of the current era are seen as the products of the broad movement over time from informal practices of exculpation, to informal standards for criminal responsibility and legal subjectivity." Loughnan's illustration emphasizes that laws are not simply developed and written overnight.

workable basis capable of supporting a codified version of the defence.[4] As will be discussed below, the wording of the provision has been unchanged in nearly 150 years because of the controversy that surrounds the defence, particularly where the threats involve the sacrifice of a life. Over time, the defence of duress (also called compulsion, compulsion by threats, or coercion)[5] was conceptualized as a full defence: as a "concession to human infirmity in the face of an overwhelming evil threatened by another."[6] This has led to the observation that our society has a very complicated relationship with the criminal defence of duress.[7]

Often confusing and potentially gendered, as discussed below in the case of *R v Ryan*, the defence may exclude a female accused from using the defence. This article first examines the historical development of the defence which culminates with the earliest case law and writings of Sir James Fitzjames Stephen ("Stephen"), who, at the time of modern codification and the creation of our Canadian Code, was one of the first modern theorists to write on the defence of duress.[8] Stephen's questionable opinions about the defence of duress seem to be the dominant reason that the provision is so statutorily restrictive today, as this disdain was wholly transplanted into the 19th century movement towards codification. Even when the defence is traced to Stephen and his early writing on the topic, it is still unclear why so many offences were excluded.[9] As will be discussed, the Canadian

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4 Robinson, *supra* note 2 at 1.

5 See J Ll J Edwards, "Compulsion, Coercion and Criminal Responsibility" (1951) 14:3 Mod L Rev 297 at 297, online: <doi.org/10.1111/j.1468-2230.1951.tb00208.x> [perma.cc/6YRR-YHQK].

6 Don Stuart, *Canadian Criminal Law: A Treatise*, 2nd ed (Toronto: Carswell, 1987) at 394.

7 Joshua Dressler, "Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits" (1989) 62:5 S Cal L Rev 1331 at 1331.

8 1829–1894.

9 *The Legal News* Journal of 1894 reports on Sir James Fitzjames Stephen shortly after his death. "The Late Mr. Justice Stephen" (1894) 17:7 Leg News 104.The article notes that "[Stephen's] contributions [to *Saturday Review* and *Cornhill Magazine*] being marked by a thoroughness of thought and lucidity of phrase which rendered them very acceptable reading even to those who did not share the conclusions at which he arrived" at 105. *The Legal News* confers with this notion, stating that "on many an occasion the editor would receive two articles on topical subjects from [Stephen's] pen before ten o'clock in the morning, and that their argumentative power and phraseology would not be inferior to his more studied contributions to the reviews" (*ibid*). It is unclear whether Stephen's works were indeed based in law. If anything, this proves that Stephen had the ability to write quickly and convince the editors of his position.

Criminal Code was adopted almost entirely from the Code drafted for England, meaning that the provision on duress originated directly from Stephen, who was one of the chief drafters of the English Code. Duress was codified in the late 19th century without any discussion or focus on the philosophical underpinnings and the need for such a defence in our system.[10] This article also reviews the last missed opportunity to shape the defence through the 1955 amendments to the Canadian *Criminal Code*.

The article will then explore the statutory defence of duress today and will note the formative cases that have defined the defence in Canada including the list of excluded offences that appears in s. 17 of the Canadian *Criminal Code*.[11] In the seminal case of *R v Ruzic*, the Supreme Court did not address the issue of excluded offences and said simply, "this appeal does not concern the constitutional validity of the list of excluded offences."[12] Even though the Court of Appeal for Ontario declared that s. 17 of the *Criminal Code* be of no force and effect only to "the extent that it prevents an accused from relying on the common law defence of duress preserved by s 8(3) of the Code,"[13] the court of appeal in *Ruzic* added an addendum to the decision saying that this declaration was not to apply to the excluded offences in s. 17.[14] The court left the decision as to the validity of the excluded offences to another case which, as of yet, has not materialized.

Next, this article will examine how duress once again came into the spotlight with the divisive Supreme Court decision in *R v Ryan*. Nicole (Ryan) Doucet attempted to hire someone to kill her abusive husband after years of physical, emotional, and financial abuse in which he repeatedly threatened to kill her and their young daughter.[15] In a controversial approach to the case, Jason MacLean *et al* have noted that the court in *Ryan* "failed to consider duress within the particular context of domestic violence and coercive control," leading to a gendered application of the defence.[16] The court in *Ryan* also ignored the issue of why certain offences were

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10 *Ibid* at 105–06.

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

12 *R v Ruzic*, 2001 SCC 24 at para 19 [*Ruzic* SCC].

13 *R v Ruzic*, 41 OR (3d) 1 at para 109, [1998] OJ No 3415 [*Ruzic* CA].

14 *R v Ruzic*, 41 OR (3d) 38 at para 1, [1998] OJ No 4732 [*Ruzic* CA Addendum].

15 *R v Ryan*, 2013 SCC 3 at paras 4–5 [*Ryan* SCC].

16 Jason MacLean, Nadia Verrelli & Lori Chambers, "Battered Women under Duress: The Supreme Court of Canada's Abandonment of Context and Purpose in R. v. Ryan" (2017) 29:1 CJWL 60 at 61, online: < doi.org/10.3138/cjwl.29.1.60> [perma.cc/794W-U3RF] [MacLean et al].

excluded. This article attempts to trace the history of the defence so that modern cases can be understood in a broad context rather than the arcane and unsatisfactory state of the defence at present. If the conclusion is that there is no legally sound reason why this defence should not be available to a battered spouse like Nicole Ryan (or the next Nicole Ryan), then there is no reason why certain offences (such as murder) are excluded. Yet, we are left with a situation in Canada that offences are excluded, and some offenders are not permitted to use the defence.[17] By excluding a considerable number of offences (originally 22), offenders (particularly women) are cut off from a defence that could be vital to the recognition of the coercion and control to which they are subjected.

At first blush, the historical underpinnings of this defence may seem unimportant. However, after tracking the development of the defence, it is concerning that such an unprincipled approach by a single English theorist still defines the defence, particularly for women who are using duress in the context of domestic violence. There seems to be no reason why duress is restricted in 2021. Although the application of the defence to women who experience unthinkable violence was almost certainly uncontemplated in 1879, today we need a reasoned and pragmatic understanding of those who act under such coercion.[18] The piecemeal fashion in which duress has been used in sentencing in recent years needs reform, and this article traces that development. The use of the duress defence in *Ryan*, and the few cases which have followed, clearly show that duress is an important and needed defence in Canadian society.[19]

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[17] Excluded offences stretch across a broad spectrum which includes infanticide and mental incapacity laws. See Loughnan, *supra* note 3, where she uncovers various issues relating to the lack of recognition of excluded offences in modern law.

[18] As a point of comparison, an example of a defence that disregards women is, ironically, infanticide. The *Criminal Code* sets out and defines infanticide as a female person who wilfully causes the death of her newborn child within the time frame (first 12 months after giving birth) where she has not fully recovered from the effects of giving birth. See *Criminal Code*, *supra* note 11, s 233. As recently as 2016, in the case of *R v Borowiec*, 2016 SCC 11 [*Borowiec*], the structure of the wording in the *Code* has been contemplated. However, just as with duress, the law of infanticide has not significantly changed in its structure of meaning since its implementation in the *Code*.

[19] *Ryan* SCC, *supra* note 15. It is important to note how paragraph 38 of *R v Ryan* cites s. 17 of the present *Code*, which mirrors s. 12 of the 1892 *Criminal Code*. An exact comparison of the lack of change and development of s. 17 can be found in *Dunbar v The King*, [1936] 4 DLR 737, 67 CCC 20 (specifically s. 12 of the 1892 *Code*, which was the section titled “compulsion by threats” (later changed to duress)). While these two

This article will conclude by considering the few cases that have come after *Ryan*, how they deal with the issues of excluded offences, and how future cases may be more successful in using duress as a mitigating factor. The authors then address a "near-duress" situation which should be a factor in mitigation upon sentencing, but there is little research on how this would function. It is the position of the authors that a review of duress in sentencing would allow duress to have a real impact on individual offenders. Formalizing this view of duress in sentencing may add coherence to a defence that substantially lacks coherence. The final portion of this article shows that mitigation is a real solution and, perhaps, the future of duress to prevent it from becoming (or remaining) an archaic, gendered, and inaccessible defence. This discussion of the history of the defence from a British and then Canadian perspective will show that the defence of duress is in serious need of reformulation given the uncertain foundation on which it was based. Presently, s. 17 of the *Code* is not the product of broad movements; it is, as it originally was, simply reflective of the Victorian sensibilities of a white man named Sir James Fitzjames Stephen.

II. THE HISTORY OF THE DEFENCE OF DURESS

A. Methodology, Definition, and Philosophy

Some suggest that our emotional reaction to duress is linked to our beliefs about those who find themselves coerced.[20] Joshua Dressler notes that the need for the "good" and "bad" actor is prioritized in law, and "it is unclear which appellation more fairly describes a person who accedes to an unlawful threat."[21] He goes on to suggest the example of a person who, with a "gun pointed at his head, kills an innocent child at the behest of a terrorist. Is he a victim who merely chose life over death? Or, is he the villain because 'his aversion to dying was greater than his aversion to killing'?"[22] These are

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pieces of legislation are written over a century apart, they are nearly word for word in their structure and meaning. The conceptualization of duress was set in stone, so to speak, in 1892 and has yet to change since that date. Over time, the defence of duress has been put into question, before many courts, yet the very law of duress that Canada upholds has never changed and has never been amended. This realization is, in essence, detrimental to the laws of duress in Canada.

[20] Dressler, *supra* note 7 at 1332.

[21] *Ibid*.

[22] *Ibid*, citing Alan Brudner, "A Theory of Necessity" (1987) 7:3 Oxford J Leg Stud 339 at 353.

difficult questions with no easy answers. It is because of these difficult questions that tracing the historical basis of the defence may lend some clarity for the future of duress. It is important to note that this article is not a traditional historical analysis with archival research. This is an analysis comprised of the writings of Stephen and those around him who were writing on this topic at the time when the defence was being established. Thus, the methodology adopted in this article is only quasi-historical, sociological, and grounded in a feminist perspective. In the paper, historical sources will be used to explore the contemporary issues with the defence as it exists today. Of course, there are undoubtedly justifications used by theorists which are not readily apparent today, but the following analysis attempts to explore the existing sources outside of pure archival research.[23]

It goes without saying that from 1892 and the conception of the *Code*, to the 1985 amendments, Canada has changed in both a legal and social sense. Certain acts which were once regarded as acceptable, such as assaulting one's wife, became newly labeled criminal acts.[24] Considering the power imbalances that existed in those 100 years and the unstable foundation that the *Criminal Code* was built on, it was inevitable that the defence of duress would need reconfiguration. This ultimately leads to the question of why there has not been an evolution of the law of duress. In the fields of medicine, law, and psychology, there have been vast and extensive developments of the human mind and its correlation with committing crimes. Yet, none of this has been analyzed and applied to the development of the law of duress.

To comprehend the defence of duress, one must understand its historical underpinnings. While the defence of duress is "of venerable

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23 This article cannot be all things to all readers, but a much more detailed historical analysis of Stephen can be found in the first author's LLM dissertation at Western University titled, Frances E Chapman, *Under Pressure: The Canadian Criminal Defence of Duress* (LLM Dissertation, Western University) [unpublished]. For those wishing a more archival look at Hansard when it comes to the defence of duress may find more analysis there. Similarly, a detailed analysis of the works of George Fletcher and other authors who wrote extensively on the defence are highlighted in my dissertation. See George P Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978) [Fletcher, *Rethinking*]; George P Fletcher, "The Individualization of Excusing Conditions" (1974) 47:4 S Cal L Rev 1269 [Fletcher, "Individualization"]; George P Fletcher, "The Right and the Reasonable" (1985) 98 Harv L Rev 949 [Fletcher, "The Right"].

24 Don Stuart & Steve Coughlan, *Learning Canadian Criminal Law*, 13th ed (Toronto: Carswell, 2015) at 577.

antiquity and wide extent,"[25] it has proven to be a very elusive term as it is difficult to trace its uncertain history with relatively few reported cases.[26] In fact, the defence may have dated back to the Romans[27] and ancient Hebrews.[28] Aristotle wrote about duress saying, "on some actions praise indeed is not bestowed, but forgiveness is, when one does what he ought not under pressure which overstrains human nature and which no one could withstand."[29] Despite its longevity, the defence remains vague and has an unstable foundation.[30] The imprecision in the terms "duress," "coercion," and "compulsion" has done little to rectify the problem. If the usage of the terms is examined, it is apparent that:

> Compulsion… appears to be the expression first used in the context of overbearing threats which induce criminally proscribed action and is the expression commonly used by the common law commentators. It is also the expression preferred by Stephen and presumably through his influence on the Draft Criminal Code of 1879… [d]uress however, is the term preferred by Blackstone and is now widely used in Anglo-American law. Both expressions, however, continue to be used interchangeably in the case-law 'without definition, and regardless that in some cases the legal usage is a term of art differing from popular usage.'[31]

Clearly, even the definition of the concept on which the defence is based is tenuous.[32]

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25 *R v Howe*, [1986] UKHL 4 at 428, [1987] AC 417, Lord Halisham LC.

26 *Lynch*, *supra* note 1 at 686.

27 Eugene R Milhizer has traced justification and excuse back for many centuries and has examined duress from the perspective of the Romans. See Eugene R Milhizer, "Justification and Excuse: What They Were, What They Are, and What They Ought To Be" (2004) 78:3 St John's L Rev 725, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1499850> [perma.cc/2SCJ-B7UH].

28 Samuel Mendelsohn, *The Criminal Jurisprudence of the Ancient Hebrews,* 2nd ed (New York: Hermon Press, 1968) at 30, cited in Peter Rosenthal, "Duress in the Criminal Law" (1990) 32:2 Crim LQ 199 at 200.

29 Jonathan Barnes, ed, *The Complete Works of Aristotle*, vol 2 (Princeton, NJ: Princeton University Press, 1984) at 1753.

30 Warren J Brookbanks, "The Defence of Compulsion: An Overview" (1981) [unpublished] at 5, online: <www.nzlii.org/nz/journals/NZLRFOP/1981/20.html> [perma.cc/XD2T-G8T8]. Brookbanks provides a historical review of the defence of duress in England and applies it to the current situation in New Zealand.

31 *Ibid*, citing *Lynch*, *supra* note 1 at 688.

32 For the purposes of this paper, the modern term "duress" will be used. To undertake an examination of duress, it is necessary to assess the historical development of the defence in Britain and then in Canada. David M. Trubek noted in his works, "Max Weber on Law and the Rise of Capitalism" (1972) 1972:3 Wis L Rev 720, that bourgeois capitalism was the very foundation of European law and the basis of

Treason and murder were historically excluded, and both remain an excluded offence today; in fact, several of the early unsuccessful treason cases involved murder. The classic statement which solidified the position of duress and murder again came from Sir Matthew Hale in what became known as his "stern" rule. In *Pleas of the Crown*, Hale stated that:

> If a man be menaced with death, unless he will commit an act of treason, murder or robbery, the fear of death doth not excuse him, if he commit the fact; for the law hath provided a sufficient remedy against such fears by applying himself to the courts and officers of justice for a writ or precept *de securitate pacis.*[33] Again, if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent: but if he cannot otherwise save his own life, the law permits him in his own defence to kill the assailant; for by the violence of the assault, and the offence committed upon him by the assailant himself, the law of nature, and necessity, hath made him his own protector.[34]

Hale excluded murder, treason, and robbery in times of peace as one should rather sacrifice oneself. Putting aside, however, the impracticality of stopping a situation of duress and going to the court to apply for a writ to cease a situation of duress, the writ no longer exists, and some have

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Stephen's bills in India, England and Canada. Additionally, Trubek describes Weber's thoughts on the relation of law and capitalism, noting that "a system controlled by capitalists will presumably be quite predictable, at least from the capitalists' point of view" (*ibid* at 748). This thought is very provoking, especially when applying its concept to the laws of duress. However, it becomes evident that Stephen's duress concept is only valid to those of a certain bourgeoisie class, the class that he was a part of, which puts Stephen's work, most specifically his *Digest*, into question. The creation of this enigma leads to the understanding that the *Canadian Criminal Code of 1892* was entirely structured to accommodate the upper classes making it difficult to understand why 21st century Canada is still using these laws.

[33] Writ for someone fearing bodily harm from another, as when the person has been threatened with violence. See Henry Campbell Black, *Black's Law Dictionary*, 7th ed by Bryan A Garner (St. Paul, MN: West Group, 1999) sub verbo "securitate pacis".

[34] Sir Matthew Hale, *Historia Placitorum Coronae (The History of the Pleas of the Crown)*, 1736 vol 1 (London, UK: Professional Books Ltd, 1971) at 51. The argument against this protection is that "there would in all probability be no time or opportunity to resort to the protection of the law," see Edwards, *supra* note 5 at 299. This passage is rarely cited in full. Most commentators highlight the phrase "ought rather to die himself, than kill an innocent" and not "but if he cannot otherwise save his own life, the law permits him in his own defence to kill the assailant." This passage is far less clear than some commentators believe.

suggested that "the exclusion of murder from the defence may be an anachronism, there being no clear reason why the exclusion should be maintained."[35]

Some would argue one would most need the defence of duress in the case of murder, but there developed an aversion to allowing a murderer to use this defence. Stephen went even further, saying that:

> Criminal law is… a collection of threats of injury to life, liberty, and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder, If you do it I will hang you. Is the law to withdraw its threat if some one else says, If you do not do it I will shoot you?[36]

As the defence continued to develop in England, it became clear that duress could apply to a range of offences including "possession of ammunition, larceny, conspiracy, arson, and perjury."[37] Using the defence in the case of treason continued to be resisted, perhaps based on Hale's historic principle that the defence could only be used in wartime. Theorist Finbarr McAuley has said that:

> [I]t is worth remembering that the argument for excluding treason comes down from Hale, having been a component part of that writer's theory that duress, at least as an answer to serious crimes, was unavailable in peacetime. As that theory has long since been discredited, does it not follow that the basis for any residual exclusionary principle has also fallen away?[38]

Even though questions about the benefits of continuing the exclusions continued for decades, these pronouncements on exclusions by Hale, and later by Stephen, are widely cited as the fundamental basis for disallowing the defence of duress to murder. Stephen was the pioneer behind the formation of the modern defence, but, as will be noted, Stephen had a particular dislike for duress and attempted to make the Canadian defence as stringent and unavailable to offenders as possible. The resulting codification is a section that is largely the section found in the *Code* today.[39]

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35 Brookbanks, *supra* note 30 at 9.

36 Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol 2 (London, UK: Macmillan and Co, 1883) at 107 [Stephen, *History*].

37 Finbarr McAuley, "Necessity and Duress in Criminal Law: The Confluence of Two Great Tributaries" (1998) 33 Ir Jur 120 at 167.

38 *Ibid* at 168.

39 See Desmond H Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University of Toronto Press for the Osgoode Society, 1989) [Brown, *Genesis*]. He notes a letter on this subject from Sir John "Sleepy Jack" Holker, an attorney General in

A study of the history of the defence must also briefly include a discussion of the philosophical basis, including discussions of the voluntary actions of individuals and their culpability. This includes a "theory of personal responsibility [which] assumes that all humans are morally responsible agents who possess free will and, accordingly, are personally accountable for their intentional conduct — even conduct that is somehow 'caused.' Exceptions to this principle, like the excuse of duress, are sparingly granted and severely restricted."[40] Given the "choices" to be made in duress, it is not surprising that the results of the inquiry are often controversial.

England at the time, to Lord Chancellor Cairns, a powerful political chief advisor. The letter describes the interactions Holker had with Stephen regarding the codification of Canadian laws. Holker's most important lines include that "[t]here is a feeling in [Canada] which is rapidly gaining strength that something ought to be done in this direction," where "this" was referring to the codification of Canadian laws (*ibid* at 27). Holker goes on further to note that Stephen agreed with this statement and that "[Stephen] has addressed to [Holker] a letter containing suggestions for a measure for the amendment of the criminal law, which would be a fitting preparation for its ultimate codification" (*ibid*). Holker also states that he is "fully convinced that Sir James Stephen would merely in consequence of the deep interest he takes in the question and not with any expectation of remuneration for his labour, afford every assistance in his power to secure the production of a satisfactory Bill, and need hardly say [Holker himself] would devote all [his] energies to the same object" (*ibid* at 27–28). This statement demonstrates the sheer will and desire Stephen had to find a means to codify the criminal law. Following his time in India, Stephen was denied the ability to codify laws in England; his bills were ignored and set aside. Stephen had a goal of codification and would not stop, even if it meant receiving no compensation for his work. What is even more curious is that on August 2, 1877, Lord Cairns "commissioned Stephen 'to draw a Penal Code and a Code of Criminal Procedure [for Canada] at once" (*ibid* at 29). Stephen was to be paid twelve hundred pounds for his work, which was later increased to fifteen hundred guineas. Stephen was to complete the matters at once, and so he used his own pre-written *Digest* to complete this task. The creation of the Canadian Code was fueled by the desire to have the power to publish a Bill in unchartered territory coupled with potential greed. In essence, with the notation of Stephen in Brown's work, the creation of a clear path between Canadian and English laws was formed. The sense that England and Canada held close legal visions was quickly dismantled when Stephen accepted the task to formally conceive the Canadian *Code*. Although he was of English birth, his time spent abroad in different English commonwealth countries clearly left a great impact on his work, specifically in that the laws formulated in the 1892 *Code* are intrinsically and morally different from those of standard English common law. See also Sir James Fitzjames Stephen, "A Penal Code" (January-June 1877) 27 Fortnightly Rev 362 [Stephen, "Penal Code"].

40 Laurie Kratky Doré, "Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders" (1995) 56:3 Ohio St LJ 665 at 755.

Many theorists have focused on "choice" and the autonomy of the actor. The dilemma is that:

> A person who is subjected to duress *chooses* to perform her compliant actions after deciding that her performance of them offers the least unattractive option from a set of unpalatable alternatives with which she is faced. Since she thus desires to perform these actions, and this desire moves her to perform them, it seems, *prima facie*, plausible to claim that she is fully self-directed, fully autonomous, with respect to their performance. However, to claim that a person who is *forced* to perform a series of compliant actions by being subjected to duress is a paradigm of someone who is engaged in autonomous self-direction seems clearly mistaken.[41]

The irony is that the actor suffers from "impaired autonomy" in that she may wish to comply and relinquish control to her duressor to avoid serious consequences.[42] Even in an individual who is acting rationally and clearly and has willed action, one may find it impossible to comply with certain behaviour where there is no "normatively acceptable option" to choose.[43] Although the actor has a choice, it is a constrained choice because it is made between "two bad outcomes, neither of which the actor would consider worthy of choice in itself or in better circumstances."[44] Choice makes duress an "atypical excuse" because the actor "chooses" the offence rather than the consequences which is a choice that is very difficult in that it is "unwilling, but it is not unwilled."[45] Thus, it is not "impaired capacity," as many argue, that one lacks to conduct oneself in the proper manner, but it is "lack of opportunity to do so."[46] The individual, from all appearances, seems to be acting in a voluntary way. The key difference is in responding to the duressor's demands and deciding whether she should resist.[47] This results in the impossibility that plagues the defence of duress in that one is simultaneously autonomous and not autonomous.[48] Taking this

41 James Stacey Taylor, "Autonomy, Duress, and Coercion" (2003) 20:2 Soc Phil & Pol'y Found 127 at 150 [emphasis in original].

42 *Ibid* at 154.

43 Brenda M Baker, "Duress, Responsibility, and Deterrence" (1985) 24:4 Dialogue: Can Philosophical Rev 605 at 609.

44 *Ibid* at 605.

45 Dressler, *supra* note 7 at 1356, 1360 [emphasis in original]. Dressler argues that "[i]f law is paramount, so the argument might proceed, a person who knowingly places his own interests above that of the community, as represented by the law, should not be excused."

46 Baker, *supra* note 43 at 609.

47 Taylor, *supra* note 41 at 154.

48 Although it is beyond the scope of this paper to briefly examine moral/normative involuntariness, a crucial place to begin is with the findings of the court in *Perka v The*

philosophical and moral position in history, Stephen took this defence towards formal codification in Canada.

B. The 19th Century Movement Towards Codification

Canada moved towards codification guided by principles from commentators like Sir William Blackstone who believed that, generally, the law was "certain, immutable, and unambiguous."[49] While Blackstone believed that crimes and punishment were "ascertained and notorious; nothing is left to arbitrary discretion,"[50] Jeremy Bentham disagreed and had a passion for analyzing the criminal law. Bentham believed that there was vast uncertainty in the common law which was a "fathomless and boundless chaos made up of fictions, tautology and inconsistency,"[51] and that legislation was needed to solve the problems of discrepancy.[52] Thus, when a complete *Draft Code* was offered to Canada from Britain, it was appealing.

Queen, [1984] 2 SCR 232 at 249 [*Perka*] adopting the reasoning of Fletcher, which was extended to duress in *R v Hibbert*, [1995] 2 SCR 973 at para 53 [*Hibbert*]. *Ruzic* SCC, *supra* note 12 approved of the reasoning in *Perka* that "[a]t the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable" at para 29. The Supreme Court elevated the principle of moral involuntariness to the status of a principle of fundamental justice. Fletcher notes that an individual acting under duress is under what he calls normative involuntariness in that "were it not for the external pressure, the actor would not have performed the deed." Fletcher, *Rethinking*, *supra* note 23 at 803.

49 Graham Parker, "The Origins of the Canadian Criminal Code" in David H Flaherty, ed, *Essays in the History of Canadian Law*, vol 1 (Toronto: University of Toronto Press for Osgoode Society, 1981) 249 at 250. Interestingly, Parker notes that to call this legislation a "code", "was something of an afterthought suggested by Judge James Gowan, who strongly influenced the conversion of the criminal law of Canada to statutory form. Whether this constitutes 'codification' is a matter of debate" (*ibid* at 249). Parker distinguishes between different codification movements which took the form of (a) legal housekeeping through consolidations, (b) law reform, or (c) systemization and reform.

50 William Blackstone, *Commentaries on the Laws of England in Four Books*, vol 1 (Oxford: Clarendon Press, 1862) at 416, cited in Parker, *supra* note 49 at 250.

51 Parker, *supra* note 49 at 250, citing Jeremy Bentham, *A Comment on the Commentaries: A Criticism of William Blackstone's Commentaries on the Laws of England*, ed by CW Everett (Oxford: Clarendon Press, 1928).

52 *Ibid* at 250. J.L. Austin, however, believed that codification was a task for many, but one which should start with a digest. Parker notes that although the criminal law was largely where Austin began on this task, he had difficulty in making his classifications of private law fit with the criminal law model and his theory never "progressed beyond a very sketchy framework."

Despite scathing criticisms,[53] the Code was introduced to Parliament in 1892 by Sir John Thompson,[54] who was the Minister of Justice for Canada.[55] The Bill passed the House and received Royal Assent on July 9, 1892, and came into force on July 1, 1893.[56] At the second reading of Bill No 7 in 1892, Thompson stated the purpose of such a codification, quoting the *Draft Code* which stated that codification, was "a reduction of the existing law to an orderly written system, freed from needless technicalities, obscurities, and other defects which the experience of its administration has disclosed."[57] The *Code* was based on the *Draft Code* prepared in 1879, Stephens' *Digest of the Criminal Law* of 1887, Burbidge's *Digest of the Canadian Criminal Law* of 1889 and Canadian statutory law.[58]

C. Sir James Fitzjames Stephen and Morality

Stephen was the English Secretary to the Council in India in the 19th century. Upon return from his post, he was unsatisfied with the state of codification in Britain and with the support of the Attorney General, he introduced a criminal code in the English Parliament in 1878.[59] Even before the *Draft Code*, Stephen published on duress,[60] and his conception was

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53 Some theorize that the criticisms of the bill by Lord Chief Justice Sir Alexander Cockburn may have assisted in the rejection of the Code. See AJ MacLeod & JC Martin, "The Revision of the Criminal Code" (1955) 33:1 Can Bar Rev 3 at 4-5.

54 *Ibid* at 5. Thompson asked Mr. Robert Sedgewick, the Deputy Minister of Justice who was appointed to the Supreme Court of Canada in 1893, to draft the bill.

55 The original Code was not without criticism; it was seen as having "inconsistencies, ridiculed for its archaisms, disparaged for its verbosities and derided for its ambiguities." *Ibid* at 3.

56 Bill 7, *The Criminal Code*, 2nd Sess, 7th Parl, 1892, 55-56 Vict, c 29, cited in Alan W Mewett, "The Criminal Law, 1867-1967" (1967) 45:4 Can Bar Rev 726 at 728. Thompson introduced Bill 7 in March 1892 with one sentence as "there were no questions." Desmond H Brown, ed, *The Birth of a Criminal Code: The Evolution of Canada's Justice System* (Toronto: University of Toronto Press, 1995) at 36.

57 "Bill 7, The Criminal Code", 2nd reading, *House of Commons Debates*, 7-2, vol 1 (12 April 1892) at 1312 (Sir John Thompson) [*Debates 12 April 1892*].

58 *Ibid*. See Sir James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments)*, 4th ed (London, UK: MacMillan, 1887) [Stephen, *Digest*]. See also George Wheelock Burbidge, *A Digest of the Criminal Law of Canada (Crimes and Punishments)* (Toronto: Carswell, 1890).

59 MacLeod & Martin, *supra* note 53 at 4.

60 *Ibid* at 4. See Stephen, *History*, *supra* note 36 at 102. See also Stephen, *Digest*, *supra* note 58; Sir James Fitzjames Stephen, *A General View of the Criminal Law of England* (London, UK: MacMillan, 1863) [Stephen, *General*]. While writing *A History of the Criminal Law of England*, Stephen admitted that the writing had become "more or less the plague, and

linked to a "choice of evils" theory and the nature of the voluntary action. His ideas about criminality seemed to stem from his beliefs on morality. Stephen wrote that even though terms like "morality" may be "indefinite and unscientific," criminal justice should remain rooted in morals.[61] He saw the laws of a country as reflecting this morality, and the terms he used reflected this idea. Stephen said that "it will be found in practice impossible to attach to the words 'malice' and 'malicious' any other meaning than that which properly belongs to them of wickedness and wicked."[62] In the October 1861 issue of the *Edinburgh Review*, Stephen published an article on English jurisprudence.[63] His purpose in publishing this work was to "define the province of jurisprudence."[64] Among the propositions he puts forth for achieving his purpose, he noted:

> Men set laws to each other; those who set them are called sovereigns, and those to whom they are set are subjects. In every independent political society there is a sovereign and there are subjects; and the tests by which an independent political society may be known are, first, that the bulk of the given society are in a habit of obedience to a determinate and common superior; let that common superior be an individual or an aggregate of individuals. Secondly, this common superior must not be in the habit of obedience to a determinate human superior.[65]

This proposition unveiled the way in which he views the world: two separate classes of people, one that is obedient and the other that is all-powerful and knowing. From the *Genesis of the Criminal Code of 1892*, it has been confirmed that Stephen was so desperate to have his works (namely

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also one of the great pleasures of my life," and near its completion he said that he "experienced a sense of loss bordering on bereavement." KJM Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge, UK: Cambridge University Press, 1988) at 53 [Smith, *Stephen*].

[61] Stephen, *General*, *supra* note 60 at 82. Of course, Stephen is drawing from morality and well-established philosophical questions about the defence but he seemed to add to this with his personal beliefs.

[62] *Ibid*. In this chapter, Stephen also wrote on what he called "moral insanity" which he believed was a "specific inability to understand or act upon the distinction between right and wrong, a sort or moral colour-blindness, by which persons, sane in all other respects, are prevented from acting with reference to established moral distinctions" (*ibid* at 95).

[63] Sir James Fitzjames Stephen, "English Jurisprudence" (July-October 1861) 114 Ed Rev 233.

[64] *Ibid*.

[65] *Ibid* at 237.

his *Digest*) published, that he proposed an offer to write the Code with no remuneration.[66]

Even from these early publications, Stephen placed limits on the applicability of the defence, saying that it is only an excuse in the case of rebels or "rioters" and noting that there was "little authority upon this subject, and it is remarkable that there should so seldom be occasion to consider it."[67] Although Stephen acknowledged that an individual could be physically manipulated by another, he believed that threat of physical harm was much different. Since "even in extremis, when acting under the threat of death, an individual is still exercising the ability to choose whether to act in a particular way."[68] Stephen believed that even the "very strongest forms of compulsion do not exclude voluntary action."[69] To illustrate his theory Stephen argued that:

> A criminal walking to execution is under compulsion if any man can be said to be so, but his motions are just as much voluntary actions as if he was going to leave his place of confinement and regain his liberty. He walks to his death because he prefers it to being carried. This is choice, though it is a choice between extreme evils… [a] man is under compulsion when he is reduced to a choice of evils, when he is so situated that in order to escape what he dislikes most he must do something which he dislikes less, though he may dislike extremely what he determines to do.[70]

For Stephen, choice was still autonomous, even if subject to severe compulsion. Even though Stephen's very limited view of duress was not fully reflected in the codification, it may account for the Canadian defence of duress "being one of the most restrictive to be found and certainly narrower than the English common law of 1892 or today."[71] The *Code* was based, in part, on Stephen's *Digest*.[72] The only reference to duress in the *Digest*, other

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66 Brown, *Genesis*, *supra* note 39 at 28. One can only assume then that his egotistical and power-seeking personality, along with the payment of having "subjects" who must follow his code would be payment enough. It must, therefore, be asked whether Stephen's purpose was to create laws or whether he was attempting to write for his own enjoyment and pure gratification, and thus the true conception of the Canadian *Code* is put into question.

67 Stephen, *History*, *supra* note 36 at 106.

68 Smith, *Stephen*, *supra* note 60 at 66.

69 Stephen, *History*, *supra* note 36 at 102.

70 *Ibid*.

71 Stuart, *supra* note 6 at 394–95, n 68, citing *Lynch*, *supra* note 1 at 680–84, Lord Wilberforce.

72 See Stephen, *Digest*, *supra* note 58.

than that to the concept as applied to a married woman, is found in Article 31 which stated that:

> An act which if done willingly would make a person a principal in the second degree and an aider and abettor in a crime, may be innocent if the crime is committed by a number of offenders, and if the act is done only because during the whole of the time in which it is being done, the person who does it is compelled to do it by threats on the part of the offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offence.[73]

Stephen cites no cases with reference to compulsion, but for the provision on the coercion of a married woman, a provision that was used to "denote the special defence available to wives who commit what would otherwise be an offence under pressure from their husbands."[74] He cites 13 cases. Stephen notes that "it is uncertain how far this principle applies to felonies in general. It does not apply to high treason or murder. It probably does not apply to robbery. It applies to uttering counterfeit coin. It seems to apply to misdemeanors generally."[75] Stephen offers no foundation for these assertions, leading one to believe that these statements were purely personal conjecture. When speaking of duress particularly, Stephen noted that "hardly any branch of the law of England is more meagre or less satisfactory than the law on this subject,"[76] noting he had 30 years of "experience at the bar and on the bench, during which I have paid special attention to the administration of the criminal law, I never knew or heard of the defence of compulsion being made... and I have not been able to find more than two reported cases which bear upon it."[77]

The restricted development of this defence may have been a "reflection of Sir James Stephen's antipathy to the defence."[78] Stephen rationalized that the definitions in this Code would not have to be fundamentally precise as an adjudicator would surely be able to morally judge whether an action was right or wrong.

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[73] *Ibid* at 23–24.
[74] Brookbanks, *supra* note 30 at 5.
[75] Stephen, *Digest*, *supra* note 58 at 23.
[76] Stephen, *History*, *supra* note 36 at 105.
[77] *Ibid* at 106.
[78] Rosenthal, *supra* note 28 at 202.

Stephen's 1879 *Draft Code* for England contained a "note" section dedicated to compulsion.[79] The Commissioners quote Lord Hale's stern rule,[80] but they note that "[t]he case of a person setting up as a defence that he was compelled to commit a crime is one of every day occurrence."[81] This statement is in complete contradiction to Stephen's writings on duress, both before and after this report. Although the Commission cites the case of *M'Growther* and the use of the rule that one who is compelled to serve in the army has a defence, the Commission says no more about this historical provision. The Commission concludes by saying that "[w]e have framed section 23 of the Draft Code to express what we think is the existing law, and what at all events we suggest ought to be the law."[82] S. 23 of the *Draft Code* provides that:

> Compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission of any offence other than high treason as herein-after defined in section 75 sub-sections (a) (b) (c) (d) and (e), murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson: Provided that the person under compulsion believes that such threat will be executed: Provided also, that he was not a party to any association or conspiracy the being party to which rendered him subject to such compulsion. No presumption shall henceforth be made that a married woman committing an offence in the presence of her husband does so under compulsion.[83]

The English *Draft Code* received a "lukewarm" reception by the House, but a Royal Commission was appointed to examine the proposal.[84] This led to a revised draft bill in 1879, which died with the change of Ministry in

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[79] *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences: With an Appendix Containing a Draft Code embodying the Suggestions of the Commissioners*, vol 6 (London, UK: Eyre & Spottiswoode, 1879) [*Draft Code*]. The members of the Commission were Colin Baron Blackburn, Charles Robert Barry, Sir Robert Lush and, of course, Sir James Fitzjames Stephen. In the introduction to the Commission Report, Stephen is described as "Our Trusty and Wellbeloved Sir James Fitzjames Stephen, Knight Commander of Our Most Exalted Order of the Star of India, one of Our Counsel Learned in the Law."

[80] See Hale, *supra* note 34.

[81] *Draft Code*, *supra* note 79 at 43.

[82] *Ibid* at 43–44. The Commissioners also make it clear that necessity "should in no case be a defence."

[83] *Ibid* at 68.

[84] MacLeod & Martin, *supra* note 53 at 4.

1880 and put an end to Stephen's attempt to codify English law.[85] This *Draft Code*, though not adopted in England, formed the basis for the Canadian *Criminal Code*.[86]

The statement noted in the preparation of the *Draft Code* was not the only time Stephen contradicted himself. Throughout his time as a writer, Stephen wrote extensively in journals. Of the most prevalent to the issue of his own contradictions is his work *Penal Code* which was published in 1877 in the *Fortnightly Review*.[87] When highlighting the creation and codification of law, Stephen states that:

> A person wishing to codify the law would propose to take it as it is, to throw it into as clear and rational a form as possible, and having done so, to ascertain both its merits and defects, to affirm the one and to remove the other. No one who understands anything about such matters would propose to sit down and write a code of laws which the public at large could be expected to obey, out of his own head, and without reference to the existing institutions of the country.[88]

However, this seems to be largely what Stephen did in his quest for codification. Stephen took his *Digest* and converted it into a *Criminal Code* for Canada. This is not to say that Stephen was not in a position to write such a tome. However, it is evident that Stephen did just as he remarked in the Penal Code and created laws that ignored existing institutions and was seemingly the product of his opinions. The creation of the *Criminal Code* is partly derived from the English common and criminal law. However, for the select laws that are not direct derivatives of English Bills, it begs the question of where Stephen found the information to formulate them.

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85 *Ibid* at 4–5.

86 In an article critique he wrote in 1869 in the Pall Mall Gazette, Stephen criticized John Stuart Mill's work, *The Subjection of Women,* 2nd ed (London, UK: Longmans, Green, Reader & Dyer, 1869), by disagreeing that women should be seen as equals in society. Stephen stated that "the happiness of [the nuclear family] is founded on the fact that each member of them, and especially the husband and wife, knows his or her place, and discharges its functions properly." Sir James Fitzjames Stephen, "Mr. Mill on the Subjection of Women", *Pall Mall Gazette* (23 August 1869). Stephen prefaced this comment by stating that he denies that "husbands and wives in such families [should] live together on terms of equality." It is evident that Stephen's views towards women and equality (not only in society, but in the *Code*) were not uncommon for the time, but the legacy continues. Sections of the *Code* of 1892 are arguably based on a misogynistic bias which is an ideal that 21st century Canadian society still upholds by not revisiting a section of the *Code* largely unaltered since 1892.

87 Stephen, "Penal Code", *supra* note 39.

88 *Ibid* at 364.

Further, this leads to the assumption that there are portions of the *Code*, such as the laws on duress, that are simply his own views.

D. Duress in the Canadian Criminal Code

Canadian sources were not to be the ultimate basis for the defence of duress. The final form of the defence in 1892 embodied in s. 12 of the *Code* was almost identical to that found in the *Draft Code.* S. 12 stated that:

> Except as hereinafter provided, compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission, by a person subject to such threats, and who believes such threats will be executed, and who is not a party to any association or conspiracy, the being a party to which rendered him subject to compulsion, of any offence other than treason as defined in paragraphs *a*, *b*, *c*, *d* and *e* of sub-section one of section sixty-five, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson.[89]

The 1892 version of the section excluded a total of ten offences, but again, it is unclear where the list originated.[90] The sum total of the debate on the defence of duress in 1892 was a question from the member from P.E.I., the Honourable Mr. Davies, who asked why the common law was being altered by the *Criminal Code* with respect to the "responsibility of married women."[91] Thompson replied that:

> The presumption under the common law is in many cases a strained one. In many cases the wife commits an act of violence in spite of her husband, but under the common law it is presumed that she is acting under the compulsion of her husband if she does that in his presence. We now leave that to be a matter of

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89 Henri Elzéar Taschereau, *The Criminal Code of the Dominion of Canada, as amended in 1893* (Toronto: Carswell, 1893) at 9, online: <archive.org/details/cihm_42873> [perma.cc/6H4Z-BSV3] [emphasis in original]. Given the case law as reviewed above, the element of escape was conspicuously absent from the codified provision.

90 This opacity goes again to the point noted above regarding Stephen's work "Penal Code," and his thoughts on the creation of laws. He states that law cannot come out of one's mind, that it must be derived from already established materials and institutions. However, this puts into question where he obtained this information to create the list. Further, this impugns how he formulated the list and what materials he used for reference. See Stephen, "Penal Code", *supra* note 39.

91 *House of Commons Debates*, 7-2, vol 2 (17 May 1892) at 2711 (Louis Henry Davies) [*Debates 17 May 1892*].

> evidence, to be proved in the court, whether she acted under the compulsion of her husband or in spite of her husband.[92]

Duress was not discussed further.

Commentators have concluded that the *Draft Criminal Code* of 1879 did not represent either the Canadian or British law on compulsion and "neither its general extension as a defence, nor the listed (excluded) offence, represent a logical development from the case law" and the fact that this draft was not adopted in England suggests "that the English legislature was unconvinced by the apparently arbitrary formulations of the Commissioners."[93] Interestingly, most of the case law cited above was not referenced by Stephen. His conclusions seem rather to adhere to a moral condemnation of a guilty person escaping just punishment rather than an actual examination of the case law and existing principles.[94] Although it is true that the Romans, Hale, Blackstone, Bentham, and others were great contributors to the creation of the laws of duress, it is clear that Stephen was the last and potentially the most influential source of the defence of duress in Canada. While his contributions to the development of the defence did not singlehandedly create the laws on duress, they were pivotal in creating our modern form of the defence infused with his Victorian, male and upper-class brand. Again, the current Canadian criminal law on duress seems to be largely the legacy of Stephen's personal and very specific views.

E. The 1955 Amendments in Canada

The next stage of the development in Canadian criminal law was to further codify the principle that had existed from the birth of the *Criminal Code*. There were amendments made in 1906 and 1927 but "neither of these

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92 *Ibid* (Sir John Thompson). The 1892 version of the *Criminal Code* provided at s. 13 that "no presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband."

93 Brookbanks, *supra* note 30 at 12.

94 This point demonstrates the sheer refutation of Stephen's former words. In "Penal Code," Stephen states, when describing the conceptualization and creation of a code, that "[w]e must start from what we have got; we must begin by rearrangement, by improving forms of expression, by ascertaining what is objectionable, what is technical, what belongs to a past age and generation; and, finally, we must adapt the result bit by bit to the present state of knowledge and feeling." Stephen, "Penal Code", *supra* note 39 at 364. In spite of his words, it is evident that Stephen does not follow his own advice. Rather, he goes off on his own thoughts and applies what he believes to be the proper and applicable law of duress.

could be called revisions."[95] In 1955, there was a slight re-wording of the section preserving the common law.[96] Again, this was in anticipation that defining every possible defence was impractical, if not impossible.[97] Preserving these defences thus served a practical purpose and spawned discussion of the "morally" guilty and innocent. The defence as we know it based on Stephen's scholarship was supposed to be the codification of the laws of a moral system.[98] Unfortunately, the codification was not an "attempt to look forward or to reshape the criminal law in terms of purpose and principle. The many amendments that have been made to the Code since its enactment have not changed its basic character. Even the major revisions of 1955 contemplated merely a restatement of the current law, rather than a fundamental reevaluation."[99] For this reason, the *Code* provision for duress today is not very different than that of 1892.

The lack of proper revision and continued use of Stephen's original work led to many issues involving the use and implementation of laws in the Canadian *Criminal Code*. Of the most relevant are the laws of insanity. In 1991, Martin Friedland wrote a comparative article about the laws of insanity. In his works, he compared the wording of insanity at the time of conception of the *Criminal Code* (specifically focusing on the case of Valentine Shortis) to the wording of insanity in 1991. He stated that "[t]here was no argument… that [Shortis] was unfit to stand trial. This would be true [in 1991] as well. Section 615 [as it then was] of the current *Criminal Code* looks to see whether the accused is 'capable of conducting his defence'… It would be difficult for Shortis then or [in 1991] to meet this test."[100] It is evident when examining the historical basis of numerous Canadian defences that there are many components of Canadian law that have not been properly revised to become fully applicable in the 21st century. Although the current *Criminal Code* is either equipped with a sleeve in its front cover for a booklet of immediate revisions or accessible with continuous (and sometimes frequent) amendments online, it is

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95 Mewett, *supra* note 56 at 728.

96 See JC Martin, *The Criminal Code of Canada, With Annotations and Notes* (Toronto: Cartwright & Sons, 1955) at 32 (s 7(2)).

97 Stuart, *supra* note 6 at 385.

98 Stephen, *History*, supra note 36 at 75–76.

99 Allan M Linden & Patrick Fitzgerald, "Recodifying Criminal Law" (1987) 66:3 Can Bar Rev 529 at 530.

100 Martin L Friedland, "The Case of Valentine Shortis – Yesterday and Today" (1991) 36:3 Can J Psychiatry 159 at 160.

questionable why that same update does not apply to laws of insanity or duress. It is remarkable how intoxication laws change frequently, but mental disorder laws (insanity) and duress remain locked in the 19th century. Logically speaking, laws should follow society's evolution to ensure that they are applicable in the most meaningful way.

