

MORAL INVOLUNTARINESS AS A PRINCIPLE OF EXCUSING CONDITONS:
WHAT'S CHOICE GOT TO DO WITH IT?

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ABSTRACT

The Supreme Court of Canada decision in *R. v. Ruzic* (2001) formulates a new principle of fundamental justice under section 7 of the *Charter*. This new principle of fundamental justice holds that notwithstanding that a person committed a crime with the required guilty state of mind, they must not be punished if their actions were “morally involuntary”, that is to say if their acts were not the “product of a free will...unhindered by external constraints”. This principle relates to defences based on external circumstances. As a constitutional principle, it may result in the redefinition of existing defences such as necessity, duress and self-defence, and may also lead to the development of new defences.

This thesis will examine the principle of moral involuntariness and evaluate its adequacy. The inquiry begins with a review of the philosophical underpinnings of the concept of responsibility, which brings to the fore notions such as freedom of the will. I will then review the theoretical basis for responsibility under the criminal law, the dominant theory of which considers the notion of choice to be fundamental. I ultimately conclude that the principle of moral involuntariness as developed by the Court is inadequate. It leads to many unanswered questions about how to measure choice and how to determine which kinds of external factors interfere with choice and which do not. Further, it does not appropriately or effectively capture the true nature of the inquiry into external excuses. When individuals are excused for committing a crime on the basis of the surrounding circumstances, it is *not* truly on the ground that they were deprived of a realistic choice about what to do. Choice is possible, although admittedly difficult, and the real basis of excuse is the *value* of the choice made. This means that a moral evaluation of the situation and the available options must be made. However, choice theory cannot accommodate this evaluation because it is based on an objective, morally neutral assessment of the possibilities and the circumstances. This approach camouflages the normative evaluation and thereby frustrates the responsibility inquiry.

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INTRODUCTION

1. Hard Choices and the Story of Marijana Ruzic

Belgrade, Yugoslavia. 1994. There is widespread corruption, violence is commonplace, and both petty street crime and sophisticated organized crime are rampant. Citizens are largely subject to the will of the criminal element and have little confidence in the authorities to provide protection or assistance. A young woman is approached one day by a stranger, a member of a criminal organization. Several days later, he appears again, and then again. With each encounter, he reveals that he knows more about her, her name, where she lives, and that she lives with her mother. He soon begins to physically assault her by burning her with a cigarette lighter and sticking her with a needle. He threatens to harm her mother and her dog. After several weeks of intimidation, he calls her at home and tells her to pack a bag and meet him at a hotel immediately. At the hotel, he straps three packages of heroin onto her body, gives her a bus ticket to Budapest, a false passport and some money. She is given further travel instructions with the ultimate destination of Toronto, and told she must leave right away. Upon arrival in Canada, she is to make a phone call to a fixed number and deliver the drugs to a designated location. To secure her assistance, she is told that if she does not do as instructed, something will happen to her mother. The young woman is faced with a horrible choice: she can illegally bring heroin into Canada and face prosecution if she is apprehended, or she can defy those who seek to exploit her vulnerability and risk her mother's life and possibly her own.

This is but one of the many situations in which a person is confronted with a dilemma. A choice must be made between two or more unappealing or potentially devastating courses of action; suffering a threatened harm or committing a crime. These are typically not situations of one's own making. Rather, external circumstances and pressures may propel us into situations that require some action, but in which all possibilities appear to us to be undesirable. Scenarios range from the relatively trivial to the extremely dire. We can imagine, for example, that a poor person might consider whether or not to steal money in order to pay for necessary medicine for themselves or a child, or even to steal the medicine.

We can also conceive of an individual, held at gunpoint, being ordered to rob a bank or drive a getaway car. The order might be to drive speed through red lights and stop signs even if that means risking hitting pedestrians. A choice must be made; what is the right course of action? The right or reasonable choice may not be so clear either from a personal or a moral standpoint, especially where the action being contemplated would involve inflicting some harm on another person.

Few would voluntarily implicate themselves in such difficult situations; their involvement may well be unfair and undeserved. Nonetheless, perilous circumstances can and do occur from time to time, and the unfortunate actor faces an unavoidable choice. A variety of responses are possible. The actor might choose to avoid the injury by committing the offence in compliance with the demand or pressure. Conversely, he or she may opt to submit to the injury threatened and avoid committing the crime demanded by the situation. A third option is also possible. Some individuals might respond to the crisis by resorting to heroic action. A heroic response would involve facing the threatened harm directly and by some means evading or overcoming it. A heroic response could also involve self-sacrifice.

In perilous circumstances, any course of action carries with it a myriad of possible consequences for any number of people. But most certainly the actor in the middle of the dilemma will not escape consequences of one sort or another, whether physical injury or psychological trauma, or both. If the actor chooses to yield to the external pressure and break the law, then the consequences include the risk of criminal liability.

At this juncture, it becomes the law's turn to respond. In effect, the law has its own hard choice to make; whether or not to hold the actor accountable and to punish. In other words, should the person who chooses to commit a crime in these circumstances be held responsible for that crime? What magic line separates situations for which we desire to excuse intentional wrongdoing because it was motivated by the circumstances, and those for which we want to punish wrongdoing regardless of its motivation? How and why do we care about the motivation at all? Aside from motivation, what is the crucial feature of the external

circumstances that can excuse a person from the normal and expected legal consequences of their actions?¹

This thesis will turn its attention to the law's hard choice. How should the law treat those individuals who, when faced with dire circumstances, choose to commit a crime rather than to submit to the threatened harm or otherwise act in defiance of the threat? What magic line separates situations for which we desire to excuse intentional wrongdoing because it was motivated by the circumstances, and those for which we want to punish wrongdoing regardless of its motivation? What is the crucial feature of the external circumstances that can excuse a person from the normal and expected legal consequences of their actions? How should the law decide what conditions or circumstances count as sufficient to reduce or altogether extinguish liability for a crime? To be sure, these are very difficult questions.

A discussion of excusing conditions depends on an understanding of the basic structure of criminal liability that distinguishes between *offence* and *defence*. Conceptually, the former precedes the latter. Responsibility for an offence is a matter of inculcation. It requires proof of a prohibited act and a specified mental state, typically intent to do that prohibited act or knowledge of relevant circumstances. These constituent elements lead to *prima facie* responsibility for the crime, unless there is some available defence. Defences relate to

¹ At this juncture I should clarify my use of the term excuse. Canadian jurisprudence recognizes a distinction between defences of justification and of excuse. Justifications are said to negate the very wrongfulness of the action and thus render the act non-criminal. Justified acts are the "right thing to do". Excuses, on the other hand, are said to accept the wrongfulness of the act but seek to relieve the accused from responsibility on the ground that it would be unfair for her to be punished for the crime in the particular circumstances in which it was committed. In my opinion, although there are obvious moral differences between *some* claims of justification and excuse, I do not believe that such differences rise to the level of demanding a fundamentally different theoretical approach to the defences. The difference between "right thing to do" and "wrong but understandable" is a moral question, and one not easily answered. In my view it is not one that *legal* theorists ought to place at the centre of a distinction between different types of defences unless they are also prepared to offer an accompanying comprehensive moral theory, which they do not. Having rejected the distinction, my use of the terms "right" and "wrong" in this thesis (and related moral terminology) will not parallel the distinction between justifications or excuses in criminal law theory. I do not necessarily associate "wrong" with excused acts and "right" with justified acts. Rather, my uses of "right" and "wrong" should be viewed as related to whether or not the act is one for which the actor should be held accountable and punished. A rare few scholars also dismiss the essential nature of the distinction. Michael Corrado, "Criminal law: Notes on the Structure of a Theory of Excuses" (1991) 82 J. Crim. L. & Criminology 465, asserts that justification defences are a subset of excuses. Kent Greenawalt finds the borders between justification and excuse "perplexing" and unfixable but does not go so far as to discount the distinction in "The Perplexing Borders of Justification and Excuse" (1984) 84 Columbia L.R. 1897.

matters of exculpation. Even if the basic conditions for responsibility are satisfied, a variety of reasons for acting, based on external circumstances, permit an actor to avoid responsibility for crime. Self-defence, duress and necessity all excuse various crimes where the crime was committed for the purpose of protecting an individual's bodily integrity from some form of threat.² For greater clarity, I am concerned with claims of excuse based exclusively on external circumstances and not on an internal defect within the actor, such as intoxication, mental disorder or loss of self-control.

2. The Principle of Moral Involuntariness

The Supreme Court of Canada addressed some of these questions in the recent decision *R. v. Ruzic*, the case of the young Yugoslavian woman whose story is described above.³ Ms. Ruzic chose to do as she was told. On a secondary inspection at Toronto airport, a customs officer discovered the drugs. Ms. Ruzic was arrested and charged with importing narcotics and possession of a false passport. At trial, she claimed that she acted under duress and should be acquitted. Section 17 of the *Criminal Code* of Canada⁴ provides a defence of duress for many crimes where a person is compelled to commit an offence under (1) threats of immediate death or bodily harm (2) from a person who is present when the offence is committed. These two combined requirements make s.17 one of the narrowest constructions of duress in the common law world.⁵ The statutory defence appears to be drafted with the

² I will note here that it is still an open question whether duress and necessity can excuse murder and other very serious offences.

³ *R. v. Ruzic*, [2001] 1 S.C.R. 687, affirming (1998), 128 C.C.C. (3d) 97 (Ont. C.A.) [hereinafter *Ruzic* cited to the S.C.R.].

⁴ *Criminal Code*, R.S.C. 1985, c. C-46, s.17 [hereinafter *Code*]. The full text of s.17 reads: 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). It should be noted as well that the defence of duress also exists at common law in Canada. The common law defence is available to parties to offences, as opposed to principals: *R. v. Paquette*, [1977] 2 S.C.R. 189.

⁵ The common law defence of duress in Canada is broader and more flexible than the statutory defence. See description of the defence in *Ruzic*, *supra* note 3.

paradigm duress case in mind, namely the situation of a demand to act made at gunpoint. But this was not the type of duress faced by Ms. Ruzic. The threatener was in Yugoslavia when Ruzic imported the drugs into Canada, and any harm to her mother would have occurred at a later time, not immediately upon the non-commission of the offence. In these circumstances, the person making the threat has significant leverage to compel the desired action without having to be in the presence of either the accused or the third party being threatened. But the defence of duress under s.17 was unavailable to Ms. Ruzic.

Defence counsel therefore challenged the constitutionality of the imminence and presence requirements under s.7 the *Charter*, which reads: "Everyone 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".⁶ The argument was that the two requirements were too restrictive and could thereby deprive the accused of her liberty in a manner not consistent with the principles of fundamental justice. At trial and on appeal, Ms. Ruzic's arguments succeeded.

The Supreme Court of Canada was eventually seized of the matter and upheld the earlier judgments.⁷ The central focus of the Court's ruling was the notion of "moral involuntariness". This concept was traced back to the Supreme Court's earlier decision in *R. v. Perka*,⁸ in which the Court adopted the notion from the work of noted American legal scholar George Fletcher.⁹ In *Perka*, the Court invoked the notion of moral voluntariness as a means of grounding the common law defence of necessity.¹⁰ The principle was explained as describing a situation where a person, on account of perilous circumstances, is deprived of a realistic choice about whether to break the law. The later Supreme Court judgment in

⁶ *Canadian Charter of Human Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11, s.7 [hereinafter *Charter*].

⁷ *R. v. Ruzic*, *supra* note 3.

⁸ *R. v. Perka* (1984), 14 C.C.C. (3d) 385 [hereinafter *Perka*].

⁹ George Fletcher, *Rethinking Criminal Law* (Boston: Little Brown and Company, 1978).

¹⁰ For the most recent restatement of the common law defence of necessity see *R. v. Latimer*, [2001] 1 S.C.R. 3 [hereinafter *Latimer*].

Hibbert held that on account of the juridical similarity between the excuses of necessity and duress, the defence of duress must also be grounded in the notion of moral voluntariness.¹¹

In *Ruzic*, the Court elevated the common law principle of moral involuntariness to a principle of fundamental justice with constitutional status. The Court held that in order to be punishable, a person must have committed a crime “morally voluntarily”. Consequently, absence of a realistic choice or alternative, moral *involuntariness*, must lead to an acquittal. Essentially, the Court reasoned that it would be contrary to justice to punish a person whose acts are involuntary in the sense that external constraints deprived the person of a realistic choice about whether to break the law. So for instance, if a fleeing bank robber jumps into your car and points a gun at your head and demands that you speed through town so that he may escape, you can be said to have lacked a real alternative to speeding and you could not be punished for it.

The Court thus created a new principle of fundamental justice that “only voluntary conduct – the product of a *free will* and controlled body, *unhindered by external constraints* – should attract the penalty and stigma of criminal liability”.¹² The Court then found that the presence and imminence requirements of s.17 especially in combination create the possibility that a person could be convicted for morally involuntary action and were thus held to be unconstitutional and were not upheld as a reasonable limit under s.1.¹³

The concept of moral involuntariness is essentially a principle of excusing conditions; it sets limits on the circumstances in which the state can punish a person who committed a crime with full knowledge and intention. Endowed with constitutional status, the principle must now be considered central to any theory of excusing conditions - at least excuses of external pressure - in Canadian criminal law.

¹¹ In *R. v. Hibbert*, [1995] 2 S.C.R. 973 [hereinafter *Hibbert*], the Supreme Court held that the defence of duress was essentially an analogue of the defence of necessity, the difference being the source of the threat, and that both were founded on the principle of moral or normative involuntariness.

¹² *Ruzic*, *supra* note 3 at para. 47 (emphasis added).

¹³ I will explore the reasons for the Court’s decisions in greater detail in Chapter 3.

Although perhaps appealing at first glance, the theoretical basis for the Court's description of moral involuntariness may be subject to question. For the Supreme Court, choice has everything to do with excusing crime. The guiding criterion, according to the Court, is the absence of a realistic choice other than commission of the crime, on account of external constraints. This description raises many questions. How many crimes are committed in circumstances in which the accused is unhindered by external constraints of one kind or another? How do we determine whether or not other choices were possible or realistic? How do we draw a line between constraints that reduce available options to one and those that simply present a tragic choice situation? Are the actions of a person who steals food out of extreme hunger and poverty "unhindered by external constraints"? Could moral involuntariness refer to an act of civil disobedience, for instance where a person destroys evidence where they genuinely believe there is it necessary to save an innocent person from a corrupt prosecution for a serious crime? Is it morally voluntary to terminate the life of a loved one suffering from a terminal disease and who is pleading to have their life ended?

More fundamentally, we must ask whether it is even accurate to describe situational pressure as depriving an actor of all other realistic choices. Aren't choices made even in the face of a dilemma? Is absence of options really what we are concerned with, or are we instead really interested in the *value* of the choice made?

3. Organization of Thesis

In this thesis I will examine the notion of moral involuntariness, its underlying rationale and theoretical foundation, and assess its effectiveness as compass according to which the law can determine whether a chosen course of action was right or wrong, in the sense of whether or not it should be punished.

The problem of responsibility and excusing conditions has engaged legal scholars and philosophers for centuries. It is sometimes remarked that a detailed examination of the reasons why we excuse people for crimes also serves to illuminate the very principles and conditions upon which we hold people accountable for them in the first place. In order to

understand the external circumstances under which an individual will be *excused from responsibility* for wrongdoing, we must first have a clear appreciation of the conditions under which an actor is *responsible for* wrongdoing. We must also understand what counts as *wrong*. Chapter 1 will therefore begin with a review of various philosophical perspectives on moral responsibility. Moral philosophy is concerned with establishing normative standards of conduct that distinguish between right and wrong, and developing models for assigning moral accountability for individuals' actions and choices.

In Chapter 2, I will review legal perspectives on the same issues and illustrate how philosophical accounts have been incorporated into criminal law theory. In particular, I will examine various theories for the justification of punishment. I will also turn to the notion of responsibility as understood by criminal law theory and the dominant theory that is said to underlie responsibility.

In Chapter 3, I will turn directly to the concept of moral involuntariness. I will briefly describe the *Ruzic* case and the principle itself. I will then turn to an assessment of the principle by reference to the theories of criminal responsibility outlined in Chapter 2. I will conclude that the principle of moral involuntariness is based on a choice theory of responsibility, and I will consider the adequacy of this foundation as a normative device for drawing a line between culpable and non-culpable conduct. Ultimately I will conclude that this account is inadequate on a variety of levels, the principal one being that it does not include a moral assessment of the chosen course of conduct.

In Chapter 4, I will discuss some of the ramifications of the Court's reliance on a non-moral principle of excuse. A non-moral principle may expand existing excuses in undesirable ways, and at the same time fail to provide a mechanism for assessing the legitimacy and desirability of novel claims of excuse. I will also offer some suggestions for building a moral element into the theory upon which the excuses are based.

Finally, in the Conclusion I will synthesize my findings and attempt to answer the question posed in the title of the thesis, namely what does choice have to do with excusing criminal behaviour.

CHAPTER 1: MORAL RESPONSIBILITY

The concept of responsibility figures prominently in almost all interactions between individuals and between individuals and society at large. Responsibility is central to the formation of our attitudes towards one another and in the human sentiments of praise and blame, and the feelings of condemnation, gratitude, forgiveness. We are reluctant to blame or punish someone unless we think that person was somehow responsible for a given state of affairs, and likewise we do not bestow praise for good deeds that were not voluntarily chosen and undertaken.¹ These attitudes we hold and develop towards others and towards ourselves “seem to be intimately bound up with beliefs about what we call ‘moral responsibility’”.²

The term moral responsibility itself suggests that it is made up of two constituent parts: questions about what is *moral* - was a particular act right or wrong and thus deserving of praise or blame? - and questions about *responsibility* - who is the proper recipient of our response? Indeed, two principal discourses in field of moral responsibility address various issues surrounding the responsibility of individuals for their actions and the consequential assignment of blame or praise. The morality discourse involves competing notions of moral and ethical behaviour and seeks to establish principles and systems for distinguishing right from wrong and for guiding human behaviour. A closely related philosophical discourse pertains to the notion of personal responsibility and conditions for its attribution to and avoidance by particular individuals.

In this Chapter, I will explore both philosophical perspectives on morality and theories of responsibility ascription. Both provide a window into the practices and principles behind excusing conditions in the criminal law, and illuminate some of the considerations involved in evaluating the notion of moral involuntariness as espoused by the Supreme Court of Canada.

¹ For convenience, I will be referring principally to responsibility for *acts* or *actions*. For the most part, I mean this to include responsibility for omissions. I will not canvass literature that deals specifically with responsibility for omissions. For my purposes, it is sufficient to presume that a person can be responsible where they had an obligation to act.

An excuse can theoretically appeal to either the notion of “right and wrong” in respect of the act in question, or to the conditions of responsibility ascription. More specifically, an actor might seek an excuse on the ground that (1) in the circumstances, the crime was not wrong (or was not sufficiently wrong) and so should not be punishable, or (2) if it is wrong, responsibility should not be attributed to her for the wrongdoing.³ Against the backdrop of the various philosophical principles and concepts to be discussed in this Chapter, I will be able to assess more effectively the adequacy of the principle of moral involuntariness espoused by the Supreme Court.

Philosophical exploration of these issues has much to add to a theory of excusing conditions for criminal responsibility if that theory is to be principled, coherent and widely socially acceptable.⁴ Criminal law theory is full of morally rich concepts and terminology, such as wrongdoing, blameworthiness, culpability, fault, and guilt. The theory behind such legal doctrines and concepts borrows heavily from the wealth of philosophical exploration of the same issues. Further, we have a common sense intuition that if the law permits excuses for what would otherwise be criminal conduct, one might expect there to be a corresponding moral explanation for the “rightness” of the behaviour, or at least an account of why the behaviour was not morally wrong (or sufficiently wrong) so as to be punishable. Despite the appeal of a symmetrical relationship, the connection between law and morality is very complex and difficult to discern with precision.⁵ I will say more about this relationship in Chapter 2. For now, it is sufficient to recognize that we normally expect some

² J. Glover, *Responsibility* (New York: Humanities Press, 1970) at 1.

³ Recall that in the Introduction, I stated that I am not concerned with the distinction between justification and excuse, so that my use of the moral concepts of “right” and “wrong” should not be taken to relate to either justification or excuse.

⁴ D. Husak, *Philosophy of Criminal Law* (New Jersey: Rowman & Littlefield, 1987) at 226 recognizes that “[m]oral and political philosophy is the discipline in which questions about the wrongfulness of conduct are assessed. Accordingly, criminal theory is woefully incomplete unless it acknowledges and develops its intimate connections with moral and political philosophy”. I concede that a complete theory of criminal responsibility and excuse should also be consistent with various components of political philosophy. However, I will not be able to pursue such connections in this thesis.

⁵ To be sure, not all conduct that is morally wrong is or should be prohibited, certainly not by the criminal law. Some moral wrongs that are not criminal may be enforceable by civil law. For instance, lies and deception may be actionable as a tort of misrepresentation. Also, in some instances, what seems to be morally right action can constitute a crime, as in the case of an act of civil disobedience.

correspondence between what the law permits and prohibits, and what is right and wrong by moral standards.⁶

1. Morality: Right and Wrong

Many of us might normally think that moral concepts such as right and wrong generally pertain to actions. The branch of philosophy known as virtue ethics, however, takes the position that ethics is principally concerned with elucidating the qualities and characteristics that we should develop within ourselves, and not simply with the moral quality of actions viewed objectively or in a vacuum. Aristotle's *Nichomachean Ethics* is commonly viewed as the central work in virtue ethics. For Aristotle and other virtue ethicists, the emphasis is on developing the character, as exemplified by living a good, healthy and sane life. Aristotle distinguished between *ethical virtues* such as wisdom and intelligence, and virtues of *character* such as generosity, courage, and temperance. Leading a virtuous life includes acting in accordance with the virtues. Thus if the character virtues are cultivated and practiced by an individual, then right action should naturally flow in any given situation. The reasons for acting, insofar as they reflect the virtues of the actor, are the objects of moral significance.

Whereas virtue ethics is primarily concerned with the development of the character of the individual as a tool for arriving at moral behaviour, other philosophers are concerned more directly with the morality of acts, and have sought to describe rules and principles for distinguishing between right and wrong action and for guiding behaviour in any given situation.

Consequentialist moral theories, as the name suggests, base judgments about morality upon the consequences of actions. The value of the consequences of an act is viewed from an objective perspective, and is based on some particular conception of "the good". It follows

⁶ The criminal law is obviously concerned primarily with judgments of blame and the consequential imposition of punishment. But sometimes the moral quality of an action as right or permissible will also be the subject of interest to the criminal law, as in the case with some defences. For this reason, it is important that an inquiry into excusing conditions begin with an exploration of moral philosophy.

that “acts are right if they promote the best overall state of affairs and wrong if they do otherwise” according to some chosen value.⁷

Classical utilitarianism, the most well-known form of consequentialism, holds that good and bad are measured in terms of pleasure and pain. Jeremy Bentham espoused a particular view of human nature and psychology that held that humans are naturally (and unavoidably) motivated to act in pursuit of pleasure and avoidance of pain.⁸ Pleasure is thus a good to be maximized, and pain is an evil to be reduced or avoided. Good and bad, and consequently right and wrong, are measures of the pleasure and pain produced by a given action. This is known as the principle of utility. An act conforms to the principle of utility (and is therefore “right”) if “the tendency it has to augment the happiness of the community is greater than any it has to diminish it”.⁹

Consequentialist theories are forward-looking; the primary concern is with the direct results of actions, and the effect of acts on the behaviour of the actor and others in the future. Because the good to be promoted is overall welfare, the moral system is a tool used for encouraging behaviour that maximizes overall welfare and discouraging behaviour that does not.¹⁰

Many philosophers are dissatisfied with the consequentialist fixation on outcomes as the marker of right and wrong. Critics argue that placing too much moral emphasis on the consequences of actions conflicts with many of our intuitions about what is right and wrong. Some acts are right notwithstanding that they fail to produce a net increase in happiness, and conversely, some acts are distinctly wrong, even if they would have the effect of maximizing overall welfare. For instance, from the utilitarian standpoint, harvesting the organs from a

⁷ H. Geirsson & M. Holmgren, Eds., *Ethical Thoery: A Concise Anthology* (Peterborough: Broadview Press, 2001) at 81. Modern consequentialists do not all agree on the human values and principles according to which “the best overall state of affairs” should be measured. Indeed, as with any other branch of philosophy, there is disagreement among consequentialists about various other aspects of consequentialist theory and method. The details of these disagreements is beyond the scope of my inquiry.

⁸ J. Bentham, *An Introduction to the Principles of Morals and Legislation*, edited by J.H. Burns & H.L.A. Hart (London: Athlone Press, 1970) at 11.

⁹ Bentham, *ibid.* at 12-13.

¹⁰ For Bentham, the legal system is a tool designed to serve the very same purpose.

relatively healthy person in order to save the lives of five dying patients would maximize overall welfare by sacrificing one life in order to save five, and on this account would be the right thing to do. However, our intuitions strongly indicate that such an act would be morally wrong, and that the healthy patient should not be sacrificed in this way. Indeed, even if the healthy patient died of natural causes, many would still think it wrong to harvest her organs without her prior consent or the consent of her family.

Many philosophers point to our deeply held beliefs about the rights and duties of individuals as proof that consequentialism is wrong. Deontologic theories thus place the notion of *right* at the center of moral judgments, rather than good, pleasure or overall welfare.

Determinations about what is right are in turn based on either a single or multiple moral principles. When applied to a given situation, these principles illuminate the right course of action. Whichever outcome is suggested by the governing moral principle(s) is the right thing to do regardless of the consequences on others, on the individual actor, or to the overall welfare of society. If the consequence of a right action happen to increase overall happiness, that is a side benefit. Conversely, if the net effect is to increase overall pain or unhappiness, this is unfortunate but does not change the moral nature of the act.

Often, deontological moral principles are in the nature of propositions respecting certain basic human rights. The golden rule, do unto others as you would have others do unto you, is an example of such a moral principle. Other moral principles relate to the right of each person not to be killed or deprived of liberty. Emmanuel Kant's categorical imperative, namely that each person is a end unto him or herself, and thus can never be used as a means to another person's ends, is commonly viewed as a fundamental moral principle governing human interactions and interactions between individuals and the state. This moral principle, among others, fuels our intuition that it is wrong to harvest the organs from the healthy person even though that would save the lives of five others (and even if five hundred would be saved). The healthy patient is believed to have certain basic fundamental and absolute rights, and others have an equally compelling corresponding duty to respect those rights, regardless of the consequences. This principle is reflected throughout our criminal justice system, from the theory of punishment generally, to explaining certain substantive offences,

and is also embedded in the law of excusing conditions. I will return to this moral principle in the next Chapter in my discussion of criminal responsibility.

Philosophers disagree as to whether moral principles can be overridden. Kant, for example, believed that moral principles are absolute. Others believe that when two fundamental moral principles come into conflict, one principle may be more compelling than the other in the circumstances. For instance, one might be guided by the moral principle that one should not harm one's child and the principle that one should honour one's promises. However, the former might take precedence over the latter in a case where the promise was to take the child somewhere that has recently become dangerous. This is an important point about excusing conditions. Where an excuse is claimed on the ground of external circumstances, it may be a case of two moral principles in conflict. In such situations, either possible course of action might be wrong in reference to one of the applicable moral principles. For instance, in the paradigmatic duress situation, the actor faces a choice between committing a crime - which would violate her duty to abide by the law - or suffering harm - which would violate her duty of self-preservation.¹¹ She must act, but it may be impossible to comply with the dictates of both principles.

What is to be done when a situation presents only two possible courses of action, but both lead to morally wrong conduct?¹² Can the applicable principles be reconciled or must one yield to the other? If one must yield, which principle takes priority? And finally, how should the law respond to the actor's choice?

Other moral philosophers have an altogether different view of morality. Non-traditional moral theories reject principled, universalized theories such as those described above.¹³

¹¹ Many philosophers do consider self-preservation to be a moral duty.

¹² According to some writers, applying all the principles will eventually lead to an appreciation of the right thing to do. For others, however, in true hard choice situations, applying all the principles together may not necessarily yield a right answer. Isaac Levi, *Hard Choices* (Cambridge: Cambridge University Press, 1986) at 5 writes that "[g]enuine dilemma or conflict presupposes that what ought to be done, all things, considered, is as yet unsettled".

¹³ Ethical relativism holds that what is good or right is determined by the relevant party, either at the individual or cultural level, and that there are no objective moral values binding on all: Geirsson & Holmgren, *supra* note 7 at 1.

Because “universal ethical principles... do not constitute absolutes but resemble statistical laws: they hold in the large majority of instances”,¹⁴ they suffer from the weaknesses of overgeneralization and rigidity. Most principled moral systems, for instance, have a precept that killing another human being is wrong. While most people favour consistent application of this moral rule, there are clear instances when strict application of the rule yields an undesirable moral result, for instance in cases of personal self-defence or war. Moral principles and tenets come into conflict from time to time, and rigid adherence to one or more can place an individual in a difficult moral position. Of course, one could respond that moral principles have certain standard and reasonable exceptions, but the more particularized and detailed the rule gets, the more difficult it may be to apply and the less understandable and accessible it is to the society within which it operates. Eventually, with the addition of enough exceptions and exemptions, the principle ceases to be general, and might at some point even cease being a principle. Instead, it becomes a dictate to act taking into account the totality of the circumstances of each case. Understanding this dilemma, some philosophers suggest that we can only assess individual responsibility in a “non-normative, individualized fashion in response to the exigencies of a concrete situation”.¹⁵ Simply, there are too many exceptions and special circumstances for general principles to hold much weight.

Of course, a system of individualized ethics is vulnerable to the criticism that it is no system of ethics at all. It may be too permissive and flexible, and if carried to extremes, could threaten peaceful and orderly social functioning. The dilemma is how to balance a rule-based system (rules that risks being overinclusive and inflexible) against the need to permit individualized assessments (which threatens consistency, predictability and impartiality).

I do not propose that one model or approach to morality is preferable to another. Such a determination is beyond the scope of my modest inquiry. It is my purpose here simply to set out in a general way the major philosophical approaches to ethics. I will draw on these theories in later chapters.

¹⁴ E. Bodenheimer, *Philosophy of Responsibility* (Littleton, Colorado: Fred B. Rothman & Co, 1980) at 95.

¹⁵ *Ibid* at 88.

2. Responsibility Ascription: Linking the Person to the Act

In addition to seeking some basis on which to assess the moral quality of acts, philosophers are also concerned with developing methods by which to determine who should bear society's response to a given act. Philosophical accounts of responsibility do this work. The term "responsibility" has many different but related meanings. In everyday speech we often hear that someone or something is "responsible for" a certain state of affairs. This can refer to a causal or physical relationship, such a drought being responsible for a poor crop yield. We also commonly hear it said that people can be "responsible for" or "responsible to" other people. This would generally be applicable where there is a particular or special relationship between individuals such as that between a parent and child, and indicates a current or future obligation.¹⁶ In moral terms, responsibility can refer to actions (or omissions) that fulfil certain criteria for deserving blame or praise. The ethical approaches outlined above provide mechanisms for determining whether praise or blame are owing to a "responsible" actor. Legally speaking, responsibility can mean satisfying the prescribed requirements for accountability under the law.¹⁷ All of these notions of responsibility are related, but they are by no means equivalent or mutually dependent in any given case.¹⁸

Feinberg captures the various conceptions of responsibility this way:¹⁹

"An equivalent way of saying that some result is a man's fault is to say that he is *to blame* for it. Precisely the same thing can also be said in the language of *responsibility*. Of course, to be responsible for something (after the fact) may also mean that one did it, or caused it, or now stands answerable, or accountable, or liable to unfavourable responses from others for it. One can be responsible for a result in all those senses without being to blame for it. One can be held liable for a result either because it is one's fault or for some quite different reasons;

¹⁶ This may be what Hart has in mind for the notion of role-responsibility: H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) at 212.

¹⁷ Hart calls this "legal liability-responsibility", *ibid.* at 215, in contrast to "moral liability-responsibility". According to Simester liability refers to a persons being subject to "certain kinds of responses" for failing to fulfill their obligations: C. Simester, *Responsibility and Criminal Liability* (Dordrecht: Kluwer Publishers, 1989) at 14.

¹⁸ In general, causal responsibility is required for both moral and legal responsibility. There are exceptions, however. Some forms of legal responsibility can be imposed in the absence of causal responsibility, such as vicarious liability. Moral and legal responsibility often co-exist, but this is by no means necessarily so. To be sure, not all offences prohibit behaviour that is morally wrong, and not all moral wrongs are prohibited by law. It is an interesting and perplexing question whether a morally right act can excuse a criminal offence: B. McDowell, *Ethics and Excuses* (Westport, Connecticut: Quorum Books, 2000) at 47.

¹⁹ J. Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970) at 188.

and one can be to blame for an occurrence and yet escape all liability for it. Still, when one is to blame for a harm, one can properly be said to be 'responsible for it really'; that is, there is a sense of 'responsible for' that simply means 'chargeable to one as one's fault'. One of the commonest uses of the expression 'morally responsible for' is for being responsible for something in this sense".

Philosophers generally agree that there are two central components for responsibility; agent capacity and criteria for responsibility.²⁰ Agent capacity refers to the minimum degree of intellect, awareness and control that an individual must possess to be eligible for praise or blame.²¹ It is not necessary for my purposes to say anything further about capacity. Assuming an agent has that basic minimum degree of capacity, there must in addition be satisfaction of certain conditions for the ascription of responsibility *for a particular act* to that agent. This double aspect of responsibility has been incorporated into the basic structure of criminal law theory, although the substance may vary somewhat.²² This is evidenced in part by the existence of two different types of defences, each aimed at either one or the other aspect of responsibility. Certain excuses in the criminal law are directed toward the agent's capacity or eligibility for responsibility, such as mental disorder, infancy or diminished capacity.²³ Other defences, such as duress and necessity, do not deny capacity for agency, but seek to prevent an agent from being held culpable for a crime she actually committed on the basis that someone or something else was truly responsible for it. These are the sorts of claims implicated by the notion of moral involuntariness. My interest therefore is limited to the second aspect of responsibility theory, namely those conditions under which responsibility for an act can be attributed to a particular actor. I will now turn to various models of responsibility, beginning with Aristotle and moving into modern theories.

²⁰ J.M. Fischer and M. Ravizza eds., *Perspectives on Moral Responsibility* (Ithaca N.Y.: Cornell University Press, 1993) at 6; P. French, *Responsibility Matters* (Kansas: University Press of Kansas, 1992) at 3; S. Meyer, *Aristotle on Moral Responsibility* (Oxford: Blackwell, 1993) at 3-4.

²¹ Hart, *supra* note 16 at 227 refers to this component as "capacity-responsibility". It is also sometimes referred to as moral agency or responsible agency.

²² Hart, *ibid.* agrees at 225-226 that the "striking differences between legal and moral responsibility are due to substantive differences between the content of legal and moral rules and principles rather than to any variation in meaning of responsibility when conjoined with the word "moral" rather than "legal"". It should be noted that Hart counts three elements for responsibility (both legal and moral); (1) capacity-responsibility, (2) sufficient causal connection between the act and the harm, and (3) sufficient relationship between the agent and the misdeed (*Ibid.* at 218-221). It seems to me that Hart's conditions (2) and (3) can be viewed as two sub-components of the larger element of 'criteria for responsibility'.

²³ There is little evidence of support for a partial excuse of diminished capacity in Canada but it is recognized throughout much of the United States and in the United Kingdom.

A. Aristotle and Voluntariness

Although Aristotle emphasized the virtues and character as opposed to the moral quality of acts, he was nonetheless interested in the question of individual responsibility for actions because he recognized that virtues are concerned with action, and that legal and moral consequences flow from our assessment of action. He was not insensitive to the impact of external circumstances on the question of responsibility for actions, separate and apart from questions of character. According to Aristotle, a person is eligible for praise or blame (i.e. is responsible) only for their *voluntary* actions.²⁴ Instead of defining what he meant by voluntary, Aristotle posited that voluntariness could be defeated by two kinds of conditions; ignorance and force. Ignorance of relevant circumstances can render an act involuntary and defeat a person's responsibility for the outcome.²⁵ I will not be dealing with this kind of excusing condition.²⁶

However, Aristotle's recognition of force as a condition that can negate responsibility is a useful starting point for a discussion of moral involuntariness. Aristotle describes forced action as involuntary action because the "moving principle is outside, the person compelled contributing nothing".²⁷ He cites as examples the case of a person being carried by wind or "by men who had him in their power". It is almost universally agreed that Aristotle's notion of force in this context was limited to physical manipulation or the application of direct force to control and move another person's body.²⁸ In these cases, the action was not a product of the person's will in any way. The bodily movement at issue can be categorized as an event (something that happened to the person) as opposed to an action (something done by the

²⁴ Aristotle does not ignore the need for a causal link between the agent and the act; the agent herself is cast as the "cause" of her voluntary actions. In fact, it has been said that Aristotle's notion of voluntariness was developed "in order to capture the conditions in which an agent is causally responsible for an action": Meyer, *supra* note 20 at 39.

²⁵ Aristotle, *Nicomachean Ethics*, Translated by W.D. Ross (Oxford; Oxford University Press, 1980) at Book III ch 1. For instance, if A places poison in B's cup of tea but believes the poison to be sugar, then A does not know a relevant fact and is not responsible for the poisoning. In terms of the criminal law, this element would equate to *mens rea* for an offence (where the requisite *mens rea* was knowledge of a relevant fact).

²⁶ Indeed, the criminal law readily accepts mistake of fact as a defence to criminal conduct. Generally, the mistake operates as a denial, in that it negates proof of an essential element of the offence. There is a voluminous literature related to mistake of fact in the criminal law. Mistake of law, on the other hand, generally does not excuse a crime.

²⁷ Aristotle, *supra* note 25, Book III ch 1.

person).²⁹ Under current criminal law doctrine, this sort of physical compulsion is generally viewed as negating the act that forms the subject matter of an offence.³⁰

Aristotle's notion of force (and involuntariness) does not encompass *morally* involuntary conduct as conceived of by the Supreme Court, namely the choosing of a particular course of action because the alternatives are unacceptable. However, Aristotle did recognize the dilemma posed by this situation. He wrote:³¹

But with regard to the things that are done from fear of greater evils or for some noble object (e.g. if a tyrant were to order one to do something base, having one's parents and children in his power, and if one did the action they were to be saved, but otherwise would be put to death), it may be debated whether such actions are involuntary or voluntary.

...

Such actions, then, are mixed, but are more like voluntary actions; for they are worthy of choice at the time when they are done, and the end of an action is relative to the occasion. Both the terms, then, 'voluntary' and 'involuntary', must be used with reference to the moment of action. Now the man acts voluntarily; for the principle that moves the instrumental parts of the body in such actions is in him, and the things of which the moving principle is in a man himself are in his power to do or not to do. Such actions, therefore, are voluntary, but in the abstract perhaps involuntary; for no one would choose any such act in itself.

Despite some ambivalence, Aristotle concludes that these situations do not produce involuntary actions, but rather *voluntary*, rational, and indeed "worthy" actions. It might be useful to characterize these acts as *compelled*, although not *forced*.³² For Aristotle, their designation as voluntary does not, however, automatically result in the assignment of responsibility or the consequential response (i.e. blame where the act was a misdeed). Aristotle recognized that in some situations we may be inclined to praise an agent, rather than blame, for choosing a lesser harm. In other situations, pardon as opposed to praise is appropriate, as "when one does what he ought not under pressure which overstrains human

²⁸ Bodenheimer, *supra* note 14 at 32; Glover, *supra* note 2 at 6; J. Feinberg, *The Moral Limits of the Criminal Law, v.3 Harm to Self* (Oxford: Oxford University Press, 1987) at 115.

²⁹ The branch of philosophy known as action theory is concerned with the analysis of what human beings do intentionally and includes efforts to distinguish actions from mere events. I will not be concerned with this particular philosophical discourse; I will presume general agreement that in claims of situational excuse, the actor acknowledges having *acted* in a meaningful way. Indeed, I think this admission is part and parcel of a claim of situational excuse (i.e. "I did X, but I should not be held responsible because...").

³⁰ It is said that the actor whose body was forcefully moved against his will did not perform the act, but rather was a mere instrument of the mover. In essence, an actor in this situation commits no act, and therefore no crime. The question of excuse does not arise.

³¹ Aristotle, *supra* note 25.

nature and which no one could withstand”.³³ But Aristotle also makes clear that some acts must be avoided absolutely, no matter how great the external pressure, including great suffering and death.³⁴

It is likely that Aristotle’s reluctance to require condemnation of all agents for all voluntary actions reflects his belief that not all “bad acts” manifest vice or defect of character. Since his overarching concern is one of virtues and character, when a “bad act” is not a result of vice but possibly of virtue, the actor’s blameworthiness is open to question. I will return to this theme in Chapter 2 in the context of character theories of criminal responsibility.

Aristotle’s account provides a helpful picture of the differences between voluntary and involuntary actions. His account also reveals that “there are many ways in which a person can be said to have been forced or compelled to do something, and that not all of these ways of being forced or compelled are equally relevant to the question of responsibility”.³⁵ Still, his account fails to provide a principled basis for ascertaining when *voluntary* misconduct should be praised, when it should be pardoned, and when it should be punished (i.e. the harm sought to be avoided should have been endured). He acknowledges that such determinations are very difficult to make in some cases. Although this may well be true, this is not a helpful concession. Aristotle was clearly ambivalent with respect to situational excuses such as duress and necessity.³⁶

What is clear, though, is that to the extent that he might have recognized the excusing conditions based on external circumstances, he would have done so on the basis of a principle *other* than involuntariness. Although Aristotle does not elucidate the nature of the excusing criterion on these cases, it is my view that his instinct is correct that the excusing force is not a matter of involuntariness. I will develop this further in Chapter 3.

³² Meyer, *supra* note 20 at 97.

³³ Aristotle, *supra* note 25, Book III.

³⁴ Aristotle does not specify which acts fall into this category, except to suggest matricide.

³⁵ H. Tam, *A Philosophical Study of the Criteria for Responsibility Ascriptions* (New York: Edwin Mellen Press Ltd, 1990) at 59.

³⁶ Bodenheimer, *supra* note 14 at 32.

B. Modern Theories of Responsibility

In some ways, Aristotle's account of responsibility continues to be influential in modern philosophical accounts of responsibility. Most modern theories include some positive formulation of Aristotle's responsibility-negating elements.³⁷ Whereas Aristotle's account seems to presume voluntariness and thus moral responsibility unless ignorance or force can be shown, most current models of responsibility *require* knowledge (the inverse of ignorance)³⁸ and freedom (the inverse of compulsion) as positive conditions for responsibility. The notion of voluntariness also continues to be significant.

In one important way, however, Aristotle's view of responsibility has been rejected by modern theorists. Aristotle's account sets what many consider to be a very low standard for voluntariness and responsibility; all acts except those committed in ignorance of relevant facts or under physical force are voluntary. Today, "we are much more aware of factors that impair freedom and take away responsibility for actions" than Aristotle was.³⁹ Indeed, the Supreme Court's conception of moral involuntariness is directed at precisely non-physical forces that impair a person's freedom and which can negate responsibility for actions.

There are many different theories of responsibility but most can be conveniently grouped in the following way: (1) traditional theories that emphasize freedom in respect of: (a) alternate possibilities for action, and (b) the will or volition, and (2) non-traditional theories that: (a) evaluate responsibility in terms of acting for reasons, (b) emphasize a connection between action and character or moral systems, and (c) describe responsibility as reactive attitude.

(i) Traditional Theories that Emphasize Freedom

The concept that figures most prominently in theories of responsibility is freedom.⁴⁰ It has long been thought by philosophers that to be morally responsible, one must have acted *freely*.

³⁷ Fisher & Ravizza, *supra* note 20 at 6.

³⁸ I will not be concentrating on the knowledge aspect of responsibility.

³⁹ Gabriel Moran, *A Grammar of Responsibility* (New York: Crossroad Publishing Company, 1996) at 96.

⁴⁰ R. Audi, *Action, Intention and Reason* (New York: Cornell University Press, 1993) at 181.

It is possible to understand the term “responsible” as the coupling of “response” and “able”. If being responsible means being *able to respond*, this might in turn be thought to imply some element of control or freedom.⁴¹ In fact, many philosophers go so far as to equate “free” with “truly responsible” and use the terms interchangeably.⁴² Freedom can be a direct and essential component of responsibility theory, as in “X is responsible if X acted freely”. It might also appear more indirectly, for example as a sub-component of intention, where intention is the main condition of responsibility.⁴³

Although the notion of freedom is prevalent in accounts of action and responsibility, it has many different formulations. There is a lack of unanimity among philosophers as to what freedom means in a morally relevant sense, and to what exactly freedom relates. Part of the explanation for the limitations of current philosophical discourse on freedom is that most of the literature concerning freedom or free will forms part of the discourse on the debate over free will versus determinism.⁴⁴ Unfortunately, then, relatively little philosophical writing on

⁴¹ French, *supra* note 20 at 16.

⁴² G. Strawson, *Freedom and Belief* (Oxford: Clarendon Press, 1986) at 2. Strawson goes on to say that “Questions about what freedom is, and about whether or not we are or could be free, will be understood to be questions about what true responsibility is, or might be, and about whether we are or could be truly responsible or truly deserving of praise or blame”.

⁴³ Some theories focus on the notion of intention as the foundation for responsibility, the basic principle being that an agent is responsible for all and only her intentional actions. Intention is sometimes broadly conceived of as the coupling of knowledge and freedom to do otherwise. Other times, intention means that an agent “has reasons for doing some things, expects certain outcomes, or wants certain ends, or seeks, or hopes, or whatever”: French, *supra* note 20 at 4. French warns that the interpretation of intention is too narrow to the extent that it fails to capture all acts for which we would normally want to hold someone responsible such as “deliberate” or “wilful” acts, the consequences of which are not desired but are tolerated in furtherance of achieving some other objective (at 11).

⁴⁴ Much of the philosophical literature on freedom relates to the centuries old debate between free will and determinism. This debate is thought to be crucial for many philosophers. Determinism entails that all human action is nothing more than the result of prior causes, not the product of meaningful choices by autonomous, rational individuals. If determinism is true, the entire notion of moral responsibility, and possibly punishment, are cast in doubt because if all actions are pre-determined and not caused by each actor in any way it is difficult to find a basis for responsibility. Thus there has been a phenomenal effort by philosophers over several hundred years to develop an account of free will capable of coexisting with determinism. This is known as “compatibilism”. The compatibilist takes a slightly different approach to the notion of freedom. Even if the choice to act was determined (as in caused by prior events and therefore not an act of free will in this sense), a person could still be “free” under the following circumstance: *if they had chosen otherwise, they would have been able to carry out their choice*, in the sense that no external force would actually prevent them from carrying through with their decision. So even if the person could not have avoided making the decision to act in a particular way (i.e. assuming determinism is true), they can still be said to have been free not to carry out the act if they would have been physically able to do otherwise. Compatibilists thus assert that determinism and free will can coexist, in which case individual responsibility need not be rejected. Compatibilism does have its

freedom or free will has been addressed to the questions: is freedom necessary for an actor to be responsible for an action? And if so, what is the precise nature and quality of the necessary freedom?

It has been suggested that the various concepts of freedom in accounts of responsibility can be divided into two categories; those that place emphasis on the notion of ability or power, and those that place emphasis on the notion of choice or desire.⁴⁵ According to the former, a person does something freely if “he does it though it is in his power not to do it”; according to the latter, a person does something freely “if he does it because he wants to”. I will first explore the notion of freedom as it is related to ability or power.⁴⁶

Traditionally there has been a very strong association of freedom and moral responsibility with what philosophers have termed the “principle of alternative possibilities”. Theories of responsibility commonly hold that in order for an agent to be responsible for an action, the agent must have had “freedom to pursue other courses of action” or the “freedom to do otherwise”. The notion of freedom of action causes us to ask the following question: did the actor have the ability to do X and also to avoid doing X? This theory is premised on the view that it is appropriate to hold an actor responsible for having done some act, if it was in her power to not perform the act. Conversely, if an actor could *not* avoid act X, then she should not be held responsible for it.

Thus if a driver runs a red light and hits a child crossing in the cross-walk, we would ask whether she “could have done otherwise” than she did, i.e. whether she could have stopped at the light. If the answer is yes, she had ample time to stop, her view was not obstructed, she saw the light and simply failed to apply the breaks, then she would normally be held responsible for hitting the child. However, if she was hit from behind and her car propelled through the red light and into the intersection, then she was not able to do otherwise, and she might not be held responsible.

detractors who say that the theory does not intuitively accord with what we mean when we say that an agent was free.

⁴⁵ A. Kenny, *Freewill and Responsibility* (London: Routledge & Kegan Paul, 1978) at 25. Kenny adds that the first type of freedom has historically been termed liberty of spontaneity, and the second liberty of indifference.

The same principle works in respect of responsibility for omissions. If a lifeguard is forcibly confined to her chair while a swimmer drowns, the lifeguard will be said not to be responsible for her failure to save the swimmer because she was not free or able to fulfil her obligation.

It bears noting that some recent philosophical work rejects the association of responsibility with the principle of alternate possibilities or “freedom to do otherwise”. Some writers dispute the commonly held view on the ground that we often hold people morally responsible for conduct that can not be said to be carried out freely or for which at the time no other action was possible, such as reckless and negligent behaviour.⁴⁷ It has also been suggested that an actor can be responsible for certain *intentional* actions that are not done freely. Even where a person has no choice and is compelled to act in a certain way, there might be circumstances in which we would say they are responsible for their actions. For example, imagine a youth who for years has been making visits to a retirement home every weekend out of a genuine sense of compassion and affection for those he visits, and plans to continue these visits for years to come.⁴⁸ One day, the legislature passes a law that requires every citizen to visit the sick or the elderly one day a month. Does the youth suddenly cease to be praiseworthy for his visits? Does one out of his four visits not count anymore as praiseworthy? While it may well be the case that “learning that someone could not have done otherwise often alters our assessment of the attitudes and values that person realizes in the way she lives her life”, this is not always the case.⁴⁹ Sometimes, we maintain our views

⁴⁶ It should be noted at this stage that some theories require both kinds of freedom.

⁴⁷ Audi, *supra* note 40 at 184.