Although the 1955 amendments may have been an opportunity to amend the section regarding duress, the section was substantially unaltered.[101] The discussion regarding this section seemed to be headed toward critical debate when the Honourable Mr. Nesbitt inquired:

> There are a number of offences listed in this section which are separate. In spite of that, compulsion is no excuse for an offence. I should like to ask this question. Would there be some merit in separating the words 'immediate death or grievous bodily harm'? A person may believe that the person compelling him may carry out the crime of murder, let us say, at the point of a gun, and that may well be an excuse for committing this offence; whereas the threat of grievous bodily harm could very well not be accepted. Can the minister tell us whether any consideration has been given to that? This puts the person in a position where he might commit the crime of arson, of robbery or even of murder merely in order to save his own life? Has that been considered?[102]

Instead of engaging in a meaningful discussion of the duress, immediacy, and bodily harm aspects of the legislation, the Honourable Stuart S. Garson simply replied that:

> This new section 17, apart from one or two small consequential changes, is in substance identical with old section 20, which apparently through the years has stood the test of time. We thought if it had been challenged, or any difficulty had been found with it, that it would likely have had at least decided cases that would have resulted in our changing the wording somewhat. But we followed what I think is the right practice in that the sections of the old code that have been found to be

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101 The 1955 *Code* was substantially shorter with 753 sections, compared with the more than 1,100 in the previous *Code*; with 289 pages rather than 418 pages in the Revised Statutes of 1927. MacLeod & Martin, *supra* note 53 at 11. The revised 1955 *Code* stated in s. 17 that:

> A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm or arson.

Criminal Code, SC 1953-54, c 51, s 17.

102 *House of Commons Debates*, 22-1, vol 2 (19 January 1954) at 1256 (Hon Wallace Nesbitt), online: <parl.canadiana.ca/view/oop.debates_HOC2201_02/242?r=0&s=1> [perma.cc/2Q3P-W7BH] [*Debates 1954*].

> workable have been retained, and it is only those in connection with which difficulty has been experienced that we have changed. We have not changed for the sake of changing. Section agreed to.[103]

Thus, another opportunity to clarify the duress defence was lost even though this was a stated purpose of the amendments.[104]

Allen J. MacLeod was the draftsman charged with restructuring the *Code* in 1954; he said that "the Department of Justice view was that the exercise was to be not so much a 'revision' as a 'restructuring' of the Code, i.e., more form by far than substance."[105] It is for this very reason that the statutory defence of duress has remained largely unchanged. In 1952, Garson, the Minister of Justice, said that "the revision was not undertaken for the purpose of effecting changes in broad principles. Our system of criminal jurisprudence embodying as it does the high principles of the British system provides as fair and just a system as it is possible to devise to ensure that justice will be accorded to all."[106] Alan Mewett made the apt comment in 1967 that "it is not a cause for congratulation that Sir James Stephen would be quite at home with the Criminal Code of 1967."[107] It is also true that Stephen would still be comfortable with the codification of duress at present.[108]

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103 *Ibid* (Hon Stuart Garson).

104 The stated purpose of the amendments in 1955 was to: "(a) revise ambiguous and unclear provisions; (b) adopt uniform language throughout; (c) eliminate inconsistencies, legal anomalies or defects; (d) rearrange provisions and Parts; (e) seek to simplify by omitting and combining provisions; (f) with the approval of the Statute Revision Commission, omit provisions which should be transferred to other statutes; (g) endeavour to make the Code exhaustive of the criminal law; and (h) effect such procedural amendments as are deemed necessary for the speedy and fair enforcement of the criminal law." See William Melville Martin, *Report of Royal Commission on the Revision of Criminal Code: Reports of Special Committee on the Bill No. 93 "An Act Respecting the Criminal Law"* (Ottawa: Department of Solicitor General, 1954) at 3–4, online (pdf): <publications.gc.ca/site/eng/9.827905/publication.html> [perma.cc/YUR7-E2HH].

105 Brown, *Genesis*, *supra* note 39 at 238, n 14, in a letter to Brown from AJ MacLeod dated May 11, 1988.

106 MacLeod & Martin, *supra* note 53 at 19.

107 Mewett, *supra* note 56 at 740. Brown, *Genesis*, *supra* note 39 takes this comment as a positive statement which "emphasizes the main characteristic of the work – its durability" at 151. When it comes to the defence of duress, durability, paired with a lack of workability, is not always a laudable characteristic.

108 Stephen's comfort, as stated by Mewett, would largely make sense in reference to the lack of change to the present-day laws of duress. However, Stephen did note in a publication from 1880 that law is a substance that must progress with society but still remain rooted in its past. See Sir James Fitzjames Stephen, "The Criminal Code (1897)"

Few cases used this defence in the intervening years, and even fewer were successful.[109]

III. THE USE OF THE STATUTORY DEFENCE OF DURESS TODAY

A. *R v Ryan*, Domestic Violence, and Duress

In the intervening years, the court did not strike down the statutory provision on excluded offences evidenced by the state of s. 17 in our *Criminal Code* today, and as confirmed in *Ruzic*.[110] The statutory defence remains almost untouched since Stephen. When the case of *Ryan* was eventually considered by the Supreme Court in 2013, the boundaries again stretched to consider "a novel question: may a wife, whose life is threatened by her abusive husband, rely on the defence of duress when she tries to have him murdered?"[111] To answer this very modern question (that may have

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(1880) 7 Nineteenth Century 136 [Stephen, "Criminal Code (1897)"]. In his publication, Stephen states at 144-45 that

> It is perfectly true that the legislation of a nation so ancient, and composed of such varied classes and interests as our own, can never be deprived of its historical character and reduced to mathematical regularity; but it is no less true that large departments of it, perhaps in time the whole of it, may be far more distinctly, conveniently, and systematically arranged than they are at present, though that arrangement ought always to have reference as well to past history, and to proved convenience, as to theoretical symmetry.

While this does not fully contradict Mewett's point, it does raise the question as to whether the choice not to alter the Code in 1954 was the correct choice. It is evident, as Stephen points out, that progression in society and law is inevitable. As he states, so as long as the core of each law remains, the law may be adapted to better serve the present society wherein it is used.

[109] See e.g. the Quebec decision *The King v Farduto*, 1912 CarswellQue 249, 21 CCC 144. There are many more duress cases over time. For more information see Chapman, *supra* note 23.

[110] *Ruzic* SCC, *supra* note 12 at para 18. See *Criminal Code*, *supra* note 11, s 17, which says today:

> Compulsion by threats
>
> 17 A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

[111] *Ryan* SCC, *supra* note 15 at para 1.

been unthinkable to ask in 1892), the court once again fell back on the historical roots of the defence. Although the trial court acquitted Ms. Ryan on the common law defence of duress, the Court of Appeal clarified that s. 17 would be open to Ms. Ryan because she was charged with "counselling offence that is not committed" instead of the excluded offence of attempted murder which was on the exclusion list and would likely be the charge against other women in her circumstances in the future. By again ignoring the excluded offences in *Ryan*, and the real need for this clarification, and given the possibility of a future case that might seek to rely on the statutory provision, the courts have given very little guidance on what to do in the future with duress cases involving domestic violence. In fact, they have given little guidance on all future duress cases. The Supreme Court in *Ryan* disagreed with the Court of Appeal finding that there was "no principled basis" to exclude the defence of duress in this case mandating that duress should be "available only in situations in which the accused is threatened for the purpose of compelling the commission of an offence,"[112] but chose to leave the discussion of excluded offences "to another day."[113]

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[112] *Ibid* at paras 16, 33.

[113] *Ibid* at para 84. A comparison to the defence of infanticide is also informative. It was not until a 1948 amendment that infanticide was formally introduced to the *Criminal Code*. S. 262(2) of the Canadian *Code* mirrored the English Law on infanticide in that a woman who willfully caused the death of her newly born child was not guilty of murder or manslaughter if, at the time of the act or omission, "she had not fully recovered from the effects of giving birth" resulting in the "balance of her mind" being "disturbed." See Lisa Silver, "Regina v Borowiec on Infanticide: Does the Crime Fit the Times?" (10 August 2015), online (blog): *CanLII Connects* <canliiconnects.org> [perma.cc/P65F-E2VQ]. In 1954, through an amendment, the word "balance" from "balance of her mind" was replaced with "disturbed mind," which expanded the offence by offering another possible reason for the "mind being disturbed." Namely that infanticide could also occur when the "female person" was not fully recovered from "the effect of lactation consequent on the birth of the child." *Borowiec*, *supra* note 18 at para 30. However, as Nancy Theriot sets out in her article on insanity, "[i]t is safe to assume that the exclusion of women from medicine in the early and mid-nineteenth century affected the 'scientific' view of women's mental (and physical) illness." Nancy Theriot, "Diagnosing Unnatural Motherhood: Nineteenth-century Physicians and 'Puerperal Insanity'" (1989) 30:2 Amer Stud 69 at 79. S. 233 of the Code relies greatly on Victorian medicine and male-oriented understandings, rather than modern-day applicable medical terms. The creation of ss. 12 and 13, coupled with their lack of progression since their conception, has slowly created barriers for women in modern society. When faced with mental health crises surrounding the birth of their children, women are subjected to the punishments of the Victorian misogynistic biases of the

B. The Latest Cases Addressing Statutorily Excluded Offences in Duress

As there is so little Supreme Court guidance on duress, it is important to examine the lower court judgments which came after these landmark cases in the development of excluded offences. In the case of *R v Fraser*, which involved a robbery (post-*Ruzic*), Justice Sherar found that "[s]ince *s. 17* of the *Criminal Code,* at least in relation to the offence of robbery, is in violation of *s. 7* of the *Charter of Rights and Freedoms*; it is hereby declared to be inoperative. The crown is not, in this case, attempting to justify the constitutional violation under *s. 1* of the *Charter of Rights and Freedoms*."[114] The court quotes from Martha Shaffer's work where she derides the automatic exclusion of 22 offences from duress because "[e]ven though the offences excluded from the ambit of s. 17 are serious ones for the most part, there is no reason that any of these offences cannot be committed in a morally involuntary fashion."[115]

Shaffer goes on to say that as much as "we might aspire to the principle that we should give up our own lives rather than cause the death of an innocent person, it is not reasonable for the law to demand that people do so or be penalized as a murderer."[116] It is admirable to hold our citizens to this standard, but it is just unrealistic to expect so without a pragmatic examination of the circumstances of the case. It has become clear to many theorists that excluding 22 offences simply because Stephen deemed it so is no longer tenable. The court did the right thing in *Fraser* by excluding robbery from the list of offences in s. 17. However, the case then must be tested on its merits. The defence may still be unsuccessful, but automatic exclusion simply does not work.[117]

The excluded offence of robbery was picked up in the 2012 case of *R v Mohamed*, but this case was not challenged on the constitutional validity of excluding robbery from s. 17, and so s. 17 of the *Criminal Code* "remains in full force and effect."[118] As a result, the defence of duress was not available

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Code rather than a modern understanding of the human mind. This conclusion similarly parallels the issues that are evident in the laws of duress.

114 *R v Fraser*, [2002] NSJ No 400 at para 16, 3 CR (6th) 308 [*Fraser*].

115 Martha Shaffer, "Scrutinizing Duress: The Constitutional Validity of Section 17 of the Criminal Code" (1998) 40:3 & 4 Crim LQ 444 at 469.

116 *Ibid* at 470.

117 It appears that *Fraser*, *supra* note 114, was not appealed, but it has not been followed in many cases.

118 *R v Mohamed*, 2012 ONSC 1715 at para 27 [*Mohamed*].

to Mr. Mohamed.[119] *Fraser* was also followed in the subsequent case of *R v Sheridan* in 2010.[120] Interestingly, it was argued in *Sheridan* that a case-by-case analysis should be done even in the case of murder. Picking up from *Fraser*, the court considered whether the accused had a "realistic choice other than to murder the innocent person as an act of self preservation, as opposed to sacrificing their own lives" and whether, as a result, the act was "morally involuntary and constitutes *prima facie* a s. 7 *Charter* infringement."[121] Through a reasoned analysis, the court found that although innocent victims must be protected from murder, this absolute limitation is in violation of the accused's s. 7 *Charter* right to have only a minimal limitation on their rights.[122] Justice Ewaschuk found that because s. 17 violates s. 7 and is not justifiable under s. 1 of the *Charter*, the section is "constitutionally invalid in rare and limited circumstances."[123] The court found in unique circumstances where there is: 1) an air of reality to be put to a jury; 2) immediate threats of death; 3) the presence of the threatener; 4) an act done by a principal; 5) that is proportional, and; 6) there is no safe avenue of escape, then s 17 must be read down.[124]

At this time, the last word that we have on the constitutionality of s. 17 is the Saskatchewan lower court 2014 case of *R v Allen*.[125] Justice Kovach does a thorough examination of the law surrounding duress, as set out in the long history of the cases which came before. It is of note that no case has, as of yet, picked up on the reasoning in *Allen*, and the case was not appealed, but this is a precedent which is ripe for getting the law of duress back on track. *Allen* involved an individual who was the principal actor in a bank robbery and was charged with both robbery and assault with a weapon, which are both excluded offences under the current statutory provision in s. 17 of the *Criminal Code*. The accused had stated, and the evidence

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[119] *Ibid* at paras 29, 53. The court talks explicitly about the lack of credibility with the accused. Counsel attempted to launch a *Charter* challenge after the trial was over, but the court would not allow this at the strenuous objections of the Crown.

[120] [2010] OJ No 4884, 224 CRR (2d) 308 [*Sheridan*].

[121] *Ibid* at 4.

[122] *Ibid* at 9–10.

[123] *Ibid* at 10.

[124] *Ibid* at 11. Interestingly the court in *R v Aravena*, 2015 ONCA 250 noted the decision in *Sheridan* but found that without a successful constitutional challenge, the defence was not available for murder in this case, finding that the "constitutionality of the murder exception to the duress defence in s. 17 of the *Criminal Code* is not before the court" at para 86.

[125] 2014 SKQB 402 [*Allen*].

supported, that he was picked up by two individuals who threatened him with severe physical violence if he did not take a small knife and commit robberies at two banks. Employees testified that the accused was very polite and threatened no violence during the robberies, and the court found an "air of reality" to the defence of duress. Mr. Allen asserted that depriving him of the defence of duress violated three principles of fundamental justice including, "i) that a person's actions be morally voluntary; ii) that laws not be arbitrary; and iii) that a law's effects not be grossly disproportionate to its objective."[126] Most fundamentally, the court found that only those who have made a "freely willed and conscious choice" may be blamed for their conduct, as "culpability rests only on those who deserve it."[127] Thus, the court found that it is "abhorrent" to a free and democratic society to order a warrantless punishment that serves no purpose.[128] The court did a thorough analysis of the prior case law including *Ruzic*, *Hibbert*, *Rabey*, *Fraser*, *Sheridan*, and of course, *Ryan.*[129] Proportionality is, of course, a factor in the analysis.

It is also important to mention that the common law version of the defence remains operative. The 1892 *Criminal Code* maintained an important underlying principle: the common law defences were not superseded by the *Code.* When it came to the defence of duress specifically, the court would find that there was an "uneasy tension in some cases between interpretation of a detailed statutory provision and application of a common law defence."[130] Using the judiciary to fill the gaps proved to be a difficult task.[131] Yet, Thompson believed in the power of preserving the common law and said that his bill:

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[126] *Ibid* at para 7.

[127] *Ibid* at para 21.

[128] *Ibid.*

[129] *Ruzic* SCC, *supra* note 13; *Hibbert*, *supra* note 48; *Rabey v R*, [1980] 2 SCR 513 [*Rabey*]; *Fraser*, *supra* note 114; *Sheridan*, *supra* note 120; *Ryan* SCC, *supra* note 15.

[130] Stuart, *supra* note 6 at 386.

[131] See Glanville Williams, "Necessity" (1978) Crim L Rev 128 at 129–30. Even Stephen noted the importance of the common law defences in the commentary to the *Draft Code*, and explained that it was equivalent to giving "the benefit of a doubt... to a prisoner." He reasoned that the "worst result that could arise from the abolition of the common law offences would be the occasional escape of a person morally guilty. The only result which can follow from preserving the common law as to justification and excuse is, that a man morally innocent, not otherwise protected, may avoid punishment."

> [A]ims at a codification of both common law and statutory law relating to these subjects, but… it does not aim at completely superseding the common law, while it does aim at completely superseding the statutory law relating to crimes. In other words, the common law will still exist and be referred to, and in that respect the code, if it should be adopted, will have the elasticity which has been so much desired by those who are opposed to codification on general principles.[132]

Again, the framers of the *Code* wanted to preserve even more flexibility in the use of duress.[133] Perhaps this was the correct political decision at the time to placate those who wished for the continuation of the common law.[134] Although great strides had been made in codification and the benefits such a process brought with it, the "common law resisted eradication."[135] Most interesting in *Allen* is that the court quotes from *Ryan* and notes that:

> [T]he statutory defence applies to principals, while the common law defence is available to parties to an offence. The second is that the statutory version of the defence has a lengthy list of exclusions, whereas it is unclear in the Canadian common law of duress whether any offences are excluded… <u>This is an unsatisfactory state of the law, but one which we think we are not able to confront in this case.</u> Although we had the benefit of extensive argument about the parameters of the common law and statutory defences of duress, understandably no argument was presented about the statutory exclusions. In addition, some courts have found some of these exclusions to be constitutionally infirm. We accordingly leave to another day the questions of the status of the statutory exclusions and what, if any, exclusions apply at common law.[136]

The court in *Allen* found that the accused testified that he feared for his life, but he was never threatened, and the knife was not used.[137] The court found that in a crime with no real violence, "self-sacrifice, while commendable, is an ideal" given that the accused was threatened with very

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132 *Debates 17 May 1892*, *supra* note 91 at 1313 (Sir John Thompson).

133 Brown, *Genesis, supra* note 39 at 126. Brown notes at 126 that Thompson achieved substantially the same result without formally annulling the common law as "[m]ost of the common law pertaining to crime had been incorporated in Bill 32. Once that legislation was enacted, such provisions became statute law and, ipso facto, the common law doctrine on the subject was abrogated."

134 See Parker, *supra* note 49 at 249 that, as for the alternative, "[s]ome 'Codes' were introduced in the United States, but the Benthamite-Austinian concept of a code which would supplant the common law and provide a totally new approach, a fundamental rethinking of the law, was never more than an ideal."

135 *Ibid.*

136 *Ryan* SCC, *supra* note 15 at paras 83–84 [emphasis added].

137 *Allen*, *supra* note 125 at para 48.

real violence if he did not comply.[138] Thus, the Saskatchewan court found that the "blanket exclusion of robbery and assault with a weapon from s. 17 prevents an accused from claiming duress in situations where he or she has no realistic choice but to commit the offence," and thus the exclusion violates the principle of moral voluntariness.[139]

The court then goes on to do a s. 1 analysis and finds that that the blanket exclusion is "not proportional to its deleterious effects."[140] The Saskatchewan lower court was not comfortable with striking down s. 17 in its entirety because the Supreme Court had found that most "aspects of s. 17 pass constitutional muster" but that the words "robbery" and "assault with a weapon" were to be struck from the section while the other offences were "left for another day."[141] *Allen* has not been adopted by any cases between 2014 and 2021. Thus, we are left with a section that is far from perfect and still without the legislative will to revise this section of the *Criminal Code*, which we know violates our principles of fundamental justice. The courts cannot continue to wait for a fictional day in the future when they can wholly contemplate this important defence in a rational and well-reasoned way. Theorists like Kent Roach may be right that the "constitutionality of such categorical exclusions will have to be litigated on a case-by-case basis. Section 17 will only be invalidated when courts have struck down the last excluded offence... But it is not clear when or if that day will come."[142] Instead of wasting the court's resources on a discussion of each of these excluded offences, which will likely take decades, we need action by our legislators.[143]

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[138] *Ibid* at para 55.

[139] *Ibid* at paras 59, 62.

[140] *Ibid* at para 84.

[141] *Ibid* at para 88.

[142] Kent Roach, "The Duress Mess" (2013) 60:2 Crim LQ 60 159 at 160.

[143] In recent years, there have been few cases where duress was used as a defence. The most recent use of the defence in Canada comes from a Manitoba case, *R v Ducharme*. Ducharme was charged with first-degree murder and accessory after the fact to the murder of a fellow inmate at Stony Mountain Institute. Defence counsel argued that his actions were done out of necessity and duress and that he had no part in the murder or anything thereafter. The tests of necessity and duress were both successfully applied, and Her Honour could not find, beyond a reasonable doubt, any evidence that could offer a reasonable alternative. As such, Ducharme was acquitted of the charges held against him. See *R v Ducharme*, 2020 MBQB 177 [*Ducharme*]. It would also be prudent to note that this case was decided largely with the assistance of constant surveillance and video footage of the Stony Mountain Institute. With the assistance of this footage,

IV. IS THERE ANOTHER OPTION? THE USE OF DURESS AS MITIGATION IN SENTENCING

A. Duress as a Factor in Mitigation

With the uncertain nature of the development of the defence, and the difficulties of treating duress as a full defence, perhaps there is another option. A complete rejection of a defence which has been applied to cases for over a century may be too drastic. Although Stephen's interpretations on the subject are questionable, what he stated in his 1880 publication "The Criminal Code (1897)" in *The Nineteenth Century Journal* would apply in this situation;[144] history cannot be surgically removed from the laws it has created, but it must remain at its core in order to maintain a level of chronological consistency in order to uphold the law. By exploring a different route to address the issues relating to duress in Canadian law, this core could remain the same and the law could become more pliable and applicable to a modern, 21st-century court of law. Notwithstanding the historical understanding, when considering the defence of duress, many have argued that it should only be a matter for mitigation upon sentencing. There is evidence that "relates to an ancient era preceding the middle ages when justifications absolved, while excuses were merely a matter for mitigation of punishment."[145] Stephen was adamant about only using duress as a matter in sentencing rather than a full defence, stating it is:

> [A]t the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary. It is, of course, a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands… No doubt the moral guilt of a person who commits a crime under compulsion is less than that of a person who commits it freely, but any effect which is thought proper may be given to this circumstance by a proportional mitigation of the offender's punishment. These reasons lead me to think that compulsion by threats ought in no case whatever to be admitted as an excuse for crime, though it

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it was possible for the defence to build a case of duress with actual, physical evidence of the actions of the accused and other inmates. This should be kept in mind when analyzing and comparing other cases, where the actions relating to necessity and duress are not recorded and are not visible to assist in confirming the use of the defence.

144 Stephen, "Criminal Code (1897)", *supra* note 108.

145 Stuart, *supra* note 6 at 389.

may and ought to operate in mitigation of punishment in most though not in all cases.[146]

The concept that duress should function only as an element of sentencing is not new. However, some researchers discussing the modern form of the defence felt that duress should not be used simply as a factor for mitigation. In *Lynch*, Lord Wilberforce stated that duress has been recognized from the 14th century as a full defence and not "as diminishing responsibility or as merely mitigating the punishment... Parliamentary action would be necessary if proof of duress were to operate upon the sentence."[147] Yet, as Lord Edmund-Davies noted in *Lynch*, Stephen's summary of the law of duress as left to mitigation "at least makes for neatness"[148] as all arguments of justifications and excuses are bypassed. Accepting Stephen's assertion that duress should function only as mitigation would be a solution to ineffectual legislation and the "band-aid solution"[149] accomplished through the common law.[150] Examining this solution deserves another consideration in light of today's sentencing practices. Using this solution, the court may consider the conduct of the accused rather than an artificial list of excluded offences. Those with serious threats would qualify for the defence of duress, while those that did not qualify as serious bodily harm would immediately be in a position to use duress in mitigation.

Many have suggested conceptualizing the defence for use in the sentencing phase in order to restrict the defence rather than find a further option for those who act under duress. Stephen starts with two basic assumptions when expounding the principle that duress should simply be a matter of mitigation, arguing that: (1) to give credence to threats of a rogue would be akin to opening the door for collusion of malefactors and (2)

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146 Stephen, *History*, supra note 36 at 107–08. Rosenthal, *supra* note 28 has noted that the "logical consequence of Stephen's argument would be that the penalty should increase in proportion to the force of the compulsion!" at 211.

147 *Lynch*, *supra* note 1 at 681.

148 *Ibid* at 707.

149 Stuart, *supra* note 6 at 401.

150 UK, Law Commission, *Criminal Law: Report on Defences of General Application* (No 83) (London, UK: Her Majesty's Stationary Office, 1977) at 8–9 [*Law Commission No. 83, 1977*] forwarded two propositions:

> 1. Certain very terrible threats should excuse from all crimes.
> 2. Less terrible threats should be a matter of mitigation only. If the crime is a minor one the mitigation may result in an absolute discharge, but that is at the discretion of the judge.

criminals would "confer impunity upon their agents by threatening them with death."[151]

Some theorists have made extremist arguments about allowing duress as a defence. An example is the comment of Lord Salmon in *Abbott*, relying on the comments of Lord Simon of Glaisdale in *Lynch*, who argued that actions under duress cannot be regarded as excusable, as this would "prove to be a charter for terrorists, gang leaders and kidnappers."[152] This fear was properly criticized by the U.K. Law Commission in *Law Commission No. 83, 1977*, which states:

> [W]e would point out that, over the many years that duress has been accepted as a defence, the few reported cases in which it has arisen for consideration, and the even fewer occasions when it has apparently been successfully relied upon, seem to indicate that the fears are without serious foundation. It is after all a defence of last resort, which entails acceptance of participation in the offence, and a degree of courage is required to advance the defence if the threats are really serious and convincing because of the possibility of reprisals against the defendant or those close to him.[153]

As noted throughout, there has not been a flood of duress cases; it remains a difficult defence to assert only after the elements of the case have been made out. However, it is necessary to examine duress at sentencing because of the "power to grant an absolute discharge where appropriate. In addition, there are various administrative procedures which may be employed in suitable cases: the discretion not to prosecute, the exercise of the royal prerogative of pardon, the powers of review of the Parole Board."[154] If duress was fundamentally relevant to mitigation "it would allow the court to pass one of a wide variety of sentences to match the diversity of cases that shelter under the umbrella of duress."[155] There could be benefits to the accused under this scheme, as the court could pay attention to the circumstances of each individual. Although this may (or may not) result in sympathy, a court could adjust for morally blameless conduct and an appropriate sentence in the circumstances where a defence

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151 Stephen, *History*, supra note 36 at 107.

152 *Abbott v The Queen*, [1976] UKPC 19 at 766, [1977] AC 755 [*Abbott*].

153 *Law Commission No. 83, 1977*, *supra* note 150 at 8.

154 Ian H Dennis, "Duress, Murder and Criminal Responsibility" (1980) 96 Law Q Rev 208 at 235–36. Note that the "royal prerogative" is purely a British construct in the case of murder.

155 Martin Wasik, "Duress and Criminal Responsibility" (1977) Crim L Rev 453 at 457 [Wasik, "Duress"].

has failed, as "the court has the normal sentencing discretion and can give effect to shades of culpability and complicity."[156]

Using duress in sentencing would also placate those who criticize the exculpatory power of the defence, as it would punish those offenders most deserving of reprimand. Individual characteristics could again be considered in the particular case. Using the defence at the sentencing phase may also bring a solution for prior fault, which has plagued the defence of duress in Canada and abroad. There have been numerous situations where the accused brought the duress on themself with involvement in, for example, a criminal organization.[157] One is left with the situation that "[t]o refuse to admit the defence in such a case may well be unjust, but its acceptance so as to exonerate the accused entirely could amount to a 'terrorist's' charter."[158] Clear sentencing aims could alleviate this issue.

Others have theorized that leaving duress to mitigation would also solve the problem of excluded offences, particularly murder. It has been said that "the best solution would be to allow the defence of duress to reduce murder to manslaughter, thus providing the judge with the desirable discretion on sentence."[159] In *Abbott*, Lord Salmon stated that leaving duress to

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[156] *Ibid.*

[157] In the 1987 publication of The Cambridge Law Journal, Conor Gearty wrote about issues relating directly to this topic through the use of the case *R v Sharp* [1987] 3 WRL 1. See Conor Greaty, "Duress–Members of Criminal Organisations and Gangs" (1987) 46:3 Cambridge LJ 379. He noted that the case involved three individuals who were accused of committing an act of robbery. Two of the three members were charged additionally with manslaughter and murder, respectively. The third member, Sharp, did not commit acts of manslaughter or murder and claimed that his participation in the robbery was due to duress which was imposed on him by one of the members. The Lord Chief Justice at the Court of Appeal noted that "where a person has voluntarily, and with knowledge of its nature joined a criminal organisation or gang which he knew might bring pressure on him to commit an offence and was an active member when he was put under such pressure, he cannot avail himself of the defence of duress" (*ibid* at 380). This exact act describes the nature by which one can bring duress upon themselves through the involvement of gang activities. The court in *R v Sharp* also noted that the case of *R v Hurley and Murray* [1967] VR 526, along with various criminal codes (including the Canadian *Criminal Code*), "together with the draft code of 1879 prepared by Mr. Justice Stephen, tended to confirm that... '[the above noted] exclusory doctrine was already part of the common law'" (*ibid*). Ultimately, Mr. Sharp's defense of duress was rejected on these bases. The mention of Stephen in a case as recent as 1987, however, is both surprising and not. The words of Stephen from the draft code and the *Code* of 1892 still hold weight in modern courts of law.

[158] Wasik, "Duress", *supra* note 155 at 458.

[159] *Ibid.*

sentencing, at least in the case of murder, would be feasible, claiming "[t]here is much to be said for the view that on a charge of murder, duress, like provocation, should not entitle the accused to a clean acquittal but should reduce murder to manslaughter and thus give the Court power to pass whatever sentence might be appropriate in all the circumstances of the case."[160]

One reason given for the use of duress at the sentencing phase is that duress would be "considered in a less formal, more flexible context, producing a speedier but no less just result."[161] This type of use for the defence was considered for provocation in New Zealand. A Law Reform Committee report noted that, at sentencing, the court would be able to determine the issue "untrammelled by artificial legal rules and definitions."[162] Perhaps sentencing may be the way to escape the numerous difficulties of duress and its troubled history.[163] Thus, there are benefits for both those who believe in the defence and want to see it used in a more reasoned way, and arguments for those, like Stephen, who saw duress as a dangerous tool and believed that sentencing would be a way to limit its applicability.[164]

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[160] *Abbott*, *supra* note 152 at 768. Lord Salmon also took the opportunity in *R v Sang*, [1979] UKHL 3, [1980] AC 402 [*Sang*] to again agree with Stephen that compulsion should not be an excuse but should be used to mitigate punishment. He noted that the "punishment would certainly vary according to the circumstances of the case; sometimes it might be minimal" at 12.

[161] Martin Wasik, "Excuses at the Sentencing Stage" (1983) Crim L Rev 450 at 458 [Wasik, "Excuses"].

[162] *Ibid*, n 58.

[163] ATH Smith, "On *Actus Reus* and *Mens Rea*" in PR Glazebrook, ed, *Reshaping the Criminal Law: Essays in honour of Glanville Williams* (London, UK: Stevens & Sons, 1978) 95 at 105–06 noted that:

> Modern sentencing powers being what they are, the sentence can be extremely flexible, and justice might be satisfied by the granting of an absolute discharge. It seems to me that these latter are entirely proper policy considerations. It is probably also true that, as more defences become available, it is easier for the guilty to take advantage of the law's greater complexity to fabricate defences. The costs in time and other resources that must be expended as a consequence of formally admitting a greater number of exculpatory pleas should also, perhaps, be taken into account. My point is simply that the arguments against a duress defence are lent no weight by an appeal to 'theory'... It is an argument from definition, and that should not influence the policy issue at stake one way or the other.

[164] In Clayton C Ruby et al, *Sentencing*, 6th ed (Markham, ON: LexisNexis Canada Inc, 2004), the authors note the discrepancy in that "[e]xcessive delay which does not amount to a breach of section 11(b) of the Charter can be taken into account in mitigation of sentence, because it causes prolonged uncertainty for the appellant. It is utterly anomalous that a Charter violation cannot mitigate sentence, but a course of

B. Mitigating Excuses

There is also an argument for what has been called a separate class of "mitigating excuses." Mitigation has been conceptualized as something that may add up to a "negative tariff" of mitigating factors that would entitle an offender to a lesser sentence if deterrent or incapacitation are not the overriding principles.[165] However, some have noted that there are a small group of factors that have an "excusatory effect."[166] Martin Wasik developed this concept from the work of Hyman Gross, a theorist on punishment. Gross examined mitigation and concluded that "[t]he punishment *deserved* for the crime is no less when these things are taken into consideration, but since what is deserved is not all that matters in deciding what sentence is right, there is good reason for a lighter sentence in spite of that."[167] This leaves space for duress as a mitigating excuse on sentencing.

Wasik builds on this theory claiming that a sentencer should first consider mitigating excuses because "they form part of the determination of proportionality itself." [168] He states that once culpability is established, one may take into account other mitigating factors which may reduce the sentence to "a level below what would be regarded as proportionate, because of reasons of policy or humanity. This suggests that... allowance for mitigation should be regarded as an entitlement of the offender."[169] If a mitigating excuse was considered before the other typical mitigating factors, it would be granted more weight because we ascribe these types of excuses more value. Perhaps if the sentencer ascribed some increased meaning to the mitigating excuse, culpability could be applied by the sentencing judge who heard the evidence and may balance blameworthiness and the needs of the offender.[170] These factors may not reach the level of full excuse but could allow more focus on the individual punishment appropriate for the offender.

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conduct, which does not amount to a violation of the Charter, can do so" (*ibid* at 264, citing Allan Manson, "Charter Violations in Mitigation of Sentence" (1995) 41 CR (4th) 318).

165 Wasik, "Excuses", *supra* note 161 at 462–63.

166 *Ibid* at 463 [emphasis in original].

167 Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979) at 449 [emphasis in original]. Wasik notes that Gross is operating from a "just deserts" model. Wasik, "Excuses", *supra* note 161 at 463.

168 Wasik, "Excuses", *supra* note 160 at 463.

169 *Ibid* [emphasis in original].

170 DA Thomas, "Sentencing Implications" (1980) Crim L Rev 565 at 565–68.

Legal theorist Allan Manson says that a veritable "menu"[171] of mitigating factors have been accepted in Canadian law.[172] Traditionally, duress has been accepted as one of these factors, and Manson notes that these offences have a reduction in moral blameworthiness in offences that may have been excluded by s. 17. Although there may be no full defence, the crime remains less blameworthy and may "mitigate a sentence. The common case is a drug courier who argues that a threat was made to encourage his or her participation. If there is no defence of duress, there may still be facts that support its use for sentencing purposes."[173] Even though the state of s. 17 is in question, it is likely that the common law will be in place, and there will be offenders who do not fit within the defence and could benefit from effective sentencing.

C. Duress as a Partial Defence on the Duress Continuum

Alternatively, theorists have recently proposed that duress should act as a "partial defence."[174] This is the purely traditional response that duress should take its place among other mitigating factors. Douglas Husak argues that this theory explains the use of mitigation in duress, since "threats of bodily harm can excuse completely when they are sufficiently extreme, then they can excuse partially when they are less so." [175] He goes on to say that the defendant who acted under duress had "'no choice' but to commit the crime. Of course, this claim cannot be taken literally; defendants who plead duress decide to acquiesce to the threat. But threats are among the most familiar reasons to deny that a choice is fully voluntary. If a severe threat greatly reduces the voluntariness of an act, a less severe threat slightly reduces its voluntariness."[176] Like a mitigating excuse, the partial excuse of duress may also be used in mitigation. It has been said that many theorists have a distinction between "excusing conditions and mitigating excuses... The basis for this assumption is rarely articulated, and when it is, it seems unconvincing. Those writers who urge or assume a sharp distinction between excusing conditions and mitigating excuses are faced with

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[171] Allan Manson, Patrick Healy & Gary Trotter, *Sentencing and Penal Policy in Canada: Cases, Materials, and Commentary* (Toronto: Emond Montgomery, 2000) at 132. "Menu" is the term used by the authors.

[172] Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001).

[173] *Ibid* at 140.

[174] Douglas N Husak, "Partial Defenses" (1998) 11:1 Can JL & Jur 167.

[175] *Ibid* at 184.

[176] *Ibid*.

something of a problem by the existence of 'partial excuses' in the criminal law."[177] However, Wasik makes it clear that rather than an either/or dichotomy, the more useful distinction would involve a "'scale of excuse,' running downwards from excusing conditions, through partial excuses to mitigating excuses."[178] Many benefits can be seen as flowing through this type of model. As Baker has noted:

> This change would greatly increase the ability of the criminal law to respond flexibly, realistically, and fairly to the enormous diversity of actual fact situations involving duress that do arise. All of the facts bearing on the accused's responsibility and culpability could be placed before the body entitled to determine guilt and recommend sentence. The criminal law would gain in justness, in that it could better apportion its verdicts and penalties to the merits of each individual case. I expect the perception of its fairness would also increase.[179]

Further, there is value in a continuum of duress because "it would be possible to combine a general relaxation of the excusing power of duress with specific provisions marking an upper boundary on the seriousness of offences for which duress could acquit, and above which duress could only mitigate by reducing the sentence."[180] This continuum theory of duress offers an appealing alternative to the model currently employed.

Duress is difficult for theorists to conceptualize fully. Could it be that duress naturally flows through different categories all the way from an

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[177] Martin Wasik, "Partial Excuses in the Criminal Law" (1982) 45:5 Mod L Rev 516 at 516 [Wasik, "Partial"] [emphasis in original]. See Marcia Baron, " Justifications and Excuses" (2005) 2:2 Ohio St J Crim L 387 at 388–89, n 4, where she notes that Hart distinguishes three types of defenses: excuse, justification, and mitigation. I find this a peculiar grouping, blurring two separate issues. One issue is whether the defence is complete or only partial, complete defences being those that result in acquittal, whereas partial defences merely reduce the crime to a lesser one (usually murder to manslaughter). What Hart calls 'mitigation' can be either formal or informal. Formal mitigation is the same thing as a partial defence, and informal mitigation is simply the handing out of a lighter sentence than one would otherwise mete out. The second issue is whether the defence is a justification or an excuse. These strike me as distinct issues, and although we should leave open the possibility that a justification has to be complete to be a justification (and likewise for excuses), I see no reason to take that as a starting point and to shape our classification of defenses accordingly.

[178] Wasik, "Partial", *supra* note 177 at 524–25.

[179] Baker, *supra* note 43 at 610.

[180] *Ibid*. Baker goes further to extend the example to murder. In the proposed mitigation approach, Baker suggests that "the law would be able to acknowledge, through reduction in sentence, the moral difference between taking a life as a result of an agonized choice between that evil and great personal loss, and the more usual cases of killing that the law prohibits."

excusing condition, to a partial defence, to perhaps even a mitigating excuse? It appears very rational that "[a]t a given stage in the history of criminal law, policy claims against admitting a particular excuse as an excusing condition will be seen as more or less compelling."[181] This is why *Lynch* and *Abbott* opened up the defence when it was needed. Perhaps this is why *Ruzic* was decided as it was because the particular facts of these cases made duress traverse the duress continuum.[182] The answer is just as difficult as some will argue that:

> [C]riminal law excuses are so morally and legally significant that they *must* be considered prior to the verdict. These are the excuses towards the higher end of the 'scale of excuse' where maximum exculpatory power outweighs considerations of policy and expedience for not admitting the excuse as an excusing condition. To transfer these issues to the sentencing stage, as some would have us do, would sacrifice individual culpability to social policy. On the other hand some excuses, towards the lower end of the scale, may properly be dealt with just by the sentencer, and it will be pointed out that sentencers are now developing more rigorous procedures after conviction for assessing the weight to be attached to mitigating excuses.[183]

Taking all of the theory on mitigating factors, mitigating excuses, and all of the surrounding information, the best summary of the theory is provided by Zoe Sinel through a revised retributivist theory with the addition of judicial mercy, as discussed above. Sinel argues that:

> [T]he retributivist's concern for the inherent dignity and freedom of human beings is emphasized and serves as a justification for legislative and/or judicial sensitivity to particular situations of partial agency. Thus, the harshness of the retributivist regime, it is argued, can and ought to be mitigated by a sensitivity to human agency and its limitations in exigent circumstances that affect its functioning. It behooves us to be sensitive to this situation of partial agency. An accused who commits an act under partial agency should not be held as responsible for his act as one who commits an act under full agency. If we are not sensitive to this difference, the argument runs, then the unmitigated punishment of the accused acting under duress is disproportionate. Therefore, far from undercutting the retributivist doctrine's duty to punish the wrongdoer, excuses can serve to mitigate the

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[181] Wasik, "Partial", *supra* note 177 at 525.

[182] *Ibid* at 529. Determining exactly how to calculate a discount using duress has proven problematic, and it is not conducive to allocating specific numbers for a specific offence. As noted by Wasik, the job of the sentencing judge will be more art than science.

[183] *Ibid* at 531–32 [emphasis in original].

harshness of this doctrine by paying close attention to the *ad hoc* circumstances that inhere in a situation that would make it disproportionate to punish.[184]

This is the same argument given in Wilson's dissent in *Perka* where she noted that where "a defence by way of excuse is premised on compassion for the accused or on a perceived failure to achieve a desired instrumental end of punishment, the judicial response must be to fashion an appropriate sentence but to reject the defence as such."[185] There is much support for a theory that, under whatever title, recognizes the unmitigated punishment of an offender who acts under duress is unsustainable. There is an appropriate place for judicial mercy in sentencing. The debate on this alternative theory of duress will continue, but looking at duress in the full range of possibilities will only help illuminate the best path for the future of this defence.[186]

D. Criticism of Duress in Sentencing

Glanville Williams succinctly summarizes the common criticisms of allowing duress to function as a factor in mitigation. He stated that:

1. Allowing a specific defence means that the evidence is brought out fully before the jury. It is a criticism of our trial system that when evidence is admissible only in mitigation, so that it is no concern of the jury, it is not

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184 Zoe Sinel, "The Duress Dilemma: Potential Solutions in the Theory of Right" (2005) 10 Appeal 56 at 65–66.

185 *Perka*, *supra* note 48 at 234.

186 Douglas Husak, "On the Supposed Priority of Justification to Excuse" (2005) 24:6 Law & Phil 557 at 582 [Husak, "Priority"]. Husak discusses partial justifications and excuses. He analyzes partial excuses as grounds for his rejection of what he calls the "priority" of justifications over excuses. Husak claims that "[i]f we suppose that a defendant should prefer a full justification to a complete excuse, should she also prefer a partial justification to a complete excuse? Does this preference remain even though the complete excuse, unlike the partial justification, allows her to be acquitted?" Although Husak is "noncommittal" about whether what he calls "hybrid defences" exist, he makes the point that we should perhaps conceptualize a defence like duress as a "borderline case" in which it is not possible to categorize the act as an excuse or a justification. There has been some criticism of this hypothesis, including Marcia Baron, "Is Justification (Somehow) Prior to Excuse? A Reply to Douglas Husak" (2005) 24:6 Law & Phil 595. Baron notes that she is not certain that justifications are prior to excuses. In fact, she claims "I'm not sure that I think it is." See Fletcher, "The Right", *supra* note 23 at 955. However, I adopt Baron's acceptance of Fletcher's statement in "The Right" that an analysis of justification precedes that of excuse. This discussion, again, ties into the discussion of the philosophy of the defence in Chapter 2. See Husak, "Priority", *supra* note 185 at 583-84. Husak concludes that the priority thesis should be rejected as excuses are only noncommittal about justifications, and this does not mean that justifications have priority over excuses.

considered and probed with the same thoroughness as evidence going to liability.

2. There is a special argument for murder. If duress were not allowed as a defence the judge would have to pass a life sentence.
3. A last argument is perhaps the most decisive. In the case of overwhelming duress, no punishment can in justice be imposed on the unhappy victim of the duress. The moral rigorist may assert that there must nevertheless be a conviction, to maintain the supremacy of the higher morality. But, as Rupert Cross remarked, 'an absolute discharge or an instant release under the prerogative of mercy are strange methods of enforcing absolute moral prohibitions.'[187]

Critics of this rather simplistic model point out that it is not "sufficient in the true case of duress for account to be taken of the duress by the exercise of some discretionary power" and that the proper place for the consideration of the defence is before a jury.[188]

Although all of the factors would be before the trial judge, they may not be available to other authorities using the defence of duress and, as Lord Edmund-Davies again points out in *Lynch,* "there can be no assurance that even a completely convincing plea of duress will lead to an absolute discharge. And even the exercise of the Royal prerogative involves the notion that there must have been a degree of wrongdoing, for were it otherwise no 'pardon' would be called for."[189] Lord Morris of Borth-y-Gest also surveys whether duress could serve as a function of mitigation. He ponders the justness of such an approach but concluded that fairness could be ensured after conviction, as a "judge could ensure that after a conviction full opportunity would be given to adduce all material evidence" and if the actions were compelled by "the compulsion of a threat of death or of serious bodily injury it would not in my view be just that the stigma of a conviction should be cast on him."[190] The example becomes all the more sound when Lord Edmund-Davies looks at the case of *Crutchley*, where an individual was

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187 Glanville Williams, *Textbook of Criminal Law,* 2nd ed (London, UK: Stevens & Sons, 1983) at 626.

188 *Law Commission No. 83, 1977*, *supra* note 150 at 7. Some theorists, such as Doré, *supra* note 40, note that duress, especially for the battered offender, is "especially suited for resolution by the jury. That is, because duress requires a judgment about what a person of reasonable firmness would do under similar circumstances, the question of coercion, in all but extreme cases, arguably should go to the jury as representatives of the relevant standard-setting community" at 762.

189 *Lynch*, *supra* note 1 at 707.

190 *Ibid* at 671.

compelled to do damage to machinery by a mob.[191] Lord Edmund-Davies quotes Glanville Williams, who claims "*Crutchley* was a case where justice demanded not merely a mitigation of punishment but no punishment at all; nor would there have been any sound reason for registering even a technical conviction."[192] This argument is persuasive, as the stigma should not attach to the innocent.

Is leaving the defence to the use of the sentencing judge placing the "stigma of conviction" on the innocent?[193] Lord Simon also recognized these limitations and said:

> It is true that the Home Secretary can advise exercise of the royal prerogative of mercy, and that the Parole Board can mitigate the rigour of the penal code; but these are executive not forensic processes, and can only operate after the awful verdict with its dire sentence has been pronounced. Is a sane and humane law incapable of encompassing this situation? I do not believe so.[194]

There may be another factor to consider with the insistence of the judges in *Lynch* and *Abbott* that duress be a defence and not left to the sentencing judge, which leads to the discussion of mandatory minimums.[195]

Others have noted that the deterrent effect will be lost if mitigation is permitted under duress. However, it is aptly noted that "[s]urely if the prime object of the law were to deter, it would treat duress as an aggravating circumstance."[196] Yet, despite the difficulties with sentencing, mitigation in the case of duress is promising. The criticisms are succinctly enunciated by Sinel who says that:

> A mitigation in sentence includes a verdict of moral culpability – we still consider the accused to have committed a wrong. In addition, sentencing discretion is manipulatable. Whom should this power of acquittal go to? A judge, a jury, an elected body? Furthermore, what considerations ought such a body take into account when mitigating sentences? It seems obvious to say that we would prefer not to leave something as significant and nuanced as a defense of duress solely to the discretion of judges. Moreover, the situation of duress is conceptually different from most mitigating situations. If a person acting under duress refuses to succumb to the will of his/her duressor, then we do not simply consider his/her actions to be morally right, but morally saintly. We consider him/her to have acted

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191 *R v Crutchley*, (1831) 172 ER 909, 5 Car & P 133 [*Crutchley*].

192 See Glanville Williams, *Criminal Law: The General Part*, 2nd ed (London, UK: Stevens & Sons Ltd, 1961) at 755, cited in *Lynch*, *supra* note 1 at 707.

193 *Law Commission No. 83, 1977*, *supra* note 150 at 7.

194 *Lynch*, *supra* note 1 at 696.