⁴⁸ This example is based on the Milbur example provided in E. Schlossberger, *Moral Responsibility and Persons* (Philadelphia: Temple University Press, 1992) at 11.

⁴⁹ To cite another example, imagine an actor tasked with guarding dangerous weapons who gives in to threat of torture (and possibly actual torture) and reveals the codes, even though his responsibility was to protect the codes at the cost of his own life and who was given a pill to induce death in the event of just such an intrusion. Few people would assert that the guardian *freely* gave the access codes or that he was able to do otherwise at the time of torture, yet at least one author has suggested that we might still be inclined to hold the guardian responsible for giving the codes and for failing to take his own life when he had the chance: See Audi, *supra* note 40 at 185, where he states that if the guardian gives the combination “knowing that many thousands will probably be killed, he would surely be morally responsible, even blameworthy, for giving it. He ought to have taken the poison or held out longer”. It should be noted that this kind of scenario likely applies only in cases of role-responsibility, where an actor has some special duty. The real locus of responsibility for Audi is avoidability, as opposed to freedom. Avoidability permits a more nuanced analysis because it is qualified by

about a person's moral responsibility regardless of whether they could have acted otherwise.⁵⁰ This kind of example forces us to question the traditional emphasis on "could have done otherwise" and freedom of action as central to the question of responsibility ascription. Even if "could have done otherwise" is required for moral responsibility, it does not necessarily follow that alternate possibilities are what ground our ascriptions of responsibility.⁵¹

Whereas the principle of alternate possibilities emphasizes freedom in relation to the *power of action*, other theories attempt to connect the relevant notion of freedom to *choice or desire*. These theories focus on responsibility as a function of free will or volition. Volition has been conceived of as a mental event, the connector between a desire and the doing of an act, and as "acts of will".⁵² Thus some theories posit that an agent is responsible for acts that issue from the agent's will.⁵³ This is similar to Aristotle's conception of "the moving principle" being internal to the agent. According to this approach, an actor's conduct is attributable to her if the act is a product of her will or volition, roughly speaking if she *chooses* to do the act. Where a stronger person or a strong wind (to cite Aristotle's example) force an actor's body to move in a particular way, the movement can not be said to issue from the actor's will and it is variously termed involuntary, non-voluntary, or non-volitional. Accordingly, the *actor* was not the cause of motion, and therefore she can not be responsible for it. Conversely, where an actor wills or has a volition to do a certain thing, some mental process (a volition) causes her body to move in a particular way. She identifies her will with the act, and the act is *hers*. The concepts of the will or volition focus the notion of responsibility as related to a mental or psychological process within the actor.

two temporal variables; the time of the action itself (at which point it may not be possible to do other than what one does), and the time of avoidability, some time prior to the time of action at which point the actor could have done otherwise and avoided the situation that resulted in the act in question. The latter question of avoidability is not just an objective factual assessment, but is in part determined by "what a morally sound person in the situation in question might reasonably have been expected to do". Audi's account of responsibility is moralized, and he considers this to be appropriate. He rejects theories that focus on freedom or volition in part because they try to be non-moral (i.e. to provide an account of responsibility that is free from value judgments about right wrong). I will address this distinction in greater detail below.

⁵⁰ Schlossberger, *supra* note 48 at 11. Schlossberger notes that even though "could have done otherwise" is not a requirement of responsibility, it may still be an "absolving excuse".

⁵¹ Fischer & Ravizza, *supra* note 20 at 37.

⁵² Audi, *supra* note 40 at 75. Audi also notes at 75-77 that other views conceive of volition as a mental state akin to trying, or associated with intention, or as wanting.

These theories provide further refinement to the freedom of action accounts of responsibility in order to explain situations where the will, as opposed to the body, is overpowered. There are two possible ways in which the will can be affected. The will may be overborne in actual fact by an internal condition (e.g. insanity) or on account of extreme external pressure (e.g. prolonged torture). Under such circumstances, the agent may be “unable to make a rational choice that reflects his underlying long-term preferences”.⁵⁴ Because of the impairment of the normal functioning of the will, these would be classified as non-volitional in the same way as involuntary acts.

By contrast, some circumstances result in what has been termed *constrained volition*, wherein an actor is limited to choosing from among unwanted alternatives, but retains the capacity to make a rational choice.⁵⁵ In these cases, an actor is *forced to will* something they would not otherwise have willed, in other words “the choice itself was made under compulsion”.⁵⁶

It is an interesting philosophical question whether the will can ever be forced or compelled. Volitions or acts of will are often equated with *choices*, and it seems counterintuitive on some level that *choice* can be involuntary or compelled. The very definition of “choose” (“to select freely and after consideration”) requires some conception of freedom.⁵⁷ By its very nature, an act of will is an internal, mentalistic process, and so can not be manipulated by force in the same way as a physical object such as a human body can.

Still, some philosophers recognize that an actor’s choice or will can be manipulated in *some morally relevant way*. Whereas the principle of alternate possibilities is concerned with an actor’s ability to carry out her choices, freedom of will is concerned with prior questions surrounding the making of the choice itself. Was the actor free to make the choice she wanted to make? Thus on this positive model, freedom exists where an agent not only acts

⁵³ Glover, *supra* note 2 at 15.

⁵⁴ A. Wertheimer, *Coercion* (Princeton: Princeton University Press 1987) at 9.

⁵⁵ *Ibid.*

⁵⁶ Glover, *supra* note 2 at 15.

according to her will, but also wills according to her choice.⁵⁸ An actor is “truly responsible for his actions... because the reasons that determine his actions are indeed *his* and nobody else’s in the normal case, when he is not subject to any sort of psychical restraint”.⁵⁹

The theory recognizes that under certain conditions, an agent should not be held responsible for acting on account of certain choices, if the choices she makes were constrained in a morally relevant way. When external obstacles or forces impose themselves upon a will, it can be argued that there is insufficient or defective identification of an actor with her will. The will, and thus the choice made, did not belong to the actor in a meaningful sense. Unwanted alternatives may lead an actor to make a rational choice, a choice that she may “regret having to make” but one she will “not regret having made”.⁶⁰

These are interesting approaches to understanding how we regard people as responsible and also why some people ought to be excused for some of the things they do. We are inclined to praise and credit people for their good deeds when their so doing was caused by their own *free choice*. The youth who chooses to visit the old age home once a week is praised as kind and compassionate. However, if we later discover that he is not making the visits out of his own choice, but rather for example as punishment imposed by his parents for having defaced public property, our estimation of him changes, and we would almost certainly cease to consider him responsible for his visits and thus he is no longer viewed as praiseworthy. Although he acts *freely* and according to his *choice*, the reasons that ground his choice are not *his*.

Similarly, we may have concerns about holding responsible the actor who chooses and who commits a wrong under circumstances in which the choosing of the wrong was done under constraint, because of threats of harm or on account of dire circumstances. The actor would not have chosen to be the dire circumstances, or to receive the threat, and so on. The actor would have chosen *not to have to choose X*, if it was in her power to do so. And this is

⁵⁷ Merriam Webster Collegiate Dictionary (Springfield, Mass: Merriam-Webster, 1998).

⁵⁸ S. Wolf, “The Real Self View (In which a Nonautonomous Conception of Free Will and Responsibility Is Examined and Criticized)” at 157 in Fischer & Ravizza, *supra* note 20.

⁵⁹ G. Strawson, *supra* note 42 at 58 (emphasis in original).

precisely the way in which she was not free. This seems to be a close approximation to the notion of moral involuntariness espoused by the Supreme Court and a good candidate for the locus of responsibility.

But there are concerns with this approach that bear mentioning. The model works on the premise that responsibility can be avoided because an actor *did not want to want* what she in fact wanted, or *would not choose to choose what she chose*. Unlike most of our normal actions, her choosing and doing are perhaps accompanied by remorse and reluctance. However appealing this approach may be, it is not clear how it addresses certain other types of “unwilled” desire and action situations. For instance, it raises difficult questions with respect to addiction and other compulsive disorders that cause certain individuals to have desires they do not wish to have. For instance, the smoker wants a cigarette, but desperately desires to not want it, and would always choose to not want it if this was possible. Nonetheless, this desire appears within her, and she cannot make it go away. The desire is arguably just as foreign to her as if it had been planted in her mind by a hypnotist; she does not claim the desire as her own. But if the desire is strong enough, she may act on it, all the while wishing she could refrain from wanting the cigarette. She too may be acting reluctantly and with remorse and regret.⁶¹

There are additional situations of wanting against one’s will that raise problems with this account. For instance, in necessitous circumstances such as extreme poverty or illness, a person may have unwanted desires to steal food or medicine. The person would not choose to be in necessitous circumstances or to desire to steal, but this is not something within their power to change. Peer pressure situations also present another situation in which the choice to do an act might not have emanated within an actor, or belong to her, but she chooses nonetheless in order to impress or gain acceptance into the group. An actor might feel

⁶⁰ Wertheimer, *supra* note 54 at 171.

⁶¹ Some may seek to limit the forcefulness of the claim with respect to addiction and compulsive disorders by appealing to the fact that they are internal to the person and reflective of some character flaw. This distinction may have force if it is followed with an assertion that individuals are *responsible for their characters*. I will address the notion of responsibility for character in the next section.

compelled to engage in acts of civil disobedience or conscientious objection on account of their sense of justice.

It is not clear how the notion of freedom of will accounts for these unwanted, internal desires and compulsions. These situations reveal that the “freedom of will” account has difficulty describing the exact relationship between freedom, the will and responsibility. This in turn leads to an unclear dividing line between unwanted desires and choices that negate responsibility and those that do not. Freedom to act and freedom of the will are concepts that do not admit of degree, “whereas freedom in the relevant sense does”.⁶² Several philosophers have remarked on the difficulty that exists when focusing responsibility ascriptions on a variable that is a matter of degree.

In discussing the problem of degrees of freedom in respect of the notion of voluntariness, Feinberg remarks that an “action done under a threat of physical violence [falling short of death], for example, comes closer to being fully voluntary than an act done under the threat of death”.⁶³ We value our lives more than the experience of a minimal or even a moderate degree of pain, and will feel more or less compelled to act in accordance with the degree of the threat. Feinberg’s example helps illustrate how in ascribing responsibility, the external circumstances may be as relevant as the actor’s internal mental state, if not more so. This casts doubt on whether the roughly equivalent notions of voluntariness and freedom are adequate to do the job they are currently performing in accounts of responsibility. If freedom admits of degrees, then we must ask *how much* freedom is sufficient for a person to be responsible for her acts. The problem of degrees of freedom brings to the fore the question of whether responsibility accounts should be moralized or not. I will address this issue later in this Chapter and again in Chapter 3.

⁶² Audi, *supra* note 40 at 186.

⁶³ Feinberg, *supra* note 19 at 149.

(ii) Non-Traditional Accounts

Traditional models treat responsibility as concerned with determining the “relation between an agent and her action”,⁶⁴ focusing on questions such as the presence or absence of certain mental states (such as knowledge) or some notion of freedom. The traditional approach presumes the existence of objective requirements for responsibility, and further that these requirements can themselves be justified and empirically verified. The traditional approach has been criticized for failing to accord with our true understanding of responsibility and for leaving out of the analysis fundamentally important questions about the moral nature of the acts and circumstances. Theorists concerned with these and other problems with the traditional approach have developed alternative accounts of responsibility ascription.

(a) Acting for Reasons

Humans are rational beings, and most of our actions can be explained. That is to say that we generally act for reasons. A set of theories prefers to consider the notion of responsibility from the perspective of “acting for reasons”, rather than focusing on vague and contested notions like voluntariness, volition or free will. These theories build on the common-sense intuition that to understand responsibility, we should explore the reasons people have for acting as they do. They seek to describe responsibility by describing some relationship between actions and reasons.

This conception of action opens up new possibilities for a theory of responsibility. Whereas traditional theories are based on what has been termed an “executive thrust model”, emphasizing a causal link between volition/will and action, this kind of view adopts a “guidance and control model”, which holds that “actions result when energy already present in the motivational structure is released in the appropriate direction by a suitable eliciting event, such as thought or decision, or a perception of an opportunity of what one wants, and guided in that direction by (above all) the agent’s belief”.⁶⁵ Reasons are a kind of mental

⁶⁴ Meyer, *supra* note 20 at 18.

⁶⁵ Audi, *supra* note 40 at 101.

state, essentially comprising the union of desire and belief.⁶⁶ Desire refers to what it is the agent hopes to achieve, accomplish, make happen, get, and so on. Belief relates to the agent's conviction that performing the chosen act will have a tendency to bring the agent closer to achieving his or her desire. A person's believing something and desiring something jointly constitute her having a reason to do the thing.

Theorists advancing an "acting for reasons" approach recognize that traditional accounts that center on freedom suffer from the weakness that freedom is a matter of degree, and there is no satisfactory mechanism for measuring the quantity of freedom necessary for responsible action. Proponents of this theory accept that "actions for reasons divide into the free and the unfree, though there are degrees of freedom which make some actions difficult to classify".⁶⁷ But on an "acting for reasons" approach, the "division between the free and the compelled must be made...in terms of the kinds of factors that explain action".⁶⁸ Thus one solution to the "degrees of freedom" problem is to evaluate responsibility as a function of the reasons people have for acting as they did in the circumstances.

Diverting attention away from freedom as the locus of responsibility and redirecting it toward the *reasons* for the action reflects an important dichotomy that is well-known in criminal law, that between intent and motive. Whereas in criminal law, we assign responsibility for acts committed with a specified mental state that typically does not require bad motive, this approach suggests that in assigning responsibility, understanding the motive is crucial to making a determination about responsibility. In essence, we can not truly know what the agent *did* unless we also know *why* she did it.

(b) Responsibility for Character

Traditional models "center on how our acts are caused. We are responsible, they claim, for acts caused in a certain way, by our choices, intentions, or desires".⁶⁹ Some theorists reject

⁶⁶ Strawson, *supra* note 42 at 34.

⁶⁷ Audi, *supra* note 40 at 30.

⁶⁸ *Ibid.*

⁶⁹ Schlossberger, *supra* note 48 at 5.

this objective, causal approach described above and focus on the connection between responsibility and character or value systems. For these thinkers, our “habit of speaking of responsibility for actions is merely a habit and does not suit well our deeper conceptions of moral evaluation”.⁷⁰

These thinkers suggest that when we hold someone responsible for an act, we generally do so because that act reflects a character trait of some kind. In the case of praiseworthy conduct, we find that the person’s actions reveal kindness or generosity or compassion. In the case of blameworthy conduct, we really blame the person not so much for the actions they performed but rather for the disregard, callousness, disrespect or malevolence the act reflects. We are thus said to be morally responsible for our “personhood”.⁷¹ Aristotle’s approach to ethics based on virtues is fundamentally based on our responsibility for our characters. For Aristotle, the virtues must be cultivated and put into practice through action. Other philosophers have gone into significant detail about various kinds of character traits and the different way in which we might, or might not, be responsible for them.⁷²

Other views go farther and define responsibility by elucidating some connection between the agent and her entire value system. On one conception, force, violence or constraint is sufficient to negate responsibility if it “interferes with or inhibits the agents’ normal abilities to control their behavior in accordance with values and choices of their deepest selves”.⁷³ The “agent’s behavior is attributable to the agent’s real self - and therefore that the agent behaves as she does in the absence of undue constraint - if she is at liberty (or able) both to govern her behavior on the basis of her will and to govern her will on the basis of her valuational system”.⁷⁴

This may appear similar to the notion that an agent is responsible for an act if she willed it freely, but goes farther in the sense that we do not simply take a snapshot of the will at the

⁷⁰ *Ibid.* at 17.

⁷¹ *Ibid.* at 19.

⁷² For example, Audi holds that we are responsible for having produced a character trait (generative), retaining a trait (retentive), and developing a trait (prospective).

⁷³ Wolf, *supra* note 58 at 155 (emphasis added).

⁷⁴ *Ibid.* at 159.

time the choice is made to determine whether it was free. On the contrary, we must inquire whether the choice to do the act was in accordance with the actor's entire value system, her "real self". This approach also goes farther than the "acting for reasons" approach, which seems to limit the inquiry into reasons and motivation to the time frame roughly surrounding the event.

(c) Responsibility Ascription as Reactive Attitude

Some philosophers criticize traditional accounts for "overintellectualizing" responsibility ascriptions, and thereby ignoring something crucial about the notion of responsibility, namely the practice of responsibility ascriptions as an integral part of interpersonal relationships and interaction, as the human experience of expressing our attitudes and sentiments toward fellow human beings. This non-traditional view holds that "responsibility is grounded in nothing more than our attitudes toward one another", in what have been called our "reactive attitudes".⁷⁵ This approach rejects an objective understanding of responsibility which is perceived to neglect the context of "interpersonal dimension of human relationships" in which the practice of attributing responsibility should be understood.⁷⁶ We evaluate other people's conduct with personal, rather than objective attitudes because "we share a common nature with our fellow human beings... The personal concern is one aimed at finding out if others are favourably or unfavourably disposed towards us, not because of the possible benefits or harm which may result from such dispositions, but simply because it is in our human, or as some may say, social nature to care about what other people think or feel about us".⁷⁷

This model does permit some nuance in responsibility ascriptions to account for exceptional circumstances. Where the actor was behaving uncharacteristically on account of stress or other circumstances, we may still judge them to be responsible for what they have done, but we reinterpret the act in such a way that our otherwise normal attitude of resentment may be

⁷⁵ Fischer & Ravizza, *supra* note 20 at 16. This approach was first developed by Peter Strawson, "Freedom and Resentment" (1962) *Proceedings of the British Academy* 48.

⁷⁶ Tam, *supra* note 35 at 14.

⁷⁷ *Ibid.*

inhibited.⁷⁸ Circumstances that cause such a reinterpretation are conceptualized as exempting conditions, rather than excusing conditions.

This approach to responsibility has been criticized as conflating *being held responsible* with *being responsible*, each of which can exist without the other. Even though this approach might illuminate the human and social practice of assigning responsibility, some suggest that it fails to provide a mechanism or principle by which we can determine who is an *appropriate recipient* of responsibility attribution.⁷⁹

3. Excusing Responsible Action

Theories of responsibility include some notion of responsibility-negating circumstances or conditions. Some theories cast the absence of excusing conditions in general terms as the positive requirements for responsibility. Many accounts relating to freedom try to do just this, by capturing the responsibility-negating element of compulsion within the relevant notion of freedom. Other theories posit more basic conditions of responsibility and provide a distinct theory of excusing conditions that is juxtaposed on to the theory of responsibility. Thus the question becomes, if an actor was *prima facie* responsible for her acts, under what circumstances might she be entitled to be released from responsibility and the normal state or social response?

I should note here that much of the philosophical writing on responsibility does not clearly distinguish between conditions for responsibility and excusing conditions. There is often a blurring in the discussion of the conditions necessary to render a person responsible for an act and those that are capable of negating responsibility. So for instance, the notion of freedom of the will is sometimes cast as necessary for responsibility and sometimes as a

⁷⁸ G. Watson, "Responsibility and the Limits of Evil: Variations on a Strawsonian Theme" at 128 in Fischer & Ravizza, *supra* note 20.

⁷⁹ This problem may be more acute in discussions of legal responsibility and excuses. There is a greater need for the criminal law to be clear, understandable and accessible to the citizenry than moral tenets need be. Whereas a certain degree of flexibility and disagreement as to what acts are morally blameworthy is acceptable, the same degree of uncertainty in respect of the conditions of criminal liability raises very serious concerns about justice and individual rights.

responsibility-defeating condition. The distinction is not relevant insofar as the ultimate determination of responsibility is concerned in any given case, but conceptually these matters are distinct and unfortunately writing in this area does not always recognize the distinction. This problem occurs as well in writings by criminal law theorists, which I will describe in the next Chapter.

Few philosophers have attempted to tackle the question of excusing conditions directly. Some have attempted to formulate one or more general principles, such as whether “the situation was such that it would be unreasonable to expect [a person] to do otherwise than what [they] did”,⁸⁰ or whether “a morally sound person could be expected to do otherwise in the relevant situation”.⁸¹ Philosophers who have waded into this territory commonly issue the warning that it is extremely difficult to elucidate the precise conditions for excuse because there exists widespread disagreement about where the line should be drawn.⁸²

Philosophical theories of excusing conditions are rarely more detailed, with one notable exception. Though many different conditions can defeat responsibility, coercion has been the subject of much study by moral and political philosophers.⁸³ Because almost all accounts of responsibility permit coercion or compulsion of some kind to negate responsibility, theories of coercion have much to add to our understanding of excusing conditions more generally.⁸⁴ This literature is also important since the notion of moral involuntariness developed by the Supreme Court underlies the excuse of duress, which is the rough equivalent of coercion in philosophical writing.⁸⁵

⁸⁰ Glover, *supra* note 2 at 61.

⁸¹ Audi, *supra* note 40 at 187

⁸² Glover, *supra* note 2 at 61 explains the difficulty by stating that “it is so very open to dispute how much my doing what I should must be to my disadvantage before it becomes unreasonable to require me to do it”.

⁸³ Political philosophers are generally concerned with concepts such as freedom, autonomy and power. These inquiries often touch upon questions of individual responsibility.

⁸⁴ Some writers have suggested that common language of the coercion plea of “I had no choice” is responsible for leading philosophers to associate freedom to do otherwise with responsibility: A. Ross, *On Guilt, Responsibility and Punishment* (Berkeley: University of California Press, 1975) at 159ff.

⁸⁵ I use the terms coercion, duress and compulsion interchangeably. Note that Feinberg, *supra* note 28 at 191 uses them differently; “compulsion” occurs when “one alternative has been made impossible”. By contrast, “coercion” doesn’t make an option impossible “so much as destroy its appeal by increasing its cost”.

While it is commonly accepted that coercion or compulsion can undermine responsibility, the exact nature of coercion and the way in which it impacts responsibility are far from clear. Many theories commonly assume that coercion negates or constrains freedom and because freedom is necessary for responsibility, coercion thereby negates responsibility. Others have concluded that what negates or absolves responsibility in coercion cases is not at all a matter of limited or constrained freedom as the traditional views would suggest, but rather some kind of unfairness in the situation. The question of fairness is a function of some wrongful conduct by another. The requirement of wrongful conduct highlights an important difference between *causing* someone's dilemma and *taking advantage* of a pre-existing situation. It is likely that it is less wrong to take advantage of a necessitous situation than to create such a situation intentionally. It may be that "the key to coercion is not in the choice situation itself, but in its genesis".⁸⁶ If this is so, the validity of a coercion claim may vary depending on the *coercer's* conduct, even if in either case the coerced *actor's* state of mind was identical. Thus Robert Nozick has written that when other people's actions place limits on one's alternatives, "whether this makes one's resulting action non-voluntary depends upon whether these others had the right to act as they did".⁸⁷

4. Moral vs. Non-Moral Theories of Responsibility

An exploration of the diverse range of approaches to responsibility reveals a fundamental tension between moral accounts and non-moral accounts of responsibility. Models of responsibility that focus on freedom tend to be non-moral or empirical. They function on the premise that there exists some objective universal truth about responsibility that can be expressed in terms of the relationship between the external choice situation and the internal experience of constraint in the actor. They conceive of voluntariness or freedom (whichever is the key concept for the particular account) as a function of the agent's state of mind, their way of evaluating the choices open to them and choosing one over the other. Applying the

⁸⁶ Wertheimer, *supra* note 54 at 202.

⁸⁷ R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at 262. This does not mean that taking advantage (as opposed to creating the situation) cannot in some circumstances undermine responsibility. But if it does so, it is not on the ground of coercion.

relevant objective criteria and conditions yields either a yes or no answer to the question “was the agent responsible?”

Some theories, on the other hand, recognize that at a certain point the decision about whether an actor *is responsible* is transformed into the question of whether or not the actor *should be held responsible*. This inquiry will be influenced, if not determined, by our collective judgments about right and wrong. These theories contain some component to capture how that normative assessment should be made. Thus the experience of psychological constraint in a decision situation does not in itself render an actor non-responsible. The *moral* dimensions of the situation must also be taken into account.⁸⁸

Those who advocate a moralized view of responsibility believe that the notions of voluntariness and freedom are misused in accounts of responsibility, and that it is inaccurate and misleading to speak in terms of “no choice” or “no freedom”. Rather, choice and freedom exist, and it is the value of the choices, given the situation, that are morally relevant. They assert that the language of voluntariness and freedom conceals the moral nature of the inquiry. The question is not whether the actor is or is not responsible, but rather whether she should be held to account for the normal consequences of her actions.

Taking a moral view of responsibility raises the question of how to treat choices made on account of natural threats as opposed to threats from other people. Threats and other misconduct by persons can quite easily change the *moral* nature of a situation because there is a clear wrong and a wrongdoer to whom we can point as responsible. Conversely, many philosophers take the view that “nature does not limit freedom”.⁸⁹ This does not mean that natural events and forces can not create difficult or tragic choice situations, but it does raise the question of what moral force to give such causes, and how to decide which natural threats

⁸⁸ For example, A might *freely* choose surgery even if it presented her with only a 50% chance of survival, but we would not say that A freely choose to jump out of the hospital window at gunpoint even if she stood the same 50% chance of survival. Her choice situation is factually equivalent (50% chance of survival), and she may feel equally psychologically constrained in both, but the cause of the choice situation (threat vs. illness) and the wrongfulness of the threat (there was no justification or excuse for it) alter the moral quality of the situation in such a way as to change our decision about her responsibility for choosing to jump but not about her responsibility for choosing the surgery: See Feinberg, *supra* note 28 at 148.

⁸⁹ Wertheimer, *supra* note 54 at 263.

or causes are sufficient to excuse responsibility for conduct. It surely also raises the question of whether freedom is the cornerstone of responsibility; nature is constantly constraining our possibilities for action. Philosophical accounts of this question are very limited.

This tension between moral and non-moral accounts of responsibility reveals the intimate connection between the philosophical discourses on morality and on the conditions for responsibility ascription. At the outset of this Chapter I described these two discourses as distinct areas of inquiry. However, this may not be a sustainable position. It is possible that each area of inquiry necessarily informs the other; it is difficult to ascertain where one branch ends and the other begins. More importantly for present purposes, this interconnection between conditions of responsibility and the moral quality of circumstances and conduct fuels philosophical discourse on excuses, the principal means of avoiding responsibility.

In this Chapter I explored two distinct components of the notion of moral responsibility. The first component relates to questions about morality generally and the moral quality of actions. It is the moral quality of an action that determines what kind of response society may wish to have. Secondly, I explored some philosophical theories of personal responsibility. These theories seek to establish the connection between an act and an actor, so that society can determine who should bear the appropriate response.

Both of these aspects of philosophical inquiry are directly implicated in the structures that underlie criminal law excuses. In the next Chapter, then, I will turn to responsibility in the criminal law context and show how philosophical ideas have been imported into the underlying theories that support criminal responsibility. In Chapter 3, I will turn more directly to the Supreme Court's conception of moral voluntariness. I will assess its underlying theoretical foundation and discuss whether it is a suitable one. More particularly, the debate among philosophers about the preference for a moral or an empirical account of responsibility is equally pertinent in respect of the criminal law, and I will address this issue in detail.

CHAPTER 2: CRIMINAL RESPONSIBILITY AND PUNISHMENT

In the preceding Chapter, I elucidated various philosophical approaches to moral responsibility. This involved questions relating both to determining the moral quality of actions, and the nature of personal responsibility that links a person to their actions in a meaningful way. In this Chapter, I will explore various ways in which philosophical accounts of morality and responsibility have been incorporated into criminal law theory and inform criminal law theory's approaches to the questions of responsibility and excuse.

Although moral philosophy provides some of the fundamental building blocks of criminal law, the relationship between the criminal law and these aspects of morality is difficult to discern with precision. And further, there are divergent and conflicting views about many fundamental questions of criminal law. One can easily imagine that the conflicting perspectives on basic questions of criminal law reflect the same basic tensions in philosophical discourse on morality and personal responsibility.

1. The Relationship Between Law And Morality

For legal positivists, a separation between law and morality is required. The positivist account of law is held out to be empirical, scientific, and non-moral. Although it is certainly desirable if the dictates of law and of morality should happen to coincide, positivists hold that "law is one thing and morality another and neither can be reduced to the other".¹ In the realm of criminal law, then, a criminal wrong can be defined solely by virtue of the fact of its prohibition by the state; *moral* wrongfulness of the act is not a necessary requirement of a criminal offence. Rather, the essence of criminal liability is rooted in the intentional (or reckless) commission of an *act prohibited by law*.

To others, the law is an inherently moral endeavor; indeed morality is an essential component of the law. In the context of criminal law, offences should proscribe conduct that is morally

¹ J. Feinberg, & J. Coleman, *Philosophy of Law* 6th ed. (Belmont: Wadsworth/Thomson Learning, 2000) at 2.

blameworthy. On this view, the criminal sanction is imposed for the intentional (or reckless) commission of a *moral wrong*.

The debate between legal positivism and various forms of natural law has been ongoing for centuries and is the subject of innumerable books and articles, the details of which I will be unable to explore any further here. It is sufficient for my purposes to note that, regardless of the positivist account of law as a human construct distinct from morality, it is indisputable that aspects of morality and ethics have been incorporated into various elements of our criminal law theory and practice. There is indeed a great deal of overlap between legal and ethical systems. Both are normative systems prescribing how we ought to live, and they are often “mutually supportive”.²

There is a “general expectation that the written law and judgment will at least roughly approximate prevailing moral values and moral judgment”.³ To most of us, it seems intuitively correct that criminal wrongs are also moral wrongs.⁴ Murder, rape and theft, some of the most serious criminal offences, are undeniably grossly immoral conduct, and many would assert that such conduct is criminally prohibited precisely *because* it is morally wrong. At the top end of the scale of seriousness, the proposition that the criminal law is concerned with moral wrongs is relatively unproblematic. However, the relationship is not perfectly symmetrical; as we move away from the most serious offences toward less serious ones, it becomes more difficult to hold that the law is directly concerned with morality. For instance, some strict liability offences and regulatory offences might proscribe conduct that would not generally be viewed as immoral, such as driving regulations or fishing quota regulations. People should obey these laws, we might think, not because the proscribed conduct is immoral, but rather for reasons of efficiency, safety or good management of natural resources.

² B. McDowell, *Ethics and Excuses* (Westport, Connecticut: Quorum Books, 2000) at 47.

³ Tebbit, M., *Philosophy of Law* (New York: Routledge, 2000) at 4.

⁴ The converse does not necessarily hold; not all moral wrongs are or should be subject to the criminal sanction. It seems logical that the class of moral wrongs that should be punishable criminally are those of a sufficient degree or quality of wrongfulness. The more morally wrong a behaviour is, the higher the likelihood it qualifies for criminal prohibition.

Hart suggests that the debate about the relationship between law and morality often involves a conflation of two distinct sets of questions.⁵ The first relates to the moral value of the criminal justice system generally. The second question relates to the treatment of any particular actor caught within the system. The traditional debate seems to suggest that either the criminal law punishes morally wrong acts *or* the criminal law punishes intentional violations of the law in which case moral fault is not required. According to Hart, this is a false dichotomy; these two viewpoints need not be mutually exclusive. He suggests that if the criminal justice system is moral on the whole,⁶ then it is right to punish those who violate laws *because* they violate the law. Fault derives not from the intentional commission of a moral wrong, but rather from the intentional violation of a legal rule enacted under a morally just system. If the system is *not* morally defensible, then we would be morally permitted to disregard laws.

Hart's approach does seem to accord with the reality of our criminal justice system. Liability for a criminal offence generally does not require a showing of a "moral wrong or dishonest intent or conscious guilt".⁷ With respect to the criminalization of conduct, all that is normally required is that an actor intentionally, knowingly or recklessly engage in proscribed conduct.⁸ It is true that the intentional or knowing commission of harm against another can generally be categorized as morally blameworthy. But this is not always the case. Sometimes people break the law for a good motive, for conscientious reasons, or on the belief that it is the morally right thing to do. Nonetheless, these people still commit a crime and are subject to punishment unless an existing defence is applicable. As per Hart, the blameworthiness or fault that is contained within the elements of offences derives from the intentional breach of the law under a system of law that is, on the whole, morally defensible.

One of the striking ways in which law and moral philosophy diverge is in respect of the consideration of motives that guide people's actions. In the previous Chapter, I discussed a

⁵ H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) at 39.

⁶ According to Hart, the system itself is morally defensible if we are better off with it than with the situation that would ensue if the system were eliminated.

⁷ G. Williams, *Textbook of Criminal Law* (London: Stevens & Sons, 1978) at 50.

⁸ The proscription of conduct as criminal is generally based on some form of harm principle. See J. Feinberg, *The Moral Limits of the Criminal Law* v.1 (Oxford: Oxford University Press, 1986).

number of moral theories that advocate looking to the reasons people act, to the relationship between their actions and their character, or to a conflict between moral principles that might explain the action taken. Each of these inquiries looks to motive in some way as a relevant consideration that might affect our judgment of responsibility.

In the criminal law, on the other hand, traditionally moral considerations such as motive are often left out of the responsibility equation in terms of what accounts for a crime. It is an oft quoted maxim that motive is irrelevant to criminal liability. At best, motive is helpful from an evidentiary perspective; it helps to explain the crime and thereby assists the trier of fact at coming to a verdict. To be sure, the general proposition that motive is irrelevant to criminal liability is subject to numerous exceptions, and so the usefulness of the proposition is itself in question.⁹

Further, some theorists attack the proposition on the level of principle. Appealing to philosophical approaches to personal responsibility, theorists assert that motives and reasons for acting are typically components of rational action and relevant to the assessment of whether praise or blame should be bestowed. To be sure, some theorists are highly critical of the position taken by orthodox criminal theory that morality and law are concerned with different subject matters and hold that the “claim that justice in law is something different from justice in morality has been accepted altogether too uncritically. Morally unjust results [in the criminal law] *should* be a cause of alarm and deep concern”.¹⁰ Theorists therefore often criticize the criminal law’s failure to “attach significance to [motive as] a factor relevant to blameworthiness”.¹¹

⁹ See e.g. A. Duff “Principle and Contradiction in the Criminal Law: Motives and Criminal Liability” at 173 in A. Duff Ed., *Philosophy and the Criminal Law* (Cambridge: Cambridge University Press, 1998). Exceptions to the general proposition include offences of specific intent that require the act be done for a particular purpose, and several defences that permit exculpation on the grounds of motive. Also, motive is directly relevant at the sentencing stage.

¹⁰ D. Husak, *Philosophy of Criminal Law* (New Jersey: Rowman & Littlefield, 1987) at 128.

¹¹ See e.g. Husak, *ibid.* at 144. One commentator notes that, because motives are sometimes relevant when the offence is defined to include them, the claim that motive is irrelevant to responsibility always includes the implicit qualifier “except where they are relevant”. As such, the claim of motive’s irrelevance is “not a normative assertion”, but rather a weak truism: M. Thornton, “Intention in Criminal Law” (1992) 5 Can. J.L. & Juris. 177 at para. 17.

The general proposition that motive and other traditionally moral considerations are irrelevant should not be taken to be an inflexible rule of law reflective of a rigid and unsympathetic criminal law system. While it is certainly fair to argue that although morality may not always or necessarily play a role in the criminalization of certain conduct or that its role is minimal in that regard, moral considerations do seem to be important in terms of excuses.

Many defences exist, in part, to inject into the criminal process an inquiry into the moral quality of the situation. They treat motive and reasons for acting as having moral significance relevant to ultimate culpability or liability. Although absence of bad motive is not normally an element of the crime, presence of a good motive can in some circumstances provide a means of exculpation. Defences recognize that a prohibition that accords with ethical precepts in the typical case may, in unusual circumstances, prohibit an action that would otherwise be morally right or permissible. A particular action might therefore be simultaneously unlawful (in the abstract) but not morally blameworthy in the particular case. For instance, acting for the purpose of self-defence against an armed assailant would justify an intentional homicide that would otherwise be murder. The reason for the killing was self-preservation, and this reason explains the action and renders the killing morally blameless.

The defences of duress and necessity, toward which the principle of moral involuntariness is directed, also operate on this premise. Certain defences in essence provide a mechanism for releasing from punishment an individual who has violated the law under circumstances where punishment would be unfair or unjust because the action was, *morally speaking*, permissible or acceptable in the circumstances. The law therefore does show some interest in the moral quality of the situation surrounding the crime.

2. Punishment, Responsibility and Excuse

In the previous Chapter, I explored the philosophical underpinnings of the twin notions of morality and responsibility in order to set the backdrop against which the question of excusing wrongdoing could fully be appreciated. In considering excusing conditions, it is equally important to understand the purpose and justification of a system of criminal justice

and punishment. Responsibility, in a crucial sense, means “liability to punishment; and so the justification of responsibility is closely connected with the justification of punishment”.¹² The principles and objectives which underlie the criminal law as an institution set the parameters for the notion of criminal responsibility, and in turn give guidance as to the nature and content of excusing conditions. In the remainder of this Chapter, then, I will examine theories of criminal law and punishment. I will then consider various conceptions of criminal responsibility.

Many of the leading moral philosophers whose work was considered in the previous chapter were also concerned with questions of legal responsibility and punishment. It is not surprising to find that the major tension in moral philosophy between consequentialist and deontologic theories has been translated into competing theories of criminal law and punishment.

According to Bentham, the principle of utility which grounds his view of morality should also be placed at the core of law. As explained in the previous chapter, utilitarianism as a theory of morality is concerned with maximizing social good. With respect to punishment, utilitarian theory holds that the criminal sanction and punishment are justified in the name of social utility. Punishment for wrongdoing is believed to bring about a number of social goods, principally specific and general deterrence of criminal behaviour, rehabilitation and isolation of the offender, which are sometimes collectively referred to as “social protection”.¹³ The most important of these social goods is general deterrence; the threat of punishment provided by the criminal law, and the actual punishment of offenders, are said to deter the commission of crime by others in the future. Punishment is imposed because it serves this deterrent purpose, the consequence being a reduction of criminal behaviour in society.¹⁴ If justice for the individual offender is achieved, it is a side benefit, but not a primary concern in the punishment process.

¹² A. Kenny, *Freewill and Responsibility* (London: Routledge & Kegan Paul, 1978) at 69.

¹³ G. Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998) at 30.

¹⁴ G. Fletcher, *Rethinking Criminal Law* (Boston: Little Brown and Company, 1978) at 414.

Since a utilitarian approach to criminal law justifies punishment on the basis of the social protection goods that come from it, a utilitarian approach to excuses would generally reject the imposition of punishment in circumstances where it would not have a corresponding social utility. Excuses are therefore a function of the efficiency of punishment on the future conduct of others.

If there are circumstances in which there is extreme external pressure operating on an individual and leading her unavoidably to commit a crime, the threat of punishment may have little deterrent force. Where the law's threat does not act as counterbalance to extreme pressure, punishment arguably serves no purpose. If this individual was not deterred by the threat of sanction *this time*, they likely would not be next time either. Likewise, if the threat of punishment could not deter *this* person, it would likely fail to deter others in equally compelling circumstances in the future.¹⁵ Thus circumstances that are so overwhelming such that the threat of punishment is no deterrent to the commission of crime are likely candidates for excuses on the utilitarian model of criminal law. Necessitous circumstances and threats of violence, for example, create extreme pressure on an actor to comply with the demands of the situation in order to protect themselves. The risk of imprisonment may do little to counterbalance the natural and immediate instinct for self-preservation. If the risk of punishment can not deter under such circumstances, then punishment of that person would be pointless as it would not advance the general welfare. Necessity and duress, and other defences of circumstantial pressure, can therefore be shown to be supportable by a utilitarian rationale.

Just as many philosophers reject utilitarianism as a theory of morality, most criminal law theorists question the soundness of the utilitarian approach to criminal punishment on a number of grounds. Critics argue that if the goal of the system is to increase social happiness by reducing the incidence of crime, utilitarianism should support punishment for mere dangerousness, without the requirement for an offence. Yet this is a proposition that

¹⁵ Hart, *supra* note 5 at 19 disputes the utilitarian stance here by stating that the most that can be shown is that the *threat of punishment* is ineffective in certain circumstances under question. This does not mean that *actual imposition of punishment* would necessarily fail to secure a higher level of compliance with the law on the part of normal persons.

few would take seriously. Critics also oppose the forward-looking nature of a utilitarian criminal justice system on the ground that it ignores considerations of fairness to the individual subject to punishment. If social good is all that matters, then justice for the individual actually before the court can be compromised or even dispensed with. One can surely surmise that the more harshly the system deals with individuals, the harder others will try to comply with the law. Critics of a utilitarian approach to punishment hold that the deliberate infliction of pain and discomfort on one person for the purpose of affecting the behaviour of other persons also violates Kant's categorical imperative that it is wrong to treat people as means to ends. Critics further express doubt about the veracity of the claim that punishment actually deters criminal behaviour.¹⁶

In contrast to utilitarian theories that look forward to the beneficial consequences of punishing a person, retributivist theories look backwards to the actor's wrongful act as justification for punishment. Retribution holds essentially that criminal liability and punishment are justified by an actor's desert; a person deserves punishment in accordance with their offences.¹⁷ Whereas utilitarianism's focus is on the general social welfare and the protection of society engendered by the criminal sanction, retributivism places the individual at the core. The individual is treated as "a responsible human actor, someone who deserves punishment for his crime".¹⁸

It is readily apparent that retributivism is closely associated with the deontologic approach to morality as described in the previous chapter. The approach places emphasis on individual rights and justice at the centre of the question of legal responsibility. If the actor is not blameworthy, they should not be punished, no matter how great the utility of their punishment on the social good. Conversely, punishment is explained, justified, and even *mandated* (according to some) as a response to the crime. The notion of desert is not easily described, but it is said that desert is "primarily dependent on the agent's mental states. In legal terms...desert is proportionate to the agent's *mens rea* and to the reason that the mental

¹⁶ Fletcher, *supra* note 14 at 414.

¹⁷ Hart, *supra* note 5. Hart is generally credited with having revived the notion of retribution as the primary justification for punishment in his seminal work in 1968.

¹⁸ Fletcher, *supra* note 13 at 32.

state was formed (and to the amount of harm caused)".¹⁹ Stated more generally, punishment should be proportionate to the crime.

Retributivism, like utilitarianism, is not free from criticism. It has a difficult time explaining the basis of desert, its precise nature, and how it is measured. Retribution also does not easily account for punishment for crimes that are considered to be relatively trivial and not wrong in the moral sense. Further, taken to extreme, the retributivist's exclusion of considerations of social good does not accord with our intuitions. For instance, suppose an agent intentionally kills one person in order to save the lives of fifteen others. To the extent that we intuitively feel this actor did the right thing (and might even be eligible for moral praise), it is on account of the consequences of her actions and the benefits to society. Retributive justice does not easily accommodate this kind moral consideration.²⁰ Retributive justice is also subject to criticism by those who believe in determinism and reject free will.

The retributivist conceives of the person as a rational agent deserving of punishment only "when they act as subjects".²¹ Conversely, punishment must not be imposed for actions by persons who are *objects* manipulated by other people or circumstances, or for other actions that can not be said to be the product of a free, autonomous, choosing agent. This emphasis on the person as autonomous agent logically leads to an approach to excuses that looks to whether the circumstances deprived the actor of the ability to choose to commit the wrong. Circumstances that deny a fair opportunity for choice are likely candidates for excuse. This view can also support the defences of duress and necessity and other excuses that might involve moral involuntariness. These defences imagine scenarios in which an actor finds herself in a situation where, by no fault of her own, she may be deprived of sufficient freedom to choose her course of conduct and feel compelled to choose one course of action over another for reasons of self-preservation. *Were it not for the circumstances*, the actor would not have violated the law, and so the crime is attributable to the conditions, and not to

¹⁹ S. Morse, "Diminished Capacity" in Shute, Gardner & Horder, Eds., *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993) at 240.

²⁰ According to Ashworth, "in an urgent situation involving a decision between n lives and $n+1$ lives, there is surely a strong social interest in preserving the greater number of lives": A. Ashworth, *Principles of Criminal Law* (Oxford: Clarendon Press, 1991) at 124.

²¹ Fletcher, *supra* note 13 at 43.

the actor.²² In such circumstances, it would be unfair to hold the actor responsible for a circumstance not of her making, for the commission of crime that was compelled by the circumstances. Thus retributive thinking, in addition to the utilitarian approach, can support excuses based on external pressure. Although both theories sustain defences of situational pressure, they do so for very different reasons. The utilitarian will excuse because the agent's punishment would serve no social purpose; the retributivist because it would be unfair to punish the agent for his crime under the circumstances. In the next part of this Chapter I will discuss theories of responsible agency that focus in more closely on the reasons why excuses are permitted in these circumstances.

The debate between utilitarian and retributive views of punishment has been going on for 200 years. Retributivists criticize utilitarians for their moral insensitivity to the individual, and utilitarians criticize retributivists for their indifference to overall human and social welfare.²³ Some modern criminal theorists attempt to find some manner of reconciling the competing approaches. Hart has suggested one possible method. The criminal justice system *as a whole* could be justified in large part on its value as a deterrent to criminal behaviour, whereas the punishment of particular individuals should be guided by considerations of justice and fairness to the individual.²⁴ Hart's approach limited the principle of utility to its role in justifying the criminal law system as a whole.²⁵ Fairness to the individual (and punishment in accordance with her desert) is essentially a side constraint to be applied in the determination of individual cases, although overall the system is explained and justified on social welfare grounds.

²² G. Fletcher, "Individualization of Excusing Conditions" (1974) 47 Southern California Law Review 1269 in M., Corrado, Ed., *Justification and Excuse in the Criminal Law* (New York: Garland Publishing, 1994) at 54.

²³ Fletcher, *supra* note 13 at 33.

²⁴ See Hart, *supra* note 5 at 8ff. Hart warns that retribution as a "general justifying aim" of punishment must be distinguished from "retribution as distribution" of punishment for particular offender. There are a variety of other "mixed" approaches to the justification of punishment. For instance, one can claim that the general justifying aim of the criminal law is retributive (to punish agent's according to their desert) and that utilitarian considerations operate as a side constraint (an agent should be punished according to her desert only if it is in the social interest to do so). For a discussion of some mixed theories see M Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford: Clarendon Press, 1997) at 92.

²⁵ Fletcher, *supra* note 16 at xix.

Even though many theorists reject utilitarianism as the *sole* justification for punishment, today many accept that the “overall or justifying aim of the criminal law is the general prevention or general deterrence - to induce people, by the threat and imposition of punishment, not to cause harms of certain kinds”.²⁶ Justice for the individual has become of paramount importance in a number of respects such as sentencing, the conditions for criminal responsibility and excusing conditions.²⁷

3. Responsible Agency

While utilitarian principles may still be operative in justifying the criminal law generally (and possibly also in relation to specific sentencing decisions), in respect of matters related to determining responsibility for actions, the law shows a strong preference for liberal values that place the highest premium on individual liberty and the capacity for rational and autonomous action. Criminal law in Western liberal societies is based on a model of responsible agency - we do not hold people responsible for harm unless we can link that person to the harm in a concrete and significant way; it is not enough that there is some social benefit to a finding of responsibility. Basing criminal responsibility on the principle of individual autonomy maximizes the degree of liberty that each person has to choose from among various courses of action taking into account the predictable consequences of their choices.²⁸ Responsible agency establishes the “responsibility relation”, namely the link between an actor and her actions.²⁹

There are two basic components of responsible agency in the criminal law, which closely parallel the philosophical account of responsibility discussed in the previous chapter: (1) capacity for agency, and (2) conditions for criminal responsibility for a particular offence. A minimum degree of capacity for rationality is required before a person can be the subject of

²⁶ Ashworth, *supra* note 20 at 10.

²⁷ The criminal law in Canada has adopted a blended approach, although not exactly the one envisaged by Hart. The rights of the individual to fundamental justice have been enshrined in s. 7 of the *Charter* and these rights play a role in limiting Parliament’s ability to criminalize conduct. Further, s.718 of the *Criminal Code* recognizes various utilitarian objectives for punishment of individual offences, such as denunciation, general and specific deterrence and rehabilitation.

²⁸ See e.g. Ashworth, *supra* note at 128, Hart, *supra* note 5 at 47.

²⁹ Moore, *supra* note 24 at 38.

criminal responsibility. This minimum threshold is not easily defined with precision. It can be understood to entail “an assessment of the agent’s overall functioning”, by reference to certain qualities such as the capacity to choose a goal as superior to others, believing that certain means will achieve the goal, and employing those means to achieve the chosen goal.³⁰ The law normally presumes that adults are endowed with this capacity, and that children under a certain age lack it. With respect to adults, the presumption of capacity may be rebutted, for example by a showing of mental defect.³¹ The situational defences I am concerned with arise in cases in which capacity is present. As such, I will not be addressing capacity further.

Assuming that a person is endowed with the necessary capacity for responsible agency, the focus of the inquiry shifts to determining whether the person is criminally responsible for a given offence. In a technical sense, the conditions for criminal responsibility are those that are required by the applicable law; the relevant criminal code or common law will specify the prohibited conduct and the accompanying mental state that together constitute the offence. The prohibited conduct itself contains a minimum mental element of voluntariness.³² Upon proof of the legally required elements - namely a voluntary prohibited act with accompanying mental state - responsibility for the crime will be established. To move from responsibility for an offence to culpability (and thus liability to punishment), an additional condition must be satisfied, namely absence of a defence.

On the orthodox structure of criminal responsibility, the required mental state is the legally meaningful link between an actor and her actions; it represents the actor’s fault. Recall here that the mental state required is typically intention (and often recklessness) with respect to an

³⁰ Morse, *supra* note 19 at 248.

³¹ It is also recognized that rationality is a matter of degree, and so responsibility may be reduced on account of some partial defect in rationality: Morse, *ibid.* at 249.

³² The criminal law’s conception of voluntariness sets a low threshold that is often described as requiring nothing more than a “willed bodily movement”: Williams, *supra* note 7 at 33. Most discussions seek to elucidate the concept of voluntariness by describing situations in which it is absent. An act might be involuntary, for instance, if the person’s body was forcibly moved by another person or by a natural external force such as a strong wind, or if the body moved without the intervention of the mind such as in the case of a reflex or seizure. The criminal law’s conception of voluntariness is akin to Aristotle’s, insofar as it precludes voluntariness where the moving cause was outside the actor’s body or mind.

action or a consequence, or knowledge with respect to a circumstance.³³ Proof of malicious or other immoral motive is not normally required.