195 A full discussion of mandatory minimums is beyond the scope of this paper.

196 André Gombay, "Necessitate Without Inclining" (1985) 24:4 Dialogue 579 at 587.

> superogatorily. It seems odd that if the accused succumbs to the threat, we hold him/her guilty, but withhold punishment; and if the accused does not succumb, we write him/her into our hagiography.[197]

Thus, although there are many criticisms of using duress post-conviction, there are also some very compelling reasons to consider this comprehensive approach.

E. The Benefits of a Reasoned Use of Duress in Sentencing – Comparison to the United States

It has been said in Canadian jurisprudence that "it must not be forgotten that, even where compulsion or coercion is not available as a defence, it will generally be a mitigating factor in considering the question of punishment."[198] However, Canada has never seen fit to put down a firm rule with respect to the role of duress in sentencing to ensure that it is taken into account in the proper proportion in sentencing. American authorities, however, have seen that a policy statement was inserted into the Federal Sentencing laws to solidify the place of duress. Policy statement 5K2.12 states that:

> If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions, on the proportionality of the defendant's actions to the seriousness of coercion, blackmail, or duress involved, and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency.[199]

Reducing the sentence below guidelines is a serious consideration. This model could be followed in Canadian sentencing. With some statutory

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[197] Sinel, *supra* note 184 at 66, 67. Sinel also takes up the argument of Professor Alan Brudner who claims that many of the problems of duress could be solved by making duress a "justificatory defense."

[198] Edwards, *supra* note 5 at 313.

[199] *Federal Sentencing Law and Practice,* § 5K2.12 (2005 ed). This policy statement took effect November 1, 1987, and has been amended only once. Note that a statement to depart from sentence is necessary in a system where sentencing can be very formulaic as it is in the United States. Nonetheless, this is an important statement showing the United States court's belief in the need for mitigation for duress.

changes, modifications could be made to mandatory minimums, allowing an exception in the case of duress.

In the United States the "sentencing court may take into account the subjective mental state and personal characteristics of an offender in determining whether she was susceptible to coercion or duress in the commission of an offense."[200] American caselaw has found that a departure from the sentencing guidelines can be appropriate whether or not a jury has considered and rejected the mitigating circumstances as a complete defence for what was called "imperfect duress."[201] In addition, it has been noted that the subjective factors otherwise irrelevant to guilt may be taken into account in sentencing, where a court can consider the offender on an individual basis. Thus, a battered offender's subjective perception of danger, her individual evaluation of the opportunity to escape, her psychological makeup, and her particular susceptibility to "patterns of dependence, domination and victimization," while arguably irrelevant to her culpability, may be utilized in determining her sentence.[202] However, the difficulty in the United States, as in Canada, is that even when departures are made from the guidelines because of duress, "courts may find themselves further hamstrung by legislative mandatory minimum sentences."[203] The result is that even if the court views "battered offenders as less deserving of punishment, and less in need of deterrence or incapacitation, [they] might be precluded from translating those sentiments into practice."[204] On the

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200 Mary-Christine Sungaila, "Taking the Gendered Realities of Female Offenders into Account: Downward Departures for Coercion and Duress" (1995) 8:3 Federal Sent'g Rep 169 at 170. Sungaila notes at 171 that:

> While the guidelines make no express accommodation for women offenders, they do allow sentencing courts to take into account mitigating circumstances disproportionately experienced by women offenders because of their sex. They enable courts to consider the significant impact on female offenders of experiences largely felt by women, such as abuse and male domination, and thereby equitably dispense justice in sentencing. It is incumbent upon defense counsel to make courts aware of the possibility of such downward departures, and thereby ensure that their female clients are appropriately sentenced under the guidelines.

201 *United States v Lopez-Garcia*, 316 F (3d) 967 at 973 (9th Cir 2003).

202 Doré, *supra* note 40 at 734 [footnotes omitted].

203 *Ibid* at 735. This sentiment has also been echoed in Isabel Grant, Dorothy Chunn & Christine Boyle, *The Law of Homicide* (Toronto: Carswell, 1999) (loose-leaf updated 1999, release 1), at 6–68, where they noted that "[i]t should be remembered, however, that life imprisonment is mandatory for murder, thus limiting judicial flexibility with respect to the appropriate stage for taking coercion into account."

204 Doré, *supra* note 40 at 736, 764–65 [footnotes omitted]. Doré has noted that:

other end of the spectrum are those who believe that sentencing is not an effective way to deal with duress because "[i]n terms of principle, many would regard leaving matters to sentencing discretion as a poor substitute since in ever more cases that discretion is curtailed by legislation, and, more importantly, the defendant is denied the opportunity for the jury to consider the question of culpability."[205] Again, this reinforces the view that stigma would attach to the undeserving.

F. Cases Involving Duress as a Mitigating Factor

When examining the purposes and principles of sentencing, the quandary is that none, or very few, of the legislative aims seem to squarely apply to someone acting under duress.[206] As discussed above, punishing someone who felt that they had no real control of their actions does not meet the traditional aims of deterrence because this individual is not likely to allow themselves to be put in this situation again, nor are others likely to be stopped through general deterrence. Incapacitation is largely ineffective because these offenders do not normally pose a threat to the safety of others after the threat of duress has resolved, and rehabilitation is futile because the offender felt that they had no other choice and cannot be rehabilitated from thinking they did the right thing. Reparations are unproductive, again, because the offender feels that there are not culpable for their actions. The only aim that is applicable is denunciation, and the Supreme Court has

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> It is tempting to compensate for this sentencing inadequacy by throwing up one's hands in frustration and urging that if the battered woman defense cannot be fully accounted for at sentencing, a court has no alternative but to permit the jury to consider it in assessing guilt. While emotionally appealing, this argument remains theoretically disquieting. I question the wisdom of attempting to correct a faulty sentencing scheme with an injudicious expansion of the substantive excuse itself – an expansion that requires a fundamental modification in excusing and that applies to a much broader class of psychologically 'coerced' offenders" [footnotes omitted].

205 David Ormerod, ed, "Duress" (2006) Crim L Rev 142 at 145, citing Andrew Ashworth, *Principles of Criminal Law*, 4th ed (Oxford: Oxford University Press, 2003) at 228.

206 *Criminal Code*, *supra* note 11, s 718, which states:

> The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to the community; and
> (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to the victims and to the community.

made it clear that "exemplary sentences (i.e. the imposition of a harsher sanction on an individual offender so that he or she may be made an example to the community) are unjustified" simply on the grounds that the sentence can be used as a "resource to deter potential offenders."[207] The individual culpability of the offender should be the most important goal.[208] Theorists have argued that marginalized populations are most at risk when we tout deterrence (as has been a goal in drug mule cases), as there are many women who have been "tricked, or entrapped and persuaded, to carry out these offences."[209] Examining some recent Canadian drug mule cases will focus these principles.

In the case of *Valentini*, there were four defendants: Valentini, Paquin, Bonin, and Tepsa.[210] For the purpose of this analysis, the focus will be on Tepsa as the court found that she had the least knowledge about the circumstances. This case involved individuals who had conspired to import cocaine from Aruba. Tepsa's then-boyfriend, Bonin, agreed to bring back cocaine from their vacation. Tepsa did not know the plan until several days later but was told that she had to comply because they were being watched, and she believed Bonin when he said that others had threatened to kill them if they did not import the narcotics. Tepsa arrived in Toronto with 3.5 kg of cocaine and was arrested. The jury found that Tepsa was not under duress and rejected her defence. The trial judge did not believe that duress "should ever be considered, even under another name, for sentencing purposes, once it has been rejected by the jury."[211] The trial judge summarized that Tepsa had no criminal record, she was five months pregnant at the time of sentencing, she was vulnerable at the time of the offence, she had a favourable pre-sentence report, and there was no evidence that she knew they were being paid for the importation. However, it was found that there were aggravating factors, including the value of the cocaine, her knowledge, and no real sense of remorse, which led to a sentence of 7 years incarceration and a weapons prohibition for 10 years.[212] The use of the

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207 *R v* CAM, [1996] 1 SCR 500 at para 78 [CAM].

208 Taking into consideration that s. 718.1 states that "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." *Criminal Code*, *supra* note 11, s 718.1.

209 Alured Darlington, "The mule's defence" (1999) 149 New LJ 402 at 402.

210 Tepsa's maiden name is used to distinguish her from her husband's name of Bonin.

211 *R v Valentini*, [1995] OJ No 3933 at 11, 29 WCB (2d) 342 [*Valentini*, Trial].

212 *Ibid* at 23. This sentence was reduced to 18 months imprisonment on appeal. *R v Valentini*, [1999] OJ No 251 at paras 114, 132 CCC (3d) 262 [*Valentini*, Appeal]. The

"failed" defence of duress on sentencing is a critical mitigation tool when appropriately used.

Even more troubling is a case out of the Northwest Territories Supreme Court in *R v RFS*.[213] In this case, Shelly Marie Elanik was found guilty of manslaughter of a hotel employee during the commission of a robbery. Her defence was that she was under duress from her boyfriend, Ronald Frank Sayers. Elanik was found to have done "some thing or things that aided or abetted Mr. Sayers."[214] On the night of the robbery, Elanik testified that Sayers had sexually assaulted her with a bat, brought a knife into the bathroom and told her that he had killed their baby, and spoke of killing her and himself. However, the court found that Elanik refused to do what her boyfriend said at the time of the robbery and she testified that if she did not comply, he would take her outside and "beat her until she was almost dead."[215] Justice Schuler found that, since she still refused to assist in the robbery, she clearly was able "to exercise some choices as to what she would or would not do."[216]

Elanik also refused to assault the victim when told to do so and again was threatened with another beating. In fact, she only admitted to searching for money at the location of the crime. Justice Schuler refused to accept the evidence of the defence expert witness who testified that she acted under duress and Battered Woman's Syndrome (BWS) and would not take this evidence into account on sentencing. Even though there was evidence that Elanik was beaten by Sayers in the past (and, indeed, Sayers was convicted for assaulting Elanik only two years prior), Justice Schuler said that he did not "accept that the battered women's syndrome explains Ms. Elanik's actions that night or provides any mitigation in this case. I find the proposition that it would [sic] particularly hard to accept when the violence was directed to an innocent third party."[217] Thus, it seems that duress (and, by extension, evidence of battered women's syndrome) as a factor in sentencing is being used inconsistently across the country. Even with the

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fact that the amount of cocaine was greater than in the other cases may explain some of the disparity, but this is very different than the cases described above.

213 2003 NWTSC 69 [*RSF*].

214 *Ibid* at 14.

215 *Ibid* at 16.

216 *Ibid* at 19.

217 *Ibid* at 19. It was also found that Elanik had a reasonable avenue of escape.

acknowledgment that Elanik was the subject of an abusive relationship, there was no allowance for a mitigation of sentence.[218]

It is a concern that in some cases the accused has to decide whether to gamble and to adduce evidence in the hopes of a full acquittal on the excuse. The risk is that, if the defence is unsuccessful, some sentencing judges do not take the evidence of duress as a source of mitigation. On the other hand, if the accused decides to immediately plead guilty and ask for the mercy of the court by presenting evidence of duress that does not have to pass the difficult standards of the defence, the judges seem far more likely to take the evidence into account. A new look at duress is needed to ensure that the use of the defence at the sentencing stage is being justly employed. The aim of denunciation is being met, but the court must also be consistent with s. 718.1 of the *Criminal Code* because the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

As seen above, having an undefined use of duress in sentencing is not resulting in fair outcomes for all offenders. Having a defence like duress based on compassion is laudable, but its use is very inconsistent. Fletcher noted the difficulties of leaving compassion to the courts, stating that hoping for judicial mercy to determine whether the conduct is "blameworthy can hardly depend on whether the judge feels like blaming the defendant. The judge's proper response is not to ask whether she feels like blaming the defendant, but whether the defendant deserves blame."[219] One can see that this is the case with compassion for offenders who raise duress on sentencing, as they are left at the whim of the judge who can choose to include or exclude the factors. A principled approach to sentencing in the case of duress is required, perhaps to the level of a mitigating excuse.

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[218] *Ibid* at 24–25. Elanik received a sentence of five years because of the mitigating factors that she was 18 years old at the time of her offence, had no criminal record, had a grade nine education and, as the court commented, she had "very little work history, which is probably not surprising, considering that she was a mother at the age of 18." Elanik had the support of her family and had adhered to her bail conditions. At para 81, the court also notes that Elanik was an Aboriginal offender, but Justice Schuler saw "no basis to treat Ms. Elanik any differently because of her Aboriginal status."

[219] Fletcher, "The Right", *supra* note 23 at 970. Fletcher notes that the right to be excused applies only against the court as it would be difficult to decide that, at the time of the act, the shipwrecked individuals in *Dudley & Stephenson* had a right to kill and eat the boy, and that the boy had a duty to submit to his killing. Of course, Fletcher has written on many more issues around duress. For additional analysis see Chapman, *supra* note 23.

V. CONCLUSION

As described throughout this article, the defence of duress has a rather troubled history. Little thought was given to the defence at the time of the inception of the *Criminal Code* because there were relatively few cases using the defence. Stephen's original statutory conception of the defence was dismissive, but the codified version allowed some leeway but excluded a host of offences for no particular reason. The impact of Stephen's theory on the defence is, at best, a type of unstated compromise succinctly summarized by Shaffer in that:

> Stephens' views did not, however, carry the day and the duress provision that the Commission ultimately proposed reflected a compromise between refusing to recognize the defence at all and allowing duress to serve as a defence to all offences. Section 17 thus reflects the ambivalence that has always characterized the duress defence, namely whether coercion should ever excuse the commission of a criminal offence.[220]

Add to this Stephen's shortcomings in his attempts at digesting the criminal law as he had an "unrealistic optimism that such a vast subject might be adequately dealt with in the compass of even 1,500 pages or so."[221] This, coupled with Stephen's "tendency to dwell on his own interests… resulted in an occasional lack of proportion in the treatment of certain topics."[222] His disdain for duress created an artificial and disproportionate suppression of the defence.

Despite the wishes of the earliest framers that there be flexibility, the case law does not reflect this. This restriction was not reviewed upon the revision to the *Criminal Code* in 1955, as the lawmakers felt that if the section was in need of reform, the caselaw would have provided evidence of what was required, losing another opportunity for reflection. Dressler rightly points out that there is little perfection in the criminal law, only minimum standards of conduct that do not function "as the moral police, requiring us, upon threat of death or loss of liberty and resulting stigma, to act virtuously… In some cases, it is proper for the law to excuse me, although I do not excuse myself."[223]

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220 Martha Shaffer, "Coerced into Crime: Battered Women and the Defence of Duress" (1999) 4 Can Crim L Rev 271 at 278.

221 Smith, *Stephen*, *supra* note 60 at 53.

222 *Ibid.*

223 Dressler, *supra* note 7 at 1369.

Duress is certainly not perfectly set out either statutorily or through the common law. However, as a society, we should determine how we want to treat people who are in impossible situations. If duress is really supposed to be a concession to human infirmity in the face of an overwhelming evil, then the defence cannot be so artificially limited without a reasoned explanation. Of course, public policy reasons could inform the excluded offences, but it seems that no such discussion has really been engaged throughout the history of this defence.

Since an attempt to make the law less piecemeal and more just has largely failed over the last 100 years,[224] then perhaps the pragmatic way in which the defence must change is with the increased individualization which "complements rather than detracts from the rule of law" and is required so that unique offenders are not immediately denied a defence before the discussion even begins.[225] As the Court of Appeal in *Ryan* said, "[i]n turn, it also highlights the need for this defence to be sufficiently flexible to, when appropriate, accommodate the dark reality of spousal abuse. At the same time, it will oblige the courts to ensure that reliance upon such a defence will be 'strictly controlled and scrupulously limited.'"[226] Why are we making this defence so restrictive? Without the unreasoned blanket exclusions of offences, the defence of duress could finally achieve a level of coherence. It is a fundamental principle that "[m]oral culpability may only attach to an individual who has the rational capacity to appreciate the difference between a right choice and a wrong one, and who was in circumstances that provided for a meaningful exercise of that choice."[227] There is no meaningful exercise of choice in the current legislative scheme that includes a blanket exclusion of offences. If there is the judicial and/or legislative will to eliminate the excluded offences, then we may be able to help offenders facing an impossible "choice," particularly when faced with the unimaginable circumstances a battered spouse may experience.

Should the avenue of eliminating excluded offences not prove feasible, a means of accessing duress principles is still necessary. Although faced with debate over whether mitigation is a necessary factor in sentencing cases of duress, it is nonetheless a general component of the parameters of criminal

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[224] See MacLean et al, *supra* note 16 at 80–81.

[225] Fletcher, "Individualization", *supra* note 23 at 1309.

[226] *R v Ryan*, 2011 NSCA 30 at para 91 [*Ryan*, CA].

[227] Sujung Lee, "Re-Evaluating Moral Culpability in the Wake of Gladue" (2020) 78:2 UT Fac L Rev 109 at 114.

law. Stephen himself repeatedly noted, around the time of his *Draft Code*, that "specific areas of the criminal law were in need of simplification, clarification, and rationalization."[228] Why not apply this aim to the stagnant laws of duress? Should the wording of the law itself never change, clarification and rationalization as to how the law of duress and mitigation coexist is a necessity. Marc DeGirolami asks the question, in relation to the ideals behind Stephen's punishment, "[i]f judicial discretion in sentencing is not to be controlled by principle, then is it not unrestrained and arbitrary in all of the ways that make indeterminate sentencing unattractive?"[229] A sentencing judge should act on their own accord, by a standard of good faith, and with the offender and the public's best interest in mind. Sentencing aims (including deterrence) cannot be upheld for one who truly acts under duress and who cannot be held accountable for their actions. Using duress as an individualistic mitigating factor is necessary as a principled use of duress on sentencing.

Choosing to continue to shove a round peg into a square hole of an unworkable section is no longer a possibility; change needs to occur. The pragmatic way in which the defence will change is with the increase in sentencing individualization which "complements rather than detracts from the rule of law" and is required so that offenders are not left at the whim of those making the decisions.[230] With these changes, the defence of duress may achieve a level of coherence for the first time in its long history. Mitigation is a real solution and perhaps the future of a defence which should remain relevant and accessible.

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[228] Marc O DeGirolami, "Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen" (2012) 9:2 Ohio St J Crim L 699 at 724.

[229] *Ibid*.

[230] Fletcher, "Individualization", *supra* note 23 at 1309.

Fundamentally Flawed: The Arbitrariness of the Corporal Punishment Defence

MARK CARTER*

ABSTRACT

In *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, the Supreme Court of Canada upheld the corporal punishment defence contained in s. 43 of the *Criminal Code* in the face of arguments that it is an unreasonable infringement of children's rights under ss. 7, 12, and 15 of the *Canadian Charter of Rights and Freedoms.* In the process of giving precision to the terms of s. 43 as a prelude to its s. 7 vagueness analysis, the majority indicated that the purpose of the section is to allow only the kind of force against children that has "corrective value" as determined primarily by the weight of expert evidence. The author argues that the Supreme Court's subsequent recognition of arbitrariness as a distinct fundamental justice concern under s. 7 in *Bedford v Canada (Attorney General*) meets the "new legal issue" standard for reconsidering previous declarations of validity established in *Bedford*. The author also argues that since 2004, changes in global attitudes and expert opinion in relation to corporal punishment have "fundamentally shift[ed] the parameters of the debate" which is the second *Bedford* test for reconsidering previous declarations of validity. Engaging the new arbitrariness framework and the importance that it places on the purposes of laws, the author argues that s. 43 is unconstitutionally arbitrary. Contemporary expert opinion recognizes no corrective value associated with corporal punishment. Because s. 43's objective is unachievable, there is no rational connection between it and the limit that it imposes on the children's security interests.

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> *The overarching lesson that emerges from the case law is that laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed..."*[1]

> [T]*here can be few things that more effectively designate children as second-class citizens than stripping them of the ordinary protection of the assault provisions of the Criminal Code.*[2]

I. INTRODUCTION

S. 43 of the *Criminal Code* provides that "[e]very schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances."[3]

In *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*,[4] the Supreme Court of Canada rejected constitutional challenges to the defence found in s. 43 based on several sections of the *Canadian Charter of Rights and Freedoms*.[5] Many scholars and children's rights advocates took the *Foundation* decision in stride and have continued to work tirelessly to end the physical punishment of children by seeking the repeal of s. 43.[6] Recently, the movement has been given added impetus by the findings of the Truth and Reconciliation Commission of Canada (TRC). In its final report, the TRC concluded that "corporal punishment is a relic of a

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1. *Bedford v Canada (AG)*,2013 SCC 72 at para 105 [*Bedford*].
2. *Canadian Foundation for Children, Youth and the Law v Canada* (AG), 2004 SCC 4 at para 72 [*Foundation*].
3. *Criminal Code*, RSC 1985, c C-46, s 43.
4. *Foundation*, *supra* note 2.
5. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*].
6. See e.g. Joan E. Durrant et al, "Defining Reasonable Force: Does It Advance Child Protection?" (2017) 71 Child Abuse & Neglect 32; Joan E. Durrant & Ron Ensom, "Twenty-Five Years of Physical Punishment Research: What Have We Learned?" (2017) 28 J Korean Academy Child & Adolescent Psychiatry 20; Ailsa M. Watkinson & Letnie Rock, "Child Physical Punishment and International Human Rights: Implications for Social Work Education" (2016) 59 Intl Social Work 86; Joan E. Durrant et al, "Predicting Adults' Approval of Physical Punishment from their Perceptions of their Childhood Experiences" (2017) 8:3/4 Intl J Child, Youth & Family 127; Cheryl Milne, "The Limits of Children's Rights under Section 7 of the *Charter*: Life, No Liberty and Minimal Security of the Person" (2005) 17 NJCL 199.

discredited past and has no place in Canadian schools or homes."[7] Among the TRC's calls to action is that "the Government of Canada… repeal Section 43 of the *Criminal Code* of Canada."[8] For its part, the first of Justin Trudeau's federal Liberal Party administrations did not exclude this recommendation from its general commitment to implement all of the TRC's calls to action.[9]

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7 *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: TRCC, 2015) at 144, online: <www.trc.ca/assets/pdf/Executive_Summary_English_Web.pdf> [perma.cc/AFH5-L5 6D].

8 *Ibid* at 145.

9 Gloria Galloway, "Liberals agree to revoke spanking law in response to TRC call", *The Globe and Mail* (20 December 2015), online: <www.theglobeandmail.com/news/politic s/liberals-agree-to-revoke-spanking-law-in-response-to-trc-call/article27890875/> [perm a.cc/UZT4-7JY9].

While opposed to the physical punishment of children, some currents of editorial and academic opinion nonetheless support s. 43's retention in order to prevent the prosecution of parents for minor force used against children. See e.g. Margaret Wente, "A ban on spanking: Who'd it hurt the most?", *The Globe and Mail* (21 December 2015), online: <www.theglobeandmail.com/opinion/a-ban-on-spanking-wh od-be-hurt-the-most/article27896251/> [perma.cc/5LSQ-NB4W]; Lisa Kelly & Nicolas Bala, "More Harm than good: Repealing reasonable correction defence could backfire," *Lawyers Weekly* (19 February 2016). Alternatively, Hamish Stewart recommends a new statutory defence of "deemed consent." See Hamish Stewart "Parents, Children, and the Law of Assault" (2009) 32:1 Dal LJ 1.

Many opponents of s. 43 would want to distinguish their support for its repeal – a clear human rights objective - from any commitment to having more parents prosecuted for assault. As I have suggested elsewhere, the same objection "that inspires opposition to the corporal punishment defence extends to a lack of enthusiasm for, and a lack of faith in the positive results of, sterner criminal justice responses to social problems." See Mark Carter, "Corporal Punishment and Prosecutorial Discretion in Canada" (2004) 12:1 Intl J Children's Rights 41 at 41. To this end I have, for example, explored the potential for prosecutorial discretion to modify the application of the law of assault in some circumstances that might otherwise have fallen within the scope of s. 43. See also Joan E. Durrant, "Corporal Punishment: A Violation of the Rights of the Child" in R Brian Howe & Katherine Covell, eds, *A Question of Commitment: Children Rights in Canada* (Waterloo: Wilfred Laurier University Press, 2007) 99 at 99. Relatedly, in her dissenting opinion in *Foundation*, Justice Arbour suggested that in the absence of s. 43, parents could invoke the *de minimis* defence in response to assault charges based on "trivial use[s] of force to restrain children when appropriate" (See *Foundation*, *supra* note 4 at para 132). But see Steve Coughlin, "Why *De Minimis* Should Not Be a Defence" (2019) 44:2 Queen's LJ 262.

Finally, while the Canadian social, economic, and legal context is unique, Joan Durrant's research indicates that in countries that have removed their corporal

In the absence of s. 43's repeal, doctrinal developments since the *Foundation* decision in 2004 provide a new basis for questioning the constitutionality of the section. This article concentrates on developments in relation to the "principles of fundamental justice" in s. 7 of the *Charter* which, along with ss. 12 and 15, occupied a significant part of the Court's analysis in *Foundation.*[10] S. 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In *Bedford v Canada (AG)*,[11] the Supreme Court consolidated and rationalized its jurisprudence relating to those principles of fundamental justice that are concerned with flaws or failures in the "instrumental rationality" of laws.[12] These are the rules against arbitrariness, overbreadth, and gross disproportionality. In *Bedford* the Court also established tests for situations when Supreme Court precedents – and, in particular, earlier findings of constitutionality – can be revisited by lower courts and the Supreme Court itself. I argue that in light of the Court's guidance in relation to these principles of instrumental rationality, the question as to whether s. 43 of the *Criminal Code* infringes s. 7 of the *Charter* meets the "new legal issues" threshold for reconsidering precedents.[13] I also argue that there has been "a change in the circumstances or evidence that fundamentally shifts the parameters of the debate"[14] since 2004, which meets the Supreme Court's other test for reconsidering past precedents.

Of the three flaws in instrumental rationality, this article focuses, in particular, on the arbitrariness of s. 43 as that concept has been understood since *Bedford*. In the *Foundation* decision, concerns about the arbitrariness

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punishment defences, and where adequate longitudinal data exists (e.g., Sweden and Germany), "[c]oncerns about the criminalization of parents and the intrusion of child welfare authorities into families' lives have not been borne out." See Joan E. Durrant, "Corporal Punishment and the Law in Global Perspective" in James G. Dwyer, ed, *The Oxford Handbook of Children and the Law* (Oxford: Oxford University Press, 2020) at 18, online: <www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190694395.001.0001/oxfordhb> [perma.cc/3X94-8N24] [Durrant, "Corporal Punishment"].

10 *Foundation*, *supra* note 2.

11 *Bedford*, *supra* note 1.

12 *Ibid* at para 107. The Supreme Court adopted this way of characterizing arbitrariness, overbreadth, and gross disproportionality from Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 136.

13 *Bedford*, *supra* note 1 at para 42.

14 *Ibid* at para 42.

and overbreadth of the corporal punishment defence were melded into the Court's primary focus on the section's potential vagueness. Vagueness is now better understood as a distinct challenge to fundamental justice. In *Bedford* itself, in which the prostitution-related offences in the *Criminal Code* were declared unconstitutional, the Court specifically recognized that arbitrariness, overbreadth, and gross disproportionality "have, to a large extent, developed only in the last 20 years" and in a manner that now more clearly distinguishes them from the rule against vagueness.[15]

As will be discussed, since *Bedford*, the instrumental rationality analysis places a premium on the purposes of laws in the determination of their constitutionality. Laws that infringe s. 7's threshold rights to life, liberty, and security of the person will avoid characterization as arbitrary, overbroad, or grossly disproportionate only if those infringements are connected, in particular ways, to the purposes of the challenged laws. To avoid characterization as arbitrary, there must be some connection between the infringement of a threshold right and the purpose or object of the law. As an initial matter, this process requires the identification of the purposes of the laws in question. Furthermore, the *Bedford* decision demonstrates that if the Court has identified the purposes of laws in previous decisions (even ones that concerned different constitutional issues), then those statements of purpose will be significant for future instrumental rationality analyses. In the words of the Court, "[t]he doctrine against shifting objectives does not permit a new object to be introduced at this point."[16]

In *Foundation*, the Court accepted that the corporal punishment defence adversely affects children's right to security of the person.[17] However, in its perfunctory arbitrariness and overbreadth analysis – connected as these concepts were at the time with vagueness considerations – the majority did not seriously consider the connection between the infringement of this threshold right and the purpose of s. 43 of the *Criminal Code*, as the instrumental rationality analysis now requires.

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15 *Ibid* at para 45.

16 *Ibid* at para 132. In this regard, the Court in *Bedford* established a new outpost for the rejection of "shifting purposes" which was otherwise a concern in the context of considering whether laws that infringe *Charter* guarantees are reasonably justified under s. 1 of the *Charter*. See Mark Carter, "Sections 7 and 1 of the Charter after *Bedford*, *Carter*, and *Smith*: Different Questions, Same Answers?" (2017) 64:1/2 Crim LQ 108 [Carter, "Same Answers"].

17 This point was conceded by the Crown. See *Foundation*, *supra* note 2 at para 3.

Nevertheless, the Court in *Foundation* did contribute to our understanding of the purpose of s. 43 in a manner that can assist in the application of the current framework for assessing the section's arbitrariness. As it operated in *Foundation*, the vagueness doctrine analysis focused, unfortunately, on protecting the interests of adults using force against children rather than on the interests of children themselves.[18] Notwithstanding this, in the process of providing precision to otherwise unclear (i.e. vague) terms in the text of s. 43, the Court engaged in the kind of analysis of the "text, context, and scheme of the legislation" that the Court has subsequently identified as an important method of determining a law's purpose.[19]

In summing up its single paragraph on the overbreadth analysis, which follows and relies upon the vagueness inquiry, the Court in *Foundation* stated that "[s]ection 43 does not permit force that cannot correct."[20] The corollary of this assertion, therefore, which must be accepted as an important aspect of the purpose of the section, is that s. 43 only allows force that <u>can</u> correct. Furthermore, the Court was clear that the "corrective value" of force is to be established, not by the subjective beliefs of people engaging in this conduct,[21] but primarily by "expert evidence"[22] – as leavened occasionally in the decision by the more amorphous concept of "social consensus."[23] Indeed, "expert consensus" was critical to, and the explanation for, the Court's exclusion from the scope of the defence of any force used against children younger than three or older than 12 years. If there was any doubt in 2004, then the overwhelming weight of expert evidence is now clear that force is no more corrective within the age window established by the Court than outside of it. There is, therefore, no connection between the limitation that s. 43 places on children's right to

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18 Mark Carter, "The Constitutional Validity of the Corporal Punishment Defence in Canada: A Critical Analysis of *Canadian Foundation for Children, Youth and the Law versus Canada (Attorney General)*", (2005) 12:2 Intl Rev of Victimology 189 [Carter, "Critical Analysis"].

19 *R v Moriarity*, 2015 SCC 55 at para 31[*Moriarity*].

20 *Foundation*, *supra* note 2 at para 46.

21 *Ibid* at para 36: "It is wrong for caregivers… to apply their own subjective notions of what is reasonable; s. 43 demands an objective appraisal based on current learning and consensus."

22 *Ibid* at paras 36–41, 46.

23 *Ibid* at paras 36, 38.

security of the person and the purpose of the law. S. 43 is arbitrary, *tout court*.

The next part of this article briefly reviews the *Foundation* decision, paying particular attention to the s. 7 analysis in the case and the majority's consideration of the vagueness issue. Part III of the article discusses the significance of the *Bedford* decision for a reconsideration of s. 43's constitutionality, beginning with the standards established by the Court for revisiting past precedents. I then review the Supreme Court's recognition in *Bedford* of arbitrariness, overbreadth, and gross disproportionality as three principles of fundamental justice that are distinct as between themselves and from the concept of vagueness. In Part IV, I return to the *Foundation* decision, first applying the tests from *Bedford* for reconsidering past precedents to the s. 7 issues raised in that case. I then reconsider the object or purpose of s. 43 as it must be understood based on the majority's analysis of the terms of the section and the majority's exclusion from the ambit of the section all force used against very young children and teenagers, which experts agreed has no corrective value. The last part of the article emphasizes the lack of connection between the purpose of the corporal punishment defence as identified by the majority – to allow the application of force that has corrective value – and the limitation that it places on the security of children within the age window of vulnerability established by the Court.

II. *CANADIAN FOUNDATION FOR CHILDREN YOUTH AND THE LAW V CANADA (ATTORNEY GENERAL)*

A. The *Foundation* Case

The Supreme Court of Canada's *Foundation* case was the culmination of an attempt by a number of individuals and child advocacy groups to have the corporal punishment defence, as contained in s. 43 of the *Criminal Code*, declared unconstitutional. The action was brought pursuant to Ontario's *Rules of Civil Procedure* that provide for public interest litigation in certain circumstances.[24] As indicated by the trial judge, Justice McCombs of the Ontario Superior Court:

> This case is unusual because it does not come before the court with a factual underpinning, where one of the parties has raised a constitutional issue that impacts upon a case already before the court. Instead, this case was heard with

24 *Ontario's Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 14.05(3)(gl).

> special permission of the court, because it raises a serious legal question, and there is no other reasonable and effective way for the issue to be raised.[25]

The Foundation sought a declaration that the corporal punishment defence is unconstitutional and of no force and effect because it unreasonably infringes several sections of the *Charter*. Along with s. 7, which is the focus of this article, the Foundation argued that the defence justifies conduct that offends the protection against cruel and unusual treatment or punishment under s. 12 of the *Charter* and that the defence constitutes age discrimination, which offends the equality guarantees under s. 15 of the *Charter.* The Foundation was unsuccessful at trial, and the Ontario Court of Appeal dismissed the Foundation's appeal.[26] At the Supreme Court of Canada, Chief Justice McLachlin, writing for the majority,[27] also rejected all of the Foundation's arguments.[28] In dissent, Justice Arbour held that s. 43 is unconstitutionally vague under s. 7 of the *Charter.* Such vagueness meant that s. 43 is not a limit "prescribed by law" which is the threshold requirement for reasonable limitations of *Charter* rights under s. 1. In separated reasons, Justice Binnie and Justice Deschamps found infringements of s. 15. For his part, Justice Binnie found this limitation to be a reasonable infringement under s. 1 of the *Charter*, except insofar as the defence applied to teachers. Justice Deschamps would have declared the entire section to be of no force and effect.

B. The Section 7 Analysis in *Foundation*

1. The Structure of Section 7 Arguments

Parties challenging a law under s. 7 of the *Charter* have to establish first that the law "deprives" anyone of their right to life, liberty, or security of the person. The onus then remains on the challenger to establish that this limitation is not in accordance with the principles of fundamental justice.[29] If a challenger convinces the court that a law infringes s. 7 then, as with all *Charter* guarantees, the government can argue that the law represents a

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25 *Canadian Foundation for Children, Youth and the Law v Canada (AG)* (2000), 188 DLR (4th) 718 at para 8, [2000] OJ No 2535 (Ont Sup Ct) [*Foundation* 2000].

26 *Canadian Foundation for Children, Youth and the Law v Canada (AG)* (2002), 207 DLR (4th) 632, 52 WCB (2d) 277 (Ont CA).

27 *Foundation*, *supra* note 2.

28 For an extended review and critical analysis of the Supreme Court's decision see Carter, "Critical Analysis", *supra* note 18.

29 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536 [*BCMVA*].

reasonable limit under s. 1 of the *Charter*, pursuant to the framework established by the Supreme Court of Canada in *R v Oakes*.[30] The chances of s. 7 infringements being upheld under s. 1 of the *Charter* are very slim and, to date, no Supreme Court majority has supported such an outcome.[31]

2. Separate Representation for Children

Because the Crown conceded that s. 43 infringes children's right to security of the person, the Foundation's three s. 7 arguments concerned the principles of fundamental justice. One of these was a procedural argument. Since its earliest consideration of the nature of the term "principles of fundamental justice" in s. 7, the Supreme Court has recognized that they include, at least, procedural protections.[32] In *Foundation*, the challengers argued for recognition that in criminal proceedings that involve the invocation of s. 43, adequate procedural protection for the young complainants requires that they have independent legal counsel. The Supreme Court rejected this submission on the basis that the right to counsel for victims of alleged criminal activity has not been recognized by Canadian courts and, in any event, in criminal proceedings the Crown represents victims' interests.[33]

3. Best Interests of the Child Principle as a Principle of Fundamental Justice

The Foundation also argued that the concept of fundamental justice should be understood to include the "best interests of the child" ("best interests") principle and that sanctioning assaultive conduct toward children is not in accordance with that principle. In rejecting the best interests principle's inclusion within the concept of fundamental justice, the Court employed a three-part analytical framework that it established in *R v Malmo-Levine*; *R v Caine*,[34] a decision that had not been delivered when

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

31 Accordingly, while I will argue that s. 43 is arbitrary under s. 7, I will not engage in s. 1 analysis, which, I assume, would not be successful for reasons that I discuss in Carter, "Same Answers", *supra* note 16.

32 *BCMVA*, *supra* note 29. Also, see Mark Carter, "Fundamental Justice" in Mathew P. Harrington, ed, *The Court and the Constitution: A 150-Year Retrospective* (Toronto: LexisNexis, 2017) at 259 [Carter, "Fundamental Justice"].

33 *Foundation*, *supra* note 2 at para 6.

34 *R v Malmo-Levine; R v Caine*, 2003 SCC 74 [*Malmo-Lavine*].

Foundation was argued.[35] The Court held that the best interests of the child principle met the first requirement of being a "legal principle."[36] Bizarrely, however, the Court held that there is no societal consensus that the best interests of children is "vital or fundamental to our societal notion of justice"[37] or that it is a "foundational requirement for the dispensation of justice."[38] Accordingly, the best interests of the child principle did not meet the second, "societal consensus" requirement of the *Malmo-Levine* framework. Neither did the best interests of the child principle satisfy the Court's third requirement that principles of fundamental justice be "capable of being identified with some precision." In the Court's estimation, the best interests principle is "inevitably highly contextual and subject to dispute"[39] – something which might be said about many if not most legal principles, even those that have been recognized as part of the fundamental justice concept.

4. Vagueness

i. Protecting "Risk Takers"

As a principle of fundamental justice, the requirement that laws be adequately precise – not vague – serves important aspects of the rule of law concept. Laws that limit life, liberty, or security of the person have to be sufficiently precise that they provide an adequate basis for legal debate and "delineate… area[s] of risk, and thus can provide… fair notice to the citizen" as to the conduct that is prohibited. Laws also have to be precise enough to

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[35] As I argue in Carter, "Critical Analysis", *supra* note 17 at 204, a number of principles of fundamental justice that the Supreme Court had already recognized at this point in its s. 7 jurisprudence would not satisfy the *Malmo-Levine* framework.

[36] *Foundation*, *supra* note 2 at para 9.

[37] In a number of articles, I have criticized the circularity of the Court's reasoning in this regard. The majority suggests that since we have long-standing laws that are inconsistent with the best interests of the child (See *Malmo-Lavine*, *supra* note 34 at para 10: "[f]or example, a person convicted of a crime may be sentenced to prison even where it may not be in his or her child's best interests"), we must therefore conclude that there is no societal consensus as to the principle's fundamental character. See, for example, Carter, "Critical Analysis", *supra* note 18 at 203; Mark Carter,"'Blackstoned' Again: Common Law Liberties: The Canadian Constitution, and the Principles of Fundamental Justice" (2007) 13:2 Tex Wesleyan L Rev 343.

[38] *Foundation*, *supra* note 2 at para 10.

[39] *Ibid* at para 11.

provide "a limitation of enforcement discretion."[40] A law that fails to meet these standards of precision would be unconstitutionally vague.[41]

It will be noted that the focus of concern in this framing of the vagueness doctrine is the interests of the people engaging in potentially unlawful conduct. They are "risk takers" who will be interested in knowing what the law allows them to do or not to do, and they are the parties who will want to avoid arbitrary enforcement of the law. For these reasons, our understanding of the vagueness doctrine under s. 7 has been forged in the context of offences. S. 43, however, presents an entirely different situation. The reason that the matter was before the Court for s. 7 consideration had nothing to do with the rights of adults who may want to take the risk of engaging in assaultive conduct against children. These adults would, of course, not want to challenge the constitutionality of the defence except insofar as they are prevented from taking advantage of it. Rather, the s. 7 challenge in *Foundation* turned on the extent to which the corporal punishment defence limits the security interests of innocent third parties – children who may be subject to assaultive conduct. Accordingly, while the standard "frame" for the vagueness doctrine, with its primary concern for the interests of risk takers, may have been the only one that was available to the Foundation in making its arguments, that frame was entirely incapable of protecting the true interests that were at stake in the case. As I have argued elsewhere,[42] the vagueness analysis in *Foundation* has a surreal quality. It proceeded as if the parties who are most worthy of constitutional concern are the adults engaging in forceful conduct against children, rather than the children who are subject to that conduct.[43]

ii. Giving Precision to the Corporal Punishment Defence

Leaving these concerns aside, in *Foundation*, the Chief Justice characterized the applicant's vagueness argument in the following terms:

> [Section] 43 is unconstitutional because first, it does not give sufficient notice as to what conduct is prohibited; and second, it fails to constrain discretion in

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[40] *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 93 DLR (4th) 36 at 626–27.

[41] As noted above, Justice Arbour's dissenting opinion held s. 43 to be unconstitutionally vague.

[42] See Carter, "Critical Analysis," *supra* note 18 at 200–02.

[43] I thank Professor Anne McGillivray, Canada's leading legal scholar in this area, for bringing to my attention this strange inversion of the interests in the majority's decision. See also Judith Mosoff & Isabel Grant, "Upholding Corporal Punishment: for Whose Benefit" (2005) 31:1 Man LJ 177.

> enforcement. The concept of what is "reasonable under the circumstances" is simply too vague, it is argued, to pass muster as a criminal provision.[44]

The concept of force that is "reasonable under the circumstances," along with s. 43's reference to "force by way of correction," occupied the majority's attention as it concerned the vagueness doctrine. According to the Court, other relevant terms in s. 43 were unproblematic. In relation to who could take advantage of the defence, the section's references to parent and teacher were understood to speak for themselves. Chief Justice McLachlin also found that a "person standing in the place of a parent" had been adequately defined by the courts as "an individual who has assumed 'all the obligations of parenthood.'"[45]

Having identified the nature of the "conduct [that] falls within the sphere" of the section[46] as the only aspect of the defence that lacks precision, the Chief Justice proceeded to provide it. From her reading of precedents and expert evidence, Chief Justice McLachlin divined a "solid core of meaning"[47] for s. 43's terms. This core of meaning is reflected in requirements that, in the majority's estimation, rescue the section from characterization as being unconstitutionally vague. Two of these requirements relate, respectively, to the ages of the young people against whom force may be applied and the necessary "corrective" character of that force. As I argue below, these requirements are particularly significant for our understanding of the purpose of s. 43. This, in turn, will be essential to my assessment of the arbitrariness of the corporal punishment defence.

In *Foundation*, the Chief Justice alludes to the "agreement among experts" that force used against children younger than three or "teenagers"[48] has no "corrective value" and would be harmful to those infants and young people. By excluding from the concept of "reasonable force" under s. 43 force that is used against the very young and teenagers, the Court effectively established a ten-year window of vulnerability to corporal punishment for children aged three to 12 years. The implication is that the use of force

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44 *Foundation*, *supra* note 2 at para 13.

45 *Ibid* at para 21, citing Ogg-Moss v The Queen, [1984] 2 SCR 173 at 190, [1984] 2 RCS 173 [*Ogg-Moss*].

46 *Foundation*, *supra* note 2 at para 22 [emphasis in original].

47 *Ibid* at para 40.

48 *Ibid* at para 37: "Corporal punishment of children under two years is harmful to them, and has no corrective value given the cognitive limitations of children under two years of age. Corporal punishment of teenagers is harmful, because it can induce aggressive or antisocial behaviour."

against children within this window of vulnerability may have "corrective value" and is not harmful in the way that it is to those who are younger or older. In fact, the majority's decision is stunningly silent about the lack of any evidence of this. The most that can be drawn from the majority's engagement with expert evidence on this point is not that the use of force against children in this age group has corrective value, but only that it might not always be as harmful as it always is for those who are younger or older. This, then, undermines another requirement that the majority establishes for the kind of force that is justified under s. 43: that it be corrective in accordance with objective standards.[49]

The majority otherwise identified the conduct that is exempt from criminal sanctions under s. 43 as force that is of a minor "transitory and trifling nature,"[50] administered only by hand,[51] and below children's heads. Teachers may no longer use force "merely as corporal punishment." S. 43 now only protects force used by teachers that is intended to "remove... children from... classroom[s] or secure compliance with instructions." The necessary "corrective" character of the conduct that falls under s. 43 also excludes force that stems from "frustration, loss of temper or abusive personality."[52]

Quite apart from the specifics of the *Foundation* case itself, the majority's efforts to bring precision to s. 43 continue to raise challenging questions about the limits of the judicial role. For his part, Professor Hogg uses the *Foundation* example to discuss the general question: "[t]o what extent is it possible for a court to repair potentially unconstitutional vagueness by interpreting a challenged law to supply more precision?... [W]here does interpretation end and redrafting begin?"[53] This part of the majority's decision drew strong responses from the dissenting judges. Justice Arbour charged the Chief Justice with drafting "an entirely new provision."[54] Justice

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49 *Ibid* at para 40.

50 Although the Court did not indicate the source of this language, it seems significant that it is part of the definition of "bodily harm" under s. 2 of the *Criminal Code*: "bodily harm means any hurt or injury to a person that... is more than merely transient or trifling in nature."

51 This is the effect of the majority's prohibition on the use of "objects." See *Foundation*, *supra* note 2 at para 40.

52 *Foundation*, *supra* note 2 at para 40.

53 Peter Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Scarborough, Ontario: Carswell, 2007) at 47-64.8, 47-64.9.

54 *Foundation*, *supra* note 2 at para 190.

Binnie and Justice Deschamps expressed their respective concerns about "judicial amendment"[55] and crossing the line from "statutory interpretation into… legislative drafting."[56]

5. Arbitrariness and Overbreadth

In *Bedford*,[57] the Supreme Court recognized that arbitrariness and overbreadth had only recently developed their status as independent concerns of fundamental justice that are distinct from the vagueness doctrine.[58] The treatment of arbitrariness and overbreadth in *Foundation* reflects the older approach. Thus, in considering the potential arbitrariness of the section, the majority relates this to concerns about zones of risk and arbitrary enforcement of imprecise laws, which the vagueness doctrine guards against.[59] Similarly, concerns about the overbreadth of the section are addressed to the majority's satisfaction with "Parliament's decision to confine the exemption to reasonable correction." As indicated above, in the course of giving precision to the terms "force by way of correction" and force that is "reasonable under the circumstances" before engaging in the vagueness analysis, the majority restricted the breadth of the section by excluding as recipients of this conduct, children under two or older than 12 years.[60] None of this reflects the post-*Bedford* approach to the arbitrariness and overbreadth analysis that is primarily concerned with the connection between rights infringements and the purposes of laws.

III. *BEDFORD V CANADA (AG)*

A. Revisiting Past Precedents

In its unanimous decision in *Bedford v Canada (AG)*, the Supreme Court of Canada held three prostitution-related *Criminal Code* offences to be unreasonable infringements of s. 7 of the *Charter*. The offences of keeping or being in a bawdy-house[61] and communicating for the purposes prostitution[62] were held to be grossly disproportionate. The offence of living

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55 *Ibid* at para 81.
56 *Ibid* at para 216.
57 *Bedford*, *supra* note 1.
58 *Ibid* at para 45.
59 *Foundation*, *supra* note 2 at para 26.
60 *Ibid* at para 46.
61 *Criminal Code*, *supra* note 3, s 210.
62 *Ibid*, s 213(1)(c).

off the avails of prostitution[63] was held to be overbroad. In doing so, the Court was reconsidering the constitutionality of two offences – the bawdy-house and communicating provisions – that were upheld in the *Prostitution Reference*[64] in 1990. The unsuccessful s. 7 arguments in the *Prostitution Reference* case were based on the vagueness doctrine.

In *Bedford*, the Court considered the "vertical" *stare decisis* issue of lower courts' jurisdiction to depart from higher court precedents as had occurred in *Prostitution Reference*. The Court held that trial judges could do so if new legal issues were raised. These new issues included arguments based on provisions of the *Charter* that were not raised in earlier cases. The Court also accepted lower courts' jurisdiction to depart from otherwise binding precedent "if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."[65] As it concerned the "new legal issues" standard in *Bedford*, of particular significance to this discussion is the Court's finding that "the *Prostitution Reference* dealt with vagueness… [t]he principles raised in this case — arbitrariness, overbreadth, and gross disproportionality — have, to a large extent, developed only in the last 20 years."[66]

B. The *Bedford* Framework for Arbitrariness, Overbreadth, and Gross Disproportionality

The Supreme Court in *Bedford* confirmed the emergence of arbitrariness, overbreadth, and gross disproportionality in the jurisprudence as "three distinct principles" of fundamental justice.[67] This was the case notwithstanding courts' previous inconsistent application of the principles and a tendency to "commingle" them.[68] All three principles concern the relationship between limitations that laws impose on s. 7 rights to life, liberty, and security of the person and the laws' purposes. Laws are unconstitutionally arbitrary when there is no connection between the s. 7 infringement and the purposes of laws.[69] Laws that are overbroad are

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63 *Ibid*, s 212(1)(j).

64 *Reference Re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, [1990] 1 RCS 1123 [*Prostitution Reference*].

65 *Bedford*, *supra* note 1 at para 42.

66 *Ibid* at para 45.

67 *Ibid* at para 107.

68 *Ibid* at para 106.

69 *Ibid* at para 111.

"arbitrary in part": they are "so broad in scope that [they] includes some conduct that bears no relation to [their] purpose[s]."[70] Findings of gross disproportionality occur when laws' "effects on life, liberty or security of the person are so grossly disproportionate to [their] purposes that they cannot rationally be supported."[71] All of these defects represent critical failures in the "instrumental rationality" of laws.[72]

IV. THE CORPORAL PUNISHMENT DEFENCE AND INSTRUMENTAL RATIONALITY

A. Revisiting the *Foundation* Decision

1. Significant Developments in the Law

Since the *Foundation* decision, the law concerning s. 7 of the *Charter* has developed in a manner that meets the standard for revisiting otherwise binding precedents established by the Court in *Bedford.* Indeed, the arbitrariness, overbreadth, and gross disproportionality principles that have "emerged as central in the recent s. 7 jurisprudence,"[73] and which have significance for s. 43, are the same ones that led the Court in *Bedford* to revisit the *Prostitution Reference.* In *Carter v Canada (Attorney General)*,[74] the emergence of these principles also supported the Supreme Court's decision to revisit and reverse its decision in *Rodriguez v British Columbia (Attorney General)*[75] concerning the constitutionality of the assisted suicide offence. It is also significant that the Court's s. 7 analysis in *Bedford* was concerned with disentangling the principles of arbitrariness, overbreadth, and gross disproportionality from their connection to the vagueness doctrine in *Prostitution Reference*. As discussed above, in *Foundation*, arbitrariness and overbreadth were similarly melded into the vagueness analysis in a manner that is inconsistent with the contemporary approach to these principles as outlined in *Bedford.*

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70 *Ibid* at para 112.
71 *Ibid* at para 120.
72 *Ibid* at para 107.
73 *Carter v Canada (AG)*, 2015 SCC 5 at para 72 [*Carter*].
74 *Ibid.*
75 *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, [1993] 3 RCS 519 [*Rodriguez*].

2. Change in the Circumstances or Evidence

Another exception to the vertical *stare decisis* rule that the Court recognized in *Bedford* arises when there has been "a change in circumstances or evidence that that fundamentally shifts the parameters of the debate."[76] For example, in the *Carter* decision, along with the significant developments in the law concerning s. 7 of the *Charter*, the Court also found that the *Rodriguez* decision could be revisited based on changes in "the matrix of legislative and social facts" since *Rodriguez.*[77] Significantly, for this discussion, there existed at the time of *Rodriguez* evidence of "substantial consensus" in Western countries that a blanket prohibition [on assisted suicide] is necessary to protect" vulnerable people.[78] The Supreme Court in *Carter* was satisfied that there was evidence before the trial judge that could undermine the conclusions in *Rodriquez* about this substantial consensus.[79] This evidence included changes that had occurred since *Rodriguez* in relation to other jurisdictions that now allowed physician-assisted death.[80]

Comparable changes have occurred in relation to the banning of corporal punishment in other jurisdictions, which should be recognized as changes in circumstances or evidence since *Foundation.* At the time of the *Foundation* case, only eight countries explicitly banned physical punishment.[81] In June 2021, the Global Initiative to End All Corporal Punishment of Children reported that this group of countries had grown to 61 with 27 others committed to doing so.[82] Also, if in 2004 there was any degree of expert opinion that physical punishment of children could have "corrective value"– something which even the majority did not explicitly accept in *Foundation* – then that acceptance is gone. Writing in 2019, Dr. Joan Durrant of the University of Manitoba, a leading international expert on the subject, put it succinctly: "[d]ebates over corporal punishment's effectiveness have come to an end. No study has shown it to have long-term

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76 *Bedford*, *supra* note 1 at para 42.

77 *Carter*, *supra* note 73 at para 47.

78 *Ibid* at para 47.

79 *Ibid*.

80 *Carter v Canada (AG)*, 2012 BCSC 886 para 944.

81 *Foundation* 2000, *supra* note 25 at para 100. Those eight countries are Sweden, Finland, Denmark, Norway, Austria, Cyprus, Croatia, and Latvia.

82 "Global Initiative to end all Corporal Punishment of Children" (2018), online: *End Corporal Punishment* <endcorporalpunishment.org/countdown> [perma.cc/KK7M-V8V T].

benefits, while many have demonstrated its substantial and wide-ranging risks."[83]

B. Reconsidering the Object or Purpose of Section 43 of the *Criminal Code*

In its instrumental rationality analysis in *Bedford*, the Supreme Court demonstrated that after having established that a law limits the right to life, liberty, or security of the person, courts will next identify the object or purpose of the law,[84] before going on to consider the connection that exists between the rights limitation and that purpose or objective. *Bedford* also illustrates the Court's commitment to the idea that there exists a single "true" objective for every law.[85] In the instrumental rationality context, the Court indicated that it would not engage in any substantive analysis of the appropriateness of the legislative objectives or purposes in question, determining instead to take them "at face value."[86] Neither, however, will the Court accept any purpose that the Crown may proffer. In *Bedford*, the Supreme Court rejected the objectives for all three offences that the federal and provincial Attorneys General proposed, employing instead ones that were better supported by the "legislative record"[87] or precedent.[88] In *Carter*, the Court similarly rejected the purpose of the assisted suicide offence as proposed by the Attorney General for Canada, preferring instead a

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83 Durrant, "Corporal Punishment", *supra* note 9. The literature in support of this point is overwhelming. For a small sample, see the literature cited in fn 6.

84 In *Bedford*, in relation to each of the offences under review, and after having established that each of the three offences limit the right to security of the person of sex trade workers, the Court began its "fundamental justice analysis" with subsections titled "The Object of the Provision". See *Bedford*, *supra* note 1 at paras 130, 137, 146.

85 I consider this development at length in Carter, "Same Answers", *supra* note 16.

86 *Bedford*, *supra* note 1 at para 125.

87 In relation to the bawdy house offence, the objective proposed by the Attorneys General was the deterrence of prostitution. The Court accepted instead the "prevent[ion] [of] community harms in the nature of nuisance." See *Bedford*, *supra* note 1 at para 131.

88 In relation to the offence of living off the avails of prostitution, the Court rejected the Attorneys General's proposed objective "to target the commercialization of prostitution, and to promote the values of dignity and equality" accepting instead the Court's own fining in *R v Downey*, [1992] 2 SCR 10, the offence was targeted at "pimps and the parasitic, exploitative conduct in which they engage." See *Bedford*, *supra* note 1 at paras 137–38.

narrower version that, in the Court's determination, better accorded with the ruling in *Rodriguez*.[89]

Since the *Bedford* and *Carter* decisions, the Supreme Court has provided more guidance concerning the identification of legislative purposes for the instrumental rationality analysis. In *R v Safarzadeh-Markhali*,[90] the Court expanded upon the approach that it had recently laid out in *R v Moriarity*.[91] *Markhali* and *Moriarity* both concerned overbreadth challenges, but the approach should apply equally to the arbitrariness analysis. In *Markhali*, the Court stated:

> To determine a law's purpose for a s. 7 overbreadth analysis, courts look to (1) statements of purpose in the legislation, if any; (2) the text, context, and scheme of the legislation; and (3) extrinsic evidence such as legislative history and evolution.[92]

In this process, the Court cautions us to distinguish between legislative objectives and the means used to achieve the objectives. While the latter may assist in identifying the former, the concepts are distinct.[93] We are also directed to consider the "appropriate level of generality" with which to characterize a law's purpose: less general than an "animating social value" but not so narrow as to be a "virtual repetition of the challenged provision, divorced of context."[94] A statement of legislative purpose should be precise and succinct.[95] The Court also reiterated its position that the appropriateness of the purpose is not a concern. At this stage of the analysis, the objective will be taken "at face value" and it is assumed to be "appropriate and lawful."[96]

While a version of the corporal punishment defence has always been in the *Criminal Code*, there has been remarkably little consideration of its purpose. Prior to the *Foundation* decision, the leading authority on the meaning and scope of the corporal punishment defence was *Ogg-Moss v R*.[97] *Ogg-Moss* did not involve a constitutional challenge but, rather, a consideration of the scope of the terms "child" and "pupil" for the purposes

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89 *Carter*, *supra* note 73 paras 74–75.
90 2016 SCC 14 [*Markhali*].
91 *Moriarity*, *supra* note 19.
92 *Markhali*, *supra* note 90 at para 31.
93 *Moriarity*, *supra* note 19 at para 26.
94 *Ibid* para 28.
95 *Ibid* para 29.
96 *Ibid* para 30.
97 *Supra* note 45.

of a party wishing to take advantage of the defence. In *Ogg-Moss*, Justice Dickson stated that "a confident conclusion as to the purpose of s. 43 must await an accurate assessment of the meaning of its terms."[98] Justice Dickson did not provide that conclusion – confident or otherwise – but he did emphasize the connection between the meaning of the terms of the section and its purpose, a task that was undertaken by the Supreme Court in *Foundation.*

Among the sources to which we are directed in *Moriarity* and *Markhali* in order to determine legislative purposes, as suggested by Justice Dickson in *Ogg-Moss*, we are left primarily with "the text, context, and scheme of the legislation." Except insofar as it may be reflected by those terms, there is no separate statement of purpose for s. 43. In relation to "extrinsic evidence such as legislative history and evolution," the majority decision in *Foundation* commented on the rewording of the section as part of the 1953–54 revisions to the *Criminal Code.*[99] Before the revisions, the section indicated that the use of force by way of correction may be "lawful" in certain circumstances. "Lawful" was changed to the section's current indication that the use of corrective force may be "justified." As an aspect of its arguments as to the discriminatory nature of s. 43, the Foundation contended that the language of justification implies that the purpose of the section is to promote the idea that corporal punishment is "good for children."[100] The Court rejected this argument in a manner that suggests how limited the evidence of legislative history may be for s. 43: "[w]e do not know why ['lawful' was changed to 'justified']. We do know that the change was not discussed in Parliament, and that there is no indication that Parliament suddenly felt that the reasonable force in the correction of children now demanded the state's explicit moral approval."[101]

The most direct evidence of what must be taken to be the purpose of s. 43, therefore, arises out of the majority's "consider[ation of] its words and court decisions interpreting those words… [which] must be considered in

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98 *Ibid* at 183.

99 Also excluded from the section at this time was the relationship between masters and apprentices.

100 *Foundation*, *supra* note 2 at para 64.

101 *Ibid* at para 65. Anne McGillivray identifies the roots of s. 43 in Anglo Saxon and Roman sources and with its common law version articulated in William Blackstone's *Commentaries on the Laws of England*. See Anne McGillivray, "R v K (M): Legitimating Brutality" (1993) 16 CR (4th) 125 at 127–28.

context, in their grammatical and ordinary sense."[102] The majority held that the purpose of s. 43 is to "delineate a sphere of non-criminal conduct within the larger realm of common assault in a way that permits people to know when they are entering a zone of risk of criminal sanction and that avoids ad hoc discretionary decision making by law enforcement officials."[103] Based on the discussion above, it will be clear that this statement of purpose is framed in terms that address the specific concerns of the vagueness doctrine: zones of risk and *ad hoc* decision making. However, in the analysis of the section's terms that precede the consideration of the section's potential vagueness, Chief Justice McLachlin gave precision to the concepts of "force by way of correction" and "reasonable under the circumstances." The majority's conclusions in these respects must be understood to inform our understanding of s. 43's legislative purpose, even beyond the vagueness context. This would represent the kind of "accurate assessment of the meaning [of the section's] terms" that Justice Dickson pointed to in *Ogg-Moss* as the key to understanding the purpose of s. 43.[104]

In relation to the "force by way of correction" reference, in particular, it is important that the Chief Justice did not allow it to be determined by adults' subjective beliefs. Rather, the majority decision in this respect responded to expert consensus, at least in relation to uses of force that are never corrective, regardless of subjective belief. On this basis, the majority excluded from s. 43 any force used against children two years of age or younger and teenagers because expert consensus indicates that it has no "corrective value." This necessarily implies that force applied to children within the age window of vulnerability – three to 12 years old – does or at least may have corrective value according to the same standard used to exclude force used against younger and older people: expert consensus. All of this points to the fullest understanding of the majority's position as to the objective or purpose of s. 43: to bring precision to the "sphere of non-criminal conduct" that the section allows, and to avoid the *ad hoc* "decision making by officials," the conduct in question must not only reflect the objective characteristics that the Chief Justice identified – "transitory and trifling nature," administered only by hand, and below children's heads. The most precise and succinct statement of the purpose of s. 43 would have

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102 *Foundation*, *supra* note 2 at para 20.
103 *Ibid* at para 19.
104 *Ogg-Moss*, *supra* note 45 at 183.

to recognize that the force that it allows must have corrective value as determined most significantly by expert evidence.

C. The Arbitrariness of Section 43

1. The Unachievable Objective

Since the purpose of s. 43 as presented by the majority in *Foundation* is to allow only the kind of force against children that has "corrective value" as recognized by expert evidence, any rational connection dissolves between the rights limitation that the section imposes and its purpose. Although the majority in the *Foundation* decision could not, apparently, bring itself to say so, it may have been willing to concede the possibility of some corrective value in force used against children aged three to 12 years.[105] To repeat Dr. Durant's concise overview of current expert consensus in this regard, "[d]ebates over corporal punishment's effectiveness have come to an end. No study has shown it to have long-term benefits, while many have demonstrated its substantial and wide-ranging risks."[106] Therefore, according to the Court's own standards for determining what is force "by way of correction," s. 43 is arbitrary. Not only is there no expert consensus as to the corrective value of force used against children aged three to 12 years, but there is no evidence at all. There is, therefore, no connection between the limit that s. 43 imposes on children's right to security of the person and the objective of the law. Since the Court has told us that expert evidence must support the corrective potential of the use of force, we now know that s. 43's objective simply cannot be realized. None of this offends the Court's insistence in *Bedford* and *Moriarity* that the instrumental rationality analysis involves taking the objective of laws "at face value." Taking an objective at "face value" does not require accepting that it is realistic or achievable, even if it has traditionally been treated as such. In fact, "correcting" such traditional assumptions which have operated historically to compromise individual rights is precisely the concern of the *Charter* project including the arbitrariness doctrine.

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[105] This aspect of the majority's decision reflects a kind of logical sleight of hand. In fact, expert consensus that there is no corrective value in subjecting children of certain ages to force implies nothing but a lack of consensus – or perhaps no evidence at all – in relation to children who are not of those ages.

[106] Durrant, "Corporal Punishment", *supra* note 9.

2. The Arbitrariness of the Decade of Vulnerability

Because force used against children of any age has no corrective value, it is unnecessary to consider the obvious arbitrariness of the decade of vulnerability established by the majority in *Foundation* for children aged three to 12 years. Were rights denied to children in this age range for more legitimate reasons, important questions would arise about the lack of any objective differences between children on either side of these age lines: children who have just turned three years old, for example, or young people who are almost 13. Furthermore, the extraordinary role of the Court in establishing this age range gives additional currency to the dissenters' concerns about the majority's engagement in judicial legislating. In fact, in *AC v Manitoba (Director of Child and Family Services)*,[107] the majority upheld provisions of child protection legislation that used a specific age to limit young people's s. 7 rights. This legislation, however, did so in the interests of young people's well-being – to ensure that they receive medically necessary treatment – rather than to subject them to force so as to cause pain. Significantly, as well, the age limit in *AC* was saved from characterization as arbitrary and required to be applied flexibly, only because the legislation also recognized the principle that the majority rejected as part of fundamental justice in *Foundation* – the best interests of the child.[108]

V. CONCLUSION

Since the Supreme Court of Canada's important reformulation of fundamental justice themes under s. 7 of the *Charter* in the *Bedford* decision, the arbitrariness of the corporal punishment defence in constitutional terms is now clear. The purpose of the section, as established by the Supreme Court in the *Foundation* decision, is to allow caregivers to subject children to force that has "corrective value" as recognized primarily by expert evidence. In 2021, it is clear that the overwhelming weight of expert evidence recognizes no corrective value in corporal punishment. There is, therefore, no rational connection between the way that s. 43 deprives children of their security of the person interests under s. 7 and the purpose

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107 *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30.

108 See Mark Carter, "The Children's Trilogy: The Best Interests of the Child Principle and the Principles of Fundamental Justice" in Sanjeev Anand, ed, *Children and the Law: Essays in Honour of Professor Nicholas Bala* (Toronto: Irwin Law, 2011) 1.

of the section. Limits on rights in pursuit of unachievable purposes, are arbitrary limits.

The Constitutionality of Excluding Duress as a Defence to Murder

COLTON FEHR*

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 of duress. As such, a party to a criminal offence must plead the common

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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*].

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 moral involuntariness principle. See Martha Shaffer, "Scrutinizing Duress: The Constitutional Validity of Section 17 of the Criminal Code" (1998) 40 Crim LQ 444

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 <u>more likely</u> 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 duress to murder are well-positioned to strike down the mandatory minimum punishment applicable to murder.[17]

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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 <u>more likely</u> to appear voluntary and therefore inexcusable") [emphasis added].

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

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 person of their will.[21] Similarly, if the threat is not adequately close in time to the

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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.

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

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 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,

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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.

26 *Ibid*.

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 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

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[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.

[30] *Ibid* at paras 11–12.

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 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

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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.

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).

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 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

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[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.

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

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 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:

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[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.

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 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

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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.

[52] *Paquette*, *supra* note 2.

"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]

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

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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.
60 See *Willis*, *supra* note 10 at paras 114–16.
61 *Ibid* at para 116.

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]

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

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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 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.

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 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

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.

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.

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 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,

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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.

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

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

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 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.

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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.

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.

The "justified attacker" scenario is illustrative of a self-defence situation where the accused <u>cannot</u> 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 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

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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.

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

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. 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

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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.

91 *Ibid* at 135–42.

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

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 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 —

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.

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 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

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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.

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

99 *Ibid* at para 79.

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 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*.

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[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, "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).

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 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

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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*].

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 <u>does not come close</u> 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 <u>dramatically</u> 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 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*.

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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].

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 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

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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.

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

[123] Four years imprisonment as opposed to a life sentence.

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 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

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

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*.

The Availability of the Common Law Defence of Duress to Principals Charged with Murder: An Analysis of the Conflicting Appellate Decisions in *R v Willis (TAW)* and *R v Aravena*

ROBERT H. TANHA*

ABSTRACT

The topic of whether an accused charged as a party to murder can access the common law defence of duress has been a controversial subject in Canada. Unlike in Britain where the House of Lords in *R v Howe* categorically decided to deny the common law defence to all parties to the offence of murder, the law in Canada has been more hospitable to offenders charged with murder. Aiders and abettors and those charged under the common intention provisions of the *Criminal Code of Canada* are given access to the defence. The question of whether a principal to murder has access to the common law defence of duress has not yet been decided by the Supreme Court of Canada. In *R v Aravena*, the Court of Appeal for Ontario was inclined to the view that the defence be extended to principals to murder to give effect to the Charter principle of moral involuntariness. However, in a subsequent decision, *R v Willis (TAW)*, the Court of Appeal for Manitoba refused to follow *Aravena*, finding that the denial of the common law defence of duress to principals to murder, as provided for in s. 17 of the *Criminal Code*, was constitutional, based on a proper understanding and application of the principle of moral involuntariness. The Supreme Court of Canada refused leave from the decisions in both *Aravena* and *Willis*, leaving the law of duress confused and unsettled as between these two appellate decisions. In this article, it will be argued that there are five reasons to prefer the holding in *Aravena* to the holding in *Willis*.

I. INTRODUCTION

S. 17 of the *Criminal Code of Canada*[1] creates a defence of duress as an excuse[2] to the commission of most criminal offences where a crime is committed by an accused in response to threats of immediate death or bodily harm made against the accused.[3] This is subject to certain conditions being met, but the section expressly prohibits "persons" from relying on the defence for certain-named offences (considered to be too serious, from a policy standpoint, to be afforded protection under the defence),[4] not least the crime of murder,[5] regardless of the specific circumstances in which the duress arises:

> A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).[6]

However, there is also a common law defence of duress to the commission of criminal offences which applies to all criminal offences and

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

2 As Professor Mewett explains: "Duress is an excuse and the reason why it is an excuse lies not in the fact that there is no intention but in the fact that there is no responsibility in spite of the intention." See Alan W Mewett, "The Shifting Basis of Criminal Law" 6 Crim LQ 468 (1964).

3 Threats against an accused's property are not enough to trigger the statutory defence of duress. Nor are they enough to invoke the duress defence at common law. This was confirmed in *R v Ruzic*, 2001 SCC 24 [*Ruzic*]. In that case, the Supreme Court confirmed that the common law defence of duress requires that "the threat must be of death or serious physical harm to the accused or to a family member" (*ibid* at para 69).

4 See Stephen Borins, "The Defence of Duress" (1982) 24 Crim LQ 191 at 197.

5 Murder has always been exempted from the statutory duress defence in Canada: *R v Aravena*, 2015 ONCA 250 at para 28 [*Aravena*].

6 *Criminal Code, supra* note 1.

to all criminal offenders, except to principals to murder perhaps,[7] including to the offences designated as being excluded from the duress defence by s. 17 of the *Criminal Code*.[8] The common law defence exists by virtue of s. 8(3) of the *Criminal Code*. That section reads:

> Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.[9]

In *Aravena*, the Court of Appeal for Ontario held, albeit in *obiter*, that the common law defence of duress was likely available to an accused who is charged as a principal to murder. In the absence of a compelling justification being raised by the Crown to justify the exclusion, denial of the duress defence was a violation of the *Charter's* principle of moral involuntariness, protected by s. 7 of the *Charter*. In *Willis*, the Court of Appeal for Manitoba refused to follow *Aravena's obiter* comments, denying the duress defence to an accused charged as a principal to murder in that case accordingly.[10] The Supreme Court of Canada refused leave to appeal from both the decisions in *Aravena*[11] and *Willis*,[12] leaving the state of the law on the availability of the common law defence of duress to principals to murder confused and unsettled as between these two appellate decisions.

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7 See *R v Willis (TAW)*, 2016 MBCA 113 [*Willis*] and the Court's discussion of "Hale's Rule" beginning at para 28; *Contra*, *obiter* comments of the Court in *Aravena, supra* note 5 at para 86. But see *R v Ryan* 2013 SCC 3 at para 83 [*Ryan*] where the Supreme Court of Canada states that it is "unclear" whether the common law defence of duress applies to principals of crime and does not rule it out. As with Canadian courts, the English authorities have struggled with whether to extend the common law defence of duress to parties charged with murder. In the House of Lords's most recent decision on the common law defence of duress, both principals and aiders and abettors are denied access to the defence. See *R v Hasan*, [2005] UKHL 22 at para 21, [2005] 2 AC 467 (Eng), as cited in *Willis, supra* note 7 at para 31.

8 *Borins*, *supra* note 4 at 19.

9 *Criminal Code, supra* note 1.

10 *Supra* note 7 at para 186. That said, the Court found that the defence of duress would have been unavailing to the appellant in any case, since, even if the duress defence was available to principals to murder, the Crown had proved there was no air of reality to the defence since a reasonable person in the position of the appellant, would have contacted the police for protection in response to the threats that had been made against the appellant and his family previously.

11 *Aravena, supra* note 5.

12 *Willis, supra* note 7.

In this article, I argue that the approach endorsed in the *obiter* comments of the Court of Appeal for Ontario in *Aravena*, stating that the common law defence of duress is available to a principal charged with murder, is more consonant with the Supreme Court's trilogy of decisions on duress in *Hibbert, Ruzic,* and *Ryan*. Where the contours of the defence are to be determined and guided by the principle of moral involuntariness emanating from s. 7 of the *Charter*. There are five reasons to prefer the holding in *Aravena* to the holding in *Willis*:

1. *Aravena* does not use the principle of the sanctity of life, or the norm of not killing innocent people, to subordinate the value of the accused's life to the victim's life in its analysis of the principle of moral involuntariness.

2. *Aravena* does not conflate the principle of moral involuntariness with the principle of moral blameworthiness.

3. The Court in *Willis's* view that an accused, in a kill or be killed situation, will always have a legal alternative to murder, such as by availing themselves of a safe avenue of escape by contacting the police for protection, is fallacious and demonstrably false.

4. *Aravena* does not subordinate the *Charter* principle of moral involuntariness to the concept of Parliamentary supremacy or historical legitimacy.

5. *Aravena* does not allow the view of the English authorities on the unavailability of the common law defence of duress to parties charged with the offence of murder to detract from the binding Supreme Court of Canada authority on duress.

This article is divided into nine parts. Part II considers the Supreme Court of Canada's decision in *Paquette v R*, restricting the scope of the offences designated as being excluded from the duress defence by s. 17 of the *Criminal Code* to the principals to offences only.[13] Parts III, IV, and V, respectively, consider the Supreme Court's three most recent decisions on duress in *Hibbert*, *Ruzic*, and *Ryan*. Part VI considers the Court of Appeal for Ontario's decision in *Aravena*, holding that the common law defence of duress is likely available to principals to murder notwithstanding the terms of s. 17 of the *Criminal Code*. Part VII considers the Court of Appeal for Manitoba's decision in *Willis*, holding that the common law defence of duress is not available to principals to murder. Part VIII considers my five reasons for why the holding in *Aravena* should be preferred to the holding in *Willis*. Although my conclusion in Part IX reiterates the argument that the Court's decision in *Willis* be rejected in preference for the approach endorsed by the Court in *Aravena*, alternative approaches to the use and

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

availability of the defence of duress in Canadian criminal law will be reviewed to address a general concern implicated in all the judicial decisions considered herein. That is, that the defence of duress not be made too readily available to excuse the otherwise criminal conduct of an accused.

II. *PAQUETTE*

In *Paquette*,[14] the Supreme Court held that s. 17 of the *Criminal Code*, by its own terms, applies only to principals[15] to crime but not to persons who are made a party to an offence in a different way, such as by common intention, or by aiding or abetting.[16] Accordingly, the defence was re-opened to all offences for these three categories of parties to an offence, including those offences designated as being excluded from the duress defence by s. 17 of the *Criminal Code*. The defence remained closed to the principals to

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14 *Ibid.*

15 S. 21(1)(a) of the *Criminal Code*, *supra* note 1, defines a principal offender as a person "who actually commits the offence", rather than merely aids or abets in the commission of the offence. While "Canadian criminal law does not distinguish between the principal offender and parties to an offence in determining criminal liability" (*R v Briscoe*, 2010 SCC 13 at para 13), it does make this distinction for the purpose of determining accessibility to the common law defence of duress. Indeed, while aiders and abettors of all offences have access to the common law defence of duress, as per the Supreme Court of Canada's decision in *Paquette*, *supra* note 13, the same cannot be said of principal offenders to certain offences who are denied access to the duress defence by virtue of s. 17 of the *Criminal Code*. See e.g. *Willis*, *supra* note 7.

16 In Britain, the same technical distinction was made by the House of Lords in *Northern Ireland v Lynch*, [1975] AC 653 [*Lynch*] where access to the duress defence was provided to an accused who acted as a principal to murder in the second degree (as an aider and abettor) rather than in the first, where the defence was unavailable as a matter of law (see *Abbott v R* [1977] AC 755). The decision in *Lynch* was repudiated by the House of Lords in *R v Howe*, where the House found the distinction between principals and aiders and abettors to be untenable, stating that the duress defence was not available to an accused charged as a party to murder, regardless of their level of participation or degree of culpability: Ian Dennis, "Developments in Duress" (1987) 51 J Crim L 463. This remains the English view of the law to this day and is in stark contrast to the received view in Canada where aiders and abettors are given access to the common law duress defence for all crimes, including the offences designated as being excluded from the duress defence by s. 17 of the *Criminal Code*. And where some courts have chosen to extend the duress defence to principals to murder despite the murder exclusion for principals contained in s. 17: see, for example, *R v Sheridan* [2010] OJ No 4884, 224 CRR (2d) 308 [*Sheridan*].

the offences designated as being excluded from the duress defence by s. 17.[17] Thus, the dispositive question becomes: can the offender be classified as a party to the offence as an aider, abettor, or by common intention – rather than as a principal offender – to fall within the scope of the common law defence of duress in order to possibly be excused of murder?[18]

In *Paquette*, during the course of a robbery at the accused's former place of employment, an innocent bystander was killed by a bullet fired from a firearm operated by the accused's colleague, Simard. The robbery had been committed by Simard and Clermont (another associate of the accused), together with the accused. The accused was not present when the robbery occurred or when the shooting happened. Simard and Clermont were unable to get into the accused's vehicle following the commission of the crimes, despite two attempts to do so, meaning that the accused was unable to drive them away from the scene of the robbery and murder.[19]

The accused had driven Clermont and Simard (both of whom were armed with rifles) to the Pop Shoppe under threat of death by Clermont. He had initially refused to carry out the transport, but later agreed to conduct it after Clermont drew a gun on him and threatened to kill him. Later, he stated that he was threatened with "revenge" if he did not wait for Clermont and Simard after the robbery was completed to drive them away from the scene of the crime. He further claimed that he had been threatened with death if he "squealed" on his colleagues, and that after the crimes had been committed, he had told his girlfriend that his participation was

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17 While the accused in *Paquette* was made a party to the offence of murder under the common intention provisions contained in s. 21(2) of the *Criminal Code*, the principle established by the Supreme Court of Canada in *Paquette* has been read by courts, including the Supreme Court of Canada, to extend to aiders and abettors as well: *Aravena*, *supra* note 5 at para 24; *Willis*, *supra* note 7 at paras 25, 30. A party to an offence is guilty of committing that offence (e.g. murder), rather than a separate offence connected with the crime such as accessory after the fact. See *Criminal Code*, *supra* note 1, s 23; *R v Hibbert* [1995] 2 SCR 973 at para 26, 99 CCC (3d) 193 [*Hibbert*].

18 Edward Claxton, "Paquette v. The Queen" (1977) 15:2 Osgoode Hall LJ 436 at 437-438; *Willis*, *supra* note 7 at para 178. The critical, determinative, and, in some cases, unfair and arbitrary nature of using the distinction between principals and aiders/abettors/offenders by common intention to determine the availability of the common law defence of duress could be ameliorated if the Supreme Court of Canada were to interpret s. 17 as being in breach of s. 7 of the *Charter's* principle of moral involuntariness in not allowing the principal offenders of 22 crimes access to the duress defence. See e.g. *Sheridan*, *supra* note 16; Peter Rosenthal, "Duress in the Criminal Law" (1990) 32:199 Crim LQ 199 at 217-220.

19 *Paquette*, *supra* note 13 at 191.

"compelled." Finally, there was evidence that he had refused to allow his two accomplices (Simard and Clermont) to re-enter his vehicle after they had left the store, further signifying his unwillingness to help his accomplices escape from the crimes they had committed.[20]

The accused was charged as a party to non-capital murder pursuant to s. 21(2) of the *Criminal Code*. That section reads:

> Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.[21]

Because he had not committed the non-capital murder (or acted as an aider or abettor in the murder) but had merely formed an intention in common with Simard and Clermont to commit "an unlawful purpose" [the robbery] that he "knew, or ought to have known," could have [non-capital murder] as a "probable consequence" of carrying out that unlawful purpose, he had to be charged as a party to murder under s. 21(2) of the *Criminal Code*. He contested this murder charge based on the defence of duress. The Supreme Court held that s. 17's use of the specific words "a person who commits an offence," instead of the wording "a person who is a party to an offence,"[22] meant that the section could have no applicability to aiders, abettors, and those offenders made a party to an offence by common intention. "In my opinion s. 17 codifies the law as to duress as an excuse for the actual commission of a crime, but it does not, by its terms, go beyond that."[23] In the result, the defence of duress was available to the accused, since, unlike Simard and Clermont, he was not a principal to the offence of

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20 *Ibid*. In terms of the evidence in support of duress, the accused did not testify at trial. The aforementioned evidence came from three statements that he made prior to trial: namely, a written statement and an oral statement made to police; and an oral statement made to his girlfriend the day after the robbery occurred (*ibid*).

21 *Criminal Code, supra* note 1, s 21(2).

22 In *Aravena*, *supra* note 5 at para 24, the Court of Appeal for Ontario, per Doherty and Pardu JJ A, asserted that they found, both from a policy standpoint and based on the actual wording of s. 17 of the *Criminal Code*, that the reasons given by the Supreme Court in *Paquette* for its narrow reading of s. 17, were "far from compelling". That said, the Court did not refuse to follow *Paquette* or suggest a return to the prior law as set out in the Supreme Court's decision in *R v Carker*, [1967] SCR 114, [1967] 2 CCC 190 [*Carker*], where it was held that all parties to an offence, regardless of whether they were aiders, abettors, or principals, were denied access to the duress defence for all the crimes listed in s. 17 of the *Criminal Code*.

23 *Paquette*, *supra* note 13 at 194.

non-capital murder, but had merely formed an intention in common with these men to commit a robbery (the unlawful purpose) and to assist them therein, leading to the murder (the probable consequence of the unlawful purpose).

III. *HIBBERT*

In *Hibbert*, the Supreme Court affirmed the common law principle it had established in *Paquette*, holding that the exclusions from the duress defence enumerated in s. 17 of the *Criminal Code* applied only to principals to offences and had no applicability to parties to an offence by aiding, abetting, or by common intention:[24]

> Accordingly it remains open to persons who are liable as parties to offences to invoke the common law defence of duress, which remains in existence by virtue of s. 8(3) of the Code (which preserves those common law defences not expressly altered or eliminated by Parliament). . . The holding in *Paquette* that the common law defence of duress is available to persons liable as parties is clear and unambiguous, and has stood as the law in Canada for almost twenty years.[25]

The Supreme Court studied the relationship between the defence of duress and the other excuses and justifications recognized in the criminal law[26] and found the defences of duress and necessity to be so similar that the theoretical underpinnings and underlying rationale of the two defences had to be the same:

> As I noted earlier, the common law defences of necessity and duress apply to essentially similar factual situations. Indeed, to repeat Lord Simon of Glaisdale's observation, "[d]uress is...merely a particular application of the doctrine of "necessity"". In my view, the similarities between the two defences are so great that consistency and logic requires that they be understood as based on the same juristic principles. Indeed, to do otherwise would be to promote incoherence and anomaly in the criminal law. In the case of necessity, the Court has already considered the various alternative theoretical positions available (in *Perka*, *supra*), and has expounded a conceptualization of the defence of necessity as an excuse, based on the idea of normative involuntariness. In my opinion, the need for consistency and coherence in the law dictates that the common law defence of duress also be based on this juridical foundation. If the defence is viewed in this light, the answers to the questions posed

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24 *Hibbert*, *supra* note 16 at paras 19–20.

25 *Ibid*. Agreement with this interpretation of *Hibbert* can be found in *Aravena*, *supra* note 5 at para 35.

26 *Ibid* at paras 47–54.

in the present appeal can be seen to follow readily from the reasons of Dickson J. in *Perka*.[27]

The principle of moral involuntariness was found to animate and unify both the defences of duress and necessity. The centrality of the principle of moral involuntariness to determining the availability of the defence of duress was established by the Supreme Court in this case.

In *Hibbert*, the accused fortuitously bumped into Bailey, who was a drug dealer and a person known to him. Bailey told him he was armed with a handgun and ordered the accused to take him to Cohen's apartment (a mutual acquaintance of theirs). When he refused, Bailey punched him in the face numerous times. Because the accused feared that Bailey might take his life if he did not cooperate, he drove to a telephone booth as ordered by Bailey and placed a telephone call to Cohen, asking him to meet him in the lobby of his apartment building in twenty minutes. When the accused and Bailey arrived at the building, the accused used the building's intercom outside of the lobby to advise Cohen to "come down," at which point Cohen opened the front door to allow the accused into the lobby of the building. Unbeknownst to Cohen, Bailey walked into the lobby with the accused, armed with a handgun. When Cohen appeared, he was grabbed by Bailey. After some discussion between them, Bailey pushed Cohen away and shot him. The evidence was conflicting as to what the accused did during this exchange: the accused testified that he had repeatedly implored Bailey not to shoot Cohen, while Cohen (who survived the shooting) testified that the accused had said nothing and had failed to intervene in the conflict. After the shooting, the accused drove Bailey away from the scene of the crime. The next morning, the accused turned himself into the police in connection with the incident.[28]

For this crime, the accused was charged with attempted murder under the *Criminal Code* and was made a party to that offence under s. 21(1)(b) of the *Criminal Code*. Since he had aided Bailey in carrying out the offence in a number of respects, including in transporting Bailey to Cohen's residence and in helping him lure Cohen down to the lobby of the building so that he could be shot by Bailey.

In resolving the duress issue, the Supreme Court decided to extend the principle from *Paquette* to the accused, making the duress defence available to offenders charged as an aider under s. 21(1)(b) of the *Criminal Code*.

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27 *Ibid* at para 54.
28 *Ibid* at paras 2–11.

While s. 21(1)(c) dealing with abettors was not before the Court, the Court's statements in *Hibbert* support extending the allowance for accessing the duress defence, established in *Paquette*, to abettors under s. 21(1)(c) of the *Criminal Code* as well:

> In Paquette v. the Queen, however, this Court determined that s. 17 of the *Code* does not constitute an exhaustive codification of the law of duress. Rather, the Court held that s. 17 applies only to persons who commit offences as principals. Accordingly, it remains open to persons who are liable as parties to offences to invoke the common law defence of duress.[29]

IV. *RUZIC*

In *Ruzic*, the Supreme Court found the "presence and immediacy requirements" contained in s. 17 of the *Criminal Code* to be unconstitutional, severing those requirements from the section accordingly. Specifically, those requirements violated s. 7 of the *Charter* in a manner that could not be saved by s. 1 of the *Charter* because they had the "potential of convicting persons who have not acted voluntarily." This was a violation of the principle of moral involuntariness which the Supreme Court found to be enshrined in s. 7 of the *Charter*. The stipulation in s. 17 that the threatened harm be directed at the accused, rather than a third party, before an accused could qualify for the duress defence, was also found to be constitutionally infirm since it, too, could result in the conviction of a person whose actions were morally involuntary.[30] Not surprisingly, the constitutional defects found by the Supreme Court to be present in s. 17 of the *Criminal Code*, were prompted by a consideration of the specific circumstances that the accused had been facing in the case:

- The threat of harm that had been made against the accused was not made to have an immediate effect; the threat was to be carried out at some point in the future [no immediacy].
- The threatener was not present when the crimes were committed [no presence].

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[29] *Ibid* at para 19.

[30] That said, the Supreme Court noted that not all restrictions on, or removals of, criminal defences by Parliament under its criminal law power will breach s. 7 of the *Charter*. The Court cited the instance of removing a defence for a crime where the availability of the defence is antithetical to the very wrong that the criminal offence aims to proscribe such as an intoxication defence in the context of a drinking and driving offence: *Ruzic*, *supra* note 3 at para 23.

- The threat of harm, while conveyed to the accused, was directed at the accused's mother and not at the accused herself [no threat to accused].

The rule from *Paquette* allowing aiders, abettors, and those persons who commit an offence by common intention unrestricted access to the common law defence of duress was not before the Supreme Court in *Ruzic*. The offences for which the accused stood charged were not offences included in the list of the 22 offences excluded from the duress defence in s. 17. So, the constitutionality of these exclusions was not before the Court in this case. Still, the Supreme Court's *obiter* comments in *Ruzic* on *Paquette* reaffirmed the rule established by the Court in that case, making the common law defence of duress available to aiders, abettors, and offenders made a party to an offence by common intention:

> It [the common law defence of duress] was never completely superseded by the provision of the *Criminal Code* [my addition]. The Court held in *Paquette* and *Hibbert*, *supra*, that the common law defence remained available, notwithstanding s. 17, to parties to an offence (as opposed to persons who committed an offence as principals).[31]

The Supreme Court endorsed Chief Justice Lamer's observation from *Hibbert*, that the "law relating to duress has been plagued, nonetheless, with some uncertainties and inconsistencies since the beginning of its development."[32] The Court found some incoherence in the law of duress to be "understandable" and desirable since the rules on duress have to consider three discrete and divergent interests:

- [T]he perspective and rights of the threatened party [the accused].
- [T]he rights of third parties, not least the intended victims [the victim].
- [T]he interest of society in the preservation of the public order and in the proper upholding of the law [society].[33]

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31 *Ruzic*, *supra* note 3 at para 56.

32 See generally Kent Roach, "The Duress Mess" (2013) 60 Crim LQ 159 [Editorial]. This has been especially true of the rules on the admissibility of the common law defence of duress to parties to murder, where today we are still awaiting the final word from the Supreme Court of Canada on whether the defence is available to principals to murder (as opposed to just aidors and abettors) to resolve the contradictory appellate decisions in *Aravena* and *Willis*. Not surprisingly, other common law jurisdictions, such as Britain, have experienced similar challenges. See S J Bone & L A Rutherford, "Murder under Duress: Awaiting the Final Word" (1986) 50 J Crim L 257; Ada Kewley, "Murder and the Availability of the Defence of Duress in the Criminal Law" (1993) 57 J Crim L 298.

33 *Ruzic*, *supra* note 3 at para 58.

The accused's interests will often be opposed to the state's interest in the preservation of the public order since the accused's conduct, even if the result of compulsion, still breaches the criminal law and still endangers public safety and the public order. The situation is most serious, of course, when the crime is murder, since that offence is the most serious crime known to Canadian law and most seriously threatens the preservation of public order and the just upholding of the law. Likewise, the victim's interest in not being harmed or killed will usually be at odds with the accused's interest in protecting themselves from harm or death.

In *Ruzic*, the accused landed at Pearson Airport in Toronto and was found to be in possession of two kilograms of heroin, which was strapped to her body, together with a false Austrian passport. The accused argued that a circumstance of duress had caused her to commit the crimes. Specifically, the accused explained that while she was in Belgrade, Serbia, living with her mother in an apartment, a third-party male who she believed to be a member of an organized crime group had approached her and threatened to harm her mother if she did not agree to transport the heroin from Belgrade to Canada. Accordingly, she said she had committed the crimes to avoid the harm that might befall her mother if she did not do so. Because the accused believed that the police in Belgrade were corrupt, she did not seek the assistance of police, nor did she tell anyone about the occurrences for fear that her and her mother would be harmed.[34]

Because the accused's situation <u>did not</u> meet the immediacy and presence requirements of s. 17 of the *Criminal Code*, or the requirement that the threat of harm be made against the accused's person rather than a third party's, the accused challenged the constitutionality of these three requirements based on the principle of moral involuntariness under s. 7 of the *Charter*.[35] At the Supreme Court, this challenge was successful and the accused was permitted access to the duress defence, resulting in the accused's acquittal. Thus, the duress defence contained in s. 17 was re-opened to the accused even though the threat of harm made against her could not be carried out immediately; the threatener making the threat of death or bodily harm was not physically present with the accused when the

[34] *Ibid* at paras 1–7.
[35] *Ibid* at paras 9–10.

crime was committed; and the threat of injury was directed at the accused's mother, rather than the accused herself.[36]

V. *RYAN*

In *Ryan*,[37] the Supreme Court did not have to consider whether to apply the rule from *Paquette* to give the accused access to the duress defence, since the crime in issue – counselling the commission of a crime not committed – was not an offence designated as being excluded from the duress defence by s. 17 of the *Criminal Code*. Still, the Supreme Court's *obiter* comments in this case reaffirmed the principle established by the Court in *Paquette*.[38]

In *Ryan*, the Supreme Court was presented with a novel fact scenario in which a battered wife was seeking to rely on the duress defence with respect to the charge of counselling the commission of her husband's murder not committed, contrary to s. 464(a) of the *Criminal Code*. The accused was charged with this offence after she hired a hit man to kill her abusive husband because he had previously, and repeatedly, threatened her and her daughter with harm and death. The man hired to commit the murder was an undercover RCMP officer posing as a "hit man" and the murder was never carried out.[39] The party/principal distinction from *Paquette* was unimportant for two reasons. First, the accused had acted as a principal offender within the meaning of s. 21(1)(a) (i.e., she had committed the offence herself). She was not an aider, abettor, or an offender who had committed the offence by common intention. Second, her crime was not an offence that was designated as being excluded from the duress defence by s. 17 of the *Criminal Code*.

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36 *Carker*, *supra* note 21, is instructive of how the previous stringent requirements contained in s. 17 could result in the conviction of morally involuntary conduct because of the unfair denial of the duress defence. There, the accused committed the offence of mischief in wilfully damaging public property, in connection with a prison riot. He claimed duress because other inmates had made threats to kill him or seriously harm him if he did not participate in the criminal acts. Because he was not threatened with "immediate death or bodily harm" (the inmates who had made the threats were locked up in separate jail cells and could not carry them out), and because the threateners were not present with him in his jail cell when he committed the offence, he was disqualified from relying on the defence.

37 *Supra* note 7.

38 *Ibid* at para 42.

39 *Criminal Code*, *supra* note 1, s 464(a).

That said, the accused had a more fundamental problem, which was whether the defence of duress was available to her at all. Given that the traditionally required elements of duress were missing: the accused had not committed the crime in reply to a specific threat made against her by a third party. Instead, she was seeking to have her husband killed by a hitman to preserve the life and safety of herself and her daughter because she feared, based on his pattern of threatening and violent behaviour, that he would harm them. In short, the accused was trying to pre-empt the culmination of her husband's threats and violent behaviours, which she believed (perhaps not unreasonably) could soon lead to serious bodily harm, or death, to herself and her daughter.