Underpinning this orthodox structure of criminal responsibility is a conceptual understanding of agency that seeks to provide an explanation of the meaningful link between a person and their acts. This underlying framework is not made explicit in the criminal law either in criminal codes or in written judgments. Rather, it operates at a theoretical level. Criminal law theorists, with time and inclination to probe the underlying premises of criminal responsibility, have developed various approaches to explaining the crucial elements of the relationship between a person and their acts. These theories borrow heavily from the philosophical discussions of moral responsibility outlined in the previous chapter. Just as philosophers have sought to uncover the precise locus of moral significance in human action, so too legal theorists espouse varying views as to the core component of criminal responsibility. Theories of agency in criminal law commonly seek to explain responsibility on the basis of one of two factors; (1) choice or (2) character.³⁴

It is important to note at this stage that sometimes choice and character theory are described as theories of agency in the sense of describing the structure underlying inculcation, sometimes they are invoked to explain excuses and other conditions of exoneration. Often they are used as theories of both agency and excuse.³⁵ Unfortunately, there is a lack of precision in the literature about the exact function of the theories or the way in which each theorist is using them in a particular work. Indeed, in the literature, it is often unclear whether the notion of agency itself is used by a theorist to include exculpatory elements or

³³ Negligence is also a recognized degree of fault in most jurisdictions. Criminal liability for negligence is controversial, and much has been written about the justification for punishment of negligence. I will not be exploring this issue here.

³⁴ At least one writer suggests that these two theories are not set in opposition to each other but rather that each character implies choice and vice versa, and that each theory in reality seeks to answer a different question: Michael Corrado, "Criminal law: Notes on the Structure of a Theory of Excuses" (1991), 82 J. Crim. L. & Criminology 465 at 467 writes "The fact of the matter is that these theories answer different questions: the voluntariness theory [or choice theory] sets out a unifying mark of excuses, and the character theory explains why that mark is significant".

³⁵ It seems that a theorist's particular view of responsible agency often leads to him or her having a corresponding view about the exculpatory feature of certain circumstances. For instance, if one is predisposed to view agency as a matter of choice, then one might equally be concerned about holding someone responsible

whether it is limited to the prior question of inculcation, with issues of excuse left to be considered as a distinct matter based on wholly separate principles. This results to some degree in a lack of clarity about the application of the theories to *mens rea* as opposed to excuse. In my view it is crucial to distinguish issues and underlying principles related to *mens rea* and inculcation from those that pertain to excuses. This is especially so with respect to situational excuses, because the excusing force of the claim derives exclusively from the external circumstances and not from the internal makeup of the agent which is normally the locus of fault. In other words, situational excuses, in my view, can be (and are) based on wholly distinct considerations from those that ground responsibility in the sense of wrongdoing. As such, great care should be taken when discussing the separate issues of offence and defence.

In what follows I will attempt to tease apart the different uses of choice and character theories. This will enable me to further my own views, in the next Chapter, as to the adequacy of the theories in respect of situational excuses. Also in the next Chapter, I will take the analysis one step further and review the principle of moral involuntariness to ascertain which theory it adopts and whether the approach is appropriate to the purpose.

A. Choice Theory

Without a doubt, choice theory is the dominant theory of agency in the criminal law. As discussed in the previous Chapter, the most common set of philosophical theories of responsibility focus on the agent's freedom. Philosophers identify two kinds of freedom relevant to responsibility, freedom to act and freedom to will. Freedom to act is conceived of as "freedom to do otherwise", whereas freedom to will concerns the capacity for choosing how to act in accordance with one's preferences. We are "responsible for wrongs we freely choose to do, and not responsible for wrongs we lacked the freedom to avoid doing".³⁶ Legal theorists have embraced this construct of responsibility as explicative of criminal responsibility, with slight modification. Instead of emphasizing the notion of *freedom* as the

for a crime under circumstances where their capacity to choose was severely constrained. For these theorists, both inculpatory and exculpatory circumstances are explained on the basis of the same underlying principle.

cornerstone of responsibility, legal theorists frame their theories around the notion of *choice*.³⁷ The feature that renders human action praiseworthy or culpable is the *choice* to do or to avoid doing a prohibited act.

Choice theory comprises two distinct categories of considerations: (i) capacity to choose, and (ii) “fair opportunity” to choose.³⁸ The capacity branch of choice theory is concerned with the actor’s mental capacity to make choices.³⁹ Even if an agent possesses the minimum degree of capacity for responsible agency, her capacity to choose might be absent or impaired at a given time and in respect of a given action. Special circumstances, such as the experience of extreme fear, might impair the actor’s ability to reason, to make decisions, or to be physically able to move in accordance with her desires. This theory might assist in explaining the excuse of provocation and other situations in which some defect of capacity to choose *internal to the agent* results in the commission of a crime. As I am concerned with the excusing power of external circumstances, I will not be exploring the capacity branch of choice theory any further.

The fair opportunity branch of choice theory focuses, in close parallel to philosophical accounts of responsibility, on the (capable) actor’s freedom to choose what to do and freedom to act in accordance with her choice. This theory is concerned with the relationship between choice and opportunity to execute one’s choice and like philosophical accounts, this legal theory is based on the notion of “the will”. When the will is unconstrained such that the actor could choose from a myriad of options, and the actor is free in a physical sense to act on her will, then she is rightly held responsible for her chosen actions. Criminal liability

³⁶ M. Moore, “Choice, Character and Excuse” (1990) 7 *Social Philosophy and Policy* 59 (1990) in Corrado, M., Ed., *Justification and Excuse in the Criminal Law* (New York: Garland Publishing, 1994) at 198.

³⁷ A variant on choice theory is a theory based on the notion of control espoused principally by Douglas Husak, *supra* note 10. Husak’s theory is meant to substitute a control requirement for the criminal law’s orthodox act requirement. According to Husak, responsibility is being better explained by reference to the notion of control, than to the related notions of choice and act. Control has less to do with “could have done otherwise”, and is rather conceived of as a matter of what is reasonable to expect of persons. For Husak, this theory has two advantages over the choice theory: (1) control is not a matter of empirical fact whereas choice is, and (2) control admits of degrees.

³⁸ The notion of “fair opportunity” derives from Hart, *supra* note 5 at 152.

³⁹ Some theorists consider capacity theory to be entirely distinct from choice theory. C. Simester, *Responsibility and Criminal Liability* (Dordrecht: Kluwer Publishers, 1989) at 2 considers capacity theory to be based on the looser notion of control.

“should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it might have, that they can fairly be said to have *chosen* the behaviour and its consequences”.⁴⁰ As epitomized by Blackstone, “the concurrence of the will when it has its choice either to do or avoid the act in question, [is] the only thing that renders human actions praiseworthy or culpable”.⁴¹

The choice model understands “autonomy principally in terms of the agent’s conscious choice of ends or conduct”.⁴² It is easy to see why this model places great emphasis on mental states; mental states are key indicators of choice, and are thus the hallmark of criminal responsibility.⁴³ (Intention, which is the paradigm mental state for criminal responsibility, is sometimes conceived of as the union of knowledge (of the relevant circumstances) and choice or action (freedom to do otherwise). Recklessness requires knowledge of the possible results of one’s actions, and choice to proceed notwithstanding the risks.)

Some theorists caution that care should be taken to avoid construing choice and freedom as absolute, and argue that agency is really a matter of “sufficient freedom”.⁴⁴ Theorists therefore recognize that even a *chosen* action may be “unfree” in a different and weaker sense, in which case blame or punishment may be unfair and inappropriate. External circumstances can create unfair opportunity situations, situations which diminish a person’s ability to choose how to act by limiting the available options. Take the famous example of the lost alpinist who must break into a mountain cabin to seek refuge from the elements. The weather in this case limits the alpinist’s options - it is no longer an option to continue on his way. If he does so, he may die.

⁴⁰ Ashworth, *supra* note 20 at 128. It will be noted from this that, in addition to lack of physical restraint, knowledge of relevant circumstances is a necessary component of freedom. This is remarkably similar to Aristotle’s conception of voluntary action, which is defeated by physical compulsion and ignorance, as discussed in the previous chapter.

⁴¹ Commentaries on the Laws of England, Book IV, Chap. II.

⁴² Simester, *supra* note 39 at 3.

⁴³ Both retributivist or utilitarian principles can support choice theory. For the retributivist, the free choice to commit a wrong is the paradigm of blameworthiness and deserves punishment. Utilitarians, on the other hand, hold people responsible for wrongs they have chosen on the ground that the imposition of punishment will deter that person and others from *choosing* to commit similar wrongs in the future.

⁴⁴ Ashworth, *supra* note 20 at 80.

Theorists acknowledge that a choice is made in unfair opportunity situations. Indeed, high pressure situations result in the very *deliberate* choice of one option over another.⁴⁵ If this is so, then the *meaningfulness* of the choice situation is at issue.⁴⁶ The excusing element is not forced and unchosen action, or an organic inability to choose, but rather the lack of realistic chance to make the choice that the agent would otherwise have made. Whereas agency or responsibility (in terms of inculcation) is concerned with absence of *free choice*, it has been said that with respect to excuses, the focus is on the actor's *inability to choose freely*, the latter being a lesser impairment than the former.⁴⁷

At first blush, this subtle distinction is appealing and seems to carry great explanatory force. There is an important difference between being free to choose anything one wants, and choosing to do something only because one has to make a choice and that choice is better than the alternatives. But on closer examination, it becomes clear that the line between free choice ("fair opportunity") and inability to choose freely ("lack of fair opportunity") is nebulous. When does a person ever have the ability to choose freely from *any* course of action? Options are always constrained in some way, and usually in many ways at the same time. We are constantly constrained in our available options by our own physical, financial, geographic, intellectual and other limitations. The external world and others also constantly place limits on our available courses of action. We can not have any job we want, marry any person of our choosing, get elected to public office and so on, unless other people act in very particular ways.

The difficulty in delineating inability to choose freely from other kinds of limitations on choice is reflected in the literature. The literature contains little in the way of a test or a check list for determining when an actor can be said to have had "fair opportunity" to choose

⁴⁵ Corrado, *supra* note 34 at 493 calls these kinds of excuses "deliberative exculpation", in contrast to nondeliberative exculpation that arises in cases of impaired capacity. Corrado does not support a significant theoretical distinction between justifications and excuses, and specifically includes justification within the category of deliberative excuses. Peter Arenella, "Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments" (1990) 7 *Social Philosophy and Policy* 59 in Corrado, M., Ed., *Justification and Excuse in the Criminal Law* (New York: Garland Publishing, 1994) at 248, by contrast, categorizes these kinds of excuses "volitional", in contrast to "cognitive" excuses that impair capacity.

⁴⁶ Tebbitt, *supra* note 3 at 130.

⁴⁷ Sistare, *supra* note 39 at 77.

a course of conduct. Theoretical explications of “fair opportunity” or “sufficient freedom” are lacking in specificity or detail. To be sure, the notion of “unfair opportunity” is not easily defined. But if the concept of fair opportunity is to have adequate explanatory power, it should provide an account of what distinguishes some cases of unfair opportunity from others. Works in this area are also often unclear as to whether the presence of “fair opportunity” is being employed as a matter of mens rea (inculpation) or rather whether “lack of fair opportunity” is a matter of excuse (exculpation).

One theorist has suggested that in order to lack a fair opportunity to avoid doing wrong, there must be some evil that one is avoiding.⁴⁸ One can fairly wonder whether this conception of fair opportunity is simply a restatement of the nature of certain existing defences such as self-defence, duress and necessity. Even so, this formulation is quite imprecise. For instance, what counts as an “evil” that one may avoid such that their actions will not be culpable? Indeed, threats of harm or necessitous circumstances that place at risk human life are the paradigm circumstances that are seen to impair or limit one’s opportunity to choose freely how to act. In this regard, choice theory and the notion of fair opportunity can be argued to meet their descriptive objective well; it can be said to describe existing defences of self-defence, duress and necessity. Each of these defences arises in a situation where some external threat to the physical integrity of a person causes that person (or another) to choose to engage in criminal conduct as a means for avoiding the threatened harm.

But as a normative theory, choice theory has a difficult time establishing parameters for determining whether other sorts of pressures can render an act sufficiently unfree so that responsibility can be excused. The law clearly recognizes the excusing force of action in avoidance of threats to bodily integrity by other people or natural circumstances. But what other circumstances might diminish a person’s opportunity to choose their preferred course of conduct? Should the law also be concerned with threats to life caused by illness or starvation? What about a person’s interest in avoiding prolonged pain and suffering? These bodily interests are not well recognized in the literature as choice-constraining. People also often feel constrained in their choices on account of interests other than the interest in bodily

⁴⁸ Arenella, *supra* note 45 at 264.

integrity. For instance, people or circumstances might threaten an individual's property interests or their interest in maintaining their marriage, reputation or employment? A further controversial example relates to crimes committed out of civil disobedience. In fact, can it ever be said that an act was chosen in the absence of any external constraints? Isn't all human action constrained by some circumstances - some within the actor's control and some not - and by variety of other factors?

It is indeed a difficult task to determine "whether a given condition ought to be admitted as an excuse or a defence, and, if so, whether it is defined so as to draw an acceptable line between 'sufficiently free' conduct and 'significantly restricted' behaviour".⁴⁹ As a normative theory, choice theory does not provide much insight into the excusing power of pressure emanating from threats to interests other than bodily integrity. Consequently, it provides little assistance at resolving claims of novel defences. I will pursue this issue further in the next Chapter, when I turn to an analysis of the content and potential ramifications of the notion of moral involuntariness.

B. Character Theory

Character theory is an alternative to choice theory, but it is less well-recognized and criticized by many theorists. I will here briefly highlight the main elements of this theory. Character theory places character at the centre of the construct of personal responsibility, and holds individuals liable for actions as proxies for the characters the actions reveal and express.⁵⁰ Character theorists object to choice theory's adoption of "a narrow time-frame that focuses on whether the circumstances immediately preceding the criminal act prevented the defendant from complying with the laws dictates".⁵¹ They note that character and motivations are intimately connected to the choices people make, yet are absent from discourse about liability, and that it defies common sense and psychology to assess and

⁴⁹ Ashworth, *supra* note 20 at 81.

⁵⁰ Moore, *supra* note 36 at 198.

⁵¹ Arenella, *supra* note 45 at 248

evaluate an agent's choices without reference to her motivations, values, moral education, and so on.⁵²

Character theory seeks to explain criminal responsibility as a function of whether or not the offence reflects some kind of character defect. A character defect can be defined as a failure to be motivated to avoid interfering with the interests of others or to avoid foreseeable risks or harmful consequences.⁵³ In the normal case of a criminal offence, the intentional or reckless commission of a crime does indeed reflect a defect of character within the actor. For instance, in the paradigm case, breaking and entering reveals a defect of character on the part of actor, namely a lack of appreciation and respect for the property interest of another.

It is crucial to note that character theorists do not assert that the criminal law holds people responsible for their bad characters *per se*.⁵⁴ People are not culpable for their actions, not for their characters. But they are *held responsible* for their actions, according to character theorists, because their chosen actions reveal a character defect, and not simply because the agent had the power to choose otherwise in an empirical sense. The core assertion is that character theory better reflects our blaming judgments than does choice theory.

Just as choice theory is double-sided in that it explains a possible basis for responsibility and also a basis for excuse, so too character theory has this dual application. If a defect of character (as reflected in an action) is the real basis for our blaming judgments, then a circumstance or condition that blocks the normal inference from crime to a defect of character should operate as an excuse.⁵⁵ So for instance, if it is learned that the home invader broke and entered to seek refuge from a violent stalker, the normal inference of lack of respect of the property interest of another might be blocked. Consequently, it might be inappropriate to blame.

⁵² *Ibid.* at 266.

⁵³ R. Brandt, "A Motivational Theory of Excuses in the Criminal Law" (1985) 27 *Nomos* (Criminal Justice) 165 in Corrado, M., Ed., *Justification and Excuse in the Criminal Law* (New York: Garland Publishing, 1994) at 104.

⁵⁴ See Jeremy Horder, *Provocation and Responsibility* (Oxford: Oxford University Press, 1992) at 132.

⁵⁵ Brandt, *supra* note 53 at 106.

Like choice theory, character theory can explain the situational defences of self-defence, duress and necessity. The normal inference of a character defect can be blocked if necessitous or otherwise dire circumstances come to light, as illustrated just above. The dire circumstances experienced in such situations leads people to act out-of-character, in ways they would otherwise never contemplate, and in order to alleviate the urgency of the situation. The law excuses because the situation is essentially responsible for the offence, and the actor was motivated by self-preservation and not by any character flaw such as a lack of respect for the interests affected by the crime.

Character theory is fairly powerful at describing actual legal principles and practices. But character theory also suffers from choice theory's flaw, namely it's lack of power as a normative theory. It is not very helpful at resolving the practical problems associated with the presentation of controversial or novel excuses. For instance, it is easy to assert that it is a character defect if one's aversion to killing one's spouse is weaker than is the desire to elope with one's secretary, or even to acquire millions of dollars in inheritance. But the facility of making this kind of judgment may simply be a result of the clarity of the moral issues involved. The average citizen unfamiliar with moral theory would almost certainly agree that killing one's spouse (or simply the desire to kill one's spouse) for the reasons cited above would reflect a serious moral character flaw.

But the theory is not well positioned to assist in determining the relative strength of morally ambiguous motivations or motivations of (roughly) equivalent moral strength. For instance, in some cases the aversion to killing one's spouse is counterbalanced against the desire to assist that spouse at fulfilling their desire to end their life because of a painful and terminal illness. In other cases, the aversion to killing one's spouse may be set off against a spouse's desire to be free from a desperate and violently abusive (although not life-threatening) situation. Character theory has little to say about *character* in situations where competing moral principles or imperatives collide.

Character theory must also deal with the issue of responsibility for character. If responsibility and blame are really based on character, then on some level, a person must be

responsible for their character.⁵⁶ Indeed, some theorists reject the character theory of responsibility because they believe that we are not (or not sufficiently) responsible for our characters. Character theorists insist that we are responsible in some sense for being the kind of people we are, and that the notion of “responsibility for character” is intuitively powerful. But this responsibility is also, admittedly, a question of degree.⁵⁷ We might say that character is determined initially by processes over which we have no control or choice, and that our responsibility for character derives from our later choices to maintain that character.⁵⁸

Choice theory explains the situational excuses by reference to the lack of fair opportunity for the actor to avoid choosing to commit the crime. Character theory, on the other hand, explains the excuses as a filtering mechanism that block the normal inference from crime to bad character. Although in most (but not all) cases choice and character conceptions of excuse will produce the same blaming judgment, they do so for very different reasons. There is a significant philosophical difference between the two approaches. They embody the difference between conceiving of individuals as having a will or as having a character.⁵⁹ Whereas any action evidences a will, character typically causes only certain actions and not others. From this perspective, choice theory arguably has greater explanatory power in that it can account for a greater number of actions than character theory. On another level, though, character theory may have broader explanatory power than choice theory. This might be the case for example in terms of spontaneous, impulsive, unthinking or repetitive behaviours. A person who just “acts” without thinking might be said to have acted without choosing on any conscious level, yet we might still ascribe some character defect to a person who for such conduct.

⁵⁶ Indeed, if character is completely beyond our control, the retributivist would be uncomfortable ascribing responsibility for it. Utilitarians would also be slow to punish for character if character is beyond our control; punishment for actions that were beyond the actor’s control would serve no purpose.

⁵⁷ Moore, *supra* note 36 at 218.

⁵⁸ Ascertaining character and determining the degree to which a person is responsible for their character are difficult tasks and subject to much philosophical debate since the time of Aristotle. (One behavioural understanding of character holds that character derives from past acts. Another might hold that character can be forward-looking, and relate to our disposition to future conduct. On this forward looking view, a person can be disposed to act a certain way even (i.e. have a certain character) even if a situation never arises to cause them to act in accordance with that disposition. Another view sees character as a state inherent in the person, and thus independent of future or past behaviour.)

The reasons that underlie the criterion of excuse are relevant in assessing the adequacy of a theory of excuse. This will be the focus of the next Chapter.

⁵⁹ Moore, *supra* note 36 at 221.

CHAPTER 3: THE INADEQUACY OF CHOICE THEORY

In the previous Chapter, I outlined two theories that are argued to underlie the notion of responsible agency and excuse in the criminal law, namely choice and character theory. These theories are based on philosophical work in the area of moral responsibility, as described in Chapter 1. Choice theory is undoubtedly more accepted and well recognized by legal theorists. Choice theory seeks to explain responsible agency in terms of an agent having the freedom to act and choosing to commit a crime (with knowledge of the circumstances). This theory explicates the content and importance of *mens rea* concepts such as intention, knowledge and recklessness. Choice theory is further invoked to explain excuses as situations of constrained freedom of choice, or lack of fair opportunity to act in accordance with one's choices, which thereby reduces or negates responsibility.

In this Chapter, I hope to demonstrate that the Supreme Court's conception of moral involuntariness, which is a theory of (at least) external excusing conditions, is based on a choice theory understanding of agency and excuse. I will then turn to a critique of choice theory, and consequently a critique of the Supreme Court's notion of moral involuntariness.

1. The Supreme Court's Conception of Moral Involuntariness

Recall the case of Marijana Ruzic described in the Introduction. Ms. Ruzic was intimidated by a member of criminal organization in her home country of Yugoslavia. She was told to bring heroin into Canada, and that if she did not comply, her mother would be hurt in Yugoslavia. Ms. Ruzic did as she was told. She was apprehended upon arrival in Toronto and charged with importing heroin and possession of a false passport.

At trial she attempted to raise the defence of duress. The defence codified in section 17 of the *Criminal Code* had been given a very restrictive and literal interpretation by the Supreme Court of Canada.¹ The phrase "present when the offence is committed", coupled with the immediacy criterion, requires that the person making the threat be either at the scene of the

¹ *R. v. Carker*, [1967] S.C.R. 114; *R. v. Paquette*, [1977] 2 S.C.R. 189.

crime or at whatever other location is necessary to make good on the threat without delay if the accused does not carry out the demand. This was not the case for Ms. Ruzic.

Defence counsel therefore challenged the constitutionality of the imminence and presence requirements under s.7 the *Charter*, which reads: "Everyone 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".² The argument was that the two requirements were too restrictive and could thereby deprive the accused of her liberty in a manner not consistent with the principles of fundamental justice.

The trial judge agreed that the requirements of s.17 were too restrictive and unreasonably denied the defence of duress to the accused and instructed the jury on the common law defence of duress, which was more lenient and lacked the two challenged requirements. The Ontario Court of Appeal upheld that decision.³ On appeal by the Crown, the Supreme Court of Canada upheld the earlier judgments and struck down the two requirements of s.17.⁴ The Supreme Court agreed that the principle of moral voluntariness was key to the case. The concept of moral involuntariness was first adopted in Canada in the Supreme Court's earlier decision in *R. v. Perka*.⁵ In *Perka*, the Court held that the notion of moral voluntariness was the theoretical basis for the common law defence of necessity. The principle was explained as describing a situation where a person, on account of perilous circumstances, is deprived of a realistic choice about whether to break the law. Later, in *R. v. Hibbert*, the Supreme Court applied the same principle to the defence of duress, largely because duress and necessity are juridically similar and therefore have the same underlying principles.⁶

Unlike the Court of Appeal, the Supreme Court rejected the accused's argument that moral involuntariness can be equated to moral blamelessness. The Court of Appeal had held that

² *Canadian Charter of Human Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11, s.7 [hereinafter *Charter*].

³ *R. v. Ruzic* (1998), 128 C.C.C. (3d) 97.

⁴ *R. v. Ruzic*, [2001] 1 S.C.R. 687 [hereinafter *Ruzic*].

⁵ *R. v. Perka* (1984), 14 C.C.C. (3d) 385 [hereinafter *Perka*].

⁶ *Hibbert*, [1995] 2 S.C.R. 973 [hereinafter *Hibbert*].

moral involuntariness could be equated to moral blamelessness.⁷ Prior Supreme Court jurisprudence had established the principle of fundamental justice under s.7 of the *Charter* that only morally blameworthy conduct could be punished.⁸ Existing jurisprudence had limited the application of the notion of moral blameworthiness to the context of the required fault elements for offences. To be punishable, an act must have a sufficient level of fault, or blameworthiness such as intention, recklessness or gross negligence.

Lebel J. rejected the contention that moral blamelessness was a broader concept that could be extended beyond the traditional elements of an offence and apply to defences as well. He held interestingly that moral blameworthiness is “an ambiguous concept”, “undefinable and potentially far-reaching” and therefore not appropriately expanded beyond the issue of required elements for offences.⁹ Further, relying on the distinction between excuses and justifications, Lebel J. held that morally involuntary conduct is “not always intrinsically free of blame”. Rather, once the elements of the offence have been satisfied, the act can no longer be viewed as “blameless”, although it may be excusable. For the Court, equating moral involuntariness with moral innocence would “amount to a significant departure from the reasoning in *Perka* and *Hibbert*. It would be contrary to the Court’s conceptualization of duress as an excuse”.¹⁰

⁷ *Ruzic*, *supra* note 3 at paras. 78-85. The Court of Appeal acknowledged the distinction between justification and excuse as set out in *Perka*, *supra*. However, the Court then seemed to ignore the distinction by holding that duress, like self-defence, can render an action blameless. The Court seemed to consider it relevant that *Perka* and *Hibbert* were not decided under the *Charter*.