The Supreme Court clarified that there is a different set of triggering facts for the defence of duress than for the defence of self-defence. For duress to apply, the accused's actions must arise from a threat of death or bodily harm such that the accused's actions can be said to be morally involuntary. The accused's conduct did not fall within that definition (even if it could be said that her actions arose out of sense of urgency and were "morally involuntary" in that sense). According to the Supreme Court, where an accused is threatened outside of the foregoing circumstances with death or bodily harm, the accused's only recourse in law is to the defence of self-defence since duress will not be available to them.[40]

The Supreme Court continued to stress the fundamental importance of the *Charter's* principle of moral involuntariness to understanding and delineating the defence of duress:

- [T]he principle of moral involuntariness represents the "rationale underlying duress."
- [T]he principle of moral involuntariness is a principle of fundamental justice, protected by s. 7 of the *Charter*.
- [T]he elements of the substantive legal test for duress are heavily influenced by the principle of moral involuntariness.
- [U]nder the principle of moral involuntariness, the accused's criminal act is still considered to be wrong and is not equal to moral blamelessness; instead, it is conduct that is entitled to be excused by the criminal law.
- [T]he principle of moral involuntariness is an organizing principle of the criminal law; only the voluntary actions of an accused should be punished by the criminal law; not the actions committed by an accused where they had no

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40 *Supra* note 7 at para 29.

"realistic choice" but to commit the crime they did due to the duress they faced.

- [T]he statutory duress defence should continue to be interpreted in accordance with the *Charter* principle of moral involuntariness and other *Charter* values.[41]

VI. *ARAVENA*

In *Aravena*, the Court of Appeal for Ontario overruled the trial judge in the court below, who had found in a pre-trial ruling that the common law defence of duress did not apply to the murder charges facing any of the appellants, regardless of whether they were offenders by aiding, abetting, or by common intention rather than being perpetrators of the crimes.[42] Accordingly, the trial judge did not have to address the constitutionality of the murder exemption contained in s. 17 of the *Criminal Code*.[43] The trial judge's "absolutist position" on the unavailability of the duress defence to offenders charged with murder was well expressed in the learned judge's instruction to the jury at trial, in relation to the threat allegedly made against the appellant, Aravena, by the appellant, Kellestine:

> Duress is not available as a matter of law to a charge of murder, and for other legal reasons I need not get into, it is entirely irrelevant to this case. In a nutshell, it is not open to anyone to say to an innocent victim "you will die so that I can live."[44]

On appeal, the Court of Appeal, per Justices Doherty and Pardu, disagreed with the trial judge's position on the unavailability of the duress defence to parties charged with murder. They affirmed and applied the rule from *Paquette*, stating that the common law defence of duress is available to parties to an offence by aiding, abetting, or by common intention, including on a charge of murder.[45] Since all the appellants raising a duress defence

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[41] *Ryan*, *supra* note 7 at paras 23, 40–44.

[42] *Aravena*, *supra* note 5 at para 13. That said, the trial judge did find that duress was available to the appellants on the included charge of manslaughter because manslaughter was not an offence designated as being excluded from the defence by s. 17 of the *Criminal Code*.

[43] *Ibid* at para 29.

[44] *Ibid* at para 16.

[45] *Ibid* at para 85. While the Court opined that they found the justification for the rule established in *Paquette* to be less than convincing, the Court did not retreat from the rule. See discussion at *supra* note 21.

were aiders and abettors, as per the rule in *Paquette*, the common law defence of duress was available to them.

In *Aravena*, six criminal associates – the appellants Kellistine, Mushey, Sandham, Mather, Aravena, and Gardiner – were charged with eight counts of first degree murder in connection with the deaths of eight members of the Toronto Bandidos motorcycle gang who were shot and killed on a farm property owned by the appellant, Kellistine, in Shedden, Ontario.[46] As a dissident member of the Toronto chapter, Kellistine had orchestrated the murders to "pull the patches" from the remaining members of the Toronto gang, as the American Bandidos were displeased with the Toronto chapter. Kellistine had solicited the assistance of the Winnipeg members of the group to carry out the task. Kellistine, together with the appellants Mushey and Sandham, were alleged to be the shooters and were convicted by a jury following trial of all eight counts of first-degree murder.

The remaining appellants (Aravena, Gardiner, and Mather) were alleged to be aiders and abettors to the shootings. They acted as lookouts while the murders were allegedly being committed by Kellestine, Mushey, and Sandham and assisted these men with the cleanup of the crime scene following the killings. Mather and Aravena were convicted of manslaughter with respect to the first homicide and convicted of first-degree murder with respect to the remaining homicides. Gardiner was convicted of manslaughter on the first two homicides and convicted of first-degree murder for the remaining homicides. All men – except Sandham, who decided to abandon his appeal – appealed their convictions for murder and manslaughter to the Court of Appeal for Ontario.[47] At trial, only the appellant Aravena chose to testify and make a serious attempt to develop the defence of duress for consideration by the jury in relation to the manslaughter charges against him that were before the court. Aravena testified that immediately following the second murder for which he was present, Kellestine expressly threatened to kill him and his family if he (Aravena) "talked."[48]

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46 *Ibid* at para 4. Another man, M.H., also participated in the murders but provided evidence as a witness for the Crown at trial in exchange for immunity to prosecution and, therefore, unlike the other named-appellants, was not convicted of any crime at trial in connection with the murders.

47 *Ibid* at paras 1–2.

48 *Ibid* at paras 87–95.

Five grounds of appeal were advanced by the appellants. The only ground that concerns us was raised by the appellants Aravena, Mather and Gardiner, namely that the trial judge had erred in concluding that as a matter of law, duress is not available to perpetrators or aiders and abettors to murder, and that this error had caused these appellants to be significantly prejudiced at trial.[49] The Crown argued that the three appellants who had raised duress on appeal had had an opportunity to advance the defence during the course of the trial on the manslaughter charges and that to the extent they did not, or the defence failed, this indicated that duress would have been similarly unsuccessful on the murder charges. Even if the trial judge's pre-trial ruling denying duress as a defence to murder, as it applies to both principals and aiders and abettors, was made in error. Hence, the issue of the unavailability of the duress defence was a moot point, and no miscarriage of justice or substantial wrong had occurred.[50]

The three appellants raising duress as an issue on appeal (Aravena, Mather, and Gardiner), were alleged to be aiders and abettors and were not charged as principals under s. 21(1)(a) of the *Criminal Code*. Accordingly, the rule from *Paquette* allowing aiders and abettors access to the common law defence of duress applied and the defence was available to these appellants. With respect to Aravena, the only aider and abettor who had presented evidence of duress at trial, the trial judge had found that the express threat made by Kellinstine to Aravena following the second shooting was for the sole purpose of ensuring Aravena's silence about that murder and was not a threat meant to compel Aravena to assist Kellestine in any future crime. Still, based on the totality of the evidence, the trial judge was prepared to accept Aravena's claim that he had operated under an "implied threat of death," thereafter, if he did not do as he was told by Kellestine. However, the trial judge concluded that there was no air of reality to the duress defence because the criminal association exclusion applied, preventing Aravena's reliance on this defence to manslaughter. These were all correct determinations, according to the Court of Appeal, who found the criminal organization exclusion to be conducive with the principle of moral involuntariness. Since accused persons who voluntarily and knowingly put themselves in a position where they know that there is a risk that they may be forced, by threat of bodily harm or death, to commit a crime, should <u>not</u> be able to enjoy the protection of the duress defence.

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49 *Ibid* at paras 12–13.
50 *Ibid* at paras 17–23.

Aravena had willingly assisted Kellistine with the second murder, and there was no credibility to the claim that he did not know, following the completion of this murder, that he could be compelled by Kellestine to assist him in future crimes when he had personally been involved in aiding Kellestine with the completion of the second murder.[51] In the result, there was no air of reality to duress on any of the charges facing Aravena, Mather, and Gardiner and their appeals on this ground were dismissed.[52]

However, in *obiter*, the Court proceeded to address an important question left unresolved by the Supreme Court in *Ryan*. That is, whether the "murder exemption" to the duress defence for principals to murder, contained in s. 17 of the *Criminal Code*, was unconstitutional. In answering this inquiry, the Court stated that the following five areas had to be considered: basic criminal law principles, the juridical rationale underlying the duress defence, the elements of the duress defence, the fundamental principles contained in the *Charter*, and the common law authorities from other jurisdictions.[53] The Court laid out three foundational premises on which their analysis would proceed. First, the duress defence to be developed and presented by the Court was the defence "as described and defined" by the Supreme Court in *Hibbert*, *Ruzic*, and *Ryan*, with special regard to be given to the Supreme Court's admonition in *Ruzic* that the defence be kept within strict bounds in light of the various competing interests at stake. Second, it would be assumed that the accused advancing the duress defence has the full *mens rea* of an aider and abettor to murder. Third, based on this analysis, either duress was a full defence to murder leading to an acquittal for this offence or was not a defence to murder at all.[54]

With respect to the basic criminal law principles, the Court stated that a fundamental principle of the criminal law is voluntariness. Where an accused's conduct is not voluntary, the accused's actions are not punishable by the criminal law, as per the requirements of s. 7 of the *Charter*. Voluntariness is not limited to physical voluntariness and includes a consideration of whether the accused's actions were compelled because of

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51 *Ibid* at paras 94–114.

52 *Ibid* at para 115. The appellants' other four grounds of appeal were similarly dismissed. See *ibid* at paras 116–46.

53 *Ibid* at para 41.

54 *Ibid* at paras 42–44.

external circumstances or threats.[55] With respect to the juridical rational underlying the duress defence, the Court referred approvingly to the following passage of Justice Dickson from the Supreme Court's decision in *R v Perka*:

> [On] a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts whether of self-preservation, or of altruism, overwhelmingly impel disobedience.[56]

Based on the Supreme Court's decisions in *Hibbert*, *Ruzic*, *and Perka*, the Court recognized that both moral involuntariness and physical involuntariness are principles of fundamental justice. Resting on an "[A]cceptance of individual autonomy and choice as the essential preconditions to the imposition of criminal liability."[57] Moral condemnation of an accused's actions by society because of an accused's failure to "rise to the occasion" – was not to be the touchstone of the assessment of criminal liability by the courts. The Court was keen to distinguish between "moral involuntariness" and "moral blameworthiness"; these two concepts were not <u>always</u> mutually inclusive or exclusive. An accused's conduct could be entitled to exoneration because their actions were morally involuntary (in the sense of not being the product of individual autonomy) but, at the same time, still be viewed as morally blameworthy (in the sense of not representing conduct that would be viewed as morally righteous).[58] However, the test of moral involuntariness <u>does not</u> depend solely on a subjective assessment of the accused's perception as to whether "he or she had no realistic choice to act as he or she did," but also on an objective evaluation of the accused's beliefs and perceptions.[59] In the objective portion of the assessment, as per *Ruzic*, there was to be consideration of a wide variety of relevant societal interests and concerns, including the need to ensure social order and protect the lives of innocent victims who are harmed by accused because of threats they face from other persons.[60]

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55 *Ibid* at paras 46–48.

56 *R v Perka*, [1984] 2 SCR 232 at 248, 2 RCS 232, as cited in *Aravena*, *supra* note 5 at para 48.

57 *Aravena*, *supra* note 5 at para 52.

58 *Ibid* at paras 50–53.

59 *Ibid* at paras 47–53

60 *Ibid* at para 54.

The elements of the duress defence were to be wholly animated and defined with reference to the principle of moral involuntariness. This principle required that duress be kept within strict bounds. This was reflected in the elements of the duress defence, as defined by the Supreme Court in *Ruzic* and *Ryan*:

- [I]n the no safe avenue of escape criterion.
- [I]n the close temporal connection required between the threat and the harm threatened.
- [I]n the proportionality criterion: that is, the requirement that the harm threatened against the accused be equal to or greater than the harm caused in reply to the threat; and the additional requirement: that the accused's decision to inflict harm be consistent with what a reasonable person in similar circumstances would have done.
- [I]n the criminal association exclusion: the idea that an accused who by view of their membership in a criminal organization voluntarily assumes the risk of being compelled by threats to participate in criminal conduct is disqualified from relying on the excuse of duress.[61]

With respect to the fundamental principles contained in the *Charter*, moral involuntariness was a "reflection of the central importance of individual autonomy and choice in the imposition of criminal liability." As it had "in shaping the elements of the common law defence of duress," the principle of moral involuntariness was to be the central criterion in assessing whether any criminal offence, including murder, should be excluded from the scope of the common law defence of duress.[62] In order for the Crown to justify their position that parties of murder are excluded from the duress defence, they had to show one of two things. First, that the exclusion of murder from the duress defence is consistent with the principle of moral involuntariness or, second, that the exclusion of murder was a reasonable limit on the principle of moral involuntariness.[63]

The first test was impossible to meet because in a kill or be killed scenario, while it might never be "justified" for an accused to take the life of an innocent third party as the lesser of two evils, the accused's criminal conduct might still be deserving of being "excused" based on a proportionality analysis informed by the principle of moral involuntariness. First, the resultant harms – that is, the death of the accused or the innocent

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61 *Ibid* at paras 55–61.

62 *Ibid* at paras 61–62.

63 *Ibid* at para 62.

third-party victim – might be of "comparable gravity". So it might not always be wrong for the accused to succumb to the death threat and murder an innocent third person, depending on the circumstances they are facing. The Court gives the helpful example of a parent presented with a choice between taking the life of an innocent third party and the killing of their own child, where both the alleged victims are equally innocent and the harms of comparable worth.[64] Second, the criminal law is designed for the ordinary man, "not a community of saints or heroes," based on the standards of conduct that ordinary men and women could be expected to observe. The Court gives the helpful example of an accused who had no pre-existing relationship with the Bandidos and no connection to the meeting at Kellistine's farm, who just happened to come on to the property on the night of the crimes for an innocent purpose. Assume that person was taken prisoner by Kellistine's associates, and who was then ordered by Kellistine (under threat of death) to assist in some of the murders after having observed Kellestine murder two of the victims after they were removed from the barn where they were being held captive against their will. In these circumstances, the accused could hardly be said to have acted in a morally voluntary way and should be able to rely on the duress defence to exonerate themselves from liability.[65]

The Court rejected the trial judge's view that the proportionality requirement for duress could never be met in favour of an accused for the crime of murder since the proportionality test was grounded in the victim's right to life (under s. 7 of the *Charter*) and not in the principle of moral involuntariness. Acceptance of the trial judge's position would breach the fundamental principles of the *Charter* and the criminal law, where voluntariness of an accused's actions is the touchstone of criminal liability. While the victim's right to life was an important consideration in determining whether an accused's conduct was proportional and not to be discounted in the proportionality analysis, <u>the controlling factor</u> was to be whether the accused "had no realistic choice" but to have committed the act(s) they did. None of this was to say that duress was an easy defence to prove and would not be kept within strict bounds under the principle of moral involuntariness. Indeed, the Court stated that to excuse murder, the threat being relied upon by the accused under the duress defence would

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64 *Ibid* at paras 68–73.
65 *Ibid* at paras 62–66.

likely have to be a threat of "immediate death"; nothing short of that would be enough to meet the proportionality requirement.[66]

In addressing whether the murder exclusion was a reasonable limit on the principle of moral involuntariness, the Court addressed the English authorities relied on by the trial judge in the court below. These authorities – save and except the majority judgment in *Lynch*[67] – have unequivocally excluded murder from the common law defence of duress for two reasons. First, access to the defence of duress would embolden criminal organizations to use threatened intermediaries "as a means of conducting their criminal activity." Second, the victim's life is intrinsically more valuable than any possible right of the accused. The first justification for the exclusion, even if the policy argument could be sustained, was not sufficient to override the constitutional protections afforded an accused under the principle of moral involuntariness. The second justification for the exclusion, reflected a conception of duress as a justification, not an excuse. This was inconsistent with the received view on the proper conceptualization to be given to the duress defence in Canadian criminal law, where duress is treated as an excuse rather than a justification. The question to be asked is not whether a greater good was accomplished by the accused's actions justifying their criminal conduct but rather, whether the accused had any realistic choice but to have acted in the manner they did. To do otherwise was to place more importance on the life of the victim than the life of the accused, where both lives might be equally innocent, in vindicating the principle of the sanctity of life:[68]

> An individual told to "kill or be killed" cannot make a decision that will fully vindicate the right to life, especially if the choice is between the lives of two equally innocent third parties. Whatever the threatened person decides, an innocent life may well be lost. A per se rule which excludes the defence of duress in all murder cases does not give the highest priority to the sanctity of life, but rather, arbitrarily, gives the highest priority to one of the lives placed in jeopardy.[69]

Accordingly, the Court was inclined to afford the common law defence of duress to offenders charged with actually committing murder as principals, for constitutional reasons:

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[66] *Ibid* at paras 70–73.

[67] *Supra* note 15.

[68] *Aravena*, *supra* note 5 at paras 74–83.

[69] *Ibid* at para 83.

> The constitutionality of the murder exception to the duress defence in s. 17 of the Criminal Code is not before the Court. However, it follows from this analysis that, subject to any argument the Crown might advance justifying the exception as it applies to perpetrators under s. 1 of the Charter, the exception must be found unconstitutional.[70]

VII. *WILLIS*

In *Willis*, the Court of Appeal for Manitoba, per Justice Mainella, broke with the Court of Appeal for Ontario in *Aravena*, finding that while the common law defence of duress was available to aiders and abettors of murder, as per the Supreme Court's ruling in *Paquette*, it was not available to principals to murder. It followed that the murder exclusion contained in s. 17 of the *Criminal Code* was not a violation of the principles of fundamental justice protected by s. 7 of the *Charter*.

In *Willis*, the appellant had accumulated a drug debt to a criminal organization of which he was a member as a result of being caught by police in possession of a shipment of cocaine which was seized by police. Faced with threats from this organization, the appellant killed Kaila Tran (a woman he hardly knew) in an attempt to clear the debt,[71] since the organization wanted Ms. Tran dead for an unrelated reason. The appellant stabbed Ms. Tran 30 times in the course of killing her. Unfortunately, the appellant's drug debt to the organization was not forgiven on the basis of the commission of the murder. The appellant's justified the murder explaining to police: "[i]t was like my life or her life." The problem was that the appellant was not a party to the offence of murder by aiding, abetting, or by common intention – so the allowance made in *Paquette* giving an accused access to the common law defence of duress was not available to him. This, by necessity, required the appellant to challenge the constitutionality of the murder exclusion for principals contained in s. 17 of the *Criminal Code* in order to gain access to the duress defence, which he did at trial, albeit unsuccessfully. The accused was convicted of murder in the first degree, without eligibility for parole for 25 years. The question of whether the accused had access to the duress defence was a very

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70 *Ibid* at para 86.

71 There was evidence before the trial court that the accused had told the friend who had allegedly aided and abetted him in the murder of Ms. Tran, that the murder had not erased his drug debt owed to the criminal organization. See *Willis*, *supra* note 7 at para 21.

consequential issue since if the defence was available to him, and was made out by him, he could avoid liability for the murder altogether, avoiding a sentence of life imprisonment without eligibility for parole for 25 years.[72]

The Court recognized that the common law defence of duress was available to "parties" to an offence by aiding, abetting, or common intention – as opposed to principals – as per the Supreme Court's holding in *Paquette* and that the Court was bound by that precedent:

> The legal distinction between principals and parties as to the defence of duress is, subject to Parliament amending section 17 of the Code, for the Supreme Court of Canada to vary.[73]

But that distinction was of no assistance to the appellant because he had actually committed the murder as a principal. Not surprisingly, the appellant argued that s. 17's denial of the common law defence of duress to principals to murder was contrary to s. 7 of the *Charter*. First, the law allows for morally involuntary acts of an accused to be punished by the criminal law. Second, the law is overbroad.[74]

The Court stated that in order to dispose of the constitutional issues raised by the appellant in the appeal, consideration had to be given to the *Charter* principles of moral involuntariness and overbreadth and to the interpretation that had to be given to s. 17 of the *Criminal Code* by virtue of the Supreme Court's decision in *Paquette*.[75] Two fundamental premises were to govern the Court's analysis throughout. First, consideration of the proportionality requirement in the moral involuntariness analysis, had to be undertaken differently for the murder exclusion (applying to principals) than for the other offences designated as being excluded from the duress defence by s. 17. This was because the commission of murder under duress involves the loss of an innocent person's life, while the commission of the other crimes does not. Second, the use of hypotheticals, while useful to distinguish involuntary conduct from voluntary conduct, should be reasonable and not fantastical.[76]

In reviewing the history and background of the defence of duress in the criminal law, the Court reviewed Hale's writings and found that where an

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72 *Ibid* at paras 1–21. The accused advanced two further grounds of appeal before the Court, neither of which are relevant to this study.

73 *Ibid* at para 33.

74 *Ibid* at paras 21–33.

75 *Ibid* at para 33.

76 *Ibid* at paras 37–39.

accused is faced with a kill or be killed situation, the accused has two ways to conduct themselves in a lawful manner. First, they can sacrifice themselves or, second, they can act in their own defence and of their person and kill the assailant who is compelling them to commit the murder under the threat of death. Based on this conception, no accused may lawfully take the life of an innocent victim under duress and avoid criminal liability at the same time.[77] The Court considered the English Draft Penal Code and found that the first draft of the Code in 1878 did not include duress as an exculpatory defence at all. Indeed, where the elements of duress were made out, the accused was only entitled to a mitigation in their punishment. The Code, which was ultimately passed by the English Parliament, did include a duress defence, but it was severely restricted in accordance with Hale's Rule.[78] The Court pointed out that after Canada was formed, the first version of the *Criminal Code*[79] passed by Canada's Parliament in 1892 contained a murder exclusion on the duress defence that mirrored the English Code and that has stood the test of time.[80]

Based on its survey of other common law jurisdictions outside of Canada, the Court found that Hale's Rule continues to predominate in the majority of common law jurisdictions and, to the extent that the rule has been modified, this has usually been accomplished through legislative change rather than tinkering by the courts.[81] Based on *Perka*, *Ruzic*, and *Ryan*, the Court identified two questions that needed to be answered in deciding whether or not the murder exclusion contained in s. 17 of the *Criminal Code* violates the principle of moral involuntariness protected by s. 7 of the *Charter*. First, does removal of the duress defence deny a person of "any realistic choice" as to whether to break the law? Second, even if it does, was the injury done disproportionate to the benefit obtained?[82]

With respect to the first inquiry, the Court rejected the appellant's argument that, based on the fact scenario cited by the Supreme Court in *Ruzic*, that the Supreme Court had found the exclusions from the duress defence contained in s. 17 to be in breach of the *Charter* principle of moral

77 *Ibid* at paras 45–56.
78 *Ibid* at paras 57–61. The defence was also made unavailable to accused who committed crimes under duress by reason of their association with a criminal association or conspiracy.
79 1892, SC 1892, c 29, as cited in *Willis*, *supra* note 7 at para 62.
80 *Willis*, *supra* note 7 at para 67.
81 *Ibid* at paras 68–74.
82 *Ibid* at paras 111–13.

involuntariness.[83] The hypothetical example given by the Supreme Court in *Ruzic* reads as follows:

> Consider next the situation of someone who gives the accused a knife and orders her to stab the victim or else be killed herself. Unlike the first scenario, moral involuntariness is not a matter of physical dimension. The accused here retains conscious control over her bodily movements. Yet, like the first actor, her will is overborne, this time by the threats of another. Her conduct is not, in a realistic way, freely chosen.[84]

The Court found that if the Supreme Court had decided that the murder exclusion was unconstitutional, they would have "said so [explicitly] in *Ryan*," instead of leaving the question undecided, which is what they did.[85] The Court found the hypothetical from *Ruzic* to be flawed because it does not represent a situation where the accused truly lacks "a realistic choice" as to whether to commit the crime. Assuming that negotiating a way out of the predicament, attempting an escape from the dilemma, or seeking the assistance of the authorities were not viable options, the accused could commit acts of aggression against the maker of the threats. In the form of self-defence, up to and including using deadly force against the threatener to prevent the consequences of the threat from being carried out. That is to say, acts of self-defence, if available, <u>must</u> be exercised by the accused against the maker of the threats, otherwise the accused's acts are not morally involuntary, and the accused's conduct does not entitle him to access the duress defence since compliance with the law must be shown to be "demonstrably impossible."

According to the Court, rescue by police would always be an available recourse for an accused in lieu of taking an innocent life, including in the hard cases[86] (This reality is what explained Parliament's decision in s. 17 of

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83 *Ibid* at para 114.

84 *Ruzic*, *supra* note 3 at 44, as cited in *Willis*, *supra* note 7 at para 114.

85 *Willis*, *supra* note 7 at paras 114–15 [emphasis added]. Indeed, the Court underlines that the passage from *Ruzic* (see *Ruzic*, *supra* note 3 at para 44), when read in context, was simply the Supreme Court's use of a hypothetical example to illustrate the difference between physical and moral involuntariness, to demonstrate the "unifying premise" between them as being "autonomy and choice." See *Willis*, *supra* note 7 at paras 114–15.

86 *Ibid* at para 122. The problem raised in *Ruzic*, that a threat made in a foreign location might not be neutralizable, by Canada or its international partners, because a foreign police force might be untrustworthy or corrupt, was speculative and not credible and was rejected by the Court, accordingly.

the *Criminal Code* to exclude murder from the duress defence).[87] This is because the police would do everything within their power to prevent the threatened murder from occurring in a killed or be killed situation, including in the reasonably foreseeable "typical hostage case."[88] Even if this were not the case, the act of killing under duress might still not be acceptable for two other reasons. First, it would be based on the "faulty assumption that the amoral tyrant, who is prepared to compel the death of an innocent person, would also piously keep his or her promise and release the hostage from danger if the murder was committed."[89] Second, it would be based on the "faulty assumption" that an accused would prefer self-preservation and committing murder to sacrificing their own life.[90] According to the Court, "realistic choices" were always available to an accused being threatened in a kill or be killed situation under the challenged law to avoid breaching the law against committing homicide. Namely, negotiation, escape, self-defence, or seeking the aid of law enforcement.[91] Thus, the Court, per Justice Mainella, concluded, "I am satisfied that it is not inevitable that the challenged law would ever force a person to balance life against life due to an external human danger."[92]

In these circumstances, while there was no need for the Court to go on to the second inquiry in the moral involuntariness analysis, the Court decided to address the issue of proportionality for the sake of completeness. As per *Ruzic*, a variety of different interests arise in a kill or be killed situation that had to be considered in assessing whether the proportionality requirement was met. In considering these interests, the Court found itself to be in agreement with the trial judge, who found that the proportionality requirement could never be met where an accused murdered an innocent person under duress. The Court expressed four concerns with the Court's

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87 *Ibid* at para 125.

88 *Ibid* at paras 118–19. In the typical hostage scenario, a hostage would be held by an outlaw at an unknown location and the threatened party would be advised through some intermediary to murder another person or else the hostage would be killed. In order to prevent the death of the hostage, the threatened party would have to submit to the threat and commit the murder, since self-defence and negotiation would not be available to them. However, in present times, submission to the threat would not be necessary because advances in technology would likely allow the police to neutralize the threat before it was carried out.

89 *Ibid* at para 121.

90 *Ibid* at para 126.

91 *Ibid* at paras 127–32.

92 *Ibid* at para 133.

decision in *Aravena*.[93] First, the English authorities' support for the murder exclusion was based on the inviolable principle of the sanctity of life from Hale; these justifications were not based on a utilitarian rationale. The concept of the sanctity of life comes from moral principles and from a commonly accepted and deeply rooted belief in society that human life is inviolable, "that the law imposes a duty on everyone not to take innocent life based on an external danger."[94] Second, the Court in *Aravena* misunderstood the English authorities in finding that they treated duress as a "justification" rather than as an "excuse." Indeed, the Canadian and English positions were now unified in their view that duress was an excuse to a crime. And the only "unresolved question" was whether *Paquette* was still good law in Canada in light of the most recent English authorities prohibiting duress as a defence for all parties charged with murder.[95]

A third concern was that by allowing access to the common law defence of duress for perpetrators of murder, the law would create uncertainty with respect to the common law defence of necessity. This is because, to date, no appellate court in Canada had deviated from the view of the law coming from *Dudley and Stephens* that the defence of necessity is not available to a participant in a murder to excuse their conduct. If necessity and duress were to continue to have to follow the same juristic approaches and rationales, the approach from *Aravena* giving perpetrators of murder access to the duress defence had to be rejected.[96] Fourth, in conducting the proportionality inquiry, the Court in *Aravena* put undue focus on the unfairness caused to an accused if they were to sacrifice themselves rather than submit to the threat of death and commit murder. While this was the most controversial aspect of Hale's Rule, it was not relevant because an accused, in actuality, is never faced with this agonizing choice of having to balance life against life.[97]

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93 *Ibid* at paras 133–39.

94 *Ibid* at paras 140–48.

95 *Ibid* at paras 149–50.

96 *Ibid* at paras 150–53. For a persuasive case for extending the defence of necessity to murder and fusing the defences of duress and necessity together, see Birju Kotecha, "Necessity as a Defence to Murder: An Anglo-Canadian Perspective" (2014) 78 J Crim L 341.

97 *Willis*, *supra* note 7 at para 165.

VIII. Analysis: Five Reasons to Prefer the Court of Appeal for Ontario's Holding in *Aravena*

In my view, there are five reasons to prefer the holding in *Aravena* – that s. 17's removal of the duress defence from principals to murder is likely unconstitutional because it breaches the principle of moral involuntariness – over the holding in *Willis* finding contrariwise.

Reason #1: *Aravena* Does Not Subordinate the Accused's Right to Life to the Victim's Based on the Principle of the Sanctity of Life

There is no question that the effect of the Court's analysis of the availability of the duress defence to principals charged with murder in *Willis*, is to place more importance on the preservation of the victim's life than the accused's life, in a kill or be killed situation. The Court's conclusion that an accused will always have a legal alternative to killing an innocent victim under a threat of death, up to and including attacking the maker of the threat and using deadly force against them if necessary to neutralize the threat, is far from self-evident. And exercising these suggested recourses increases the risk of loss of the accused's life while not placing the innocent victim's life in any increased peril. The trouble, of course, is that if both the accused's life and innocent party's life are of comparable value under the principle of the sanctity of life, then the Court's intent to fashion an absolute rule against killing the victim, even under an immediate threat of death faced by the accused, is misplaced since that interpretation places all the risk of loss of life with the accused.

In *Willis*, the Court indicates that accused persons should never be given the right to decide "who lives and who dies" and should never commit murder because there is no guarantee that the threat of death made against them will be carried out, even if they fail to cooperate with the threatener's demands. The lack of certainty of consequence is true. But it is also true that if an accused fails to cooperate by not carrying out the act required to try to neutralize the threat and attempts to exercise any of the self-help options mentioned by the Court in *Willis*, their risk of death by the threatener goes up while the victim's risk of death correspondingly goes down or is eliminated. So, the Court's analysis of the issue does not eliminate the risk of the loss of life so much as shift the risk from the victim to the accused. In doing so, the Court is stating that the victim's life is

intrinsically more deserving of protection than the accused's life, under the principle of the sanctity of life.

While the Court in *Willis* accuses the Court in *Aravena* of placing undue focus on the interests of the threatened party – which goes against the Court's statement in *Aravena* that the accused and victim's lives are of "comparable worth" – the Court in *Willis* seems to commit the same *faux-paus* in unduly prioritizing the victim's life over the accused's life. In any event, the approach in *Aravena* leaves the question open as to whether an accused may murder under a threat of death where he has no "realistic choice" to do otherwise based on an analysis of the principle of moral involuntariness. The Court's conclusion in *Willis* that "realistic choices" will always exist for an accused to avoid committing murder when faced with a threat of death is problematic, to say the least. This is because it assumes, *a priori*, without any analysis of the relevant circumstances and whether they caused the accused's actions to be morally involuntary, that the murder of an innocent person under a threat of death is always the wrong choice for the accused. This moral judgment is far from self-evident, and the other recourses that may be available to the accused in a kill or be killed situation are not "risk neutral"; they place the accused's life in more jeopardy, while the third-party victim's life remains unaffected. Truth be told, the Court in *Willis's* veneration of Hale's views demonstrate that the Court would much sooner see an accused sacrifice their own life than to kill an innocent person irrespective of the circumstances, even if this is not pareto-optimal. On this view, it may be "impossible" for the accused to "stay alive and act lawfully at the same time."[98]

With respect, the Court in *Willis's* desire to give preference to the protection of the victim's life over the accused's life – under the principle of the sanctity of life, in every case and in all circumstances, by *a priori* finding murder by an accused under threat of death to constitute a conduct that is not capable of being morally involuntary – is deeply flawed. This is because it is based on a faulty premise, that an accused's will can never be overborne to commit murder no matter how trying the circumstances may be. However, this possibility was left open by the Supreme Court in *Ruzic* in their use of the hypothetical example of an accused being provided with a knife and being asked to kill an innocent person or to be killed themselves.

[98] See Maximilian Kiener, "Duress as a Defence in a Case of Murder" (2017) 1:2 The Philosophical J Conflict and Violence at 190–93.

While the Court in *Willis* does not find this hypothetical scenario to be particularly compelling and raises several recourses that the accused may have in a kill or be killed scenario that do not require them to commit murder, the Court is not willing to acknowledge that the law cannot always do what is required to protect the life of the threatened person. This is because, sometimes, the situation may be "too acute" to allow the accused to exercise any of the suggested recourses, making the accused's choice to murder morally involuntary. Surely, the reasonable hypothetical example provided by the Court in *Aravena* represents the kind of acute circumstance where none of the legal recourses suggested by the Court in *Willis* would be available to an accused. For example, if the accused facing the threat of death were to act in self-defence against Kellistine or his associates to try and escape the farm and not commit murder against any of the victims, the accused's defensive tactics would likely fail, and they would be killed. The death would likely be in vain and would not be pareto-optimal, in the sense that the remaining victims would likely still be shot to death by Kellestine and his associates, irrespective of the accused's choice to refuse to commit murder and to act in self-defence instead. Surely, in these circumstances, the accused's choice to murder to preserve himself would be protected under the principle of moral involuntariness by way of the duress defence, and the accused would be acquitted of murder.

While the Supreme Court in *Ruzic* recognized that there are different interests at stake in a kill or be killed scenario, the Supreme Court did not endorse the principle that the victim's life is to be treated in an inherently superior way to that of the accused's life, even if this would bring greater coherence to the law of duress. Indeed, the different interests are mentioned by the Supreme Court in *Ruzic* not for the purpose of prioritizing one interest over another, but rather to show the challenges that courts face in defining the law of duress in a way that is cognizant and fair to all those interests. By making the victim's right to life an "absolute moral postulate,"[99] the Court in *Willis* essentially neuters the principle of moral involuntariness and strips the principle of its determinative power and legal effect as a principle of fundamental justice in defining the availability of the defence of duress in cases of murder. Because of its *a priori* conclusion that the

[99] This was the view subscribed to in the joint opinion of Judge McDonald and Judge Vohrah at the International Criminal Tribunal for the Former Yugoslovia in *Prosecutor v Drazan Erdemovic*, Case No. IT-96-22-A, as cited in *Kiener*, *supra* note 97 at 188.

principle of moral involuntariness could never be met by an accused in a kill or be killed scenario.

Reason #2: Moral Involuntariness is not Moral Blameworthiness

In largely vindicating Hale's views, the Court in *Willis* fuses law and morality in a way that is not in accord with the relevant Supreme Court jurisprudence on the duress defence. Where the focus of the moral involuntariness analysis is supposed to be on whether the accused was left with any "realistic choice" but-to-commit the criminal acts they did under duress, without an evaluation as to whether the acts performed were morally just or the "lesser of the two evils." The question to be asked is whether the accused's will was overborne by the threats they faced, not whether the accused's actions were correct or optimal from a "moral evaluative standpoint."[100] In *Ruzic*, the Supreme Court established the principle of moral involuntariness as a principle of fundamental justice that was largely divorced from the principle of moral blameworthiness. Finding that the accused in that case was entitled to be acquitted because she had acted in a morally involuntary way in smuggling the narcotics into Canada from a foreign country, based on the threats that she had faced. The emphasis was to be on whether the accused could exercise a free choice, as an autonomous agent, not whether "that choice" was morally just.[101]

In *Willis*, the Court creates a *de facto* "presumptive rule" that accused who commit murder under duress must not have exercised other "realistic choices" that they had at the relevant times to avoid committing the murder, therefore making them guilty of murder. This circular reasoning is unsatisfactory and is divorced from any consideration of the circumstances in which the accused actually found themselves in and whether they could

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[100] Frances E. Chapman & Jason MacLean, Pulling the Patches of the Patchwork Defence of Duress: A Comment on R. v. Aravena, 62 Crim LQ 420 (2015) at 424–25. The commentator, Gomez, rejects the purported rationale of moral involuntariness as the reason why duress does not generate liability in the criminal law. According to him, "the reason why the actor escapes punishment in such cases is due to the fact that the conduct was performed for motives and dispositions that are deemed to be socially acceptable." See Daniel Varona Gomez, "Duress and the Antcolony's Ethic: Reflections on the Foundations of the Defense and Its Limits" (2008) 11 New Crim L Rev 615 at 631.

[101] See generally Benjamin Berger, "Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences" (2006) 51 McGill LJ 99.

have overcome their will. This analysis is not conducive with the elements of the legal test for moral involuntariness put forward by the Supreme Court in its duress jurisprudence, where a lack of realistic choice by the accused might be found by a court in the context of a murder, "where one life is hanging in the balance of another."

The Court in *Aravena* seems attuned to this possibility, concluding that nothing short of an immediate threat of death against an accused might excuse a murder. Whereas the Court in *Willis* rejects this possibility out of hand by notionally finding in the abstract that an accused will always have the choice to avail themselves of the assistance of police who have sophisticated techniques and who could be trusted to neutralize the threats by working with its international partners if necessary.

While it was valuable for the Court in *Willis* to have explored the many "realistic choices" that an accused might have in a kill or be killed scenario to avoid committing murder, the Court's intent appears to be disingenuous. This is because the Court's discussion was undertaken to demonstrate that an accused's actions in the case of a murder committed under threat of death could never be morally involuntary rather than to emphasize that the analysis of the principle of moral involuntariness must be highly contextual and rigorous, of which there is no doubt.

This *a priori* determination by the Court in *Willis*, that an accused faced with a threat of death could never act in a morally involuntary way, results in the Court's jettisoning of the principle of moral involuntariness in favour of the principle of moral blameworthiness. This approach is antithetical to the Supreme Court's decision in *Ruzic* where only the principle of moral involuntariness was to be used to set the boundaries of the duress defence. Where no equivalency was drawn between moral involuntariness and a lack of moral blameworthiness.

Reason #3: The Court in *Willis*'s Conclusion that an Accused always has "a Realistic Choice" to Avoid Submitting to a Threat of Death is Fallacious and Demonstrably False

The Court in *Willis's* conclusion that an accused, in a kill or be killed situation, will always be able to avail themselves of police assistance rather than to submit to a threat of death and kill an innocent victim, is fallacious and based on extremely wishful thinking. It confuses the mere possibility of something happening with an absolute certainty of it happening. If, as the

Court surmises in *Willis*, it is never an absolute certainty that an accused who refuses to kill under threat of death will always be killed for such refusal, then it must also be true that an accused under threat of death will not always be able to be rescued by police, depending on the circumstances they find themselves in to avoid committing murder. Indeed, the police often fail to act quickly, decisively, or effectively to respond to violent crimes or threats of violent crime in progress. The 2020 Nova Scotia Attacks are a testament to this. As well, the extent to which Canadian police can use their powers to act extra-territorially, or to influence foreign law enforcement authorities to act in the required ways to ward off the carrying out of threats facing an accused that might lead to serious harm of a person in foreign lands, is highly questionable. Could the Canadian authorities, today, really address the kind of threats facing the accused in *Ruzic* any more effectively than in the past? If the answer is "probably not," then the Court's conclusion in *Willis* that an accused must always act to allow for the possibility of rescue by police in the agonizing predicament of a kill or be killed situation falls flat. It is not self-evident that the Canadian police authorities can always sufficiently protect accused facing threats of harm or death from other persons in the context of the duress defence. Indeed, it is demonstrably false.

For example, in *R v CMB*,[102] a Manitoba case not considered by the Court in *Willis*, the accused refused to give evidence at the trial of two men who were members of a criminal gang and who were accused of assaulting him, and was cited for contempt of court. At his show cause hearing, the accused pleaded duress, stating that he had refused to give evidence against these two men at their trial out of fear for his safety and the safety of his family. Prior to the trial, while the accused was out of the province in a witness protection program and after he had requested and received police protection, he was pushed into moving traffic by men he recognized as being associates of the men he was being asked by the Crown to testify against. The accused could have been killed or seriously hurt. Second, the accused's parents had received threatening phone calls, labelling the accused as a "rat," and Manitoba Justice had to install a security system in their house. Third, two weeks before the trial, gang associates of the two men were placed in the same institution as the accused, who was in prison on another charge. Based on the evidence before the Court, past attempts by the Crown and the police to protect the accused had failed despite the accused's requests

[102] 2010 MBQB 269.

for protection. The Crown led no evidence to rebut the accused's evidence that the authorities had proven they could not protect him and that he had no reasonable safe avenue of escape from the threats he faced. Therefore, his choice not to testify against the two men charged with assaulting him was not a choice that had been freely made. In the result, the accused was acquitted of the offence of contempt by way of the duress defence.[103]

Reason #4: *Aravena* does not Subordinate the *Charter* Principle of Moral Involuntariness to the Concepts of Parliamentary Supremacy or Historical Legitimacy

In *Willis*, the Court searches for a way to give effect to Parliament's choice to exempt murder from the duress defence in s. 17 of the *Criminal Code*, finding that Parliament's choice must have been impelled by the moral principle that it is never right to kill an innocent person, not even under a threat of death. Based on this clear directive from Parliament, based on a long-venerated history, accused in a kill or be killed situation must exercise a recourse other than committing murder, since that option is not one that the law makes available to them. The problem, of course, is that no matter how venerated and lengthy the history of a legal rule, or genuine or noble the Parliamentary intent was in making it (or is in sustaining it), they do not foreclose the fundamental obligation of courts to scrutinize laws put before them based on *Charter* values and principles, including the principle of moral involuntariness. Indeed, it was confirmed in *Ruzic* that special deference was not owed to s. 17 of the *Criminal Code*, representing as it were, a statutory defence. The same points could be made about the Court in *Willis's* emphases on the distinctiveness and controversial nature of use of the duress defence in murder cases or the incoherence that could be caused between the common law defences of duress and necessity, as if those things help justify the murder exemption and concomitantly overcome the violations of the *Charter's* principle of moral involuntariness. As Schabas importantly observes, albeit in an article about the common law defence of necessity rather than duress:

> "Higher social values" now exist in the Charter, which must take precedence over common law principles and the Criminal Code, and therefore it is the role of the

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[103] For an example of a case where the Crown and police were found to have provided an accused in similar circumstances with an adequate degree of protection to disqualify the duress defence pleaded by the accused, see *R v Atkinson et al*, 2017 MBQB 98.

> courts to "second-guess" the Legislature and to assess the "relative merits" of legislation and to make rulings overriding legislation when the Charter demands.[104]

Reason #5: *Aravena* does not Allow the English Authorities to Blind the Court to the Binding Supreme Court Jurisprudence on Duress

The fifth reason why the Court's decision in *Aravena* should be preferred over the Court's decision in *Willis* is because in *Aravena*, the Court does not fall into the trap of giving too much weight to the English authorities' view on the availability of the common law duress defence to parties charged with murder. While it is true that the English authorities are now against extending the common law defence of duress to the charge of murder, and have shown a great consistency and veneration for Hale's Rule, it is worth remembering that these judicial decisions and principles are not binding on Canadian courts. Indeed, in *Hibbert*, *Ruzic*, and *Ryan*, the Supreme Court did not endorse Hale's Rule. Instead, the Supreme Court made the *Charter* principle of moral involuntariness the touchstone for the duress defence.

The principle of moral involuntariness is to define the contours, boundaries, and availabilities of the duress defence, not the principle of moral blameworthiness or some subsidiary principle to it, such as the "absolute moral principle" that it is never correct to kill an innocent person. The views of the English cases have not stopped the Supreme Court from continuing to affirm, or to show support for, the principle established in *Paquette* that distinguishes between principals and aiders and abettors – with aiders and abettors continuing to be given unrestricted access to the common law defence of duress in cases of murder. Nor have the English decisions prevented the Supreme Court from leaving the question of access to the duress defence for principals to murder, under the *Charter* principle of moral involuntariness, undecided, pending the hearing of an appeal raising this narrow issue. Indeed, in *Ryan*, the Supreme Court showed no inclination to depart from its ruling in *Paquette* based on the state of the English authorities at the time (which were against allowing aiders and abettors to murder access to the common law defence of duress) and left open the question of the constitutionality of the offences designated as

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[104] Paul B. Schabas, "Justification, Excuse and the Defence of Necessity: A Comment on Perka v. the Queen" (1985) 27 Crim LQ 278 at 282.

being excluded from the duress defence by s. 17 of the *Criminal Code*. It is worth remembering that the *Charter* and its principles of fundamental justice, including the principle of moral involuntariness, represent the supreme law of the land of Canada and that any law that is not consistent with this constitutional mandate can be struck down and made of no legal force or effect, even if this would be at odds with English authorities and principles.[105]

IX. Conclusion

The foregoing discussion demonstrates that the Court of Appeal for Ontario's holding in *Aravena* – that s. 17's removal of the duress defence from principals to murder is likely unconstitutional because it breaches the principle of moral involuntariness – is to be preferred over the Court of Appeal for Manitoba's holding in *Willis* finding contrariwise. First, *Aravena* does not prioritize the victim's right to life over the accused's right to life under the principle of sanctity of life, based on the moral postulate that killing an innocent person is never justified, regardless of the circumstances. Second, *Aravena* does not conflate the principle of moral involuntariness with the principle of moral blameworthiness. Third, the categorical and unqualified proposition from *Willis* that an accused will always have the ability to call on the assistance of police (or to exercise another legal recourse) to extricate themselves from a kill or be killed scenario, without submitting to the threat of death and committing murder, is fallacious and demonstrably false. Fourth, *Aravena* does not subordinate the *Charter* principle of moral involuntariness to the concepts of Parliamentary supremacy or historical legitimacy. Fifth, *Aravena* dutifully follows the Supreme Court of Canada authorities in developing the common law defence of duress, rather than giving undue regard to the English authorities and, in particular, to their support for Hale's Rule, which finds no support in the Supreme Court's jurisprudence on the duress defence to date.

All that said, in all of the judicial decisions reviewed herein, a concern is underlined that the defence of duress not be made too readily available to accused, since there is an important policy reason for not allowing this.

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[105] S. 52 of the *Constitution Act*, 1982, states: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." See *Constitution Act, 1982*, s 52, being Schedule B of the Canada Act 1982 (UK), 1982, c 11.

Namely, that some criminal conduct that is sufficiently intentional and culpable might go unpunished by the criminal law. While making out the defence of duress on its merits is exceedingly difficult given the rigorous requirements enumerated by the Supreme Court in *Ryan* that need to be met, whether the defence is being advanced in its statutory or common law form,[106] there is a lingering sentiment that more needs to be done to prevent the abuse of the defence, or to keep the defence within strict bounds.[107] Upon my review of the authorities and literature on the defence of duress, and without limiting the generality of the foregoing, the following reform proposals have suggested themselves:

1. Restrict duress to mitigation of sentence only – that is, do not allow duress to excuse a crime regardless of the circumstances in which the duress arises.[108]
2. Much like provocation, make duress to the charge of murder a partial defence (only), allowing for a murder offence to be reduced to manslaughter where duress is made out.[109]
3. Make duress a reverse onus defence to murder – that is, once duress is shown to have an air of reality by the accused,[110] also require the accused to prove its

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[106] *Ryan*, *supra* note 7 at para 81. Those requirements are as follows: (1) there must be an explicit or implicit threat of present or future death or bodily harm, which is made against either the accused or a third party; (2) the accused must reasonably believe that the threat will be executed; (3) an absence of a safe avenue of escape; (4) a close temporal connection between the threat and the harm threatened; (5) proportionality between the harm threatened and the harm caused by the accused; and (6) an absence of membership in a criminal conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy, or association.

[107] *Aravena*, *supra* note 5 at para 42.

[108] Claxton, *supra* note 17 at 442.

[109] See generally *Aravena*, *supra* note 5 at para 45; P H J Huxley, "The Defence of Duress in Criminal Law" (1977) 1 Trent LJ 57 at 59. For a superb discussion of the incongruity between allowing provocation as a partial defence to murder, but not duress, as a concession to human frailty, see Kenneth J Arenson, "The Paradox of Disallowing Duress as a Defence to Murder'" (2014) 78 J Crim L 65.

[110] According to Silver, the threshold of the current formulation of the "air of reality test" required to be met by an accused for a defence to be put into play is undeniably high and places a significant impediment on the ability of defences, such as the excuse of duress, to operate. See Lisa A Silver, "Poof into a Puff of Air – Where Have All the Defences Gone: The Air of Reality Test and the Defences of Justifications and Excuses" (2014) 61 Crim LQ 531. According to Luther, an accused can only challenge the removal of a defence, such as the denial of the duress defence, once the accused shows that the defence has an air of reality to it and that it would have applied to the facts of the case but-for the law's removal of it. See Glen Luther, "Of Standing and Factual

substantive elements beyond a reasonable doubt in order to receive an acquittal.

4. Add a "but-for" requirement to duress for the offence of murder: but-for the accused's actions causing death, would the victim have died anyway by virtue of the circumstances or the actions of the threatening parties? If the answer is "yes," the accused would be entitled to be exonerated under the defence. If the answer is "no," duress would be unavailable to an accused, and they would face conviction and penalty accordingly.[111]

5. Allow the applicability and availability of duress for principals to murder to be determined by courts on a case-by-case basis, rather than having the defence automatically excluded for principals.[112]

6. If possible, further tighten up the substantive elements of duress to ensure that only "truly morally involuntary actions" of an accused escape criminal liability. For example, the "lack of a realistic choice" making duress available to an accused, should only be found where there truly is "no safe avenue of escape."

7. Leave the issue of remedying the potential for morally involuntary conduct of an accused to be punished, for the offences designated as being excluded from the duress defence by s. 17 of the *Criminal Code*, to prosecutorial or executive discretion.[113]

While it is beyond the scope of this paper to comment on any of the above reform proposals in depth, it does seem that some would fall prey to the *Charter's* protection of the presumption of innocence, or its protection of the principle of moral involuntariness, much like the "presence, immediacy, and third-party requirements" in s. 17 of the *Criminal Code* did in *Ruzic*. Still, without some substantial tweaking to the terms of s. 17 of the *Criminal Code* by Parliament, or s. 17's repeal, s. 17's constitutionality will continue to remain in peril and continue to be attacked by courts and legal

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Foundations: Understanding How an Accused Challenges the Constitutionality of Criminal Legislation" (2006) 51 Crim LQ 360 at 371.

111 See *Kiener*, *supra* note 97 and his discussion of the duress defence in the context of the International Criminal Tribunal for the Former Yugoslovia's decision in *Prosecutor v Drazan Erdemovic*, Case No. IT-96-22-A, for an example of the use of this modality. Curiously, this modality has been used by at least one other author to advocate for the recognition of a necessity defence to murder and a concomitant elimination of the duress defence to murder, "because it involves wrongfully transferring death from the killer to the victim, whereas necessity can be a defence of murder in circumstances where the victim was already going to die imminently anyway." See Nathan Tamblyn, "Necessity and Murder" (2015) 79 J Crim L 46.

112 *Willis*, *supra* note 7 at para 93.

113 *Ibid* at para 125.

commentators alike on the basis that by listing certain crimes and excluding those specific offences from the duress defence, irrespective of the circumstances in which the duress arises, that "morally involuntary" actions by accused who actually commit crimes (as principals) under compulsion will continue to remain improperly punishable and convictable by the criminal law, contrary to s. 7 of the *Charter*.

Fitness to Stand Trial and Dementia: Considering Changes to Assessment to Meet Demographic Need

SHAUNA SAWICH AND
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ABSTRACT

Fitness to stand trial assessments conducted by forensic mental health specialists occur on a regular basis. The same standard has traditionally been used for close to thirty years. This paper examines an interesting case of a fitness assessment for a lawyer who was charged with a crime, which brings light to some facets of fitness assessments. Historically, it has been less common for individuals to be found unfit to stand trial related to Major Neurocognitive Disorder (Dementia) as compared to Psychotic Disorders. This lawyer's medical conditions are discussed as well as their implications for an individual's ability to be fit to stand trial. The criteria used in different legal decisions have varied in different cases. The variation has appeared to be related, at least in part, to the different diagnoses that may be impacting an individual at the time of their involvement with the legal system. We consider here the different interpretations of criteria related to fitness to stand trial, including the ability to communicate with counsel. Potential changes to fitness assessments will also be examined, including the idea of using standardized tools. The importance of these issues is made evident by the fact that Major Neurocognitive Disorder is becoming more prevalent, and these issues will likely be apparent more frequently in the future. A multi-disciplinary team approach may be an ideal way to examine the future direction of fitness assessments, including the involvement of allied health professionals.

I. INTRODUCTION

Fitness to stand trial assessments conducted by forensic mental health specialists occur on a regular basis. The same standard has traditionally been used for close to thirty years. This paper examines an interesting case of a fitness assessment for a lawyer who was charged with a crime, which brings light to some facets of fitness assessments. We have not used the name of this person within the article and instead refer to him as Mr. L.

Historically, it has been less common for individuals to be found unfit to stand trial related to a Major Neurocognitive Disorder (Dementia) as compared to Psychotic Disorders. This lawyer's medical conditions are discussed, as well as their implications for an individual's ability to be fit to stand trial. The importance of these issues is made evident by the fact that with gains in longevity, those with Major Neurocognitive Disorder are living longer and increasingly interacting with the law. As individuals diagnosed with Dementia typically have different challenges relating to fitness to stand trial, it is imperative that the standard for fitness adequately addresses the symptoms of Dementia.

The criteria used to assess fitness to stand trial have varied in different cases. The variation has appeared to be related, at least in part, to the different diagnoses that may be impacting an individual at the time of their involvement with the legal system. We consider here the different interpretations of criteria related to fitness to stand trial, including the ability to communicate with counsel. Considering the impact and potential consequences of the findings derived from fitness assessments, it is vital for the best standard to be utilized in every assessment completed. Similarly, the same interpretation of criteria is necessary to ensure fair treatment for all defendants in the justice system.

Potential changes to fitness assessments will also be examined in this paper, including the idea of using standardized tools for evaluation. Results in research evaluating the use of standardized tools in other areas are supportive of this option. In addition, a multi-disciplinary team approach may be an ideal way to conduct fitness assessments, including the involvement of allied health professionals. One potential role for allied health professionals could be to aid in educating individuals regarding fitness. Ultimately, consideration of the need to change the assessment

process may help to serve the courts more effectively, as well as defendants that have been diagnosed with a mental illness.

II. BACKGROUND

The history of considering the mental state of defendants in legal systems dates back thousands of years.[1] Much of the history around fitness to stand trial was explained in a paper by Brown (2019). The specifics of laws have varied, but the overarching theme has remained the same. It is not fair for those standing trial to be held accountable for their actions if they do not understand what is happening in court, or if they are suffering from delusions related to their matter. In Ancient Greece, Aristotle wrote about special consideration being necessary for someone being deemed not culpable for actions related to madness.[2] Prins wrote about how the views of those living in Ancient Rome were evident by the phrase *satis furore ipso puniter*, roughly translating to the notion that an individual was sufficiently punished by their mental disorder.[3] Walker described the progression of the concept of fitness to stand trial being observed over a thousand years ago in England.[4] At that time, persons unable to understand the nature of an offence were deemed to lack the intent necessary for guilt (*mens rea)* and were released to their families as opposed to receiving punishment. Later, trial by jury and eventually King's courts were instituted. The accused were confronted before a jury and required to plead "guilty" or "not guilty." Grubin explained that anyone not entering a plea was described as "standing mute."[5] In such a scenario, a jury had to determine whether the accused was "mute of malice" (malingering) or "mute by the visitation of God" (deemed unable to plead and therefore excused from the proceedings). Hale and Emlyn explained that those thought to be

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1 Penelope Brown, "Unfitness to plead in England and Wales: Historical development and contemporary dilemmas" (2019) 59:3 Med Sci & L 187 at 188.

2 *Ibid.*

3 *Ibid*, citing Herschel Prins, *Offenders, Deviants or Patients? An Introduction to Clinical Criminology*, 5th ed (London: Routledge, 2015).

4 *Ibid*, citing Nigel Walker, *Crime and insanity in England*, vol 1(Edinburgh: Edinburgh University Press, 1968).

5 *Ibid*, citing Don Grubin, *Fitness to plead in England and Wales* (East Sussex, UK: Psychology Press, 1996).

malingering were starved and had heavy stones placed on their chest until they either answered or perished, known as "*peine forte et dure*."[6]

Crotty wrote about the history of mental disorders and the law.[7] There was generally a poor understanding of mental illness until the 20th century, and many symptoms were explained by demons or religious experiences. Archaic terminology was used to describe diseases of the mind. Mental illness acquired later in life was explained by the term "insane." Someone thought to have a fluctuating presentation, appearing sane at times yet seeming to suffer from a mental illness at others, was deemed a "lunatic."

Brown (2019) further outlines how in the 17th century, the scholar Hale suggested a model much closer to our current legal framework in Canada.[8] Hale focused on a more nuanced view of mental illness and did not equate the presence of a mental disorder with automatically being unable to plead guilty or not guilty. It was thought by Hale that the conditions causing a mental disturbance limit fitness to stand trial could change over time and that the ability to plead was a temporary determination and subject to review.

The first laws regarding insanity in the *Criminal Code of Canada* were instituted in 1892.[9] These laws were based on an English case involving a man, Daniel M'Naughton, in 1843.[10] In the context of experiencing paranoid delusions, M'Naughton killed a man he thought was the prime minister. The Code indicated that an individual found unfit to stand trial was to be detained "at the pleasure of the Lieutenant Governor."[11] Amendments to the code in 1968 allowed an advisory board to be formed, at the discretion of the Lieutenant Governor, to review the cases of those in custody. Options available for those in custody included remaining in custody, absolute discharge, and discharge with conditions.

Even within Canada, the criteria for fitness to stand trial has been defined in different ways. There is a presumption of fitness under s. 672.22

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6 *Ibid*, citing Matthew Hale & Sollom Emlyn, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (Philadelphia, PA: Robert H Small, 1847).

7 *Ibid*, citing Homer D Crotty, "History of Insanity as a Defence to Crime in English Criminal Law" (1923-1924) 12:2 Calif L Rev 105.

8 *Ibid* at 188–89.

9 Graham D Glancy & John McD Bradford, "Canadian landmark case: *Regina v. Swain*: translating M'Naughton into Twentieth Century Canadian" (1999) 27:2 J Am Acad Psychiatry L 301 at 301.

10 *Ibid*.

11 *Ibid* at 302.

of the *Criminal Code of Canada*,[12] and the burden of proof is on the party that raises the issue.[13] S. 2 of the *Criminal Code of Canada* defines being unfit to stand trial as being unable on account of a mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to:

(a) understand the nature or object of the proceedings
(b) understand the possible consequences of the proceedings, or
(c) communicate with counsel.[14]

Each of the criteria for fitness is typically evaluated by asking an individual a series of questions to elicit their understanding of each concept. The ability to understand the nature or object of proceedings could be assessed by asking an accused person about their charges, the key individuals that work in a courtroom, the roles of those individuals, and the purpose of the court proceedings. It is important for the individual to realize that there are two opposing sides (defence and prosecution), as well as a deciding party (the judge).

Understanding the potential consequences of court proceedings can be measured by first asking an individual if they are aware of the different pleas available to them in court. The accused person is also typically asked about the likely outcomes if they were to be found either guilty or not guilty. Important outcomes that are reviewed with an individual usually include the possibility of a jail sentence, time served, probation, a fine, or community service. Another question asked would be about the meaning of taking an oath in court and the potential consequences if they were found to be lying under oath.

The ability to communicate with counsel can be measured in different ways. It is unusual for mental health professionals to be present to witness interactions between accused persons and their legal counsel. Possible proxies used to determine someone's ability to communicate with their lawyer include asking if the accused knows who their lawyer is, how to contact them, if they have spoken with them, or how their experience has been with their lawyer so far. Another question asked around this topic could be what someone's plan is for dealing with their charges, and

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12 RSC 1985, c C-46, s 672.22.

13 *Ibid*, s 672.23(2).

14 *Ibid*, s 2.

consequently, if they know who would be able to assist them in this task. More detailed questions about an individual's understanding of more complicated concepts are often not directly assessed. These concepts include ideas such as burden of proof or reasonable doubt.[15]

In addition to determining whether an accused person passes the threshold of being fit to stand trial based on the three criteria above, the assessor must consider the mental health status of the accused and how any symptoms present affects the current functioning of the individual. The evaluator must consider the defendant's physical and mental health status and appreciate how any disease shown by the accused may be causing mental health symptoms. After assessing the individual, the duly qualified medical practitioner will provide a fitness assessment report indicating whether they believe someone is fit or unfit to stand trial. Other allied health professionals may be involved in parts of the assessment process. The assessment will be forwarded to the court, defence, and prosecution. Ultimately, a judge renders a finding of unfitness, but the role of the medical team as amicus to the court is to help provide medical information to assist in the court's understanding of the accused's mental functioning.

Fitness assessments often occur during a one-time assessment. In Manitoba, the majority of assessments are provided on an outpatient basis by the Adult Forensic Mental Health Program. They typically occur in correctional facilities or the Law Courts building if an individual is in custody or during an outpatient appointment at Health Sciences Centre in Winnipeg. In some cases, individuals will be admitted to PX3, the Inpatient Forensic Unit at Health Sciences Centre in Winnipeg, for the purposes of completing a fitness assessment.[16] If a person is found unfit to stand trial, and it is thought that their state of unfitness is related to a mental disorder, a treatment order can be made. Most mental disorders can be treated non-invasively in a short timeframe. In the case of a treatment order being provided by the court, the individual can be provided medical care as an inpatient, and their mental state can be optimized. In Manitoba, persons under a treatment order are admitted to PX3. The order has a number of stipulations, including a 60-day limit for treatment and ongoing re-assessment of fitness. The least intrusive and least restrictive treatment must

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15 Hy Bloom & Richard D Schneider, *Mental Disorder and the Law: A Primer for Legal and Mental Health Professionals*, 2nd ed (Toronto: Irwin Law, 2017) at 89–91.

16 Hygiea Casiano & Sabrina Demetrioff "Forensic Mental Health Assessments: Optimizing Input to the Courts" (2020) 43:3 Man LJ 249 at 252.

be administered, meaning that psychotropic medication is often used, while psychosurgery and Electroconvulsive Therapy (ECT) are avoided.[17] In order for a treatment order to be made, the benefits of treatment must outweigh the risks. Accused persons found unfit following a treatment order, or thought unable to be rendered fit, are diverted to the Criminal Code Review Board (CCRB). If someone is permanently unfit, they can have a stay of proceedings. Such a determination would likely happen after the completion of a risk assessment, at the discretion of a judge. Risk assessment tools can be divided into short-term and longer-term tools used to aid in predicting violence.[18]

The current standard for fitness to stand trial is based on *R v Taylor* (1992), a case involving a lawyer diagnosed with Paranoid Schizophrenia who suffered from delusions regarding the legal community.[19] Schizophrenia describes a chronic mental illness where individuals experience symptoms of psychosis. Psychosis is a word used to describe delusions (fixed, false beliefs), hallucinations (usually auditory but can also be visual or tactile in nature), disorganized thinking, grossly disorganized motor behavior, and negative symptoms (such as avolition, a decrease in expressing emotions, and a decrease in speech). The term "Paranoid Schizophrenia" is terminology used in a previous version of the Diagnostic and Statistical Manual of Mental Disorders (DSM). The term Schizophrenia is still used, but the diagnosis no longer requires further specification by subtypes such as paranoid.

In *R v Taylor*, Taylor had been suspended from the practice of law.[20] He had stabbed the counsel for the Law Society and was arrested for aggravated assault. He experienced a number of delusions about hospitals, the legal system, and even witnesses from his case. Taylor believed that there was a conspiracy against him. He had fired a number of lawyers appointed as his counsel. After a psychiatric assessment was ordered, he was found unfit to stand trial. One issue raised was that Taylor might misinterpret evidence given by witnesses during the proceedings. Other concerns included that his

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[17] Bloom & Schneider, *supra* note 15 at 106–08.

[18] Taanvi Ramesh et al, "Use of risk assessment instruments to predict violence in forensic psychiatric hospitals: a systematic review and meta-analysis" (2018) 52 Eur Psychiatry 47 at 47–49.

[19] 1992 CanLII 7412 at 9, 11 OR (3d) 323 (ON CA) [*Taylor*].

[20] *Ibid* at 16–17.

paranoia would interfere with his ability to instruct counsel in a manner that would be in his best interests, or even to co-operate with counsel at all.

Taylor appealed the finding of unfitness, and the Ontario Court of Appeals found that the "limited cognitive capacity" test should have been used to assess for fitness to stand trial rather than the "analytic capacity" test.[21] The "analytic capacity" test requires an individual to make rational decisions that are beneficial to them and in their best interests. In the "limited cognitive capacity" test, an individual would be found unfit to stand trial related to delusions only if the delusions distorted their "rudimentary understanding of the judicial process."[22] This determination of the test for fitness to stand trial has been adopted in Manitoba and elsewhere.

The case discussed here involves a lawyer that was found unfit to stand trial for a different reason, specifically Dementia. The accused was diagnosed with Parkinson's Disease and later Major Neurocognitive Disorder, commonly referred to as Dementia. In our discussion, we will use the current terminology of Major Neurocognitive Disorder when possible. We may use the previous nomenclature of Dementia if it was used in the information we are referencing. Mr. L was found unfit to stand trial related to a number of deficits in the required criteria. One key factor related to him being found unfit to stand trial was his ability to communicate with counsel. The decision regarding his fitness discussed varying interpretations of this term in legal cases over time. In addition to examining different standards for the ability to communicate with counsel, this case has other interesting features worth discussing. One such reason is the disease of the mind that rendered him being found unfit. From an epidemiologic perspective, the most common traits of individuals referred for fitness assessments include being male, single, unemployed, living alone, and having a psychiatric history.[23] Bloom and Schneider list the most common mental disorders encountered in this context as being Psychotic Disorders (e.g. Schizophrenia), Neurocognitive Disorders (e.g., Major Neurocognitive Disorder), and Mood Disorders (e.g., Mania in Bipolar Disorder or Depression with Psychosis).[24] In our team's experience, seeing individuals diagnosed with Psychotic Disorders for fitness assessments is much more

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21 *Ibid* at 27–28.

22 *Ibid* at 21.

23 Bloom & Schneider, *supra* note 15 at 94.

24 *Ibid.*

common than individuals diagnosed with Major Neurocognitive Disorders. Even though the bar for fitness is meant to be a low one, the symptoms of certain diagnoses (such as Major Depressive Disorder) may contribute to individuals who are unfit for trial being missed.[25] This article will examine the specifics of Mr. L's case, as well as the varying interpretations of the criteria for fitness to stand trial over time. Finally, potential future directions in fitness assessments will be examined.

III. CASE REVIEW

Our program is comprised of mental health specialists. We are responsible for completing court-ordered assessments. Our evaluations typically focus on two issues - whether someone is fit to stand trial and criminally responsible for their charges. At times, we are asked to address both issues. We first came into contact with Mr. L for the purpose of completing a fitness assessment.

Pertinent events surrounding the case date back to 2013. At that time, Mr. L was a 65-year-old married Caucasian man who had previously been working as a lawyer in estate law. In December of that year, he voluntarily withdrew from the practice of law, pending an investigation into the misappropriation of trust funds for which he had acted as executor. In 2015, a discipline hearing was held, and he was disbarred. The Law Society of Manitoba reported this matter to the Winnipeg Police Service in 2016. The Winnipeg Police Service was also provided with a joint statement of agreed-upon facts from The Law Society of Manitoba and Mr. L's counsel, recommending that Mr. L be disbarred and stricken from the list of barristers and solicitors of The Law Society of Manitoba. Mr. L was interviewed by police in June 2017 and November 2018. He reported that he was unable to recollect the events he was questioned about on both occasions. He was later charged with theft over $5000, fraud over $5000, false pretences, and criminal breach of trust. Following the charges, Mr. L's lawyer hired a forensic psychiatrist working in private practice to complete an assessment regarding the potential effects of a jail sentence given Mr. L's physical and mental health. During the interview, it became apparent that Mr. L did not fulfill all criteria required for being fit to stand trial. These concerns were raised by Mr. L's defence counsel, and a fitness assessment was ordered by the court.

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[25] *Ibid* at 98–99.

Our team assessed Mr. L in November 2019. At that time, he was 71 years old. The information made available to us included a letter to the Chief of Police, an investigative brief, an arrest report, an information sheet completed by a constable, a neuropsychological assessment, a letter from Mr. L's psychologist to his family physician, a letter from Mr. L's family physician to his lawyer, a letter from Mr. L's neurologist to his lawyer (dated June 2019), and a private assessment completed by a forensic psychiatrist.

The letter from the neurologist stated that Mr. L had been diagnosed with Parkinson's Disease in 2015 after presenting with a tremor. Other neurological symptoms included urinary urgency, occasional urinary incontinence, constipation, hyposmia (impaired ability to smell), and daytime sleepiness.

A neuropsychological assessment had been conducted. This assessment uses various tools to evaluate cognitive functioning.[26] These tools are performance-based and compare an individual's score to reference groups with similar demographics.[27] Mr. L had a neurological assessment completed in May 2018. He displayed difficulties with working memory and delayed recall recognition. He scored 19/30 on a Montreal Cognitive Assessment, a decline from 23/30 in July 2017 as seen with his neurologist. It was noted that Mr. L's life partner described a gradual decline in his memory with a maintained ability to administer his own medications. Medical chart notes indicated that his assessment profile was consistent with Mild Cognitive Impairment associated with Parkinson's Disease. The report mentioned that the pattern of cognitive functioning was not suggestive of Alzheimer's Disease. This could be explained by the fact that there had only been minor changes in cognition and his level of functioning.

In 2016, Mr. L had been referred for counselling with a psychologist related to a diagnosis of Major Depressive Disorder. His depressive symptoms appeared to be related to his disbarment and legal situation. At an appointment with the psychologist in January 2019, Mr. L had been unable to recall his disbarment or the details around his charges. A letter to his family physician from his psychologist, written shortly after that appointment, explained that there had been a loss of episodic, autobiographical, and working memory. A loss of memory with respect to

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[26] Philip D Harvey, "Clinical applications of neuropsychological assessment" (2012) 14:1 Dialogues Clin Neurosci 91 at 91–92.

[27] *Ibid.*

more emotionally neutral information was also seen. It was noted that Mr. L was functioning at the level of Major Neurocognitive Disorder (NCD) due to Parkinson's Disease and possibly vascular causes. Mr. L's cognitive assessments remained within the range for Mild Neurocognitive Impairment, but his psychologist based the diagnosis of a Major Neurocognitive Disorder on the significant change seen from previous functioning and the "collapse" of his memory.

The letter from his family physician written in June 2019 described Mr. L's complicated medical history. His psychiatric history involved diagnoses of Depression, Anxiety, and Cognitive Impairment. Over time, the cognitive impairment had gradually worsened. His medical history included diagnoses of Parkinson's Disease (PD), Coronary Artery Disease (CAD), Arrhythmia, Complete Heart Block (CHB), Cerebrovascular Accident (also known as a CVA or stroke), Ankylosing Spondylitis (AS), Guillain-Barre Syndrome (GBS) with residual neuropathic pain, Diabetes Mellitus Type 2 (DMII) with small vessel disease (Diabetic Retinopathy and Foot Ulcer), Ulcerative Colitis (UC), Perianal Abscess, Angina, and Hypertension. We will discuss each of Mr. L's medical conditions but will first review his answers related to fitness in order to gain context.

The private forensic psychiatry assessment was completed in the fall of 2019. Mr. L was aware of the roles of the defence lawyer and the judge but had difficulty explaining the role of the crown. He was not able to process the fact that he had been charged with an offence for more than a few minutes during the assessment. Although Mr. L had retained some working memory, he was not able to retain information regarding the circumstances that led to his charges. Regarding communication with counsel, the report noted that Mr. L could communicate with others but was limited by what he was able to process. In other words, he would not be able to instruct his counsel regarding information presented at trial if he could not retain or process it. The report explained the medical illnesses affecting Mr. L's cognitive functioning, including Parkinson's Disease and Atherosclerosis. Atherosclerosis was defined as a complication of Diabetes Mellitus Type II that resulted in Cardiovascular Accident and Cardiac Disease. The presence of decreased blood flow through the brain was noted, along with a subsequent likely diagnosis of Vascular Dementia. It was explained that his severe memory problems were likely related to Vascular Dementia and Parkinson's Disease, and consistent with a mental disorder. The decline in memory present based on interview and collateral information was deemed

to be in keeping with Dementia. The chronic, irreversible, degenerative nature of the condition was underlined, along with the implication that it would not be possible for Mr. L to return to a state of fitness.

At the time of our assessment, Mr. L was noted to be slow to respond to questions. He was unable to recite his charges after they were explained numerous times. He demonstrated an awareness of the key professionals in the courtroom and their roles. He was able to explain the concept of taking an oath, as well as the potential consequence of a jail sentence. He knew both pleas available and explained that an individual would be able to return home if they were found not guilty. With respect to potential outcomes of being found guilty, he was only able to list a jail sentence. When asked questions to assess his ability to communicate with counsel, Mr. L stated that he had friends that were lawyers. He described his defence counsel as a personal friend and was not aware that he was being represented by this person.

Mr. L brought a list of medications to the appointment. His exact medication regimen was unclear due to conflicting information from different sources. Mr. L reported taking Bisoprolol 7.5 mg PO daily, Levocarb 25/100mg 9 tablets/day, Amlodipine 10 mg PO daily, Metformin 500 mg PO twice daily, Gliclazide MR 30 mg 4 tablets/day, Tamsulosin CR 0.4mg PO daily, Gabapentin 200 mg 8 tablets per day, and Hydromorphone 2 mg tablets as needed. The mechanisms of action for these medications, as well as their potential impact on cognition, are discussed below.

Cognitive testing was completed in our assessment by a forensic psychologist working within our program. It was determined that Mr. L's immediate memory index was in the extremely low range, at approximately the 1st percentile. His language index was in the 16th percentile, far below what would have been expected of a highly educated individual who had worked as a lawyer. A Repeatable Battery for the Assessment of Neuropsychological Status (RBANS) test was completed with Mr. L.[28] It can be used to evaluate for abnormal cognitive decline in older adults.[29] Mr. L displayed deficits in delayed recall. He performed better on verbal memory recognition tasks and was able to retain some information presented in a verbal format.

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[28] Christopher Randolph et al, "The Repeatable Battery for the Assessment of Neuropsychological Status (RBANS): Preliminary Clinical Validity" (1998) 20:3 J Clin Exp Neuropsychol 310 at 312–13.

[29] *Ibid.*

A Test of Memory Malingering (TOMM) was also administered. It is a memory test used to aid in separating feigning or the exaggeration of memory impairment from real impairment. It involves learning trials and the retention of 50 items. Mr. L's Test of Memory Malingering showed no evidence of feigning, as adequate effort was put forth during that test. A determination of adequate performance on the Test of Memory Malingering is not proof that an individual is not malingering. It is possible for an individual to feign or malinger on the interview but to score adequately on the Test of Memory Malingering. A more sophisticated patient could conceivably identify the purpose of the test, as the administration would involve switching from an initial narrative conversation to a test of memory.

The medical expert involved in evaluating an individual before the courts is tasked with the process of considering each possible medical condition present and its impact on mental functioning. Our team determined that although Mr. L was able to retain some information in verbal format, there had been a significant decline from his premorbid functioning and the neuropsychological assessment from 2018. In order to gain a better understanding of how Mr. L's medical history contributed to his finding of being unfit to stand trial, we will further discuss his medical conditions.

The main diagnosis contributing to Mr. L.'s state of being unfit to stand trial was Major Neurocognitive Disorder, with several other medical conditions acting as contributing factors. Hypoxia (low oxygen), metabolic dysfunction (problems with the production of energy), and cerebrovascular hemodynamics (blood flow to the brain) are three categories of mechanisms contributing to the development of Major Neurocognitive Disorder.[30] Risk factors present for Mr. L in the form of hypoxia included ischemia and decreased cerebral blood flow related to the Cerebrovascular Accident and Complete Heart Block. Under the category of metabolic dysfunction, Mr. L had been diagnosed with Diabetes Mellitus Type II (the body has an impaired response to insulin). A significant risk factor present under the classification of cerebrovascular hemodynamics was Hypertension (pressure from the blood against blood vessel walls is too high).

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[30] Limor Raz, Janice Knoefel & Kiran Bhaskar, "The Neuropathology and Cerebrovascular Mechanisms of Dementia" (2016) 36:1 J Cereb Blood Flow Metab 172 at 178.

Major Neurocognitive Disorder is defined as "a syndrome of insidious onset and progressive decline of cognition and functional capacity from a premorbid level, that is not attributable to motor or autonomic symptoms."[31] A diagnosis of Major Neurocognitive Disorder requires the presence of a significant cognitive decline in one or more cognitive domains.[32] The six cognitive domains are complex attention, executive functioning, language, learning and memory, social cognition, and perceptual-motor/visuospatial function.[33] Our assessment of Mr. L suggested impairments in a number of these domains. The deficits noted in Mr. L that were especially relevant to being found unfit to stand trial were declines in complex attention (difficulty retaining information), as well as learning and memory (especially impacting memory of more recent events).[34]

Although the various types of Major Neurocognitive Disorder can all have significant impacts on cognition, it is important to remember that an individual with Major Neurocognitive Disorder can still be found fit to stand trial. Dependent on the state of Major Neurocognitive Disorder, a person may retain some ability to learn through repetition, though in the long term those items learned tend to be unlearned. The information that is newest tends to be lost first as someone struggles with memory loss attributed to Major Neurocognitive Disorder. A case-by-case evaluation of the specific deficits present in an individual is required in order to determine the overall impact of a disease on a person. Psychiatrists, with their advanced training in medical disease and medication treatment, can provide a unique perspective to help the courts disentangle the roles that each medical and mental health condition plays in the presentation of accused persons.

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31 Joana Meireles & João Massano, "Cognitive Impairment and Dementia in Parkinson's Disease: Clinical Features, Diagnosis, and Management" (2012) 3:88 Front Neurol 1 at 5.

32 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders,* 5th ed (Arlington, VA: American Psychiatric Association, 2013).

33 *Ibid* (Section II: Neurocognitive Disorders: Major Neurocognitive Disorder).

34 Julie Hugo & Mary Ganguli, "Dementia and Cognitive Impairment: Epidemiology, Diagnosis, and Treatment" (2014) 30:3 Clin Geriatr Med 421 at 429.

Dementia is an umbrella term encompassing all the different types of Major Neurocognitive Disorder.[35] The four main types are Alzheimer's Disease (AD), Dementia with Lewy Bodies (DLB), Vascular Dementia (VaD), and Frontotemporal Dementia (FTD).[36] Raz notes that other important types include Dementia associated with Parkinson's Disease and Mixed Dementia.[37] Mixed Dementia refers to the presence of more than one of the previously mentioned types of Major Neurocognitive Disorder.

Alzheimer's Disease, including that it is the most common neurodegenerative disease.[38] Dementia in Alzheimer's Disease requires a decline in memory and at least one other domain.[39] According to Hugo, Alzheimer's Disease is characterized by a progressive loss of neurons and synapses (spaces between neurons where information is transmitted) and the accumulation of certain proteins (amyloid plaques and neurofibrillary tangles) in the brain.[40] The cognitive decline present in Alzheimer's Disease has an insidious onset, and problems with memory and executive functioning will typically present prior to problems in other domains.[41]

Vascular Dementia is the second most common cause of Major Neurocognitive Disorder and refers to problems caused by impaired blood flow to the brain.[42] It is often seen in combination with Alzheimer's Disease. Vascular Dementia generally impacts the complex attention and executive functioning domains.[43] The progression in cognitive decline often follows a stepwise pattern, corresponding with vascular events such as a Cerebrovascular Accident.[44]

Parkinson's Disease results from the degeneration of dopaminergic (or dopamine-related) neurons in a specific part of the brain involved in movement and rewards (the substantia nigra).[45] The core symptoms of

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35 Aida Adlimoghaddam, Banibrata Roy & Benedict C Albensi, "Future Trends and the Economic Burden of Dementia in Manitoba: Comparison with the Rest of Canada and the World" (2018) 51:1-2 Neuroepidemiology 71 at 71.

36 Raz, Knoefel & Bhaskar, *supra* note 30 at 174.

37 *Ibid* at 174–75.

38 *Ibid* at 174.

39 Hugo & Ganguli, *supra* note 34 at 431.

40 *Ibid.*

41 *Ibid.*

42 Raz, Knoefel & Bhaskar, *supra* note 30 at 176.

43 Hugo & Ganguli, *supra* note 34 at 432.

44 *Ibid.*

45 Janice M Beitz, "Parkinson's Disease: A Review" (2014) 6 Front Biosci (Schol Ed) 65 at 65.

Parkinson's Disease are bradykinesia (slow movement), rigidity, resting tremor, and stooped posture. Pertinent to the case discussed here, approximately 75% of individuals diagnosed with Parkinson's Disease will be diagnosed with a Major Neurocognitive Disorder at some point.[46] Dementia associated with Parkinson's Disease often impacts the domains of memory, executive, and visuospatial functioning.[47] It involves the accumulation of the same neuropathological proteins (Lewy bodies) as those seen in Lewy Body Dementia.[48] Diagnosis is based on which symptoms are evident first, those associated with Major Neurocognitive Disorder or Parkinsonisms (physical symptoms of Parkinson's Disease). In order to use this nomenclature system, one group of symptoms must present a year prior to the appearance of the other group of symptoms. An individual with symptoms of Major Neurocognitive Disorder appearing first is classified as Lewy Body Dementia. If Parkinsonisms present earlier on in the course of the disease, the diagnosis will be Parkinson's Disease with Dementia.

Frontotemporal Dementia is characterized by marked changes in behavior and social conduct.[49] Other changes seen can include emotional blunting and loss of insight. Age of onset is typically from 45 to 65 years old. Frontotemporal Dementia typically involves atrophy (loss of neurons) of the temporal and frontal lobes of the brain.

The diagnosis of Major Neurocognitive Disorder is typically based on symptoms and changes reported by the individual and their family members or care providers, as well as more objective measures such as cognitive screening tools including the Montreal Cognitive Assessment (MOCA) or Mini Mental Status Examination (MMSE). Both tools involve a series of questions or tasks for an individual to complete and are marked out of 30. The Montreal Cognitive Assessment includes questions divided into visuospatial/executive, naming, memory, attention, language, abstraction, delayed recall, and orientation. A score of 26 out of 30 or greater is considered to be within normal limits. It is a more sensitive test and tends to pick up deficits earlier on in the disease course than the Mini Mental Status Exam. Prior to being diagnosed with Major Neurocognitive Disorder,

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[46] American Psychiatric Association, *supra* note 32 (Section II: Neurocognitive Disorders: Major or Mild Neurocognitive Disorder Due to Parkinson's Disease).

[47] Hugo & Ganguli, *supra* note 34 at 433.

[48] Raz, Knoefel & Bhaskar, *supra* note 30 at 175.

[49] Jee Bang, Salvatore Spina & Bruce L Miller, "Frontotemporal Dementia" (2015) 386:10004 Lancet (British Ed) 1672 at 1672.

an individual may initially be diagnosed with Mild Cognitive Impairment (MCI or Minor Neurocognitive Disorder). Mild Cognitive Impairment involves a lesser degree of cognitive decline and typically higher scores on cognitive testing.

The diagnosis of Major Neurocognitive Disorder requires changes in Instrumental Activities of Daily Livings (IADLs) – tasks such as grocery shopping, cooking, managing finances, cleaning, transportation, and managing medications.[50] In Mild Cognitive Impairment, an individual's ability to carry out these tasks would be preserved. Ongoing re-assessment over time of symptoms in individuals with Mild Cognitive Impairment or Major Neurocognitive Disorder is recommended. Although some individuals may actually report an improvement, approximately 10 – 15% of individuals diagnosed with Mild Cognitive Impairment will progress to Major Neurocognitive Disorder every year.[51] The expected duration of survival of individuals can vary a significant amount, depending on other risk factors such as age or other medical co-morbidities present.

Several medical conditions present likely contributed to Mr. L's presentation and finding of being unfit to stand trial. Individuals diagnosed with Parkinson's Disease can experience related medical conditions such as Major Depressive Disorder, Anxiety Disorders, Major Neurocognitive Disorder, and autonomic dysfunction (such as orthostasis, meaning low blood pressure upon moving from lying down to standing). Major Depressive Disorder has a bi-directional relationship with Major Neurocognitive Disorder[52] and could have contributed to a worsening of his cognitive decline. Coronary Artery Disease, also known as Ischemic Heart Disease (IHD), is caused by an obstructed coronary blood flow due to the formation of atherosclerosis.[53] Over time, it can lead to Myocardial Infarctions (heart attacks). Studies have shown as high as 35% of individuals with Coronary Artery Disease also have some degree of cognitive

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50 Hui Jun Guo & Amit Sapra, *Instrumental Activity of Daily Living* (Treasure Island, FL: StatPearls Publishing, last modified 27 November 2020), online: <www.ncbi.nlm.nih.gov/books/NBK553126> [perma.cc/K3UL-6BF7].

51 Sima Ataollahi Eshkoor et al, "Mild cognitive impairment and its management in older people" (2015) 10 Clin Interv Aging 687 at 687–88.

52 Mary Ganguli, "Depression, cognitive impairment and dementia: Why should clinicians care about the web of causation?" (2009) 51 Suppl 1(Suppl1) Indian Journal of Psychiatry S29 at S29–S34.

53 Nasser T Balbaid et al, "The Relationship between Cognitive Impairment and Coronary Artery Disease in Middle-aged Adults" (2020) 12:1 e6724 Cureus 1 at 2.

impairment.[54] Potential mechanisms raised for this relationship have included ischemic insults to the brain related to cardiac ischemic events, as well side effects of medications used to treat cardiac conditions. Angina describes a type of chest pain and is a symptom of Coronary Artery Disease. Complications indicating the presence of Vascular Disease included Atherosclerosis, Cardiovascular Accident, and Coronary Artery Disease.[55]

Complete Heart Block can be life-threatening, and Mr. L required admission to a Coronary Care Unit (CCU) and the insertion of a pacemaker. Arrhythmias can vary greatly in severity but can also be life-threatening. Treatments can include medications or cardioversion. Cardiovascular Accidents can be quite debilitating. There can be a long rehabilitation process in order to re-learn skills such as walking or talking. Evidence of Mr. L's Cardiovascular Accident was visualized as a lacunar infarct (small infarct caused by the occlusion of a single branch of an artery in the brain[56]) within the left medial thalamus on Magnetic Resonance Imaging (MRI).

A number of other conditions in Mr. L's medical history likely had less of a direct impact on his cognition. Ankylosing Spondylitis is a form of arthritis that can be associated with chronic pain.[57] Medical chart notes indicate Mr. L was taking pain medications related to this condition. Guillain-Barre Syndrome (GBS) is a rare neurological condition where the body's immune system attacks part of the nervous system, causing muscle weakness.[58] Severity can vary from mild cases to paralysis to the point of an individual requiring breathing support. Most people recover, even if they have had a serious disease course. Ulcerative Colitis is a type of Inflammatory Bowel Disease that can cause symptoms such as bloody diarrhea, abdominal pain, urgency, and tenesmus (the sensation of needing

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54 *Ibid* at 6.

55 Stanford Medicine, "Vascular Disease" (11 September 2017), online: *Stanford Health Care* <stanfordhealthcare.org/medical-conditions/blood-heart-circulation/vascular-disease.html> [perma.cc/W8KF-FLK6].

56 Jamary Oliveira-Filho, "Lacunar Infarcts" (last modified 7 May 2021) online: *UpToDate* <www.uptodate.com/contents/lacunar-infarcts> [perma.cc/C6FA-AT8A].

57 Judith A Smith, "Update on Ankylosing Spondylitis: Current Concepts in Pathogenesis" (2015) 15:489 Curr Allergy Asthma Rep 1 at 1.

58 "Guillain-Barré Syndrome Fact Sheet" (last modified 16 March 2020), online: *National Institute of Neurological Disorders and Stroke* <www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Fact-Sheets/Guillain-Barr%C3%A9-Syndrome-Fact-Sheet> [perma.cc/EL82-BAQM].

to have a bowel movement).[59] It typically has a chronic course, and treatment is based on the severity of symptoms present. A perianal abscess is defined as a collection of pus, and treatment depends on the severity of symptoms. Some of the neurological symptoms described by Mr. L's neurologist, such as urinary urgency and incontinence, can be uncomfortable but there are medications available to treat them.

Mr. L was prescribed a number of medications, as listed above. With regards to Major Neurocognitive Disorder, there are pharmacological treatments available that can help to halt or slow down the progression of the disease. However, it is an irreversible neurodegenerative condition. Mr. L was not taking any medications aimed specifically at targeting the symptoms of Major Neurocognitive Disorder but several of the medications he was prescribed treated some of his risk factors for it. Bisoprolol and Amlodipine are antihypertensive medications that can be used to treat Hypertension and certain cardiac issues. Metformin and Gliclazide are Antidiabetic agents. Tamsulosin is an Alpha 1 Blocker that can be used in the treatment of urinary symptoms, such as frequency or urgency. These symptoms can be seen in males with prostate enlargement (Benign Prostatic Hyperplasia or BPH). Gabapentin is an Anticonvulsant medication that can also be used in pain management. Hydromorphone is an Analgesic. Levocarb, also known as Carbidopa and Levodopa, is an Anti-Parkinson agent.

Based on the information outlined above, our team found that Mr. L was unfit to stand trial. We recommended that an alternative disposition be considered, as there were no medications that would render Mr. L fit to stand trial. Following the completion of our report, the crown questioned if the difficulties with memory that were reported were entirely accurate. A second report was prepared to address these concerns. The possibility of declaring Mr. L unfit to stand trial and then being admitted to hospital under the Criminal Code Review Board (CCRB) was raised as a possibility for two main reasons. The first reason was that a more thorough and detailed report could be completed including collateral information from staff working with Mr. L twenty-four hours a day. The second reason was that repeated education around his charges could be provided during admission to hospital. The report noted that there were some instances where Mr. L demonstrated remaining memory skills, including

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59 Joseph D Feuerstein & Adam S Cheifetz, "Ulcerative Colitis: Epidemiology, Diagnosis, and Management" (2014) 89:11 Mayo Clin Proc 1553 at 1553.

spontaneously remembering to take his medications at the appropriate time during an interview, retaining knowledge of one of his charges after an hour during one assessment, and recalling seeing the hospital psychiatrist from a previous assessment.

A hearing was conducted in spring 2020 regarding Mr. L's fitness to stand trial. Expert testimony was provided by the forensic psychiatrist in private practice, the forensic psychiatrist based in the hospital, and the forensic psychologist working in the hospital. Cross-examination of the psychiatrist that authored the private assessment included questions around the possibility of feigning deficits to avoid a more serious sentence as the possibility was not explicitly included in the report. There were a number of reasons identified by the private psychologist that suggested that feigning was less likely. These included the presence of objective signs of Mr. L's numerous medical conditions, the consistency in various sources of collateral information, and the fact that fitness was not raised as an issue by the defendant or his counsel. In addition, it was discussed that maintaining a lie or feigning memory deficits would be difficult to maintain - especially with various professionals and in different contexts over a number of years.

Mr. L's ability to communicate with counsel was addressed in the hearing. Mr. L had been observed having a brief social interaction with his lawyer the morning of the hearing. Based on this interaction, it was clear that Mr. L was able to communicate in the colloquial sense of the word. We saw Mr. L interacting with his lawyer in a friendly manner. When we asked Mr. L about his lawyer, he told us that his lawyer was a good friend. He did not mention that they had a working relationship. During his testimony, he recalled meeting with his lawyer earlier that day. Expert testimony did not indicate whether the interaction witnessed that day suggested that Mr. L would be able to understand more complicated legal concepts related to providing a defence. A discrepancy in Mr. L's memory was raised by the Crown. Mr. L was able to remember numerous details about his previous practice, however he reported being unable to recall the details of his disbarment and charges. A possible explanation raised in testimony by the forensic psychologist included an explanation that the specific deficits present in a person can vary depending on the part of the brain affected. Another possible explanation for the discrepancy was the emotional salience of the charges, as opposed to more neutral topics.

Different interpretations of the ability to communicate with counsel were mentioned in the decision provided by the judge. The decision

reviewed two divergent lines of cases with different interpretations for the meaning of the ability to communicate with counsel, as had been done recently in *R v Daley*.[60] The first interpretation of this criteria, not favoured by the judge in the decision, is explained in *R v Jobb* as "limited to an inquiry into whether an accused can recount to his or her counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence."[61] The more detailed criteria for fitness to stand trial is explained in *R v Morrissey*[62], but also extended to the decision in another case.[63] *R v Morrissey*[64] and *R v Eisnor*[65] were two cases that involved domestic partners being killed before the defendants turned the gun on themselves.

In both situations, the defendants reported amnesia or a lack of memory of the events leading up to the shooting. In *R v Morrissey*, it was noted that communication with counsel refers to the ability to "seek and receive legal advice"[66] and that there should be "meaningful presence and meaningful communication."[67] The main fitness-related issue in these cases was memory, however, the deficits were related to amnesia rather than a neurodegenerative disease. In *R v Morrissey*, there were memory deficits related to past events, but the ability to process new information was present. In that case, Morrissey was deemed to be able to communicate with counsel.[68] It was noted that *R v Morrissey* and *R v Eisnor* had favoured the same definition of ability to communicate with counsel. In both cases, the defendants were able to hear, respond, and understand the court proceedings such that they could instruct counsel even without remembering the events surrounding the shootings.