⁸ See *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Martineau*, [1990] 2 S.C.R. 633; *R. v. DeSousa*, [1992] 2 S.C.R. 944.

⁹ *Ruzic*, *supra* note 4 at para. 41.

¹⁰ *Ibid.* at para. 41. Recall that I wrote in footnote 1 in the Introduction that I do not find the distinction between justification and excuse to be compelling. The essence of the distinction, in my view, comes down to this: the commission of the crime was “the right thing to do” and thus the act was justified, or the commission of the crime was “wrong but understandable” and thus the accused should be excused. These are fundamentally moral questions that are extremely difficult to answer with any kind of certainty or consensus. It is not clear to me why using force in self-defence is necessarily and always right and thus justified, while committing a crime under duress is always and necessarily “wrong but understandable”. Borderline cases under each category render the distinction untenable, in my view. For instance, it may seem wrong but understandable to use extreme force to prevent one’s finger from being broken, whereas it might seem “right” to speed through traffic to get a heart attack victim to a hospital. It is the Court’s conceptualization of duress and necessity as excuses that leads Lebel J. to discount an analogy between moral involuntariness and moral blamelessness. Because excuses arise when an act is said to be wrongful (i.e. blameworthy), then a theory of excuses could not negate the blameworthiness of the crime. If the distinction between justification and excuse were rejected as I believe it should be, one may wonder whether the Court’s reasons in *Ruzic* would be different.

However, the Court did accept the accused's alternate contention, namely that it was a distinct principle of fundamental justice that a person must not be punished for "morally involuntary" conduct. Although the commission of a crime under circumstances of dire external pressure *is* blameworthy in the sense that all the required elements of the offence have been satisfied, it would nonetheless be unjust to punish blameworthy action if it was morally involuntarily. The Court essentially elevated the common law principle of moral involuntariness enunciated in *Perka* and *Hibbert* to a constitutional safeguard.

In keeping with its discussion of moral involuntariness in *Perka*, the Court analogized moral involuntariness to physical involuntariness, such as a reflex action or a forced bodily movement. Although different, the two notions share the common theme of absence of choice and lack of autonomy of the actor. It is well established at common law and as a principle of fundamental justice that a person is not responsible for physically involuntary action, action for which a person's body moves without the intervention of their will or volition, and the movement is in no way chosen. In the case of moral involuntariness, although the actor retains conscious control over her bodily movements, it is still the case that "her will is overborne, this time by the threats of another. Her conduct is not, in a realistic way, freely chosen".¹¹

The Court holds that voluntariness in this moral sense can remain relevant beyond the initial finding of guilt or "blameworthiness". The Court reasons that just as people are relieved of responsibility for physically involuntary actions, so too should they be for actions that are morally involuntary, actions carried out in circumstances that presented no realistic alternative or choice but to break the law. Thus the "State refrains from punishing [a person] not because his actions were innocent, but because the circumstances did not leave him with any other realistic choice than to commit the offence".¹² It is only where the circumstances permit a reasonable or realistic alternative to criminal conduct that a person's choice to commit a crime can be said to be morally voluntary. The Court opines that only such freely chosen conduct should attract the penalty and stigma of a criminal conviction. The Court

¹¹ *Ibid.* at para. 44.

¹² *Ibid.* at para. 40.

thus created a new principle of fundamental justice that “only voluntary conduct – the product of a *free will* and controlled body, *unhindered by external constraints* – should attract the penalty and stigma of criminal liability”.¹³

The Supreme Court’s comparison of physically involuntary acts with what it calls morally involuntary action is questionable. A person whose body moves involuntarily lacks agency – there is movement but nothing that can be spoken of as an action. It is for this reason that such action is considered blameless. But a person who engages in intentional and deliberate conduct that is dictated by the circumstances acts with full agency. It is difficult to accept the Court’s assertion of equivalence between involuntary bodily movements and deliberate and considered actions.

Crucial for my purposes is the fact that the Supreme Court’s conception of moral involuntariness clearly adopts a choice theory approach to the situational excuses. The Court begins with a theory of responsible agency (i.e. of inculcation) based on free will and choice. The Court wrote that:

Even before the advent of the *Charter*, it became a basic concern of the criminal law that criminal responsibility be ascribed only to acts that resulted from the choice of a conscious mind and an autonomous will. In other words, only those persons acting in the knowledge of what they were doing, with the freedom to choose, would bear the burden and stigma of criminal responsibility.¹⁴

In speaking about the assimilation of moral involuntariness to physical involuntariness, the Court again emphasizes the importance of choice in ascribing criminal responsibility. It wrote:

What underpins both of these conceptions of voluntariness is the critical importance of autonomy in the attribution of criminal liability: *Perka, supra*, at pp. 250-51; *Fletcher, supra*, at p. 805. The treatment of criminal offenders as rational, autonomous and choosing agents is a fundamental organizing principle of our criminal law. Its importance is reflected not only in the requirement that an act must be voluntary, but also in the condition that a wrongful act must be intentional to

¹³ *Ibid.* at para. 47 (emphasis added).

¹⁴ *Ibid.* at para. 34.

ground a conviction. *Sault Ste. Marie, Re B.C. Motor Vehicle Act*, and *Vaillancourt* all stand for the proposition that a guilty verdict requires intentional conduct or conduct equated to it like recklessness or gross negligence. Like voluntariness, the requirement of a guilty mind is rooted in respect for individual autonomy and free will and acknowledges the importance of those values to a free and democratic society: *Martineau, supra*, at pp. 645-46. Criminal liability also depends on the capacity to choose -- the ability to reason right from wrong. As McLachlin J. observed in *Chaulk, supra*, at p. 1396, in the context of the insanity provisions of the *Criminal Code*, this assumption of the rationality and autonomy of human beings forms part of the essential premises of Canadian criminal law:

At the heart of our criminal law system is the cardinal assumption that human beings are rational and autonomous: G. Ferguson, "A Critique of Proposals to Reform the Insanity Defence" (1989), 14 *Queen's L.J.* 135, at p. 140. This is the fundamental condition upon which criminal responsibility reposes. Individuals have the capacity to reason right from wrong, and thus to choose between right and wrong. Ferguson continues (at p. 140):

It is these dual capacities -- reason and choice -- which give moral justification to imposing criminal responsibility and punishment on offenders. If a person can reason right from wrong and has the ability to choose right or wrong, then attribution or responsibility and punishment is morally justified or deserved when that person consciously chooses wrong.¹⁵

The Court clearly considers choice fundamental to questions of inculcation. It carries its concern with choice forward and places it at the centre of its construct of moral involuntariness and it is therefore key to matters of exculpation and excuse also. The Court reasoned that it is unjust to penalize intentional criminal conduct if that conduct was carried out in a morally involuntary fashion. Morally involuntary actions cannot realistically be attributed to the actor where "his will was constrained by some external force".¹⁶ Stated differently, morally involuntary conduct should not be punished because "... the accused's agency is not implicated in her doing. In the case of morally involuntary conduct, criminal attribution points not to the accused but to the exigent circumstances facing him, or to the threats of someone else".¹⁷ Essentially, either some feature of the circumstance or another person is responsible for the crime. The wrongdoer is not.

¹⁵ *Ibid.* at para. 45.

¹⁶ *Ibid.* at para. 46.

¹⁷ *Ibid.* at para. 46.

The Court treats choice as fundamentally important, using the language of choice throughout its reasons. However, at one point the Court does clarify that its use of this language is metaphorical:

In using the expression “moral involuntariness”, we mean that the accused had no “real” choice but to commit the offence. This recognizes that there was indeed an alternative to breaking the law, although in the case of duress that choice may be even more unpalatable – to be killed or physically harmed.¹⁸

2. Why Choice Theory is Inadequate as a Theory of Excuse

Choice theory may well be appropriate for grounding notions of responsibility. A person’s choice to carry out the act that forms the subject matter of an offence (coupled with their knowledge of the circumstances) is an understandable method of explaining the scope and centrality of criminal intent as focal to responsibility.

However, I have concerns with choice theory as a theory of situational excuse. In my view, choice theory is not helpful at grounding excuses of external circumstance for several reasons that I will set out below. Because of these concerns, I do not think the Supreme Court’s reliance on this theory to ground its conception of moral involuntariness was appropriate. In the remainder of this Chapter, I will set out the reasons why I do not think choice theory is an adequate theory of situational excuse, and consequently why the Supreme Court’s conception of moral involuntariness is problematic. The most significant concern I have is that choice theory is not a moral theory of excuse. There are additional reasons, largely reasons of a practical nature, for rejecting choice theory as a theoretical basis for the situation excuses. I will address these in turn. I should note at this stage that I have attempted to classify my concerns with choice theory in a coherent way, but there is some overlap between them.

¹⁸ *Ibid.* at para. 39.

A. Choice Theory is Not a Moral Theory

In Chapter 1, I discussed various philosophical theories of responsibility. The most commonly accepted theories of responsibility revolve around some notion of freedom, either freedom of action or freedom of will, or both. In Chapter 2 it was shown how these theories have worked their way into criminal law theory and inform choice theory of criminal responsibility. Choice theory is also invoked as a theory of excuse. I also discussed theories of responsibility based on character, which are also carried into criminal law theory, in the form of character theory. I also briefly described several other non-traditional models of responsibility such as the theory known as acting for reasons, responsibility as reactive attitude.

In Chapter 1, I also alluded to a debate among philosophers about the relative merits of moral theories of responsibility as opposed to non-moral, or empirical, theories. Some theorists criticize philosophical accounts of responsibility based on freedom on the ground that they are objective and empirical. They presume that there are external, objective and observable conditions that create situations of “constrained volition” such that some relevant notion of freedom, and consequently responsibility, is negated. Empirical theories rely on analogies with physical compulsion and “suggest criteria for when a non-physically compelled agent is deprived psychologically of the ability to behave otherwise”.¹⁹ Applying the relevant objective criteria and conditions yields either a yes or no answer to the question “was the agent responsible?”

Theorists who consider this to be a failing do so on the ground that responsibility ascriptions are, in reality, a *moralized* practice. Human behaviour and our blaming judgments are more subtle and sophisticated than a mechanistic account of freedom suggests. Decisions about whether an actor *is responsible* are in essence concerned with the question of whether or not the actor *should be held responsible*. This inquiry will be influenced, if not determined, by our collective judgments about right and wrong. Moral theorists reject the use of language of

¹⁹ S. Morse, “Diminished Capacity” in Shute, Gardner & Horder, Eds., *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993) at 250.

voluntariness and freedom. They assert that choice and freedom exist, and that it is the *value* of the choices that inform our decisions about responsibility.

In my view, a moral theory of responsibility is preferable. When we make judgments about whether a person is responsible for an action, we are doing more than simply judging one or more objective features of the choice situation. Especially in regards to excusing circumstances, we are making a *moral assessment* of whether the person deserves the normal response, be it praise or blame depending on the moral quality of the act and the circumstances. This requires that host of other factors be contemplated in the assessment in addition to questions of freedom and choice. Empirical theories of responsibility camouflage this moral inquiry.

Further, accounts of responsibility based on freedom fail to provide sufficient means by which to decide the crucial questions, namely questions about the moral quality of the act in question, whether by reference to the actor's desert or the overall impact of the act on the general welfare. Moral theorists abandon the search for an empirical test because they believe it is "technically impractical and normatively undesirable".²⁰ Philosophers have been working on the problem of freedom of the will and freedom to choose for centuries and have yet to arrive at a satisfactory explanation or description of what those concepts mean and how to measure them. Thus an approach to responsibility that focuses on freedom is impractical because it "presupposes a clearer theory of control and of the will than we really have".²¹

Also, empirical approaches that relate psychological compulsion to physical compulsion produce blaming judgments that do not always correlate to our moral evaluations. Agents act for reasons, and the ability to resist does vary with circumstances. The psychological experience of pressure and the perception of "no choice" do not always excuse. Rather, "yielding to the desire should excuse only in some circumstances".²² Empirical theories of

²⁰ *Ibid.*

²¹ T. Morawetz, "Reconstructing the Criminal Defenses: The Significance of Justification" (1986) 77 J. Crim. L. & Criminology 277 at 297.

²² Morse, *supra* note 19 at 251.

responsibility that are concerned with “the will” alone can not effectively draw the line between those choice situations that have excusing force and those that do not. This work must be done by a moral theory.

(i) Excuses Are About Morality

I agree with moral theorists that empirical theories of responsibility are lacking in their ability to explain and guide our responsibility assessments. The debate about moral and non-moral theories of responsibility in philosophical circles does not appear to have made its way into criminal theory discourse to any significant degree. In my view, criminal law theorists must confront same questions philosophers do about the continued primacy of choice and freedom in accounts of responsible agency, and especially so in regards to excuses.

Choice theory of excuse, like empirical theories of responsibility, is premised on the view that certain circumstances create a situation of “no realistic choice” other than the commission of the crime charged. It is the constraint on free choice that deprives the actor of autonomy, which is said to ground the excuses. For instance, it is said that the lost alpinist who breaks into a cabin does not make a choice at all, that he has no “real” choice, and rather that his actions are “remorselessly compelled by normal human instincts”.

But imagine a sick person who cannot afford life-saving medicine and so steals it. Is such an act not also “remorselessly compelled” by normal human instinct for self-preservation? What if it is not medicine but prohibitively expensive surgery that is required, and the agent threatens the surgeon with harm if she does not perform the surgery?²³ From a psychological perspective, the actor in all of these circumstances may feel the same degree of pressure and lack of options. Indeed, the reasonable person and the community at large may also consider these to be “no realistic choice” situations if the actor is to survive.

But the law does not treat each of these situations in the same way. The “choice situation” in and of itself does not necessarily tell us much about whether a person caught in the middle should be held responsible for their choices. The law of excuses implicitly relies on some moral theory to distinguish these situations.²⁴ Imagine that a person who is falsely accused of a serious crime destroys evidence and convinces certain witnesses to lie while testifying. Imagine further that this person believes (correctly) that such measures are absolutely necessary in order to prevent her unjust conviction. Would we excuse this person for tampering with the administration of justice? If we would not, it may be because we believe that it is not morally right for individuals to manipulate the system even if the outcome would be the correct one. We might hold strongly to the belief that appeals and other built-in mechanisms are the right way of addressing wrongful convictions.

Thus even where the actor, and the reasonable person, might feel that there was no realistic choice, we do not always excuse. We may still ascribe responsibility if on some moral theory, we value the interests that were violated more strongly than those that were saved. The price may simply be too high in some cases. Notwithstanding that destruction of evidence was necessary to spare an innocent person from being convicted, we might still value our system of justice so much so that we would not want to excuse a deliberate manipulation of it.

Some theorists do indeed recognize that this line between culpability and excuse is fundamentally a moral one. One can feel constrained in one’s choices, and actually have a limited opportunity to act in accordance with the law. But it is only where the lack of choice is *unfair* in some morally meaningful way that a person should be excused for their actions. To “lack a *fair* opportunity to avoid doing wrong, there must be some (objectively regarded)

²³ This was the premise of recent Hollywood film *John Q* (2002) in which a father takes an emergency room hostage and demands that life-saving surgery be performed on his son. This film reflects our society’s fascination with such difficult moral dilemmas.

²⁴ I should add that in answering some of these questions, the law must also implicitly have resort to *political* theory in addition to moral theory. Political theory is necessary to fill in the gaps in questions about the proper relationship between the state and the individual, government and social organization. For instance, it would be exceptional if a starving person were excused for stealing food or a sick person for stealing medicine. This might be because we organize our societies in such a way as to provide designated outlets and mechanisms for relieving such dire circumstances, such as universal health care, social assistance, food banks and so on. I will not be able to pursue the role of political theory in this thesis in any greater detail.

evil that one is avoiding".²⁵ Indeed, it is the moral dimension of the situation that provides the dividing line between compulsion that carries with it excusatory force and compulsion that does not.

In a perilous situation, the actor must choose between committing a harm and suffering a harm. Her own interests are set in opposition to the interests of others, and if she commits the crime, she has chosen her own interests over those of others that are being threatened. Whether or not she should be excused is not so much a matter of whether she could realistically choose otherwise, but rather a question of whether her choice was an acceptable one. Thus the situational excuses depend "not so much on understanding the will (and when it is overborne) as on understanding the morality of favoring the self".²⁶ The question we truly ask ourselves in these situations is whether it was acceptable (or understandable) that the agent chose to favour her own interests rather than to subject her interests to those of others.

It is likely easier to answer the moral question in the case of victimless crimes, such as drug importation. This is in part because it is more difficult to identify other interests implicated by the actor's choice to commit a victimless crime. But some victimless crimes do carry significant risk of harm. For instance, if an employee at a weapons factory is compelled to smuggle weapons out of the factory for a criminal or terrorist organization, the crime itself (theft) may have only minimal financial implications for the owner of the stolen property, but the consequences of the crime are potentially severe for the larger society. Further, even in the case of drug importation, some circumstances might suggest potential victims. Suppose for instance that the heroin imported by Ms. Ruzic was intended for distribution in high schools across Toronto and that she knew this. We might wish to revisit our perception of her crime as a "victimless" one. Whether or not the interests affected by the actor's choice are easy to identify, they are still factors we wish to understand and consider in determining whether or not the actor's choice was acceptable from a moral standpoint.

²⁵ M. Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford: Clarendon Press, 1997) at 561.

²⁶ Morawetz, *supra* note 21 at 298.

The Supreme Court has acknowledged that the defences of necessity and duress “evolved from attempts at striking a proper balance between those conflicting interests of the accused, of the victims and of society. It also sought to establish a hierarchy between them, as a full reconciliation appears problematic in this area of the law”.²⁷ The typical case of criminality involves a violation of the law for non-moral reasons, but the Court has here recognized that sometimes criminal acts occur in situations in which the moral interests of multiple parties are implicated and come into conflict with each other. Such situations involve questions about the rights and duties of individuals in respect of other persons and the relative weight of different social values.

Surely these are matters of moral inquiry, of morality. Notwithstanding lack of consensus about its precise definition, morality is generally understood to mean a code of conduct, or a guide to behaviour. When interests and rights and duties conflict, the obvious question is: what is the proper behaviour taking into account the conflict? This is most certainly a question of morality, although not exclusively; it is also a question of law. But on what basis does the law develop its own code of conduct if not (at least in part) morality? To be sure, as discussed in Chapter 2, at a minimum we have an expectation that the law will accord with morality even if we do not wish to assert that morality is the source of law.

By seeking to resolve conflict between multiple interests, the situational defences themselves must be recognized as inherently moral; they are concerned with competing moral interests and resolution of conflict in terms of identifying the right or (at least) the permissible thing to do. The defences thus “represent moral judgments. Each category of criminal defence mirrors and amplifies what is arguably a criterion for moral blamelessness”.²⁸

The Supreme Court has expressly acknowledged that defences “are the product of difficult moral judgments”.²⁹ But by holding firmly to the conception of excuses as means of avoiding responsibility for what is considered wrongful conduct, and by developing the

²⁷ *Ruzic*, *supra* note 4 at para. 60.

²⁸ Morawetz, *supra* note 21 at 277. Note here that Morawetz does not use the term morally blameless in the narrow sense adopted by the Supreme Court, but rather he uses it to denote the broader idea of non-culpable.

²⁹ *Ruzic*, *supra* note 4 at para. 25.

notion of moral involuntariness that is based on choice theory of agency, the Court seems to box itself into the position of taking moral considerations out the analysis. The result is a disconnect between what have generally been the required elements of the excuses and the application of the principle of moral involuntariness. This is because the principle of moral involuntariness is not exactly the same thing as the defences of necessity and duress. The defences are larger – they include a moral inquiry.

For instance, the common law defence of duress requires the following elements: (1) threat to the bodily integrity of the person, (2) no safe avenue of escape, and (3) proportionality between the threat and the criminal act.³⁰ Necessity requires (1) clear and imminent danger, (2) absence of any reasonable legal alternative to breaking the law, and (3) proportionality between harm inflicted and harm avoided, in the sense that the harm avoided must be either comparable to or clearly greater than the harm inflicted.³¹

The specific conditions are in essence particular indicators of either reasonableness or proportionality. Reasonableness relates to the action itself, and proportionality relates to the relationship between the harm sought to be avoided and the harm actually committed. The threat of bodily harm and absence of other alternative components of the defences speak to the reasonableness of the action in the circumstances. The proportionality requirement provides for a balancing of the various interests implicated in the situation, namely the possible harms, the threat to the accused and the interests of others. It is the proportionality requirement in each defence that is the “explicit moral judgment about the accused’s behaviour, and whether the accused should be found guilty of a crime”.³²

Yet when the notion of moral involuntariness is superimposed onto the two main components of the situational defences, it becomes clear that the principle relates only to the reasonableness component, and captures the key condition as the existence of “no realistic choice” other than commission of the crime. Moral involuntariness, construed as a matter of

³⁰ As restated in *Ruzic*, *supra* note 4 at paras. 57-62. Each element is to be assessed on a mixed subjective-objective test.

³¹ *R. v. Latimer*, [2001] 1 S.C.R. 3. at paras. 29-31.

choice and freedom of will, does not relate to the proportionality element of the excuses.³³ Moral involuntariness prevents a person from being punished if their actions were morally involuntary, if they had no “realistic choice”. It does not include a moral assessment of the choice actually made, or a reconciling of rights and obligations of the different parties affected by the situation. Indeed, in *Perka*, the majority of the Court calls proportionality a “limitation” on the defence of necessity. It was added as a side-constraint to the principle of moral involuntariness in order to ensure that the criminal justice system remain “rational” and avoid excusing the commission of greater harms in avoidance of lesser ones.³⁴ Proportionality may be related to, but it is not part of moral involuntariness.

Simply put, it seems that the Supreme Court has only constitutionalized one part of the defences of duress and necessity, namely moral involuntariness or “no realistic choice”. Since this component is now a constitutional requirement for punishment, proportionality, the moral component of the excuses, may no longer be a necessary part of the excuses themselves.

At least until the Supreme Court reconsiders and refines its position, this means that a person can not be punished for crimes committed in circumstances of no realistic choice, regardless of an analysis of whether the harm caused was more or less severe than the harm threatened (and potentially regardless of the nature of the threat), and thus regardless of an analysis of the moral quality of the action and a resolution of the competing interests and values. It is surely “a little surprising that a concept entitled “moral involuntariness” has no connection to moral issues”.³⁵

³² S. Coughlan, “Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?” (2002) 7 Can. Crim. L.R. 147 at 184-5.

³³ “The proportionality [between the harm threatened and the harm caused by the crime] requirement is the normative aspect of the test, making a moral judgment about the accused’s behaviour.... the first building block judges the moral voluntariness of the action, the second its morality”: Coughlan, *ibid.* at 156.

³⁴ *Perka*, *supra* note 5 at 400. It should be noted that Wilson J. for herself writes that necessity as an excuse should *not* include a proportionality requirement at all but should result in acquittal “where a person has acted in order to save his own life” (at 416).

³⁵ Coughlan, *supra* note 32 at 191. Coughlan writes this in the context of talking about the court rejecting the argument that excused actions are not blameworthy – he says surely there is “room for moral judgments in between “blameworthy” and “praiseworthy”.

In my view, if the excuses are believed to be fundamentally moral in nature, we should expect a theory of excuse to include a mechanism directed toward answering the moral question. When we excuse a person for actions committed under situational pressure, we do not really do so because they “had no choice” (even though we might use such language metaphorically) but rather we make a moral judgment about the quality of the acts in the circumstances. If this is so, then we need a theory that can help identify the moral considerations and guide the decision-making process. In the next Chapter, I will provide some suggestions for a moral theory.

(ii) No Guidance for the Moral Inquiry

Thus in my view, a major flaw of choice theory, and consequently the concept of moral involuntariness, is that it disguises and compromises the moral inquiry into excusing circumstances. The language of voluntariness and freedom and choice conceals the moral nature of the inquiry. By concealing the moral inquiry, choice theory fosters the perception that excusing responsible actions is *not* a moral matter but a matter of evaluating the choice situation and the objectively measurable degree of freedom of the will. In building the principle of moral involuntariness from the material of choice theory, the Supreme Court has created a principle of fundamental justice that effectively results in depriving the excuses of their moral component, or at least concealing it. This frustrates the responsibility inquiry.

Equally importantly, it fails to provide any guidance as to how to carry out the moral inquiry. The end result is a theory of excusing conditions that fails to live up to its main function, if one believes that excuses (or at least the situational excuses) are fundamentally concerned with moral questions. The question is not whether the actor had or did not have freedom of will when she acted, but rather whether she should be held to account for the normal consequences of her intentional actions. Neither choice theory (as a theory of excuse) nor moral involuntariness provide much assistance in this inquiry. In my view, the underlying theory that supports the defences should acknowledge that choice and freedom exist, and

should focus directly on the relevant issue, namely the *value* of the choice that was made as compared to the alternatives.