Another case with more similarities to Mr. L was *R v Amey*.[69] Amey had been diagnosed with Dementia. He also experienced delusions which were thought to be multifactorial in nature. After initially being found unfit to stand trial related to short-term memory impairment, he was admitted to hospital. He requested a second opinion and was later found fit to stand

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60 2007 SCC 53 [*Daley*].

61 2008 SKCA 156 at para 39 [*Jobb*].

62 2007 ONCA 770 at paras 24–42 [*Morrissey*].

63 *R v Eisnor*, 2015 NSCA 64 [*Eisnor*].

64 *Morrissey*, *supra* note 61 at para 4.

65 *Eisnor*, *supra* note 62 at para 2.

66 *Morrissey*, *supra* note 61 at para 29.

67 *Ibid* at para 36.

68 *Ibid* at para 16.

69 2009 NSPC 29 [*Amey* 2009].

trial after experiencing improvement while in hospital. He was found fit to stand trial by the review board, but again unfit to stand trial when he was returned to the court system.[70] The decision by the court stated that memories of information presented at trial was important in a person's ability to instruct counsel. The language used by the court included the term "meaningful," again with respect to communication.[71] Another trial was held again a year later, where Amey demonstrated the ability to facilitate his memory and communication in the trial process by taking and referencing notes of testimony provided. He was eventually found fit to stand trial.[72] There was also a mention by a psychiatrist that Amey had an interaction with his lawyer the day of the trial. In that interaction, it was noted that Amey acknowledged the possibility of a guilty verdict.[73]

Mr. L's testimony in the hearing was included in the judge's decision. A note was made of his overall presentation, including the presence of a flat affect and tremor, both signs of Parkinson's Disease. He often responded to questions by saying, "I don't think so" or "I don't know what that means." He was able to understand the meaning of charges such as theft or fraud. He showed deficits when asked about being charged. He recalled being told he had been charged with theft the day of the trial but stated that he was unaware of being charged with fraud. At one point, he demonstrated a general awareness of the reason for the hearing by stating that people were saying that he was "mentally defective." However, near the end of the trial when he was asked about it, he reported being unaware of the reason for the hearing. He also stated that he was not aware of the other three charges he was facing.

At the end of the hearing, the judge opined that the collateral sources of information were consistent with Mr. L's presentation in court, including the memory deficits present.

Following the decision of Mr. L being found unfit to stand trial, he was placed under the purview of the Mental Health Review Board. An assessment was completed regarding his disposition. On interview, Mr. L had a similar presentation to the previously documented assessments. He said that he was unaware that he had been charged and appeared to be unable to retain information presented to him. A risk assessment found

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70 *Ibid* at paras 1–9.

71 *Ibid* at para 36.

72 *R v Amey*, 2010 NSPC 100 at paras 22–31 [*Amey* 2010].

73 *Ibid* at para 24.

that Mr. L was at a low risk of offending. He was discharged to reside at his home address and attend regular follow-up appointments.

IV. Discussion

With respect to the case of Mr. L, there were a number of salient issues present during his assessment that factored into the determination of him being unfit to stand trial. First, he displayed deficits in his ability to understand the object and nature of proceedings. Although he had an awareness of some of the aspects of court, he was not able to process the fact that he had been charged. As a result, he was not able to apply his general knowledge about court proceedings to his specific case. Additionally, he was employed as a lawyer for many years but was unable to list any potential sentences for a guilty verdict other than a jail sentence. Again, he was unable to connect this possibility with his own sentence as he did not appear to be able to absorb the fact that he had been charged. Finally, it was deemed that he did not have the ability to communicate with counsel. The decision in his case considered previous interpretations of the ability to communicate with counsel. The limitations present in terms of processing information and the ramifications on Mr. L's ability to instruct counsel were highlighted. Overall, the importance of meaningful communication and the ability to participate in court proceedings was highlighted.

As discussed above, there have been a number of cases in Canada evaluating fitness to stand trial in the context of memory deficits. This case is unique in that it involves an individual with Major Neurocognitive Disorder who was previously employed as a lawyer. An individual diagnosed with Major Neurocognitive Disorder may or may not be found fit to stand trial. However, it is reasonable to assume that a lawyer who had not experienced symptoms of psychosis or other severe and persistent mental illness would usually be found fit to stand trial. If there were memory deficits, it would be expected that short-term memory would be affected prior to long-term memory.[74] Long-term memories would include an understanding of court proceedings and the potential consequences. This case highlights how significant and diverse the impact that Major Neurocognitive Disorder can be on fitness to stand trial, as it demonstrates

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[74] Craig E Hou, Bruce L Miller & Joel H Kramer, "Patterns of autobiographical memory loss in dementia" (2005) 20:9 Intl J Geriatric Psych 809 at 810.

the dramatic change from Mr. L's previous legal knowledge. In addition, the inability to communicate with counsel is surprising, as Mr. L would have communicated with lawyers countless times throughout his career. A reasonable expectation would be that such crystallized procedural knowledge would have been maintained, given that remote autobiographical memories are stored long-term.[75] He had extensive education and experience related to the workings of the legal system, yet was deemed unfit to stand trial based upon deficits in all three major criteria set out in the Taylor standard. Other case law discussed in his decision referenced individuals who had significant differences in comparison to our case. *R v Taylor* differed in that it involved a lawyer with delusions but without memory deficits.[76] The *R v Morrissey*[77] and *R v Amey*[78] cases involved memory deficits related to amnesia, not Major Neurocognitive Disorder. In the decision on Mr. L, there was no mention of previous cases in which an individual with significant legal knowledge was found unfit to stand trial related to Major Neurocognitive Disorder.

Although the legal knowledge and experience of the man discussed in this case in relatively unusual in fitness assessments, his difficulties with memory and communication related to his medical conditions are not.[79] There are approximately 50 million people with Major Neurocognitive Disorder worldwide, and 10 million new cases each year.[80] The number of Manitobans with a diagnosis of Major Neurocognitive Disorder is projected to increase by 20.7% from 2015 to 2025, by 68.16% from 2015 to 2035, and by 125% from 2015 to 2045.[81] It is estimated that 40,700 Manitobans will be diagnosed with Major Neurocognitive Disorder by 2038.[82] Previous studies in Canada have determined that the majority of court-ordered assessments (approximately 68%) are regarding fitness.[83] From 2014 to 2018, the number of individuals in Manitoba requiring a fitness assessment

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75 *Ibid.*

76 *Taylor*, *supra* note 19 at 7–9.

77 *Morrissey*, *supra* note 61 at para 16.

78 *Amey* 2009, *supra* note 68 at para 65.

79 *Ibid.*

80 "Dementia: Key Facts" (21 September 2020), online: *World Health Organization* <www.who.int/news-room/fact-sheets/detail/dementia> [perma.cc/M33K-N8PN].

81 Adlimoghaddam, Roy & Albensi, *supra* note 35 at 73.

82 *Ibid.*

83 Maurice Moyses Ohayon et al, "Fitness, Responsibility, and Judicially Ordered Assessments" (1998) 43:5 Can J Psychiatry 491.

increased by 30%.[84] There is no reason to suggest that this pattern will change, especially as our elderly population continues to grow.[85] As the population ages, it is instead expected that the number of individuals diagnosed with Major Neurocognitive Disorder requiring fitness assessments will increase. Neurodegenerative diseases can cause dysfunction of neural structures involved in judgment, executive function, emotional processing, sexual behavior, violence, and self-awareness.[86] Such dysfunctions can lead to antisocial and criminal behavior that appears for the first time in the adult or middle-aged individual or even later in life.[87]

In addition, Diehl-Schmid et al. (2013) studied those with dementia and noted that between 12% to 56% of the sample had engaged in criminal behavior, with differences based on the type of dementia diagnosed.[88] It was presumed that the behavior was caused by the degenerative disease, as none of the individuals had displayed criminal behavior prior to the study.[89] Further research could examine the impact on the demographics of individuals in the justice system over time. One option to reduce uncertainty and variability in interpretations of criteria is to consider the application of a standardized screening tool to assess fitness to stand trial.

Considering that there have been varying interpretations of the ability to communicate with counsel over time, it would be pertinent to examine whether a specific screening tool to assess fitness to stand trial could be more useful to the medical practitioners called upon to aid the legal system. This is an important consideration given that wide variability exists in the comprehensiveness of competency evaluation reports.[90] It was noted in the same study that mental health examiners seemed to put more weight on a defendant's knowledge and ability to participate in trial than on their ability

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84 Casiano & Demetrioff, *supra* note 16 at 252.

85 Manitoba Health, Seniors and Active Living, *Population Report* (1 June 2019), online (pdf): *Government of Manitoba* <www.gov.mb.ca/health/population/pr2019.pdf> [perma.cc/9VV2-72ZY].

86 Madeleine Liljegren et al, "Criminal Behavior in Frontotemporal Dementia and Alzheimer Disease" (2015) 72:3 JAMA Neurol 295 at 296.

87 *Ibid* at 295.

88 Janine Diehl-Schmid et al, "Guilty by Suspicion? Criminal Behavior in Frontotemporal Lobar Degeneration" (2013) 26:2 Cognitive & Behav Neurol 73 at 75.

89 *Ibid* at 76.

90 Patricia A Zapf et al, "Have the Courts Abdicated Their Responsibility for Determination of Competency to Stand Trial to Clinicians?" (2004) 4:1 J Forensic Psychol Prac 27 at 40.

to appreciate and reason.[91] Previous research has argued that competency assessment instruments may help to ensure that clinicians adequately address the relevant areas in competency assessments.[92] One paper from England discussed the development of a standardized screening tool for evaluating fitness to stand trial that could potentially be adapted to other commonwealth countries.[93] In considering relying on an assessment tool, a potential drawback to having criteria for evaluating fitness to stand trial that are too specific would be that some of the nuances of tailoring questions could be lost. However, the authors of the article explicitly stated that such a tool was not meant to replace clinical assessment; rather, it was designed to be used as an adjunct in determining "a standardised, reliable and valid way of determining whether individuals are able to participate effectively in court proceedings."[94] The fact that the *Morrissey*[95] standard has been used by multiple judges suggests that a standardized screening tool could be considered as another means to help assess fitness to stand trial that could be applied more broadly.

In terms of the operationalization of a potential standardized assessment screening tool, it would be important to reflect on the benefits of having a multidisciplinary team approach. Fitness assessments could involve a group of qualified professionals in addition to psychiatrists. The team could include Psychiatrists, Psychologists, Occupational Therapists, and Social Workers. Roles that these allied professionals could play include cognitive testing and tests for malingering by Psychology, functional assessments by Occupational Therapists (to understand the abilities in independent activities of daily living) and Social Workers to gather collateral information on functioning in the community. For those found unfit to stand trial but with the potential to be restored to fitness, education can be an option. The inpatient team, including Nurses, Occupational Therapists, and Community Forensic Mental Health Specialists, participate in educating those who are unfit to stand trial while they are hospitalized. The formalization of their involvement could be considered in a more

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91 *Ibid.*

92 Jodi L Viljoen, Gina M Vincent & Ronald Roesch, "Assessing Adolescent Defendants' Adjudicative Competence: Interrater Reliability and Factor Structure of the Fitness Interview Test–Revised" (2006) 33:4 Crim Just & Behavior 467 at 484.

93 Penelope Brown et al, "Fitness to plead: Development and validation of a standardised assessment instrument" (2018) 13:4 PLoS ONE e0194332.

94 *Ibid* at 11.

95 *Morrissey*, *supra* note 61.

standardized approach. The team could use the screening tool to help inform them about issues that warrant further review by the designated health professional. The creation of a new screening tool to assess fitness to stand trial is not required, as validated screening tools exist and are in use today.

The Fitness Interview Test (FIT) has been used as a screening instrument for fitness to stand trial.[96] The FIT-R is a semi-structured interview that assesses the three criteria specified in the Criminal Code of Canada.[97] It was originally developed for fitness assessments in Canada, but later revised to include nuances in the law from the United States of America.[98]

Zapf et al. (2001) explain that the Fitness Interview Test is divided into three separate sections to assess these issues separately.[99] The first part examines the defendant's understanding of the nature and object of court proceedings by reviewing their understanding of the nature and severity of their charges, the arrest process, the roles of key professionals in a courtroom, the two pleas available, and legal processes and procedures. The next section looks at their appreciation of the possible consequences of court proceedings, their plea options, and their understanding of the likely outcome. The final section deals with their ability to communicate with counsel. This ability is examined through their ability to communicate facts to their lawyer, relate to their lawyer, participate in their defence, plan a legal strategy, manage their behavior in a courtroom, provide relevant testimony, and to challenge the testimony of witnesses. As it is a screening tool, the goal is to rule out individuals that are unambiguously fit to stand trial. In other words, the aim would be for a low percentage of individuals that were found fit to stand trial with the screening tool later having an assessment with the opposite finding. In two studies by Zapf et al., the false negative was quite low at 2%.[100] That is to say, 2% of those determined to be fit to stand trial according to the Fitness Interview Test were later found

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96 Patricia A Zapf, Ronald Roesch & Jodi L Viljoen, "Assessing Fitness to Stand Trial: The Utility of the Fitness Interview Test (Revised Edition)" (2001) 46:5 Can J Psychiatry 426 at 428.

97 *Ibid* at 426.

98 Gregory DeClue, Book Review of *Fitness Interview Test-Revised (FIT-R): A Structured Interview for Assessing Competency to Stand Trial* by Ronald Roesch, Patricia A Zapf & Derek Eaves, (2006) 34:3 J Psychiatry & L 371 at 378.

99 Zapf, Roesch & Viljoen, *supra* note 95 at 427.

100 *Ibid* at 430.

to be unfit to stand trial. The false positive rate has been higher in these studies, ranging from 11% to 24%. The false positive rate describes the proportion of individuals initially found unfit to stand trial by the screening tool who were later determined to be fit to stand trial.

Screening tools are often designed to have higher rates of false positives compared to false negatives. False positives do not have consequences that are as serious as false negatives, as those individuals would simply be flagged as requiring further assessment. Viljoen et al. (2006) found that the interrater reliability of items and sections of the Fitness Interview Test, Revised Edition (FIT-R) was good overall, and the correlations of the summary scores for sections between raters was between 0.82 and 0.91.[101] In other words, individual raters provided very similar scores for the various sections.

Another study looked at the use of a different 22-item screening tool, the MacArthur Competence Assessment Tool, to assessing fitness to stand trial in individuals in England and Wales.[102] In that study, inmates with or without diagnoses regarding mental health were examined.[103] It showed good internal consistency and interrater reliability on the scale, with correlation between psychiatrists at 0.77. The MacArthur Structured Assessment of the Competencies of Criminal Defendants (MacSAC-CD) was initially created by Hoge et al.[104]

It is not clear to us that the use of either of the standardized tools mentioned would have made a difference to the final outcome in our case. All of the forensic assessments completed for Mr. L found that he was unfit to stand trial. However, it is important to note that there were discrepancies between the reports in our case with respect to the different criteria for being considered fit to stand trial. After our initial fitness assessment, the crown questioned the veracity of the memory problems that had been reported. There was consideration of admitting Mr. L to the Inpatient Psychiatric Unit for further observation and assessment, a resource-intensive option that is not considered lightly. The main discrepancy in viewpoints of the assessors was about Mr. L's ability to communicate with

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101 Viljoen, Vincent & Roesch, *supra* note 91 at 467.

102 Akintunde A Akinkunmi, "The MacArthur Competence Assessment Tool-Fitness to Plead: A Preliminary Evaluation of a Research Instrument for Assessing Fitness to Plead in England and Wales" (2002) 30:4 J Am Acad Psychiatry L 476 at 477.

103 *Ibid* at 476.

104 Steven K Hoge et al, "The MacArthur Adjudicative Competence Study: Development and Validation of a Research Instrument" (1997) 21:2 L & Hum Behav 141.

counsel. The other cases that we have discussed have shown that the definition of the ability to communicate with counsel has varied over time, although the standard used to determine fitness has not. Most importantly, standardized tools could help to ensure that defendants are treated fairly, even if there are different clinicians completing their fitness assessments.

In medicine, determining the specific question being asked can result in a consultation that is more effective and helpful.[105] Similarly, a reasonable goal of forensic assessments, and standardized assessments in general, is to have high levels of inter-rater reliability. The two standardized tests described above both have this quality. With respect to all three major criteria involved in assessing one's fitness to stand trial, there is a certain degree of variability present in the specific interpretation by different individuals. A previous study found that "Manitoba's forensic clinicians were using standardized criteria that were very similar to 1992 Criminal Code revisions of fitness."[106] A future project could examine whether this is still the case today. Previous research in the United States evaluating the accuracy of forensic examiners found that "mental health experts' intrinsic ability to discriminate between competent and incompetent defendants is high (though not perfect)."[107] In addition to examining the quality and consistency of assessments, it is vital to determine what standard is most useful to those ordering and using the assessments.

V. CONCLUSION

Fitness assessments are the most common forensic court-ordered evaluation.[108] Today in Manitoba, the *R v Taylor* (1992) case is accepted as the standard within the forensic psychiatric community. There have been a number of other cases since *Taylor* that have involved deficits in memory and its impact on fitness to stand trial. Other cases adopted an interpretation of the ability to communicate with counsel in more specific terms. It is reasonable to re-evaluate the standard for fitness to stand trial

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[105] Lee Goldman, Thomas Lee & Peter Rudd, "Ten Commandments for Effective Consultations" (1983) 143:9 Arch Intern Med 1753 at 1753.

[106] R Gail Robertson et al, "Clinical and Demographic Variables Related to "Fitness to Stand Trial" Assessments in Manitoba" (1997) 42:2 Can J Psychiatry 191 at 191.

[107] Douglas Mossman et al, "Quantifying the Accuracy of Forensic Examiners in the Absence of a 'Gold Standard'" (2010) 34:5 L & Hum Behav 402 at 411–12.

[108] Casiano & Demetrioff, *supra* note 16 at 263.

that has been used for nearly thirty years,[109] as interpretations of the individual criteria have varied. Different regions and countries have looked at standardized assessment tools in the hopes of achieving more accurate fitness assessments. Research looking at some of these standardized tools has shown positive results. The case discussed here highlights some of the variations in fitness criteria that have been adopted in the past. Given the discrepancy in the interpretation of fitness to stand trial, and specifically the ability to communicate with counsel, it may be time to consider examining the adoption of additional forensic screening instruments. A review of the criteria for fitness to stand trial could help to reduce individual bias and ensure fair treatment for individuals whose fitness to stand trial is questioned. This is especially true in the context of a growing aged population.

The case discussed here demonstrates a unique example of someone being found unfit to stand trial related to his diagnosis of Major Neurocognitive Disorder. Mr. L's legal experience provided perspective on the severity and breadth of the effects of being diagnosed with Major Neurocognitive Disorder. In the coming years, being found unfit to stand trial related to Major Neurocognitive Disorder may become more common. In anticipation of such upcoming changes, consideration should be given to evaluating the definitions and interpretations we are using. More discussion between legal and mental health professionals could be helpful. For example, if the mental health team were aware of which of the three prongs to be considered for unfitness were the concern of the legal team, this could aid in planning for the activation of involvement by allied health professionals for such things as education about fitness to the accused person. In addition, the plan to observe and directly evaluate patients while counsel interacts with their clients could be considered in situations where narrow delusions surrounding the lawyer were occurring.

Future collaboration by mental health professionals and legal professionals would be beneficial in determining the best standard for fitness assessments. The provision of increased communication and adoption of screening tools can help all those who serve the population of mentally ill defendants.

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[109] See *Taylor*, *supra* note 19.

Year in Review

DAVID IRELAND

I. INTRODUCTION

2020 was defined by the global COVID-19 pandemic, which has changed how we live, work, and interact with one another. 2020 was also notable in witnessing Canadian society adapt and respond to broader social movements calling for change. Decisions from both the Supreme Court of Canada (SCC) and the Manitoba Court of Appeal (MBCA) have responded to these shifting social norms by recognizing broad systemic issues pervasive in the justice system and society-at-large. There is much to celebrated when courts venture into these waters, but the age-old polemic of judicial activism is sure to follow when courts raise their voices beyond the confines of legal doctrine. This article comments on some of the most important cases decided in this unique and turbulent year in Canada.

We examine the jurisprudence of the MBCA and the SCC in February 2020 through February 2021, inclusive, with the goal of highlighting recent changes and developments in the criminal law. Where relevant, some appeals that fall outside of this period will be discussed due to their significance to the law. Further, using the framework and parameters developed in previous Robsoncrim "Year in Review" articles, we have attached an appendix of statistical infographics which highlight statistical findings of the decisions of the SCC and MBCA between the period of February 2020 and February 2021.

In 2020, the SCC also appears to have continued its trend of limiting full written decisions, preferring instead to issue extremely brief judgments.[1] While clear and succinct legal writing is to be encouraged, there can be little doubt that fulsome reasons are required to guide lower

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[1] See e.g. *R v Knapczyk*, 2016 SCC 10; *R v Shaoulle*, 2016 SCC 16; *R v Hunt*, 2017 SCC 25; *R v Robinson*, 2017 SCC 52; *R v Ajise*, 2018 SCC 51; *R v Culotta*, 2018 SCC 57; *R v JM*, 2019 SCC 24; *R v Kernaz*, 2019 SCC 48; *R v Riley*, 2020 SCC 31; *R v Langan*, 2020 SCC 33; *R v Yusuf*, 2021 SCC 2; *R v Murtaza*, 2021 SCC 4.

courts' decision-making. Under Chief Justice Wagner, the SCC continues to offer plenty of dissenting opinions and disagreement within the Court; all of it, however, appears more "tightly packaged" than under the previous tenure of Chief Justice McLachlin. It remains to be seen if this warm embrace of brevity is to be celebrated or if a lack of detailed analysis breeds confusion in the courts below.

II. METHODOLOGY

As with previous Year in Review articles,[2] we utilized both quantitative and qualitative analyses to highlight trends in the jurisprudence. The data collected for this review was limited to decisions from the SCC and MBCA from February 2020 through February 2021, inclusive. The cases were then reviewed, inserted into a data table organized by the judgement date, and subsequently categorized. We drew cases from two sources: CanLII, a publicly accessible database from the Canadian Legal Information Institute, and WestlawNext, a subscription-based database from Thomson Reuters Canada. Each reviewed case was analyzed, and certain variables were noted, including the date of the decision, a description of the decision, the hearing judge, the court of origin, the appeal result, and the docket and citation information. Other variables, especially for the SCC cases, were also noted, including identified themes and connections to other cases. In total, there were 20 criminal law cases heard by the SCC and 63 cases heard by the MBCA in the prescribed period.

Upon reviewing the data collected, the cases were categorized and placed into one of six groups (Evidence, *Charter*, Trial Procedure, Sentencing, Defences, and Miscellaneous). Of course, these categories are not watertight compartments, and a certain amount of discretion is required when categorizing a case. Many cases, for example, could fall under *Charter* and Evidence. Where this is the case, we have used our best judgement to arrange cases in a way that helps the reader know what the case is about at first blush. In other words, there is no scientific rigor in the categorization. Where a case touched upon multiple appellate categories, it was decided to only include the case in one category – namely, the category which we deemed was most relevant to the case. As a result, despite our best efforts to make categorization an objective process, subjectivity is

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[2] See Brayden McDonald & Kathleen Kerr-Donohue, "Robson Crim Year in Review" (2020) 43:4 Man LJ 245.

implicit. This methodology is consistent with our intention to summarize the jurisprudence, knowing, of course, that nothing replaces a complete and careful reading of the cases.

III. STATISTICS: SCC

A. Court of Origin

Of the appeals heard from February 2020 through to February 2021, inclusive, 20 criminal law cases appeared before the SCC. As is often the case, the majority of the decisions originated from Ontario (n=7/20). Other Provinces supplying appeals included British Columbia (n=4/20), Alberta (n=3/20), Manitoba (n=2/20), Saskatchewan (n=2/20), Quebec (n=1/20), and Nova Scotia (n=1/20). The Supreme Court heard no appeals from New Brunswick, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon, Nunavut, the Federal Court of Appeal, or the Court Martial Appeal Court of Canada ("CMACC").

B. Appellant Versus Respondent Rates

Following the trend of 2019 almost exactly, defence counsel appeared as the Appellant in 63% (n=12.5/20) of the appeals (the Crown appeared as Respondent in 37% (n=7.5/20) of the appeals). We considered the appeal in the peremptory challenge case, *R v Chouhan*, as a split appeal (Crown appeal with a defence cross-appeal).

C. Overall Success Rates

Notably, defence counsel only succeeded in 25% (n=5/20) of appeals, while the Crown succeeded in 70% (n=14/20) of appeals. One appeal was characterized as a mixed result (n=1/20).

D. Appellant Categories

Evidence and *Charter* were the most commonly explored categories before the SCC from February 2020 through February 2021, accounting for 40% (n=8/20) and 20% (n=4/20) of appeals heard, respectively. Defences and trial procedure each accounted for 15% (n=3/20) of the

appeals, and both Miscellaneous and Sentencing accounted for 5% (n=1/20) of the appeals.[3]

IV. CASE ANALYSIS: SCC

A. *Charter*

Of the 20 appeals that the SCC decided between February 2020 and February 2021, four were placed under the category of *Charter* appeals. Interestingly, the scope of *Charter* appeals which the SCC heard was markedly limited, with most of the *Charter* appeals addressing *Jordan*-related questions and providing further guidelines to the applications of *Jordan* timelines.

One such appeal was *R v KGK*, a case arising in Manitoba. In *KGK*, the matter took 42 months from charge to the rendering of the judge's verdict.[4] The primary focus of the Court's decision was whether *Jordan* presumptive ceilings applied in the time spent by a judge rendering their verdict. In his majority decision, Justice Moldaver held that *Jordan* ceilings only apply from the date of the charge until the actual or anticipated end of evidence and argument; not the time spent by judges rendering their verdicts.[5] The Court further considered the test under s. 11(b) of the *Charter*, as applied to time a judge spends rendering a verdict, and ultimately decided that the onus is on the accused to show that their right to be tried within a reasonable time has been infringed by a lengthy verdict deliberation time and that the defence must show that deliberation time took markedly longer than it reasonably should have in the circumstances.[6] The SCC majority made it clear that this test is a high bar to meet, a position which is also supported by the presumption of judicial integrity.[7]

Another case of note in which the SCC considered the *Jordan* presumptive ceilings is *R v Thanabalasingham*.[8] In *Thanabalasingham*, the Court considered the application of the transitional exceptional

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3 To see visual representations of these and other statistics, in addition to a comparison of trends in cases before the SCC and MBCA from 2019 and 2020, please refer to Appendix II of this paper.

4 *R v KGK*, 2020 SCC 7.

5 *Ibid* at para 31.

6 *Ibid* at para 65.

7 *Ibid*.

8 *R v Thanabalasingham*, 2020 SCC 18.

circumstance in *Jordan* in the context of second-degree murder.[9] The accused was charged with the murder of his spouse in 2012. The matter was not set for trial until 2017, and Thanabalasingham was in jail during that period. As most of the delay happened before the *Jordan* decision was released, the Crown argued that the ceiling can be exceeded where the state satisfies the court that the time taken was based on reasonable reliance of the law as it previously existed. The SCC rejected this argument and found that when an accused is forced to wait four and a half years for a trial, their s. 11(b) *Charter* rights will, perhaps unsurprisingly, be violated. The Court also noted the role that the seriousness of the offence and prejudice to the accused play in determining whether delay is unreasonable.[10] While a charge of murder is extremely serious, there is no doubt the Supreme Court is committed to the *Jordan* ceilings, making it clear that all players in the justice system must continually move matters forward in a timely fashion. The Court, therefore, took the opportunity in *Thanabalasingham* to highlight the fundamentals of *Jordan*, including the importance of Crowns making reasonable and responsible decisions in exercising their discretion, as well as the importance of defence counsel helping to move matters smoothly through the justice system.[11]

Although not *Jordan*-related, the theme of timeliness returned in the context of over-holding in *R v Reilly*. The accused was being held in custody on assault causing bodily harm charges in Alberta. *Criminal Code* s. 503(1) governs the initial detention of an accused in custody and prescribes that an accused must be brought before a justice within 24 hours. Reilly waited 35 hours before being brought before a justice to determine the issue of bail. The trial judge found that, because of systemic problems with the detention and bail system in Edmonton, this was unacceptable, and a stay of proceedings should be entered. The Alberta Court of Appeal disagreed and wanted the accused to face trial. However, the SCC determined in *Reilly* that it was appropriate to enter a stay of proceedings pursuant to s. 24(1) of the *Charter*, stemming from the problem-ridden implementation of Alberta's bail system and broader systemic issues.[12]

Reilly is a case that is easy to overlook in 2020. As is seemingly becoming the norm, it is a very brief decision outlining in the barest terms the scope

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9 *Ibid* at para 2.

10 *Ibid* at para 8.

11 *Ibid* at para 9.

12 *R v Reilly*, 2020 SCC 27.

of disagreement with the Alberta Court of Appeal. We would suggest, however, that this is an important decision showing the SCC's willingness to recognize systemic problems in our criminal justice system and to offer individualized remedies under s. 24(1) of the *Charter* when these problems create unfairness to an accused. As with the *Jordan* line of authority, the Court shows little tolerance for the State's inability to move an accused through the criminal justice system with alacrity. It is unclear what impact this decision will have on other procedural practices in the criminal justice system. However, the Crown is on notice that arguing an overwhelmed criminal justice system creates delay we simply must put up with, may be falling on deaf ears in our highest court.

The final *Charter* case which the SCC considered was *R v Chouhan*.[13] The question in *Chouhan* was whether Bill C-75, which eliminated peremptory challenges (the ability for an accused and the Crown to dismiss a juror without cause) and substituted judges for lay triers of fact, was constitutional within the confines of ss. 7, 11(d), and 11(f) of the *Charter*.[14] The government had brought the peremptory legislation into place in the wake of the Gerald Stanley trial concerning the murder of a young Indigenous man, Colten Boushie.[15] Chouhan was convicted at trial after his argument to receive peremptory challenges during jury selection was dismissed by the trial judge. Though the Ontario Court of Appeal found the provisions of Bill C-75 were constitutional, they held that the provisions should not have applied to those pending a jury trial at the time the changes happened. The Crown, therefore, appealed the ruling arguing that all jury trials held after the date of the provisions coming into force should not allow peremptory challenges. Despite this being a Crown appeal to the Supreme Court, Chouhan argued that the lack of peremptory challenges

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13 *R v Chouhan*, 2020 CarswellOnt 14612, SCJ No 101. No neutral citation is available yet. For a discussion about issues that animated the practice community see Michelle I. Bertrand et al, "'We have centuries of work undone by a few bone-heads': A Review of Jury History, a Present Snapshot of Crown and Defence Counsel Perspectives on Bill C-75's Elimination of Peremptory Challenges, and Representativeness Issues" (2020) 43:1 Man LJ 111.

14 For a further discussion of the Appeal Court decision in *Chouhan*, see Michelle I. Bertrand et al, *supra* note 13 at 113–44, 136–38.

15 For a fulsome discussion of the Stanley trial and its ramifications to the legal system, see Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Kingston, ON: McGill-Queen's University Press, 2019). For a discussion about eliminating peremptories and lawyer reactions, see Bertrand et al, *supra* note 13.

violated his *Charter* rights. Ultimately, the Court found that the Bill C-75 changes, including eliminating peremptory challenges, were constitutional.

However, that does not tell the full story of this case. This case created tensions within the practice community; there was much disagreement as to the purpose of peremptory challenges – do they increase or decrease systemic racism in the criminal justice system?[16] During argument, parties and interveners presented very different takes on what peremptory challenges meant to the jury selection process. Put simply, some lawyers think peremptory challenges help to create diversity in a jury pool while other lawyers believe peremptory challenges create less diversity and promote systemic racism. Despite the nuances of these positions being fully argued before the Supreme Court, we are left with a majority decision grounded in the belief that a representative jury does not include the right to a jury of a particular racial composition.[17]

Finally in this section, though a quasi-criminal *Charter* case, *Quebec (Attorney General) v 9147-732 Québec Inc.* clarified that s. 12 *Charter* protections against cruel and unusual punishment do not extend to corporations, and it is a right only humans can enjoy.[18]

B. Defences

Of the 20 criminal law appeals which the SCC heard in the timeframe of February 2020 through February 2021, only three fall under the category of defences. One of the more contentious decisions rendered by the SCC in 2020 was *R v Ahmad.* In *Ahmad*, the Court was asked to re-examine the viability of the defence of entrapment in the context of dial-a-dope operations.[19] The five-person majority upheld the test previously iterated in *R v Mack* and *R v Barnes*, which allowed for police to present an opportunity to commit a crime only upon forming reasonable suspicion based upon a combination of information that a specific person is engaged in criminal activity and/or people are carrying out criminal activity at a specific location.[20] Moreover, the Court further upheld the decision in *Mack* and *Barnes* that provides that unless reasonable suspicion exists, a stay of

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16 For an in-depth discussion of these arguments, see Bertrand et al, *supra* note 13 at 128–38.

17 *Chouhan*, *supra* note 13 at para 104.

18 *Quebec (Attorney General) v 9146-0732 Québec Inc*, 2020 SCC 32.

19 *R v Ahmad*, 2020 SCC 11 at para 3 [*Ahmad*].

20 *Ibid* at paras 8, 15–23, 57.

proceedings will be entered for entrapment.[21] The majority also found that the standard of reasonable suspicion is objective, and they recognized that the law should be cautious in expanding police powers.[22] With that said, the majority emphasized that reasonable suspicion is still the standard required since it guards against systemic racism and decreases the likelihood that vulnerable or marginalized people will commit a crime where they otherwise would not.[23] The majority's decision in *Ahmad* was subsequently applied in another case before the SCC in *R v Li*.[24]

Of note, *Ahmad* marked a particularly contentious decision from the SCC because it was one of only a few appeals from February 2020 through February 2021 in which a scathing dissent was written. In Justice Moldaver's dissenting opinion (with Justices Wagner, Cote, and Rowe), he sought to expand police powers by vitiating the potential defence of entrapment in all but abuse of process situations. The dissent held that a *bona fide* inquiry should be defined as a "factually-grounded investigation into a tightly circumscribed area, whether physical or virtual, that is motivated by a genuine law enforcement purpose."[25]

Finally with reference to defences, in *R v Chung*, the SCC dismissed an appeal that focused on the requisite *mens rea* required for the offence of dangerous driving causing death.[26] Mr. Chung drove into busy intersection in Vancouver at three times the legal speed limit, killing another motorist.[27] The accused was acquitted of dangerous driving causing death because there was a reasonable doubt as to the mental element of the offence. The British Columbia Court of Appeal substituted a conviction based on an error of law; the trial judge believed a brief period of excessive speed, no matter how fast, could not support the marked departure standard.[28]

The Majority of the Supreme Court (sitting unusually as a panel of only five justices) found that the trial judge had erred in focusing on the momentary nature of the speeding involved. Rather, momentary speeding can establish the *mens rea* of dangerous driving where it supports the inference that the driving was a marked departure from the standard of care

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21 *Ibid* at paras 15, 85.

22 *Ibid* at para 26.

23 *Ibid* at paras 25–28.

24 *R v Li*, 2020 SCC 12.

25 *Ahmad*, *supra* note 19 at para 90.

26 *R v Chung*, 2020 SCC 8.

27 *Ibid* at para 1.

28 *Ibid* at para 7.

a reasonable person would have exhibited in the circumstances.[29] When establishing the *mens rea* for dangerous driving, the focus of the trial judge should be on what a reasonable person would have foreseen in the circumstances.[30]

C. Evidence

Of the 20 appeals which the Supreme Court ruled upon, eight were on the topic of evidence. For the purposes of this paper, the decisions have been split into two categories based upon the type of evidence at issue on appeal: non-sexual evidentiary appeals and sexual evidentiary appeals.

1. Evidentiary Appeals Relating to Non-Sexual Offences

In *R v Doonanco*, the Supreme Court had to consider the role of the rule in *Browne v Dunn* in the context of calling expert evidence. The Crown failed to disclose their expert report to the defence and failed to put the contents of that report to the defence expert on the stand.[31] The Court found that it was prejudicial for the trial judge to have remedied the situation by simply not allowing the Crown's expert witness to comment on the defence's expert witness' evidence. The Supreme Court instead found the only way to protect the accused's right to a fair trial was to preclude the Crown expert from testifying. As such, a new trial was ordered.[32]

The Court was asked to determine the admissibility of both pre- and post-offence text messages and the weight to be given to them in *R v Langan*.[33] Interestingly, the Court accepted the dissenting reasons of Justice Bauman from the British Columbia Court of Appeal in which he held that the text messages were admissible as part of the narrative and circumstantial evidence and, therefore, constituted an exception to the rule against prior consistent statements.[34] In effect, the text messages were admitted not for their truth but rather to establish the fact, timing, and circumstances of their contents, all of which supported inferences of truth and reliability.[35]

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29 *Ibid* at para 19.
30 *Ibid* at para 25.
31 *R v Doonanco*, 2020 SCC 2 at para 1.
32 *Ibid* at paras 4–5.
33 *R v Langan*, 2020 SCC 33.
34 *R v Langan*, 2019 BCCA 467 at paras 88–105.
35 *Ibid* at para 99.

The Court also provided guidance on weighing the evidence provided by people with intellectual disabilities in *R v Slatter*.[36] In *Slatter*, the Court made it clear that triers of fact must be very careful to not attribute general characteristics to people with an intellectual disability, and ought to also be wary of accepting expert evidence for the purposes of attacking the credibility and/or reliability of witnesses with intellectual disabilities.[37] As a result, the Court's decision in *Slatter* ensures that myths and stereotypes surrounding people with disabilities are not perpetuated and that they too have equal access to justice.[38]

2. Evidentiary Appeals Relating to Sexual Offences

2020 did not see many developments in the law surrounding evidence in sexual assault cases – an area that has seen considerable development in the past five years.[39] In *R v Delmas*, the trial judge allowed the complainant to testify on her prior sexual history without holding a *voir dire*. Although the SCC recognized that it was an error, it resulted in no substantial wrong or miscarriage of justice as it would not have changed the verdict, and the appeal was dismissed.[40] A similar decision was reached in *R v WM*, where the trial judge mistook the specific year an offender received treatment – something to which the trial judge gave weight. However, again, the Court found that there was no material impact on the assessment of evidence or the accused's credibility, resulting in no miscarriage of justice, and the appeal was allowed in favour of the Crown.[41] The opposing argument of *Delmas* was made in *R v Cortes Rivera*.[42] In *Cortes Rivera*, the trial judge did not grant a s. 276.1 application to cross-examine the complainant on her prior sexual history, and leave to appeal was sought. Once again, the SCC relied upon the curative proviso and determined that no prejudice or miscarriage of justice arose and, therefore, dismissed the appeal.[43]

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36 *R v Slatter*, 2020 SCC 36.

37 *Ibid* at para 2.

38 *Ibid*. For a general discussion of disability in the criminal justice system, see Laverne Jacobs et al, *Law and Disability in Canada: Cases and Materials* (LexisNexis, 28 August 2021).

39 It should be noted that the Supreme Court will hear the *JJ* case relating to ss. 276 and 278 of the *Criminal Code* in October 2021.

40 *R v Delmas*, 2020 SCC 39.

41 *R v WM*, 2020 SCC 42.

42 *R v Cortes Rivera*, 2020 SCC 44.

43 *Ibid*.

Determining the pathways to conviction where consent is unclear was a question before the SCC in *R v Kishayinew*.[44] Ultimately, the majority found itself in agreement with the dissent of Justice Tholl of the Saskatchewan Court of Appeal ("SKCA"), who held that non-consent can be proven when the complainant has blacked out at the time of sexual activity but has memory of circumstances before and after the sexual assault. The Court, in accepting Justice Tholl's dissent, held that where surrounding circumstances are consistent with a complainant's assertion that they did not want to engage in sexual activity, this can form the basis for a determination of non-consent. However, if a lack of consent is not proven beyond a reasonable doubt, the analysis then shifts to prove that complainant was incapable of consenting.[45]

Finally, in *R v Mehari*, the Court considered whether uneven scrutiny amounted to an independent ground of appeal or a distinct error of law. With very minimal oral reasons provided, the SCC refrained from commenting on this question and instead sent the matter back to the SKCA to hear the other grounds of appeal.[46]

D. Sentencing

Sentencing was one of the least considered categories at the SCC from February 2020 through February 2021. Of the 20 appeals heard during that timeframe, only one touched upon sentencing – *R v Friesen*.[47] *Friesen* is an appeal that originated in Manitoba and is rooted in a horrific set of facts pertaining to the sexual abuse of an infant and the subsequent extortion of the infant's mother. The SCC's decision in *Friesen* marked a shift in judicial mindset to better recognize the multiple harms experienced by children who are the victims of sexual crimes, noting sentences for such crimes must acknowledge these harms and not be treated as less serious than offences against adult victims.[48] Notably, the Court recognized that these harms could take many years to manifest, and sexual violence against children affects other people in the lives of the victims.[49]

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44 *R v Kishayinew*, 2020 SCC 34.

45 *R v Kishayinew*, 2019 SKCA 127 at paras 52–78.

46 *R v Mehari*, 2020 SCC 40.

47 *R v Friesen*, 2020 SCC 9.

48 *Ibid* at para 107.

49 *Ibid* at para 76.

In *Friesen*, the Court also provided a non-exhaustive list of factors to determine whether or not a sentence is fit for offenders who commit sexual violence against children, including: (1) the likelihood that the offender will re-offend; (2) the abuse of a position of trust or authority; (3) the duration and frequency of abuse; (4) the age of the victim; (5) the degree of physical interference; and (6) victim participation.[50] The Court further warned against establishing a hierarchical sentencing regime based on the type of sexual act, and, by doing so, they recognized that in many cases there is not always a clear correlation between the harmful act and the harm which the victim experiences.[51] Societal concerns around the potential for lifelong harm caused by sexual offences and trauma-informed practice in the criminal justice system and infuse this judgment. The Supreme Court dedicates a lengthy judgment to these issues and provides clear and cogent direction to lower courts on the sentences that should be imposed as a result of sexual offences, generally, and against children, specifically. The *Friesen* decision reflects the growing understanding of the pain and suffering caused by sexual assault.

E. Trial Procedure

Unlike previous years, appeals on trial procedure constituted a small proportion of those before the SCC, constituting three of the 20 criminal law appeals before the SCC from February 2020 to February 2021. The nature of *Vetrovec* warnings was contemplated in *R v Riley*, in which the SCC clarified the role they have during a trial where a witness is providing exculpatory, rather than inculpatory, evidence.[52] The Court agreed with the dissent of Justice Scanlan at the Nova Scotia Court of Appeal (NSCA),[53] who held that *Vetrovec* warnings should not place the burden on the accused to show that an exculpatory witness is credible, given that its purpose is to protect against wrongful convictions.[54]

In *R v SH*, the SCC considered the rule in *Browne v Dunn* as it applies to case splitting.[55] At trial, SH's defence relied on the theory that there was insufficient proof of residency and phone linkage to an address where a

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50 *Ibid* at paras 122–54.
51 *Ibid* at para 146.
52 *R v Riley*, 2020 SCC 31.
53 *R v Riley*, 2019 NSCA 94 at paras 168–69.
54 *Ibid* at para 131.
55 *R v SH*, 2020 SCC 3 [*SH* SCC].

significant number of illicit drugs were located. However, in cross-examination, defence counsel did not put their theory to the Crown's police witnesses. As a result, following defence counsel's closing, the Crown objected on the grounds that the theory was not put to their witnesses, and the trial judge permitted the Crown to re-open its case and re-call their police witnesses to give evidence on those matters.[56] At the SCC, in a 3-2 split, the majority upheld the Ontario Court of Appeal's (ONCA) decision that although the trial judge erred in allowing the Crown to split its case, there was overwhelming evidence against *SH*, and the curative proviso could sustain the conviction.[57]

R v Esseghaier contemplated the jury selection processes under s. 640 of the *Code*.[58] By way of background, s. 640 permitted, at the time, three possible options of jury selection: rotating triers where nobody is excluded, rotating triers with unsworn jurors excluded, static triers, if an application is made, and static triers with the exclusion of both sworn and unsworn jurors, which, again, requires an application to be made.[59] At trial, counsel for the co-accused made an application to have static triers with both sworn and unsworn jurors excluded, and the trial judge stated that they were not permitted to order this, something which the ONCA found to constitute an error.[60] Moreover, the trial judge made both the accused and the co-accused use the same jury selection process, something which the ONCA found deprived the accused of his right to choose the jury selection process.[61] On these grounds, the ONCA found that there was prejudice, and the accused's conviction was set aside.[62] The SCC agreed the jury was improperly constituted but found that the curative proviso in s. 686(1) applied, and they restored the accused's conviction.[63]

F. Miscellaneous

Arguably one of the trending topics before the Court from February 2020 through February 2021 was addressing pressing social issues and for good reason. In particular, *R v Zora* was one decision in which the SCC

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[56] *R v SH*, 2019 ONCA 669 at paras 1–7.
[57] *SH* SCC, *supra* note 55 at paras 1–3.
[58] *R v Esseghaier*, 2021 SCC 9; *R v Esseghaier*, 2020 CarswellOnt 14614.
[59] *Ibid*.
[60] *R v Esseghaier*, 2019 ONCA 672 at paras 32–60 [*Esseghaier* ONCA].
[61] *Ibid*.
[62] *Ibid* at para 95.
[63] *Esseghaier* ONCA, *supra* note 60.

recognized the numerous socio-legal issues flowing from the imposition of onerous bail conditions.[64] In *Zora*, the accused was granted bail on his substantive offence and was released with 12 (and later 13) bail conditions. He was subsequently charged with four counts of breaching his bail conditions under s. 145(3), and he was convicted on one count at trial.[65]

In *Zora*, the Court determined the requisite mental element to be found guilty of an offence contrary s. 145(3).[66] The SCC held that in order to achieve a conviction under s. 145(3), the Crown must prove beyond a reasonable doubt that: (i) the accused either knowingly breached, or were willfully blind to their bail conditions, and (ii) the accused knowingly failed to act in accordance with their conditions, or were willfully blind and failed to act in accordance with them, or (iii) they recklessly failed to act in accordance with their conditions. Proof of subjective *mens rea* is required for a conviction under s. 145(3), and Justice Martin wrote "[t]he sky will not fall if the Crown has to prove a mental element."[67]

Zora is also notable for the Court's commentary in *obiter* on the imposition of bail conditions, especially in light of shifting societal values. They expressed concern over unreasonable, disproportionate, and intrusive bail conditions upon vulnerable, over-represented, and marginalized members of Canadian society. While the Court reinforced the general principles of bail, to animate these principles the Court provided a list of five inter-related questions that should be analyzed in determining whether an accused's bail conditions are appropriate.[68] Finally, the Court provided

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64 *R v Zora*, 2020 SCC 14 [*Zora*].

65 *Ibid* at paras 1–11.

66 *Ibid.*

67 *Ibid* at para 122.