The Supreme Court's reasons in *Ruzic* are based on the analogy between the requirement for physical volition and moral voluntariness and the impact on the absence of these on the attribution of responsibility to an actor. The Court essentially reasons that moral voluntariness is close enough to physical voluntariness that the former must also be a principle of fundamental justice. In each case the principle of autonomy is implicated. If autonomy is constrained by either physical force or external hindrances or constraints on choice (of some kind), then according to the Supreme Court, the actions of an agent can not "realistically be attributed to him".³⁶

This may seem like an intuitively appealing explanation of the excusing force of external circumstance, but on closer analysis, this argumentation is circular. To say that a person can not be found guilty for morally involuntary action because her actions cannot be attributed to her is simply to "rely on the conclusion itself in the reasoning".³⁷ What is missing is an adequate account of *why* morally involuntary actions *can not* be attributed to the actor. If "this is the approach the Court wishes to take, then it is required to give some meaning to the word 'imputable'" in order to allow us to assess how the imputation of responsibility can occur and under what circumstances it may be blocked".³⁸ But the Court provides no effective account.

Reference to what the reasonable person would do is not sufficient to explain attribution. How does the reasonable person feel about a request for assisted suicide by a loved one or the performance of an act of civil disobedience for a deeply held belief? How would the reasonable person feel about committing theft of property in order to avoid a broken arm? Some situations present difficult moral dilemmas and conflict between multiple moral values and interests. In such situations, the law must contain a mechanism for balancing the competing interests and values to arrive at a resolution. Consideration of the reasonable

³⁶ *Ruzic*, *supra* note 4 at para. 46.

³⁷ Coughlan, *supra* note 32 at 193.

person's actions or choices in such cases is highly speculative and does not provide much assistance at understanding whether this accused should be held responsible for having committed a crime under these circumstances. It is no way clear that the inquiry into the choices of the reasonable person is a moral inquiry. It might ask whether the reasonable person would feel compelled to do a certain action in order to avoid a certain threat, but this is not the same as asking whether we would accept that decision. It does not ask what the reasonable person *should* do. Simply put, this approach may not provide an adequate mechanism for drawing the line between compulsion and the perception of "no choice" by an individual generally on the one hand, and compulsion *sufficient to excuse* on the other. Once again, this is because the crucial question is a moral one about the relative choices and options, and this is not answered by making the inquiry into "no realistic choice" an objective one.

To be sure, it is difficult to come by a detailed account of what counts as an evil to be avoided or how to determine the morality of self-preservation. In my view, however difficult this task may be, it is a task that should be confronted directly. Instead, the Supreme Court's conception of moral involuntariness both disguises the fact that we are interested in morality when we excuse people on account of circumstance, and fails to assist us at making that difficult determination.

B. Other Concerns with Choice Theory

In addition to being concerned by the fact that moral involuntariness, based on choice theory, is non-moral and therefore both conceals and frustrates the moral inquiry, I also have concerns with the approach of a more practical nature. I will briefly set these out below.

(i) Simultaneously "Free" and "Unfree"

In respect of situational defences, the Supreme Court uses the language of choice figuratively, and by analogy with physical voluntariness. The rationale is that just as a

³⁸ *Ibid.* at 195.

person is not responsible for what their body does if their movements were physically forced, so too a person should not be held responsible for moving their body intentionally if the choice to do so was not made voluntarily.

While this may have intuitive and instant appeal as a valid parallel – for we do use the language of “no choice” in ordinary speech when talking about high pressure situations – in my view the use of language of choice in this context is unhelpful and potentially confusing. For one thing, the language of choice forces us into accepting that one single act (if committed under duress or necessity for instance) was both free and unfree, voluntary and involuntary, willed and unwilled. An act is free, voluntary and willed in the sense that the act was chosen by a capable agent with knowledge of the circumstances, and thus the physical and mental states required for the crime were satisfied. But at the same time we declare the act to be unfree, involuntary and unwilled. This state derives from the situation pressure and the agent’s lack of fair opportunity to act in accordance with her normal preferences. Thus if choice theory is invoked as a theory of responsibility *and* excuse, we must say that agency requires *choice* (of some kind), and excuses requires *lack of choice* (of some other kind). The result is that the very same act, if excused, is chosen and unchosen, free and unfree, voluntary and involuntary.³⁹

These key terms must be used in a different way in the different contexts. If they are meant to capture the same ideas, then choice in terms of excuse is simply the negation of choice in terms of *mens rea*. If such were the case, then instead of *excusing* responsibility, “lack of choice” would negate responsibility itself. In legal terms, the situational excuses would deny *mens rea* and there could not be said to be wrongdoing in the first place.

This does not accord with the law or with our common sense intuitions about responsibility and blame in everyday speech and interactions. In the law, *mens rea* relates to the knowing

³⁹ Character theory, if invoked as a theory of responsibility and excuse, does not seem to suffer from this same flaw. This is because on the character theory model, responsibility for a crime is based on an *inference* of bad character, and excuse functions to block or rebut the inference. The excusing criterion is not the negative of the responsibility criteria, but rather a refutation of a presumption. However, this aspect of character theory leads to a different problem, namely that criminal fault is based on a *presumption*, rather than proof, of the required criteria (i.e. bad character).

or intentional commission of the prohibited act and is generally morally neutral in the sense that it does not require a bad motive. Situational excuses, on the other hand, do generally assert a good motive as a means of avoiding the normal consequences of a finding of responsibility. They do not deny the commission of a crime but they inhibit a finding of culpability for the crime.⁴⁰

Thus, if choice theory animates agency and also excuse, then the notion of choice must be *different* somehow in respect of each issue, so that we would say an excused act was free in *this* way but simultaneously unfree in *that* way. This is indeed what the Supreme Court suggests in *Ruzic*, namely that excused conduct is *physically* voluntary but *morally* involuntary. To adopt this approach is to take on the task of identifying what kind of “lack of choice” should excuse and what kind should not. I will deal with this problem shortly.⁴¹

In my view, there is no reason why the underlying notion animating agency must be the same at that underlying excuses. Agency in the criminal law relates to establishing the link between a person and some prohibited action in a morally meaningful way. Situational excuses, on the other hand, involve considerations of external circumstance not part of the definition of the crime - these may well be considerations *other* than those that ground agency. Offences are generalizations about unacceptable conduct. If the difference between offence and defence is construed as the difference between the paradigm case and the abnormal or unusual case, then why must defences be based on the same underlying principles as agency? Excuse on this view is not the flip side of responsibility, but rather involves asking a different set of questions, the result of which can have the effect of changing the normal outcome of the responsibility inquiry and the expected response. Situational excuses may be *linked* to responsibility, but that does not mean that they must be explicable in terms of the very same core underlying principles. Application of the same concept and use of the same language to refer to two distinct things is unnecessarily confusing and unhelpful, in my view.

⁴⁰ I do not think I need to rely on the traditional excuse/justification distinction here. In my view, as I explained in the Introduction, excuses *and* justifications inhibit a finding of culpability for what is otherwise the intentional commission of a crime (i.e. wrongdoing).

⁴¹ In my view, as I explained in the previous section in this Chapter, this dividing line is one of morality.

One possible response to the criticism that the notions of *free* and *voluntary* must be divided into two distinct uses is to suggest that this is indeed logical, and that the execution of the *action* was free, voluntary and willed whereas the making of the *choice* to act was unfree, involuntary and unwilled. This kind of explanation draws on the philosophical distinction between the freedom of action and freedom of the will described in Chapter 1.

On one level, this response does seem to provide an adequate explanation of the different notions of choice, freedom or volition that are at play in assessments of responsibility. However, this response is satisfactory *only if* one accepts an empirical, non-moral account of responsibility according to which a straightforward factual assessment will produce a yes or no answer to the question “did the accused have a realistic choice?” The freedom of the will account raises an additional problem, however. By turning the focus to questions of *freedom to choose* how to act, this response is vulnerable to the “degrees of freedom” problem. I will address this problem below.

(ii) Constraint on Choice - A Matter of Degree

Unlike the case with physical involuntariness, it is literally false that a person who is coerced or threatened has no choice but to act as she did. It is not difficult to get choice theorists to make this admission. Even the Supreme Court recognizes that in “using the expression ‘moral involuntariness’, we mean that the accused had no ‘real’ choice but to commit the offence. This recognizes that there was indeed an alternative to breaking the law, although in the case of duress that choice may be even more unpalatable – to be killed or physically harmed”.⁴²

All theorists agree that a choice is made in situations of external non-physical pressure. At the same time, choice theorists and the Supreme Court hold that excuses must apply where there is no “real” or “realistic” or “reasonable” choice other than to commit the crime. The determination of excuse is therefore made on the basis of what is and what is not a realistic or

⁴² *Ruzic*, *supra* note 4 at para. 39.

real or reasonable choice. Even assuming that excuse is based solely on “no realistic choice” without an assessment of the morality of the situation, this approach requires the formulation of some mechanism for making the “no realistic choice” determination. This is admittedly a difficult task. As I mentioned in Chapter 2, choice theory cannot easily establish parameters for determining what sorts of pressures can render a choice *sufficiently unfree* so that responsibility should be excused. Non-moral philosophical accounts of responsibility suffer from the same deficiency.

Indeed, to adopt choice theory and the Supreme Court’s approach is to “pretend that there is a difference in kind between choosing for an extremely compelling reason and choosing for a slightly less but still very compelling reason... The...difference in kind is drawn with nothing like a shining line. As a result, creating this “new” difference in kind is likely to lead to considerable dispute over exactly where it can and should be drawn”.⁴³ In my view, neither choice theory nor the notion of moral involuntariness perform this line-drawing task adequately.

The law clearly recognizes the excusing force of action in avoidance of threats to bodily integrity. Choice theory, when invoked by criminal law theorists, seems to make the assumption that threats of bodily harm or death can render a choice sufficiently unfree. But it is never fully explained why this is so and what the threshold is for constrained choice. Indeed, choice theory “hides its moral assumptions even though those assumptions often control the outcome of the voluntarist inquiry”.⁴⁴ For instance, there is no clear account of why a threat of a severe beating would likely render a choice to act involuntary, while a threat of a broken finger would (probably) not. It seems likely that when choice theorists assert boldly that serious violations of bodily integrity can constrain choices, they have engaged in some unspoken (and possibly unconscious) moral balancing of harms. What is important to note is that this *moral* balancing is not express in choice theory accounts of excuse.

⁴³ Coughlan, *supra* note 32 at 196.

There is also no clear and convincing account of the nature or degree of “constraint” on freedom of choice by threats to *other* interests, such as property interests or the interest in maintaining one’s marriage, reputation or employment. Choice theory does not provide much insight into the excusing power of other lesser recognized interests, such as the interest in avoiding prolonged pain and suffering, or the interest in acting in accordance with one’s deeply held moral and ethical convictions. Thus where the law already recognizes the excusing force of threats to bodily integrity, choice theory can assert simply, and without explanation (as though it is so obvious that explanation is not required) that such threats limit choice unfairly. At the same time, in terms of novel claims to excuse that involve competing moral claims, choice theory offers no guidance.

It is indeed a difficult task to determine “whether a given condition ought to be admitted as an excuse or a defence, and, if so, whether it is defined so as to draw an acceptable line between ‘sufficiently free’ conduct and ‘significantly restricted’ behaviour”.⁴⁵ Difficult as it may be, it seems to me that an approach that focuses on freedom of choice must necessarily take on the task of providing an account for determining whether sufficient freedom exists or not. In my view, neither choice theory nor the Supreme Court’s conception of moral involuntariness give much guidance in resolving questions about new and controversial claims of excuse, much less how the boundaries of existing excuses can be ascertained with any degree of certainty.

(iii) No Choice, Hard Choice or Easy Choice?

Choice theory of excuse is premised on the view that certain circumstances create a situation of “no realistic choice” other than the commission of the crime charged. In my view, it is misleading and incorrect to speak of recognized situational excuse circumstances as “no realistic choice” situations and equally misleading to posit “no real choice” as the criterion with excusing power.

⁴⁴ J. Parry, “The Virtue of Necessity: Reshaping Culpability and the Rule of Law” (1999) 36 Hous. L. Rev. 397 at 422. For Parry, voluntarism is synonymous with choice theory.

What is the measure of available choice in a given situation? One way of measuring is to evaluate how close together each of the options is on a scale of desirability.⁴⁵ Let us imagine a situation in which a person must choose between a very desirable course of action and very undesirable one. For example, imagine that A can either accept the trip to Hawaii paid for by his employer (X) or refuse the trip and risk losing his job (Y). These two alternatives are poles apart in terms of desirability. We might be inclined to call this an “easy choice” situation. No reasonable person would choose Y over X. Indeed, choosing X would be the *only* reasonable thing to do in these circumstances. In an easy choice situation, there is far more support for the proposition that A had no realistic choice but to do X. Even though there was no choice, we would still consider A to be responsible for her choice of X over Y simply because X was the only reasonable thing to do.

Now let us imagine a situation in which the two alternatives are very close together on the scale of desirability. Suppose X and Y are both very desirable courses of action, so for instance A can go on an all-expenses paid vacation to Hawaii, or an all-expenses paid vacation to Paris. We might logically and reasonably think that A’s decision in this scenario is a “hard” one. But if A chooses Hawaii, we would be reluctant to say that A was not responsible for this choice *on the ground that* the choice was a hard one.

Now imagine that both X and Y are very undesirable. A can either suffer a severe beating (X) or steal some sensitive documents from his office for individuals who may use them for economic sabotage against his employer or other companies (Y). A does not want to engage in either course of action, but must choose from among them. This is another “hard choice” for A to make. But do we really want to say that if A chooses Y, he had no reasonable choice?

If the alternatives are poles apart, as above it is easy to see how we can say there was no reasonable choice to be made. Anyone and everyone would choose the desirable over the

⁴⁵ A. Ashworth, *Principles of Criminal Law* (Oxford: Clarendon Press, 1991) at 81.

⁴⁶ A. Wertheimer, *Coercion* (Princeton: Princeton University Press 1987) at 192ff.

undesirable. Where the choice is very easy, we are inclined to say idiomatically that there was no choice.

How can we also say there is “no choice” where the choice is very difficult? For one thing, if there is “no reasonable choice” when the choice is easy, and “no reasonable choice” when the choice is hard, what exactly is a situation in which multiple choices *are* reasonable? Plainly, “situations in which the defences of duress and necessity are relevant - situations in which one is faced with the choice between evils not easily compared - are situations in which no clear *moral* answer can be found”.⁴⁷ If there is no clear (moral) answer, then it is simply not helpful to categorize the answer finally chosen as the only realistic one. This suggests that *if* a person is excused for choosing to commit a crime in a “hard choice” situation, it is *not* on the ground that she had no choice or was “unable to resist”. Of course she had at least one other choice to make and was therefore able to resist the threat. If we excuse, it is because her failure to resist and to choose another option was acceptable to us from a moral standpoint.

What, then, is the relationship between options for action and responsibility? The answer may be none. “Having no choice - as measured in distance - does not, in itself, nullify or even mitigate our responsibility for the normal moral or legal effects of our acts”.⁴⁸ The reason the answer may be none is because responsibility is a moral inquiry and not an inquiry into limited choice options. To be sure, the constraint on choices, the undesirability of the alternatives, and the cause of the situation are factors to consider in determining whether or not the actor should be excused. But the outcome of that question is based on a *moral* assessment of all the factors, and not a factual assessment of whether there was “no realistic choice”. Indeed, if we asked a group of people what they thought of the actions under question, they would probably say that the conduct and choices were understandable or even appropriate under the circumstances, and reflected a balanced and desirable system of values.

⁴⁷ D. Klimchuk, “Moral Innocence, Normative Involuntariness, and Fundamental Justice” (1998), 18 C.R. (5th) 97 at 105.

⁴⁸ Wertheimer, *supra* note 46 at 197.

The situational excuses such as duress and necessity reflect hard choice situations. They are situations in which it is not easy to come to the right answer about what to do because the two alternatives are so close together in terms of (un)desirability. But to be sure, a conscious, deliberate choice is made even though it is hard to arrive at. If it is not easy to know what to do, how can we say that once a path is chosen, it was the only realistic choice available? How can we identify one over the other as the only realistic choice if they are close together in terms of desirability?

(iv) The *Only* Reasonable Thing To Do - The Problem of the Hero

The Supreme Court's reliance on the language and concept of choice lead it to analogize moral involuntariness to physical involuntariness and collapses the distinction between not choosing at all, and choosing for a very compelling reason. This approach presumes that a person would behave the same whether physically or morally compelled, in other words that the person has "no choice" but to commit the crime. If there is no (realistic) choice, the question is "not whether the actions were reasonable, but whether they were the *only* reasonable actions".⁴⁹

Do we really believe that there are situations in which there is *only one single* realistic course of action? More importantly, do we really consider duress and necessity situations to be such situations? As described above, these situations are more accurately described as "hard choice" situations, rather than "no choice". If the choice is a hard one, then surely some reasonable people in the position of the agent would (or at least could) choose something other than commission of the crime. If compelled by threats of harm as opposed to being directly physically manipulated, the actor admittedly has a choice, and may in fact choose not give in to the compulsion but rather to resist or submit to the harm threatened.

This raises the problem of the hero. The Supreme Court has made clear that the "law is designed for the common man, not for a community of saints or heroes".⁵⁰ It may certainly

⁴⁹ Coughlan, *supra* note 32 at 158.

⁵⁰ Ruzic, *supra* note 4 at para. 40.

be true (and appropriate) that the law does not *require* ordinary citizens to engage in heroic action. But can we really deny that heroic action is possible? Surely some individuals would choose self-sacrifice over self-interest. Certain individuals might sacrifice themselves to save others. This may certainly be the case where there exists a special obligation on the part of the agent to do so, such as a bodyguard, or a special relationship between the intended victim and the accused, such as that between a parent and a child. Can we in accurately and in good faith call such actions unreasonable, unrealistic or irrational?

In my view, it is inaccurate to excuse only in circumstances where the course of action taken was the *only* reasonable or realistic one. In determining whether someone is responsible, we really want to ask: was what the actor did reasonable in the sense of being morally permissible? We need not insist that the action was the *only* reasonable choice. For one thing, it is misleading to suggest that there is only one single rational course of action. In truth, there may be situations in which resistance is possible. There may be individuals for whom resistance is reasonable and even required. There are certainly individuals who are willing to sacrifice their own interests for the interests of others.

It is not only inaccurate from the perspective of our blaming judgments, but also excessively harsh to require that the commission of the crime be the only realistic choice available. This is especially noteworthy in the absence of a moral theory of excuse. For instance, assisted suicide and acts of civil disobedience are not recognized excuses. Such claims do not involve “no choice” situations in the same way that duress and necessity situations do. A choice theory of excuse could effectively deny claims based on such moral claims. However, it may well be the case that a jury could find actions under such circumstances to be “a reasonable thing to do” in the sense of being morally permissible, although not necessarily “the only reasonable thing to do”.

3. Critique of Character Theory

Character theory offers somewhat more promise than choice theory does, but in the end is also inadequate. For one thing, character theory, if invoked as a theory of responsibility *and*

excuse, does not seem to suffer from choice theory's flaw of use of the same language for both agency and excuse, as highlighted above. This is because on the character theory model, responsibility for a crime is based on an *inference* of bad character, and excuse functions to block or rebut the inference. The excusing criterion is not the negative of the responsibility criteria, but rather a refutation of a presumption. This is a conceptual advantage over choice theory - it seems to accord with our common sense intuitions about responsibility. Normal criminality generally involves acting for bad motives. Acting for bad motives normally infers a character defect. But in some circumstances, the inference to bad or immoral motive is not appropriate. The inference can be blocked by evidence of good motive or good character. However, this aspect of character theory leads to a different problem, namely that criminal fault is based on a *presumption*, rather than proof, of the required criteria (i.e. bad character).

Character theory does offer an improvement over choice theory to the degree that it moves the inquiry one step closer to what we are really concerned about in our blaming judgments. An inquiry into whether the commission of the crime reflects a character defect on the part of the actor brings us closer to examining the motivations and reasons for the act under scrutiny. By focusing on whether the act being judged reveals a defect of character in the circumstances, character theory looks to *motivation* as the relevant link between the offence and the offender. This is a closer approximation of our process of moral judgment than choice theory. But character theory fails, like choice theory, to directly ask the relevant moral question. For instance, character theory does not have a built-in mechanism for determining whether assisting the suicide of a loved one is excusable or not. It does not help us understand whether or not it is a character flaw to favour the wishes of the loved one more so than to be repulsed by the notion of killing him or her. Again, resort must be had to some moral theory in order to answer this question, and thus to know whether or not we should excuse.

In the end, it is my view that the situational excuses must acknowledge that they are concerned with moral questions, and must include some mechanism for addressing the moral question directly. In my view, both fail.

CHAPTER 4: TOWARD A MORAL THEORY OF EXCUSE

Philosophers have been debating various conceptions of morality for centuries. As I showed in Chapter 1, some philosophers consider morality to be determined according to the consequences of the action on overall general welfare. Others believe that individuals have certain rights that we expect others to honour, and correlative obligations to honour the rights of others, and that these basic responsibilities must guide decisions about action regardless of the consequences they produce. It bears repeating that despite centuries of effort, debate and disagreement persists about what approach is preferable generally as a guide to decision-making, and about how to resolve especially difficult individual cases in which moral principles collide or the goodness or badness of the consequences of different choices are of comparable weight. Nonetheless, one of the objectives of moral philosophy is to establish a guide for determining how to act in a given situation, whether an action is right or wrong or classifiable somewhere in between, as permissible. Such a determination leads to an appreciation about whether praise or blame is owing to a particular person for the act in question.

The criminal justice system is certainly concerned with making blaming judgments, and with the consequential imposition of punishment. Our society expects a rough equivalence between moral and legal judgments of fault and responsibility. This holds true even in the case of excusing conduct for which we would otherwise normally hold a person responsible, such as the intentional or deliberate causing of harm. Criminal theory should therefore pay close and explicit attention to questions of morality insofar as a theory of excuse is concerned.

The Supreme Court acknowledges that defences are “the product of difficult moral judgments”. It also appears eager to bind itself to the distinction between defences of justification and those of excuse.¹ This distinction is based on the difference between “the right thing to do” and “wrong but understandable”. This is a fine *moral* distinction. And yet,

¹ I explained in the Introduction why I do not think this distinction should be central to the criminal law organization of defences.

in developing the constitutional underpinning of external excuses, the Court has evaded the morality question altogether. Even if one accepts the central importance of the justification/excuse dichotomy, the Supreme Court would have been required to answer certain moral questions. For instance, why or how (i.e. on what moral account) should Ms. Ruzic's actions be characterized as *wrongful* as opposed to *rightful*? And if wrong on some moral account, *why* were they understandable?

As I described in Chapter 3, the Court based its conception of moral involuntariness on choice theory, which in turn is based on a non-moral understanding of responsibility and excuse. Choice theory alone cannot answer the moral questions set out above. Rather, a moralized account of external excusing conditions is required.

1. Practical Ramifications of a Non-Moral Principle of Excusing Conditions

An inquiry into the adequacy of the underlying principle of external excusing conditions is not simply a matter of academic interest. To begin, it is crucial to note that not only did the Supreme Court clarify the content of the principle of moral involuntariness in *Ruzic*, it also elevated it from a common law principle to one endowed with constitutional status. Enshrined in the Constitution, moral voluntariness is now a requirement for criminal responsibility and punishment. Moral *involuntariness* must therefore necessarily result in an acquittal. This very powerful principle immunizes an accused from conviction and punishment for what is recognized to be blameworthy and wrongful conduct. It provides a constitutional tool that can be used to "soften and redefine" the criminal defences.² Any provision of a defence, whether statutory or common law, that can result in the conviction of a person for morally involuntary action will now be held to violate s.7 of the *Charter* subject to s.1 justification. Violations of s.7 are notoriously difficult to justify under s.1 of the *Charter*, and it has been suggested that it would take exceptional circumstances to do so.³ One has to wonder, therefore, whether the government will ever be able to place policy

² D. Stuart, "'Moral Involuntariness' Becomes *Charter* Standard for Defences" (2001), 41 C.R. (5th) 37 (Annot.) at 39.

³ For example, in *R. v. Ruzic*, [2001] 1 S.C.R. 687 [hereinafter *Ruzic*] Lebel J. states that there is a "higher standard of justification for a violation of s.7".

limitations on the availability of the defences of duress or necessity or other circumstances that can be said to cause morally involuntary action. One may also ponder the implications of this principle on other areas of criminal law or even in non-criminal matters.

The Supreme Court's adoption of a non-moral principle of excuse has many ramifications of a very practical nature, which I will briefly describe below. The fact that the principle has been constitutionalized serves to aggravate these ramifications.

A. Non-Moral Approach Leads to Morally Undesirable Excuses

Placing the emphasis on whether there was factually a realistic choice other than commission of the crime fails to place any limits on the *reasons* for the commission of the crime or the moral permissibility of the chosen action. Thus a non-moral and mechanistic approach to external excuses might permit a variety of claims of excuse that we would not otherwise wish to contemplate.

For instance, an empirical theory of excuse cannot easily distinguish between choices constrained by threats and those constrained by offers. Suppose that a person in need of immediate and expensive medical treatment they cannot afford is offered the necessary money if they commit a crime. The person's life is under threat and in order to survive, they need the money being offered, but there is no other way of obtaining it in time to obtain the treatment other than to accept the offer and commit the crime. It is certainly arguable that the principle of moral involuntariness, as constructed by the Supreme Court as a non-moral inquiry into realistic choices, might lead to the conclusion that the crime was morally involuntary. To survive, this person may have as good a claim of "no realistic alternative" as the person actually threatened with violence.