68 *Ibid* at para 89. Justice Martin noted that in order to ensure principles of restraint, the following considerations are important: (1) <u>If released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions</u>? If the accused is released without conditions, are they at risk of failing to attend their court date, harming public safety and protection, or reducing confidence in the administration of justice? (2) <u>Is this condition necessary?</u> If this condition was not imposed, would that create a risk of the accused absconding, harm to public protection and safety, or loss of confidence in the administration of justice which would prevent the court from releasing the accused on an undertaking without conditions? (3) <u>Is this condition reasonable?</u> Is the condition clear and proportional to the risk posed by the accused? Can the accused be expected to meet this condition safely and reasonably? Based on what is known of the accused, is it likely that their living situation, addiction, disability, or illness will make them unable to fulfill this condition? (4) <u>Is this condition sufficiently linked to the grounds of detention under s. 515(10)(c)?</u> Is it narrowly

a strongly worded reminder to both counsel and judges on the individualized nature of bail conditions and warned against the imposition of unnecessary boilerplate bail conditions.[69] This unanimous decision flows cogently from the seminal bail decision in *Antic* and reflects the Supreme Court's concern with placing accused on numerous and unsupported conditions while on bail.[70]

V. COMMENTS: SCC

Change was one of the common themes in several decisions from February 2020 to February 2021. Many of the SCC's decisions were rendered orally or with little written reasons provided. However, where the SCC did provide written reasons, they can be seen to evoke change. Several of the SCC's lengthier written decisions including *Zora* and *Friesen* emulate the Court's awareness of systemic issues and their real-time response to these issues. Even where the SCC only provides brief written decisions, such as in *Slatter* and *Riley*, what is provided is potentially very important systemically. Moving forward into 2021 and beyond, it will prove interesting to see the SCC's decisions post-COVID-19, whether there is a change in their delivery, and whether the Court's trend towards accepting and addressing social justice issues continues.

At the time of writing the appeals dealing with the so called Gomeshi amendments and other aspects of the new legislative regime concerning sexual assault provisions brought about by Bill C-51,[71] are being argued in the Supreme Court of Canada.[72] Criminal lawyers across Canada will wait

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focussed on addressing that specific risk posed by the accused's release? (5) <u>What is the cumulative effect of all the conditions?</u> Taken together, are they the fewest and least onerous conditions required in the circumstances?

69 *Zora*, *supra* note 64 at para 100.

70 *R v Antic*, 2018 SCC 27. For a full discussion of the dangers of placing an accused on too many unsupported conditions on release, see generally Nicole M. Myers & David Ireland, "Unpacking Manitoba Bail Practices: Systemic Discrimination, Conditions of Release and the Potential to Reduce the Remand Population" (2021) 69:1 Crim LQ 26.

71 Canada, Department of Justice, *Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act* (Ottawa: DOJ, last modified 31 October 2017), online: <www.justice.gc.ca/eng/csj-sjc/pl/cuol-mgnl/c51.html> [perma.cc/P2WN-8N95].

72 *Her Majesty the Queen v JJ* (British Columbia) and *AS v Her Majesty the Queen et al* (Ontario) are being argued at the Supreme Court of Canada. See "Scheduled Hearings"

with bated breath to see the direction the Supreme Court of Canada will take with these amendments, particularly those concerning the role of complainants in the criminal trial process and the forced disclosure of communications in advance of the defence case. Given the previous splits among the nine Justices of the Supreme Court on these highly emotive issues,[73] unanimity on the propriety of this new era of sexual assault litigation may be elusive. Given the groundwork of socially conscious judgments laid in *Zora* and *Friesen*, the Supreme Court may well weigh in on the current zeitgeist and the changing norms encapsulated by the Me Too movement.

VI. STATISTICS: MBCA

From February 2020 through February 2021, the MBCA heard 60 criminal law appeals. The appeals covered a vast array of topics, with numerous cases dealing with multiple issues. For the purpose of this article, where a case overlapped with multiple categories, we have made a subjective decision on which issue was the most important and categorized accordingly.

A. Appellant Versus Respondent Rates

As is typical, defence appeals vastly outnumbered Crown appeals. The defence appeared as Appellant in 93% (n=56/60) of appeals, whilst the Crown appeared as the Appellant in only 7% (n=4/60) of appeals.

B. Overall Success Rates

Defence counsel was successful in only 22% (n=13/60) of appeals before the MBCA, meanwhile, the Crown was successful in 78% (n=47/60) of appeals before the MBCA. Extrapolation and interpretation of these results is a fraught exercise. Defence counsel proceed to appeal on client instructions while the Crown is afforded the luxury of discretion and a uniform appeal mechanism. With that said however, it cannot be denied that a success rate of only 22% is worrying reading for the local defence bar. This worry is perhaps exacerbated by some of the decisions highlighted

(last modified 4 October 2021), online: *Supreme Court of Canada* <www.scc-csc.ca/case-dossier/info/hear-aud-eng.aspx> [perma.cc/DNG-G868].

[73] See e.g. the dissent position of Justice Brown in *R v Goldfinch*, 2019 SCC 38 at paras 149–205, discussing the interpretation of s. 276 of the *Criminal Code*.

below concerning the appeal of witness credibility and reliability cases. The Court is creating a consistent line of authority that holds fast on limiting the circumstances in which an appellate court may legitimately interfere with findings of credibility and reliability of witnesses. This could well further limit defence success at appeal as this jurisprudence crystalizes in the coming years.

C. Appellate Categories

Sentencing was the most commonly explored category at the MBCA from February 2020 to February 2021, accounting for 50% (n=30/60) of appeals. Evidence was another common category which accounted for 32% (n=19/60) of appeals, followed by 12% (n=7/60) of appeals considering Trial Procedure. Furthermore, *Charter* and Miscellaneous appeals accounted for 5% (n=3/60) and 2% (n=1/60), respectively.

VII. CASE ANALYSIS: MBCA

A. *Charter*

Of the 60 criminal law appeals heard by the MBCA from February 2020 to February 2021, only three were *Charter* appeals. The Court ruled on the protections provided by s. 7 of the *Charter* in *R v Thomas et al*, in which the Appellant sought the exclusion of incriminatory comments made to undercover officers.[74] In their analysis, the MBCA held that the decision to exclude incriminatory comments is not a piecemeal analysis, but a finding of a s. 7 breach does not warrant exclusion of all incriminatory comments where there are multiple "separate operations."[75] In *R v Ong*, the appeal of a trial judge's dismissal of a *Charter* application was unsuccessful.[76] Looking ahead, one *Charter* appeal to follow as it makes it way before the MBCA is *R v Bernier*, in which the Appellant was successful in having leave to appeal granted.[77] That appeal dealt with the constitutionality of s. 229(2) of the *Highway Traffic Act* and whether it violates s. 11(d) of the *Charter*. S. 229 allows an owner of a motor vehicle to be charged with However, the appeal was dismissed from the bench in 2021 by a unanimous court.[78]

74 *R v Thomas et al.*, 2020 MBCA 29.

75 *Ibid* at para 6.

76 *R v Ong*, 2020 MBCA 14.

77 *R v Bernier*, 2020 MBCA 74.

78 See *R v Bernier*, 2021 MBCA 21, reasons released after the bench decision.

Justice Steel, on behalf of a five-panel court, declined to reconsider the previous decision of the Manitoba Court of Appeal in *R v. Gray* 1998 CanLII 1374 (MBCA) which found s. 229 of the *Highway Traffic Act* did not violate the presumption of innocence. Bernier had been charged as owner for two photo radar tickets. The court specifically rejected the argument that this legislation infringed the presumption of innocence by creating a assumption that the owner is, in fact, the driver of the vehicle at the time of the infraction. The Court in *Bernier* found that, in fact, only two elements need to be proven under s.229: that the accused owned the vehicle and that the vehicle was involved in the violation. There is no presumption that the accused is the driver and thus there is no *Charter* breach.[79]

B. Evidence

Almost one third of all cases before the MBCA concerned evidentiary issues (19 out of 60 criminal law appeals heard from February 2020 through February 2021). Determinations of credibility and reliability were the focus of several appeals. In *R v Lewin*, the MBCA reiterated that the burden of proof is not borne by the accused, and even where there are credibility issues, the third step of the *W(D)* test should not be applied in a manner where the lack of credibility of an accused equates to proof of guilt beyond a reasonable doubt.[80] The test in *W(D)* was also at issue in *R v DT*, an appeal wherein the MBCA held that evidence provided by a nurse about a sexual assault does not require formal expert qualification.[81]

Tangentially related to credibility, the application of the rule in *Browne & Dunn* by trial judges was a question before the MBCA in *R v Dowd*.[82] In *Dowd*, the MBCA allowed the appeal and found that an unfair trial arose because defence counsel failed to put their theory to Crown witnesses, and the trial judge subsequently drew negative inferences from the accused's testimony as a result.[83]

The Court was also asked to decide upon the weight to be afforded to post-offence conduct in *R v Kionke*.[84] In their decision, the Court endorsed

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79 *Ibid* at para 11.
80 *R v Lewin*, 2020 MBCA 13 at para 22.
81 *R v DT*, 2020 MBCA 88 at paras 2, 11.
82 *R v Dowd*, 2020 MBCA 23.
83 *Ibid* at paras 39–40.
84 *R v Kionke*, 2020 MBCA 32.

the 2019 SCC decision of *R v Calnen*, and further held that "what matters is that the finder-of-fact engages in this analysis and not jump to conclusions based on an accused's behaviour following an incident."[85]

Garofoli applications and the grounds upon which search warrants are issued were the focus in *R v Kupchik* and *R v Overby.*[86] In line with much of the SCC's recent jurisprudence, both appeals were dismissed by the MBCA on the basis that there were reasonable grounds for the issuing justice to believe that an offence was committed and evidence would be found at a specified time.[87] In *Overby*, a particularly gruesome murder case, the test was iterated as: were there reasonable inferences which could be drawn from the information within the ITO[88] which would allow the judge to draw the inference that a victim was murdered, or could the search of an accused's home or vehicle provide evidence of a crime?[89]

The MBCA also heard several appeals in which the accused were unsatisfied with the verdict rendered at the court of first instance and appealed on a number of grounds. In *R v Abbasi*, the MBCA dismissed the appeal on several grounds and held that the burden of showing uneven scrutiny of evidence is heavy and the admissibility of rebuttal evidence is left to the discretion of the presiding judge.[90] On several occasions, the MBCA dismissed appeals because the verdicts were reasonable, there was no merit to the argument, and/or deference is owed to the trier of fact at the court of first instance.[91] As stated above, the Manitoba Court of Appeal has, in 2020, developed a clear body of authority that is reluctance to interfere in the discretionary decisions of trial judges. In *R v Peters*, for example, the MBCA made it clear that appellate courts do not embark on fresh analyses of fact. In effect, the Court held that alternative interpretations of fact are not grounds on which an appeal will succeed.[92]

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85 *Ibid* at para 45.

86 *R v Kupchik*, 2020 MBCA 26 [*Kupchik*]; *R v Overby*, 2020 MBCA 121 [*Overby*].

87 *Kupchik*, *supra* note 86 at paras 1–7.

88 Information to Obtain.

89 *Overby*, *supra* note 86 at para 18.

90 *R v Abbasi*, 2020 MBCA 119 at para 20.

91 See *R v Castel*, 2020 MBCA 41; *R v Singh et al.*, 2020 MBCA 61; *R v Courchene*, 2020 MBCA 68; *R v Contois*, 2020 MBCA 89; *R v McDonald*, 2020 MBCA 92; *R v Herntier*, 2020 MBCA 95; *R v Simon*, 2020 MBCA 117; *R v Buckels*, 2020 MBCA 124.

92 *R v Peters*, 2020 MBCA 33 at para 7. See also *R v Miles*, 2020 MBCA 45.

Similarly, the MBCA dismissed several evidentiary appeals on the grounds that no appellate intervention was required.[93]

With that said, one evidentiary appeal saw success before the MBCA. In *R v SRF*, the MBCA found that there was a material misapprehension of evidence by the trial judge surrounding the Appellant's employment and his ability to commit the offence due to his employment. Consequently, the Court found that this constituted a miscarriage of justice, and the appeal was granted.[94]

R v Ramos[95] marked one of very few decisions from the MBCA this year which attracted a dissenting opinion. Justice Mainella, for the majority, dismissed the defence appeal on several issues centered around the trial judge's assessment of credibility.[96] Justice Steel dissented, finding the trial judge erred in in his application of the principles of *W(D)* to the credibility analysis.[97] The issue therefore made its way to the Supreme Court of Canada where, in a 23-word decision, the Court dismissed the defence appeal in line with the lengthy reasons of Justice Mainella.[98] *Ramos* may be considered an exclamation point on the line of authority developed by the Manitoba Court of Appeal declining to revisit the credibility assessments of trial judges.

C. Sentencing

Sentencing was the most commonly considered category in the MBCA from February 2020 through February 2021, accounting for 30 of the 60 criminal law appeals heard. One of the most important takeaways from the MBCA's decisions this year is the collateral consequences of guilty pleas in the immigration context, as emphasized in *R v Cerna*.[99] In this case, the Appellant plead guilty and was facing deportation pursuant to the *Immigration Refugee Protection Act* ("*IRPA*") and was not informed of these collateral consequences by his counsel at the time of sentencing.[100] On appeal, the accused successfully argued that there was a miscarriage of justice and brought forth a motion to adduce fresh evidence in support of

93 *R v Bonni*, 2020 MBCA 64.
94 *R v SRF*, 2020 MBCA 21.
95 *R v Ramos*, 2020 MBCA 111.
96 *Ibid* at para 1.
97 *Ibid* at para 144.
98 *R v Ramos*, 2021 SCC 15.
99 *R v Cerna*, 2020 MBCA 18.
100 *Ibid* at paras 1–15.

his application to withdraw his guilty pleas.[101] In effect, the *Cerna* case instructs defence counsel to make inquiries and warn clients of immigration consequences and the significant prejudice which may inadvertently arise if they fail to do so. Immigration consequences were also at issue in *R v Dhaliwal*, wherein the MBCA made it clear that judges have a positive duty to raise collateral immigration consequences where counsel fail to do so.[102] Furthermore, in *R v Richards*, the MBCA granted the appeal and reduced the Appellant's sentence from six months to six months less a day so that he was not subject to a removal order under *IRPA*.[103] The MBCA has now made it abundantly clear that criminal lawyers and sentencing judges need to live to immigration consequences arising by operation of the *Criminal Code* and IRPA.

The weight given to *Gladue* factors during sentencing was another commonly explored topic by the MBCA. In *R v Dumas*, it was argued that the accused's *Gladue* factors were not given sufficient weight in the sentencing judge's decision to impose an indeterminate sentence for sexual assault and sexual assault with a weapon. However, this argument was rejected in light of the facts and risk that the Appellant posed.[104] A similar argument was unsuccessfully advanced with regard to the weight given to the accused's *Gladue* factors in *R v Dram*, *R v Amyotte*, *R v Sinclair*, *R v McKenzie*, and *R v Vaneindhoven*.[105]

Analogous to *Dumas*, in *R v JCW*, the accused advanced an argument that improper weight was given to his *Gladue* factors and that, in totality, his nine-year custodial sentence for sexually assaulting his daughter was unfit.[106] These arguments were rejected by the MBCA in light of the SCC's then-anticipated decision in *Friesen*. While the MBCA held that the accused's sentence was harsh, it was not demonstrably unfit having regard to the risk of public safety and prospects of rehabilitation.[107]

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[101] *Ibid* at para 50.

[102] *R v Dhaliwal*, 2020 MBCA 65.

[103] *R v Richards*, 2020 MBCA 120.

[104] *R v Dumas*, 2020 MBCA 28.

[105] *R v Dram*, 2020 MBCA 93; *R v Amyotte*, 2020 MBCA 116; *R v Sinclair*, 2021 MBCA 6; *R v McKenzie*, 2021 MBCA 8; *R v Vaneindhoven*, 2020 MBCA 123.

[106] *R v JCW*, 2020 MBCA 40 at paras 1–5.

[107] *Ibid* at paras 13, 22.

The MBCA's positive treatment of *Friesen* in *JCW* was further echoed in *R v Galatas*, *R v Abbasi*, and *R v JGHW*.[108] In *JGHW*, the accused, a youth, was involved in several serious sexual offences against his half-brothers.[109] At sentencing, the judge sentenced him to a two-year probationary period, something which the MBCA determined did not take into account the meaningful consequences of the accused's actions.[110] As a result, they varied the sentence to a one-year custodial order in addition to an order of two years of supervised probation, but then stayed the effects of the orders recognizing that the youth was now an adult and would serve his sentence in an adult correctional facility.[111] The Court held that since the accused complied with the terms of his probation without incident for three years, it was not in the interests of justice for the accused to serve custodial time, and they stayed the custodial sentence.[112]

Sentencing appeals were successful in several cases. In *R v Peters*, the MBCA considered several issues, the most material of which was the concurrent sentence imposed by the trial judge for one count of breaking and entering and one count of wounding an animal.[113] The trial judge sentenced the accused to a two-year concurrent sentence, despite this sentence being well above what the Crown suggested. As a result, Justice Burnett, writing for the majority, found this sentence to be demonstrably unfit and adjusted it to a 90-day concurrent sentence.[114] Similarly, in *R v Neepin*, the accused was successful in her appeal to have her sentence of ten years imprisonment for manslaughter varied to seven years on the grounds that it was demonstrably unfit.[115] In arriving at this decision, the MBCA found that the trial judge erred materially in principle in his consideration of the provocative circumstances and *Gladue* factors, and on these grounds, the appeal was allowed.[116]

The MBCA's decision in *R v KNDW* addressed the intersection of intimate partner violence, the victimization of vulnerable persons, and

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108 *R v Galatas*, 2020 MBCA 108; *R v Abbasi*, 2020 MBCA 119; *R v JGHW*, 2020 MBCA 86.

109 *R v JGHW*, 2020 MBCA 86 at para 1.

110 *Ibid* at para 21.

111 *Ibid* at para 23.

112 *Ibid* at para 25.

113 *R v Peters*, 2020 MBCA 17 at para 1.

114 *Ibid* at paras 14–15.

115 *R v Neepin*, 2020 MBCA 55 at para 80.

116 *Ibid* at paras 64, 80.

sentencing. In *KNDW*, the MBCA varied the accused's sentence from two years less a day to five years due to the shocking nature of the sexual assault, witnessed by the complainant's children.[117] Taking into account the SCC's decision in *Friesen*, the MBCA found that although the complainant's children were not direct victims of the sexual assault, they were secondary victims, and it "deeply affected them, which in turn harmed their relationship with her [their mother]."[118] As a result, the Court determined that the sentencing judge had erred in principle and varied the accused's sentence, having regard for *Friesen*, the accused's moral blameworthiness, his *Gladue* factors, and his rehabilitative efforts.[119]

Touching on the weight given to *Gladue* factors as well, the primary issues on appeal in *R v JAW* was whether proper weight was given to the Appellant's *Gladue* factors and whether the Appellant was sentenced more harshly by the trial judge because the complainant was an Indigenous female.[120] Ultimately, the MBCA held that 39 months was not a demonstrably unfit sentence for sexual assault and proper weight was given to *Gladue*.[121] Of great import, however, was the Court's finding that the trial judge did not sentence the Appellant more harshly because the complainant was Indigenous.[122] This final point is worth noting given that this area of sentencing law is dynamic, with potential implications under ss. 718.04 and 718.201 of the *Code*, which take into account the increased vulnerability of Aboriginal female victims.[123]

Sentencing ranges and maximums were also a topic of consideration for the MBCA this year. In *R v Petrowski*, the Court was asked by the Crown to consider imposing a higher sentencing range for fentanyl trafficking.[124] Despite this request, the MBCA skirted this issue and left it for the Court to decide upon at a later point in time, finding that the Appellant's sentence was not demonstrably unfit.[125] Unlike *Petrowski*, the Court in *R v*

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117 *R v KNDW*, 2020 MBCA 52 at paras 3–8.

118 *Ibid* at para 38.

119 *Ibid* at paras 42–44.

120 *R v JAW*, 2020 MBCA 62.

121 *Ibid* at paras 19–21.

122 *Ibid* at para 21.

123 *Criminal Code*, RSC 1985, c C-46, ss 718.04, 718.201 [*Code*]. Further explications of those issues were undertaken in *R v Wood*, 2021 MBQB 4.

124 *R v Petrowski*, 2020 MBCA 78 at para 17 [*Petrowski*]. See also *Petrowski's* companion case, *R v Slotta*, 2020 MBCA 79.

125 *Petrowski*, *supra* note 124 at paras 61, 73.

Kravchenko provided soft guidance on the sentencing range for aggravated assault with a weapon, suggesting that the range is typically four to eight years.[126] The Court further provided three considerations in sentencing an offender for aggravated assault – namely, (1) the nature of violence used and the offender's state of mind; (2) the harm, wounds, maiming, and disfigurements to the victim, both short term and long term; and (3) not treating the offence of aggravated assault like attempted murder at sentencing.[127] Tangentially related to sentencing ranges, the MBCA recognized in *R v Williams* that intentional acts to cause death do not always attract a harsher sentence than failing to provide the necessities of life.[128]

With regard to maximum sentences, in *R v CP*, the MBCA recognized that the maximum probationary period for youth is two years, and as a result, granted the appeal and reduced the Appellant's probation to two years.[129] Similarly, in *R v Olenick*, the Court reminds us to take care in the sentencing process when dealing with s. 109 (mandatory) and s. 110 (discretionary) weapons prohibitions in the *Criminal Code*.[130] The Court clarified that the offences of theft under $5000 and assault attract a maximum prohibition order of ten years pursuant to s. 110 of the *Code*, not a lifetime pursuant to s. 109.[131]

The MBCA also ruled on several appeals which contemplated sentencing conditions. In *R v Gladu*, the MBCA found that the wordings of conditions imposed at the time of sentencing must be specific since they affect an individual's liberty and constitute an "improper delegation of judicial authority."[132] On the topic of conditions, but in the context of bail conditions, the MBCA further reminded us in *R v Thompsett* that on sentencing, a breach of a bail condition is not an aggravating factor and should only inform the rehabilitative prospects of an accused.[133]

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126 *R v Kravchenko*, 2020 MBCA 30 at para 63.
127 *Ibid* at paras 53–55.
128 *R v Williams*, 2020 MBCA 72.
129 *R v CP*, 2021 MBCA 9.
130 *R v Olenick*, 2021 MBCA 4.
131 *Ibid* at para 7.
132 *R v Gladu*, 2020 MBCA 109 at paras 1–2.
133 *R v Thompsett*, 2020 MBCA 47 at para 4. The Court found that the sentencing judge did not use the breach to "resentence" the accused but rather used it, as is appropriate, to assess the accused's prospects for rehabilitation.

The effect of *Charter* breaches on sentencing was contemplated by the MBCA in *R v Coutu*.[134] In short, the Court held that it is a material error for a judge to give an accused a "free ride" on weapons prohibitions.[135] Interestingly, the Court also cautioned triers of fact against finding "systematic abuse"[136] of *Charter* rights in the context of race relations with police, on the basis of judicial notice.[137] This decision is fascinating since it raises questions that are topical to the current political climate and appears to be indifferent to the SCC's findings on race relations with authorities and systemic concerns highlighted in *R v Le*.[138]

Unsurprisingly, the Court was also asked to consider the effects of the COVID-19 pandemic on sentencing in *R v SCC*.[139] At the time of sentencing, the accused was sentenced to 14 months imprisonment for distribution of an intimate image and 90 days concurrent for a breach.[140] The MBCA found the sentence to be demonstrably unfit, but, at the time of the hearing, the Respondent was granted early release.[141] As a result, the accused's counsel argued, unsuccessfully albeit, that his sentence ought to be stayed in light of the COVID-19 public health crisis.[142] In rejecting this argument, the MBCA took judicial notice of COVID-19, broadly speaking, but refused to take judicial notice of the accused's specific circumstances flowing from time spent in custody due to COVID-19.[143]

Finally, in *R v Ackman* and *R v Ward*, the Appellants' sentence appeals were rejected on the grounds they were not demonstrably unfit.[144] A similar conclusion was reached in *R v Kirton* where expert forensic psychiatric

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[134] *R v Coutu*, 2020 MBCA 106.

[135] *Ibid* at paras 35–36.

[136] *Ibid* at para 27.

[137] *Ibid* at paras 27–28.

[138] *R v Le*, 2019 SCC 34. In further opposition to the MBCA position, see *R v Morris*, 2021 ONCA 680 at para 42. The Court endorses judicial notice of the many historical and social factors contributing towards systemic racism. For a general discussion, see Amar Khoday, "Ending the Erasure?: Writing Race into the Story of Psychological Detentions – Examining *R. v. Le*" (2021) 100 SCLR (2d) 165, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3778960> [perma.cc/M9QP-L2LN].

[139] *R v SCC*, 2021 MBCA 1.

[140] *Ibid* at paras 1–3.

[141] *Ibid*.

[142] *Ibid* at paras 45–47.

[143] *Ibid* at para 45.

[144] *R v Ackman*, 2020 MBCA 24; *R v Ward*, 2020 MBCA 38; *R v Amyotte*, 2020 MBCA 116.

evidence was utilized to uphold the sentencing judge's decision to sentence the Appellant to an indeterminate sentence.[145] In arriving at this result, the MBCA reminded us that the test for determining the fitness of an indeterminate sentence is whether there is "no reasonable expectation of managing the accused's risk within the community"[146] and this "is more than reasonable in light of the evidence before them [him]."[147]

D. Trial Procedure

While many appeals before the MBCA touched upon trial procedure to some extent, only five appeals fall squarely into this category. Touching upon trial procedure during COVID-19, the Court held in *R v Thomas* that an accused has the right to attend their appeal, but this is not an absolute right to be "physically" present at an appeal and can be facilitated by way of technology.[148]

In *R v Nelson*, the Court considered the appropriateness of refreshing a witness' memory (particularly where they are uncooperative) and recognized the breadth and flexibility of the *Wilks* criteria to refresh a witness' memory.[149]

Several trial procedure appeals before the MBCA considered the prejudice flowing from comments or instructions provided to juries. In *R v Hebert*, the MBCA dismissed the Appellant's appeal on the grounds that no prejudice was effected as a result of the trial judge's failure to instruct the jury on comments made by the Crown during closing arguments.[150] Similarly, in *R v Roulette*, the prejudice of the trial judge's instructions to a jury was at issue.[151] Mirroring the SCC's endorsement of the ABCA's decision in *R v Shlah*,[152] the MBCA determined that jury instructions are not reviewed on a standard of perfection, but rather a standard of adequacy.[153] In effect, the Court held that what matters is that the

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145 *R v Kirton*, 2020 MBCA 113.
146 *Ibid* at para 19.
147 *Ibid*.
148 *R v Thomas*, 2020 MBCA 84.
149 *R v Nelson*, 2020 MBCA 53 at paras 11–16.
150 *R v Hebert*, 2020 MBCA 16.
151 *R v Roulette*, 2020 MBCA 125 [*Roulette*].
152 *R v Shlah*, 2019 SCC 56.
153 *Roulette*, *supra* note 151 at para 7.

instructions in their entirety have the overall effect of the jury being properly and fairly instructed.[154]

With regard to seeking leave to appeal, the importance of the accused moving matters along expeditiously was the underlying theme in *R v Jorowski*.[155] Ultimately, the MBCA held that where matters are dated, the case is not compelling and the accused fails to advance the matter diligently, leave to appeal will be denied.[156] Furthermore, in *R v Fisher*, the Court emphasized that even where the Applicant has continuous intention to appeal despite delays, leave to appeal will not be granted where there are no grounds to argue on appeal.[157] Comparatively, in *R v Thorassie*, the accused was successful in having their leave to appeal granted since they showed continuous intention to appeal, despite delay.[158] Of note, the MBCA in *Thorassie* commented on the barriers which people in Northern Manitoba face in accessing counsel and recognized the limitations of legal practice therein.[159]

Finally, in *R v Brar*, the MBCA provided clear commentary on the prejudice resulting from hearing a delay motion after trial.[160] The Court strongly condemned hearing delay motions after evidence at trial.[161] The Court further condemned the use of lengthy endorsements by judges in *Brar* and "strongly discouraged"[162] this action since it "offends almost the entirety of the notice to the profession"[163] and eliminates any possibility of public circulation.[164]

E. Miscellaneous

Only one of 60 criminal law appeals heard by the MBCA falls under the category of miscellaneous. In *R v VanEindhoven*, the MBCA offered a review of the test for admission of fresh evidence in support of an allegation

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154 *Ibid*.
155 *R v Jorowski*, 2020 MBCA 43.
156 *Ibid* at paras 16–18.
157 *R v Fisher*, 2020 MBCA 75 at paras 6–7, 10–13.
158 *R v Thorassie*, 2020 MBCA 87.
159 *Ibid* at para 10.
160 *R v Brar*, 2020 MBCA 58 at paras 31–33.
161 *Ibid* at para 36.
162 *Ibid* at para 45.
163 *Ibid*.
164 *Ibid*.

of ineffective assistance of counsel.[165] Therein, the Court also provided a brief but comprehensive review of the application of the three-pronged test which must be met to support a claim of ineffective assistance of counsel.[166]

VIII. COMMENTS: MBCA

Tying into the theme of change for this year, the MBCA discussed many different legal and practical issues which address adapting to extraordinary times, as well as the current social and political climate. Much like the SCC, the MBCA recognized the numerous faces of harm and its many effects, beyond just the physical, in cases like *Kravchenko* and *JAW*, and the MBCA reflected these harms in many of their decisions on several sentencing appeals. Similarly, the Court considered the flexibility required to adapt to these extraordinary and unprecedented times in decisions such as *Thomas* and *Thorassie*. The MBCA also recognized the importance of being aware of the collateral immigration consequences of guilty pleas in *Cerna*, *Dhaliwal*, and *Richards*, all of which serve a poignant reminder to counsel that Manitoba is an ever-growing and dynamic province, with people of many different origins who call Manitoba home, and we have a duty to ensure that justice is executed, but not justice which brings about both unjust and unintended consequences.

Perhaps the most important theme this year though concerns the Court of Appeal's reluctance to relitigate the decision of trial judges concerning the credibility or reliability of witnesses. These cases, outlined above under part B Evidence, coalesce to provide the defence bar with fair warning of the road ahead. The judicial discretion of trial judges, always valued by appellate courts, is arguable stronger than ever under the current jurisprudence.

IX. CONCLUSION

The common law continues to evolve in response to emerging societal problems and progressing social norms. Over the course of the past year, we have seen astounding resiliency, adaptability and flexibility in our society and this flexibility is being reflected in our Courts. The Supreme Court of Canada continues to infuse social commentary in their judgments; cases

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165 *R v Vaneindhoven*, 2020 MBCA 123.

166 *Ibid* at para 10.

like *Zora* and *Friesen* capture developing social thinking in Canada. As progressive thinking holds sway, Canada's top court appears emboldened to wade into these waters to both reflect, and perhaps encourage, these emerging social movements. Cases at the national and Provincial level continue to reflect the progressive direction of Me Too, Black Lives Matter and other positive incremental moves towards a fairer and more just society.

Such commentary from our appellate courts is to be celebrated. Positive change that better reflects the values of Canada's multi-cultural society cannot and should not happen outside of the common law. Lawyers and judges must continue to shape our responses to shared problems in society. When we look at the past year, there are encouraging signs that the Manitoba Court of Appeal and the Supreme Court of Canada are keeping pace with society at large by positively addressing some of these important issues in their judgments.

Appendix I: Table of Authorities

<u>**Supreme Court of Canada Cases – February 2020 to February 2021**</u>

<u>Charter</u>

R v Chouhan, 2020 CarswellOnt 14612, SCJ No. 101.
R v KGK, 2020 SCC 7.
R v Reilly, 2020 SCC 27.
R v Thanabalasingham, 2020 SCC 18.

<u>**Defences**</u>

R v Ahmad, 2020 SCC 11.
R v Chung, 2020 SCC 8.
R v Li, 2020 SCC 12.

<u>**Evidence**</u>

R v Cortes Rivera, 2020 SCC 44.
R v Delmas, 2020 SCC 39.
R v Doonanco, 2020 SCC 2.
R v Langan, 2020 SCC 33.
R v Kishayinew, 2020 SCC 34.
R v Mehari, 2020 SCC 40.
R v Slatter, 2020 SCC 36.
R v WM, 2020 SCC 42.

<u>**Sentencing**</u>

R v Friesen, 2020 SCC 9.

<u>**Trial Procedure**</u>

R v Esseghaier, 2020 CarswellOnt 14614.
R v Riley, 2020 SCC 31.
R v SH, 2020 SCC 3.

<u>**Miscellaneous**</u>

R v Zora, 2020 SCC 14.

<u>**Decisions from Other Years**</u>

R v Le, 2019 SCC 34.

R v Shlah, 2019 SCC 56.

Manitoba Court of Appeal Cases – February 2020 to February 2021

Charter
R v Bernier, 2020 MBCA 74.
R v Ong, 2020 MBCA 14.
R v Thomas et al., 2020 MBCA 29.

Evidence
R v Bonni, 2020 MBCA 64.
R v Buckels, 2020 MBCA 124.
R v Castel, 2020 MBCA 41.
R v Contois, 2020 MBCA 89.
R v Courchene, 2020 MBCA 68.
R v Dowd, 2020 MBCA 23.
R v DT, 2020 MBCA 88.
R v Herntier, 2020 MBCA 95.
R v Kionke, 2020 MBCA 32.
R v Kupchik, 2020 MBCA 26.
R v Lewin, 2020 MBCA 13.
R v McDonald, 2020 MBCA 92.
R v Miles, 2020 MBCA 117.
R v Overby, 2020 MBCA 121.
R v Peters, 2020 MBCA 33.
R v Ramos, 2020 MBCA 111.
R v Simon, 2020 MBCA 117.
R v Singh et al., 2020 MBCA 61.
R v SRF, 2020 MBCA 21.

Sentencing
R v Abbasi, 2020 MBCA 119.
R v Ackman, 2020 MBCA 24.
R v Amyotte, 2020 MBCA 116.
R v Cerna, 2020 MBCA 18.
R v Coutu, 2020 MBCA 106.
R v CP, 2021 MBCA 9.
R v Dhaliwal, 2020 MBCA 65.

R v Dram, 2020 MBCA 93.
R v Dumas, 2020 MBCA 28.
R v Galatas, 2020 MBCA 108.
R v Gladu, 2020 MBCA 47.
R v JAW, 2020 MBCA 62.
R v JCW, 2020 MBCA 40.
R v JGHW, 2020 MBCA 86.
R v Kirton, 2020 MBCA 113.
R v KNDW, 2020 MBCA 52.
R v Kravchenko, 2020 MBCA 30.
R v McKenzie, 2021 MBCA 8.
R v Neepin, 2020 MBCA 55.
R v Olenick, 2021 MBCA 4.
R v Peters, 2020 MBCA 17.
R v Petrowski, 2020 MBCA 78.
R v Richards, 2020 MBCA 120.
R v SCC, 2021 MBCA 1.
R v Sinclair, 2021 MBCA 6.
R v Slotta, 2020 MBCA 79.
R v Thomas, 2020 MBCA 84.
R v Thompsett, 2020 MBCA 47.
R v Ward, 2020 MBCA 38.
R v Williams, 2020 MBCA 72.

Trial Procedure

R v Brar, 2020 MBCA 58.
R v Fisher, 2020 MBCA 75.
R v Hebert, 2020 MBCA 16.
R v Jorowski, 2020 MBCA 43.
R v Nelson, 2020 MBCA 53.
R v Roulette, 2020 MBCA 125.
R v Thorassie, 2020 MBCA 87.

Miscellaneous

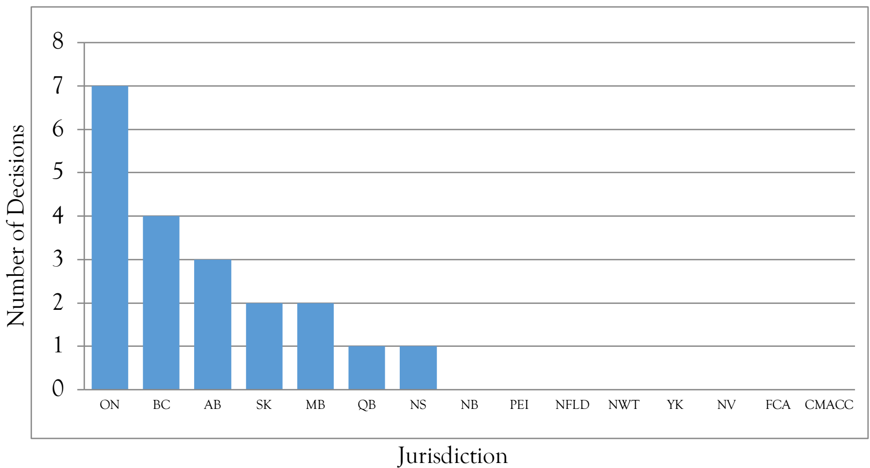
R v VanEindhoven, 2020 MBCA 123.

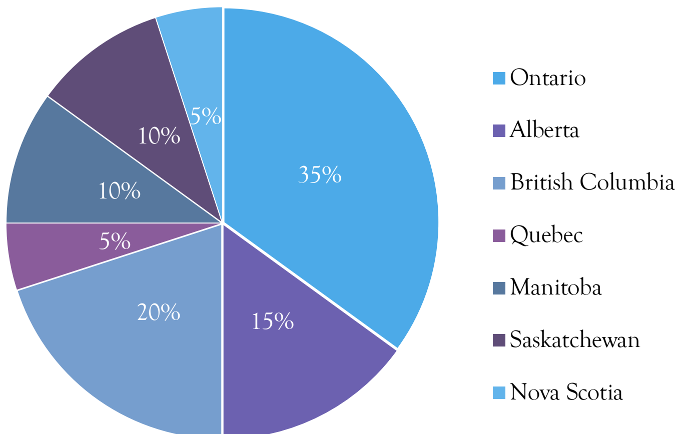
Decisions From Other Manitoba Courts

R v Wood, 2021 MBQB 4.

Appendix II: Statistical Tables and Graphical Representations

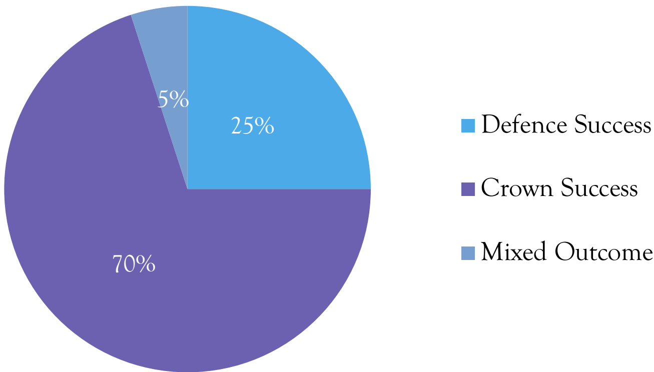
STATISTICAL INFOGRAPHICS OF SCC DECISIONS: FEBRUARY 2020 TO FEBRUARY 2021



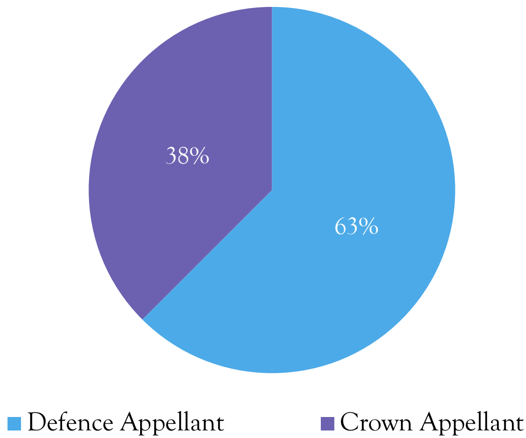


STATISTICAL INFOGRAPHICS OF SCC DECISIONS: FEBRUARY 2020 TO FEBRUARY 2021

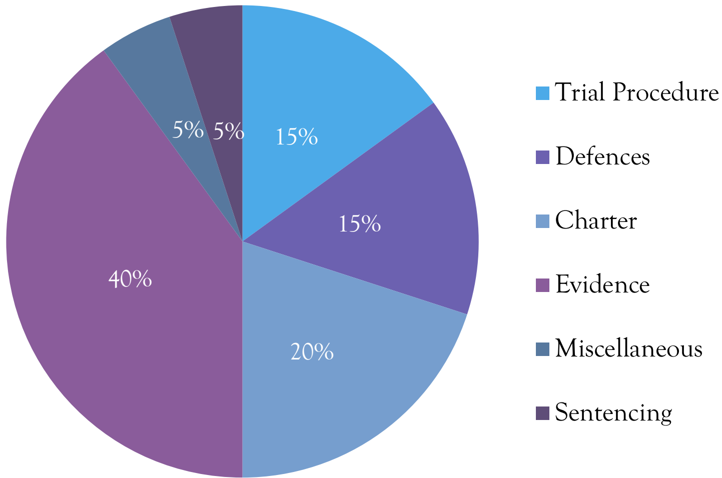
Outcome of Supreme Court Decisions
February 2020 to February 2021

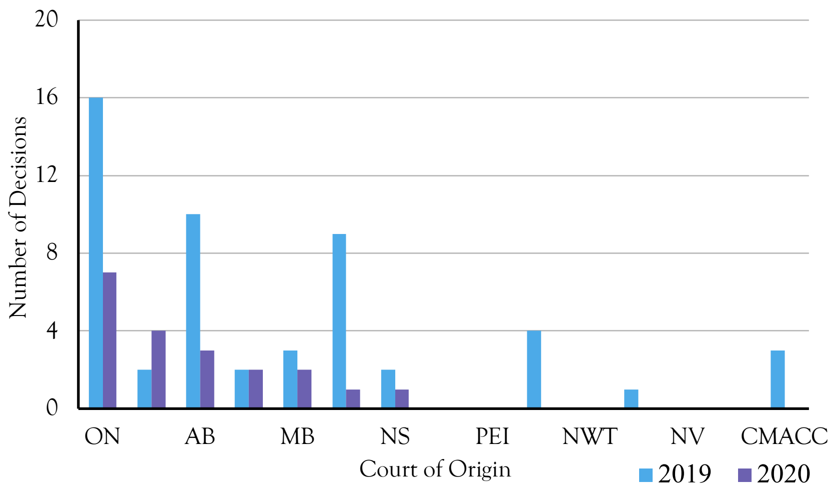


Appearances as Appellants in Supreme Court Decisions
February 2020 to February 2021



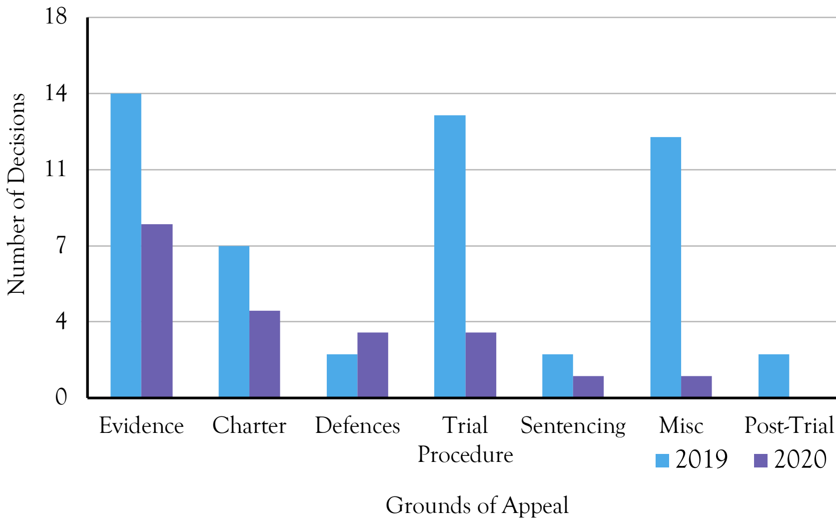
STATISTICAL INFOGRAPHICS OF SCC DECISIONS: FEBRUARY 2020 TO FEBRUARY 2021



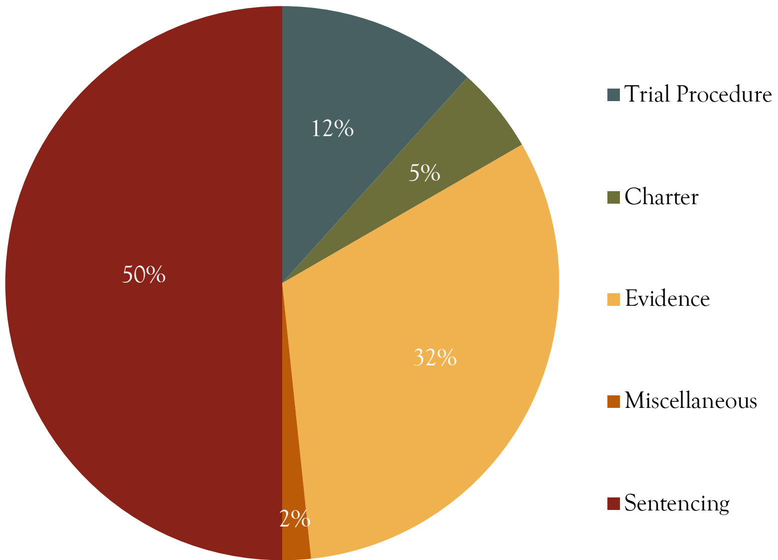


STATISTICAL INFOGRAPHICS OF SCC DECISIONS: FEBRUARY 2020 TO FEBRUARY 2021

Comparing the Grounds of Appeal of SCC Decisions from 2019 to 2020

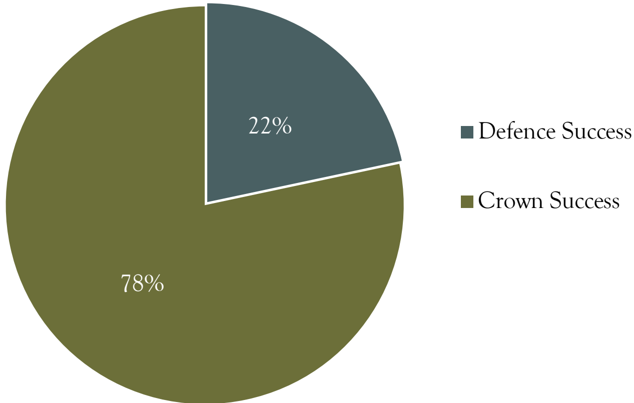


STATISTICAL INFOGRAPHICS OF MBCA DECISIONS: FEBRUARY 2020 TO FEBRUARY 2021

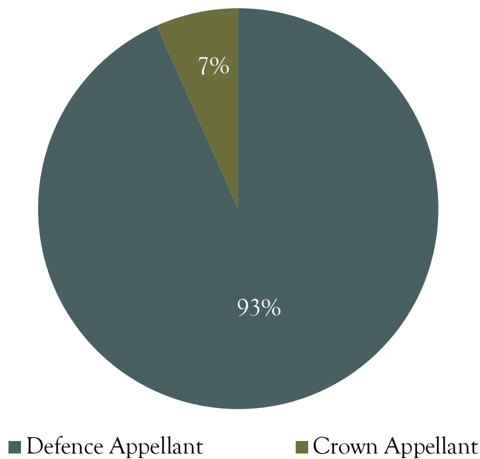


STATISTICAL INFOGRAPHICS OF MBCA DECISIONS: FEBRUARY 2020 TO FEBRUARY 2021

Outcome of MBCA Decisions
February 2020 to February 2021



Appearances as Appellants in MBCA Decisions
February 2020 to February 2021



STATISTICAL INFOGRAPHICS OF MBCA DECISIONS: FEBRUARY 2020 TO FEBRUARY 2021