We can also take a real life example. Imagine if Karla Homolka had been tried for the kidnapping, sexual assault and murder of Kristin French and Leslie Mahaffy and claimed the defence of duress. Certainly her claims of abuse and threats at the hands of Paul Bernardo

were repeatedly published in the media. She might have argued, had she gone to trial, that she had “no realistic choice” but to participate in the crimes in order to save her own life.

It is interesting to speculate about how the Court would have ruled if Ms. Homolka had made the constitutional arguments rather than Ms. Ruzic. Instead of challenging the presence and imminence requirements, Ms. Homolka would have challenged the list of excluded offences.⁴ There were glaring differences between the actions and characters of the two accused. Ms. Ruzic was a sympathetic accused, and her crimes were victimless. Ms. Homolka’s crimes were of the most horrific nature. The Court might well have ruled that Ms. Homolka should have borne the harm threatened rather than deflect the threat on to innocent third parties. It is certainly imaginable that if the Supreme Court had the same issues placed before it on the facts of Ms. Homolka’s case, the resulting judgment would have included some requirement for a balancing of harms or some other moral criterion.

These examples reveal two interconnected points. First, they confirm that a non-moral account of external excusing conditions can lead to potentially perverse results. There is indeed a need for some kind of moral evaluation of the actor’s motivations, the circumstances and available options. “No realistic choice”, even if the test is objective, is simply not a sufficient condition upon which to base our decisions about excuse. The Court’s failure to include a moral component results in a principle that seems to require an acquittal even where the harm caused was grossly disproportionate to the harm threatened, or was caused for what are morally distasteful motives. In other words, some acts that are morally involuntary may now be unpunishable, notwithstanding that they may be acts for which we would *morally* want to hold someone responsible.

Second, they strongly suggest that the Supreme Court was actually engaging in a moral balancing of harms or other moral evaluation. However, this evaluation was unstated. One can only speculate as to whether this evaluation was carried out unconsciously.

⁴ The statutory defence of duress excludes from its application over 15 separate offences, generally the most serious offences in our criminal law. If Homolka was charged as a party to the crimes, she could rely on the common law defence of duress. It is still an open question whether or not murder can be excused under duress at common law in Canada.

This reinforces the important realization that the well-recognized excuses are in actual fact morality-based. As I described in Chapter 3, the proportionality components of the defences of duress and necessity were designed to capture the kind of moral balancing that we naturally undertake in everyday evaluations when trying to resolve a dilemma of that kind. The development of these defences was based on an implicitly moral understanding of paradigmatic threat situations and of the competing interests and values involved in such situations. They declare essentially that “committing a crime in order to protect oneself from a threat of bodily harm or death is morally acceptable if the crime committed is not as bad (or not worse) than the harm threatened”. Duress, necessity and self-defence all hold self-preservation to be a moral good that trumps many other interests, such as obedience to the law and the other specific interests at stake when a law is broken (e.g. respect for the property of others).⁵ The list of excluded offences for the statutory defence of duress, and the possible exclusion of murder for the common law defences of duress and necessity⁶ also reflect a moral balancing of interests; self-preservation is an important moral value but it is not absolute. It may have to yield when other people’s lives are put at risk. This deontologic side-constraint sets some fundamental limits on the kind of trade-offs we will permit. In other words, duress and necessity still hold that human beings are ends in themselves and can not be used as a means to another persons ends. Although I do not mean to suggest that these rules and side-rules are fixed or unchangeable, they must be recognized as matters of competing moral interests and principles.

Self-preservation was determined to be a morally acceptable reason for wrongdoing long ago. It may be that this aspect of the defences is now so deeply embedded within them that it is no longer visible unless one specifically looks for it. In other words, it is possible to lost sight of the fact that the defences are based on morality. In *Ruzic*, the Supreme Court did not go to the effort of describing and defining the moral value that lies at the heart of the

⁵ To be sure, specific conditions are also attached to assist in making the moral determination. These conditions are thought to encapsulate the real world situations in which the commission of the crime is morally acceptable. However, as the *Ruzic* case itself demonstrates, sometimes the specific conditions (e.g. presence of the threatener and imminence of threat) are too narrowly conceived and themselves violate the guiding principle that demands an excuse.

⁶ It is still an unanswered question whether murder can be excused on the basis of these defences in Canada.

situational defence of duress. Rather, the Court simply takes it as an objective truth that self-preservation is a valid reason for committing crime. This may well be the case. But to the degree that we collectively believe self-preservation should render certain crimes non-culpable, it is because self-preservation is an extremely important value that takes priority over other values in certain circumstances. This requires a balancing, and the scales may come to a different equilibrium depending on the different values at stake. The Court seems to presume this element of the defence without expressly addressing it *as a moral value*, and then ultimately develops a principle of excuse that renders that moral element entirely ineffective. The Court's understanding of moral involuntariness, as an empirical principle, does not account for the proportionality component of the defences of duress and necessity and therefore arguably to render the proportionality component unconstitutional. The Court develops a principle that suggests that questions about competing values and interests can be resolved by reference to the degree of choice available.

Although the Court failed to expressly refer to the moral value of self-preservation and its preferential place in relation to other values, it is nonetheless clear that this aspect of the defence was implicitly operative in the Court's ruling. However, in the absence of an explicit mechanism, the moral inquiry is based on implicit assumptions about right conduct and the hierarchical ranking of values. The moral evaluation takes place in the shadows, out of view, where it cannot be scrutinized, reviewed or challenged.⁷

⁷ This point becomes clearer when the *Ruzic* case is compared to *R. v. Latimer*, [2001] 1 S.C.R. 3. Both cases were heard on June 13, 2000. The *Latimer* decision was released several months prior to *Ruzic*. *Latimer* involved a claim of necessity, and *Ruzic* a claim of duress. The Court has said repeatedly that the two defences are juristically similar enough that the same underlying principles apply to both. Yet the tone of the judgments is quite different. Whereas the Court seemed quite sympathetic to Ms. Ruzic, they were far less so with Mr. Latimer. The Court was able, by asserting a non-moral, empirical approach to necessity, to paint a picture of Mr. Latimer's situation as non-excused because he had another choice other than to kill his daughter, namely he could have struggled on. The Court was undoubtedly eager to avoid having to decide, on moral grounds, whether his killing his daughter out of a desire to end her suffering was excusable or not. But the Court does not explicitly decide the case on moral grounds (the s.15 arguments notwithstanding). Instead they decide the case based on the ground that Mr. Latimer had other choices. But surely morality played a role in this decision, notwithstanding the Court's attempt to avoid it as an issue. I find compelling the argument that these decisions are really based on moral considerations and judgments, and not on the empirical conditions of the choice situation. Ms. Ruzic's situation was not controversial whereas Mr. Latimer's was, for a variety of reasons. Importing drugs, even heroin, is not as serious an offence as murder. It might well be that the moral features of Ms. Ruzic's situation were relatively easily resolved in favour of committing the crimes, whereas the moral dimension of Mr. Latimer's case were not. The moral complexity of the *Latimer* case is not adequately dealt with in reference to choice. Without a moral component to the defences, it is more difficult for Mr. Latimer to

B. Non-Moral Principle Does Not Address Novel Claims of Excuse

If the underlying theory of agency and excuse is inadequate or incomplete, it may be more difficult for claims of novel excuses to be accepted. Novel claims may not fit easily into the existing conceptual framework. Moral involuntariness is as empirical and objective inquiry based on lack of choice, and may therefore be incapable of accommodating claims of excuse based on moral considerations other than “I had no choice”.

For instance, there is currently a great deal of debate surrounding whether assisted suicide should be excused. A claim of assisted suicide can be characterized as a claim of situational excuse because the excusing power (if there were to be any) depends on the external circumstances and not on any kind of internal defect in the accused. The external circumstance would be the plea of the person seeking to commit suicide (for instance to seek relief from a painful and debilitating terminal condition), and possibly also the emotional commitment between that person and the person whose assistance was requested. For many people, the issue of assisted suicide is a moral matter; a person should have the right to choose the time and circumstance of their own death and not be compelled to continue living against their wishes. However, it seems unlikely that an actor could successfully invoke the principle of moral involuntariness to assert an excuse for assisting someone to die. It would be difficult to claim that the actor had “no realistic choice” but to assist their loved one to commit suicide, for instance.⁸

Thus the non-moral nature of moral involuntariness fails to provide a mechanism for evaluating claims of excuse based for morally permissible actions. This is because there is no mechanism by which we can ask the question we would normally be concerned with in everyday responsibility ascriptions: do we want to hold this person responsible for this crime? If the principle of moral involuntariness required some examination of the moral

argue for instance that “life at all costs” is not an absolute moral good, but that “quality of life” is a preferable moral value.

⁸ The Supreme Court’s comments in *Latimer, ibid.* are instructive here. Although not dealing with assisted suicide in the sense that Mr. Latimer’s daughter did not request assistance to terminate her life, the Court suggested that Tracy’s ongoing pain did not amount to an imminent peril because it did not pose a threat to her

nature of the circumstances, motivations and actions of an actor, it might be better suited to address the truly relevant issues in a novel excuse claim.

In my view it is preferable for the underlying theory of excuse to expressly acknowledge that excuses involve “the fluid moral inquiry into the defendant’s culpability”.⁹ This does not mean that courts and legislatures will be required to accept every claim of moral action as an excuse. Rather, novel claims should be assessed on their respective merits (which should include a moral assessment). Competing moral or policy considerations may result in a court or a legislature rejecting a claim of excuse. I do not mean to prejudge any particular circumstance or claim. I only wish to suggest that claims should be accepted or rejected after consideration of all the surrounding issues and (hopefully) for sound moral and policy reasons. Claims of morally acceptable action should not be rejected (or accepted) outright based solely on a determination of whether or not realistic choice was possible.

This is also not to suggest that *moral involuntariness* is the only possible principle for testing the appropriateness of novel claims of external excuse. It is not inconceivable that faced with another set of facts, a novel claim of excuse and persuasive argumentation, the Supreme Court could theoretically develop another principle of fundamental justice that would require an acquittal. However, it is my view that the Court mishandled the opportunity presented by the *Ruzic* case. The Court should have focused on the truly pivotal issue in external excuses, namely the moral question, rather than the peripheral issue of choice, and produced a principle of fundamental justice that included an express moral component. Such a principle would have been more accurate in respect of existing excuses, and also better suited to accommodate novel claims of excuse.

life, and that the option of struggling on and trying to minimize the pain was an alternative that Mr. Latimer was obliged to pursue (at paras. 38-39).

⁹ J. Parry, “The Virtue of Necessity: Reshaping Culpability and the Rule of Law” (1999) 36 Hous. L. Rev. 397 at 414.

2. Toward a Moralized Principle of External Excuse

In the previous section, I demonstrated some of the practical ramifications of a non-moral theory of external excuses. Despite the Supreme Court's efforts at "masking and mechanizing the moral questions" by dressing them up as a questions of empirical fact, excusing the intentional commission of crime is unquestionably a matter of morality, at least in large part.¹⁰ It is not simply a fact-finding mission. This is especially so in controversial cases. Legal responsibility is:

relative to a variety of conflicting interests, purposes, and policies and cannot simply be "read off" the facts. Some kind of fault of the defendant has been officially determined to have been a causal factor in the production of a harm. But of course other factors contributed to the harm too... The question to be decided in such cases is whether the defendant's conduct was sufficiently wrongful, or whether it made a sufficiently important contribution to an outcome, to warrant ascribing responsibility for that outcome to him. The question of when a causal contribution to an outcome is sufficiently "important" for some purposes, of course, is not a question to be settled by prolonged reexamination of the facts; it can persist long after the facts are clear, especially when the purposes in question are conflicting.

In problematic cases, therefore, legal responsibility is something to be *decided*, not simply *discovered*. Should we or should we not *hold* the defendant liable for the harm? That is the proper form of the question.¹¹

The Supreme Court's conception of moral involuntariness portrays culpability and excuse as matters to be discovered by appeal to the facts. In my view, this is in error. The Court should have appreciated that responsibility (in the sense of culpability) is a matter to be decided rather than discovered. Accepting that responsibility is a matter to be decided, we are confronted with the question: *how* do we decide responsibility and excuse?

To answer this question requires us to confront the very issue the Supreme Court shied away from. The first step is to recognize that some moral component must be part of the process. In a typical duress or necessity case, a person is faced with the choice of committing a crime or suffering a bodily harm. This is a hard situation, to be sure, a moral dilemma even. The

¹⁰ *Ibid.* at 402.

¹¹ J. Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970) at 27 (emphasis in original).

actor has only two courses of action available, and each requires performing a morally impermissible action, but there are moral considerations in support of each course of action. If an actor who claims an excuse based on external circumstances faces a moral dilemma of this kind, how can her responsibility be *decided* without resort to some kind of moral theory or moral values? The second part of an answer requires actually providing some kind of mechanism for addressing the moral question.

Interestingly, the Supreme Court was prepared to accept that defences are the “product of difficult moral judgments”.¹² Yet in developing a constitutional principle of excuse based on choice, the Court left out the moral component entirely. To have taken the next step would have required the Court to endeavour to set the moral parameters according to which various claims of dilemma can be resolved adequately. This is admittedly a very difficult task, and one can easily imagine that the Court would not relish engaging in a debate about competing moral systems and an appropriate hierarchy of values and interests. Yet however much the Court might have hoped to avoid such difficult and controversial questions, in my view, it has “entered into a debate about defining harm that is unresolvable without an appeal to some trumping scale of values”.¹³ In other words, it was not enough for the Court to pay lip service to the *fact* that morality plays a role in the defences. The Court was obliged to give some content to that role.¹⁴

Below I will suggest several ways in which the Court might have taken the next necessary step in developing a moralized principle of external excuse. I do not wish to suggest that the defences must be based exclusively on a determination of morality, only that morality must play *some* part in the defences. It is a necessary, but not (necessarily) sufficient condition for excuse. Further, I do not wish to suggest that these options are ideal or that any is

¹² *Ruzic*, *supra* note 3 at para. 25.

¹³ Parry, *supra* note 9 at 420.

¹⁴ The Federal Crown argued that strong defence should be shown to Parliament in its decisions regarding excusing criminal conduct because the legislature is best placed to consider, evaluate and make the difficult value judgments involved in defining the defences (see para. 20). The Court rejected this argument, holding that the whole body of criminal law is concerned with difficult moral judgments, not just the defences. Having asserted its authority to review the statutory defences, the Court then failed to make any kind of moral judgment akin to that which the Crown asserted to be fundamental to the exercise.

particularly desirable. I offer them only as a starting point for future discussion and consideration.

A. Concerns with a Moralized Principle of Excuse

Before setting out some options the Court might have pursued, it is important to acknowledge certain difficulties associated with developing a moralized principle of excuse. On the practical side, one must confront the tension between developing a defence based on a general principle of excuse and creating specific categories of excuse with enumerated conditions.

The process of criminalization must necessarily involve a certain degree of generalization about wrongful conduct. Generalizations can not hold in every case. They will inevitably cover conduct not previously anticipated or desired; thus the need for defences. Excuses exist to account for exceptional cases where rule-based prohibitions are too rigid and inflexible. But if the excuses are overly technical and loaded with conditions of their own, they too run the risk of being inflexible and covering (or failing to cover) situations not anticipated. Our own statutory defence of duress (i.e. the presence and imminence requirements) was open to this very criticism and was partially struck down for that reason. The conditions chosen by Parliament to set the boundaries of duress were found to be too rigid and unjustly excluded certain types of situations. Indeed, we now have a principle of fundamental justice that requires an acquittal. It is likely that many of the existing elements of duress and necessity will run afoul of the principle.¹⁵

Recognizing that excuses are meant to offer a way of avoiding the rigidity of criminal prohibitions, should not excuses themselves be based on flexible principles rather than condition-based rules that are equally vulnerable to the problems of overgeneralization? The

¹⁵ It is likely that the list of excluded offences for the defence of duress will be held to violate the principle of moral involuntariness, unless the Court redefines or qualifies it. Also, there is good reason to suppose threat of bodily harm is not the only possible trigger for morally involuntary action, and that condition may also fail. Ironically, the Supreme Court in *Ruzic* reaffirmed the need for threat to bodily integrity. See S. Coughlan, "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?" (2002) 7 Can. Crim. L.R.

Supreme Court has held that no person can be punished for actions that were morally involuntary. Leaving aside for the moment my concerns with the content of that principle, one can ask whether we now need the excuses of duress and necessity at all. Why not just a defence of moral involuntariness?

This approach, while solving the problems of rigidity and overbreadth, is not without its own difficulties. Consideration of a defence based solely on a general principle leads to significant concerns related to the decision-making process. In the absence of specific conditions and requirements, emphasis is placed on the principle itself.

This raises the difficulty of arriving at some consensus about which moral principles and values should apply. Moral philosophers continue to debate both moral systems and individual moral values and principles. Many also reject the notion of universal morality and assert instead that morality is relative, either to individuals or cultures. However optimistic one is, there is surely a degree of uncertainty and disagreement that one must accept.

In addition, we must be concerned with the potential impact a moral system of excuse could have. On the one hand, there are obvious concerns with a principle of excuse that permits each individual actor to decide based on their own private morality when and how laws may be broken. We should be cautious about any approach that could lead to "universal excuse".

Equally important, leaving decisions about punishment to be decided based on a moral assessment can expose individuals to a greater risk of censure on the basis of prejudice, bias and discriminatory beliefs and attitudes. We must therefore also be diligent in consideration of safeguards that would prevent judges from deciding matters of excuse based on their own private moral codes.

There are also concerns where a jury would be involved. The jury's task is normally limited to deciding whether the facts necessary to make out a given defence have been proved (or disproved beyond a reasonable doubt). If an excuse is based on nothing more than a general

147 for a thorough discussion of the possible implications of the principle of moral involuntariness on the

moral principle, then the jury will essentially be given the task of deciding whether a particular accused *should be punished*. The jury's task is normally limited to one of fact-finding, and the conditions for responsibility and excuse are supposed to be established by the courts and the legislature.

A general principle of excuse might also therefore raise rule of law concerns. For instance, would a general principle provide sufficient notice to citizens about the conditions of liability? Would a general principle be capable of consistent and fair application by courts? These concerns must be kept in mind in developing a moralized principle of excuse.

B. Balance of Harms

A moralized principle of excuse, although difficult to develop for the many reasons cited above, is not unknown in systems of law like our own. As I have described above, our own defences of duress and necessity - at least prior to *Ruzic* - contained a moral component, namely proportionality between the harm threatened and the harm caused. The Supreme Court has maintained the proportionality element in the defences, but it has not grounded this element in the constitutional principle of moral involuntariness.

Simply, the Court could have included proportionality or balance of harms in the concept of moral involuntariness. In *Perka*, Dickson C.J. quoting Fletcher notes that there is a sliding scale between the harm threatened and the harm caused, and that determining the balance is "patently a matter of moral judgment about what we expect people to be able to resist in trying situations".¹⁶ The Court in *Ruzic* could have seized upon the proportionality element as the crucial one, rather than (or in addition to) the element of constrained choice, and produced a principle that holds that a person cannot be convicted if, under threat, their crime (the harm committed) was proportionate to the harm threatened. The outcome for Ms. Ruzic would almost surely have been the same. The harm she was threatened with - serious injury

existing defences.

¹⁶ *R. v. Perka* (1984), 14 C.C.C. (3d) 385 at 401.

to her mother - would almost surely outweigh the victimless crimes of importing drugs and possession of a false passport.

The balance of harms test derives from the defence of necessity as it is characterized as a justification. Although I do not find the distinction between justification and excuse helpful,¹⁷ in jurisdictions in which necessity is classified as a justification, it is explained as a defence based on “choice of evils” or “lesser evils”. The Model Penal Code, for instance, provides a justification for conduct “which the actor believes to be necessary to avoid a harm or evil to himself or to another...provided that ... the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged”.¹⁸ On this formulation, the harm sought to be avoided is balanced against the harm actually committed, and if the latter is found to be a lesser harm, then it is considered the “right thing to do” and thus commission of the crime is justified. The reasoning underlying this defence is that it is right to commit a lesser harm in order to avoid a greater one, and what is right can not be unlawful and must not be punished.

This is a moral defence. The balance of harms test is essentially a consequentialist equation that looks to the consequences of the threatened harm and or the harm committed, and after evaluating each, a solution is reached as to the right course of conduct. The law’s response to a crime in such situations parallels the *moral* response.

Thus the simplest solution would have been for the Court to recognize that the balancing of harms, a “matter of moral judgment”, is fundamental to excusing crimes, and to enshrine that element within the principle of moral involuntariness. Had the Court focused on the proportionality element, the result would have been a constitutional principle of excuse based not simply on choice, but on a moral evaluation of the choice. To be sure, other moral principles could be added to the utilitarian balancing. For instance, the deontologic emphasis on humans as ends in and of themselves could have carried into the principle as a side-

¹⁷ See my comments in this regard in Introduction at note 1.

¹⁸ Model Penal Code § 3.02 (proposed Official Draft 1962).

constraint that prevents the defences from being raised in defence against serious offences such as murder and sexual assault.

But instead, the Court has developed a principle of moral involuntariness that in and of itself requires an acquittal for blameworthy conduct without reference to the moral quality of the available options and specifically the chosen course of conduct. One can suppose that the Court was reluctant to inject a moral component into the principle because it would have required tough decisions to be made about which moral values and principles to include.

It should be noted at this stage that the conceptualization of necessity as a justification comes very close to being a truly moral defence.¹⁹ There have undoubtedly been many cases in which the acceptance or rejection of the defence has been controversial and gave rise to concerns about the power of judges to impose their own moral codes on defendants. The application of the defence may not always accord with the public's values or views on acceptable behaviour. Nonetheless, there is no grand unified and organized opposition to the defence on the ground that its basis in morality leads to arbitrary or capricious and unfair rulings. I believe we can assume that, for the most part, the defence is applied relatively fairly and the concerns mentioned above about moralized defences can be minimized and managed. In general, judges and juries and the public at large are fairly competent at evaluating the degree of harm and balancing relative harms against each other on a case by case basis, at least in contexts other than the highly controversial cases such as abortion, euthanasia and the like.

Even if we continue to be concerned about the ability of judges and juries to make decisions about exculpation where the moral balancing is difficult, this approach at least poses the right question. The question is one of the moral permissibility of the act. To be sure, two different juries or judges might arrive at different decisions on the same facts. We should be prepared

¹⁹ I do not mean to adopt the justification/excuse dichotomy here. I believe both justifications and excuses are concerned with the moral question "Was the actor's choice morally permissible?" I believe that necessity as a justification asks this question – and not the question "Was the actor's action the *right* thing to do?" The "right thing to do" suggests that it is a moral obligation – I do not believe justified acts are morally obligatory.

to accept this. But at least the balance of harms test frames the exculpation issue in the right way.

C. Acting for Reasons

A moralized theory of excuse such as that described above might focus directly on the moral quality of the act and would look almost exclusively to the external situation for a resolution. It would ask the question: Was the action morally permissible? If the action was morally permissible, then the actor should not be punished.

Another option might be to inject a moral element directly into the theory of responsibility and excuse.²⁰ This would be a more contextualized approach that could lead to a much broader and richer conception of excuses. It would pose the question: Should we hold this actor responsible for this crime? Although an actor may utter the words “You have to excuse me because I had no choice”, if one looks beyond the words to the true meaning conveyed, the plea is more accurately described as “You have to excuse me because *I had a good reason for doing what I did*”. Evaluating the “good reason” is a process that involves an assessment of the circumstances and a value judgment about the actor’s motivations. A moralized theory of excuse based on an evaluation of the reasons for action would more closely mirror our responsibility ascriptions in our everyday interactions. This suggestion builds on the philosophical theory of responsibility known as acting for reasons, described briefly in Chapter 1.

By analogizing moral involuntariness to physical involuntariness and placing choice at the centre of the construct, the Supreme Court collapsed “the difference in kind between choosing for a very compelling reason and not choosing at all”.²¹ But this, in my view, is an inaccurate account of our responsibility assessments when we excuse a person for a crime committed on account of external pressure. But when we refuse to punish or blame someone

²⁰ Recall in Chapter 1 I discussed the philosophical discourse on morality, and the discourse on responsibility. The balance of harms test would fit within the discussion of morality. A moralized theory of responsibility, on the other hand, would combine questions about responsibility with a moral assessment of the action.

²¹ Coughlan, *supra* note 15 at 196.

who, for instance, avoids a threat of harm by committing a crime, we are not truly excusing them because they “had no choice” but to submit to the demand. Rather, we excuse because we believe that they had a good reason for acting as they did.²²

There is indeed a very real and important difference between not choosing, and choosing for a very compelling reason. When we consider a duress or necessity case (or other case of external pressure), we evaluate the action in its proper and full context, specifically taking into account the reasons the agent had for committing the crime, and then coming to a moral judgment about the agent’s choice.

It is not normally sufficient to be told simply that an actor was compelled. We also want to know what the “compelling reason” was that caused the actor to commit the crime. Indeed, the existing situational excuses reflect our desire to exculpate “behaviour done for what are good reasons”.²³ The existing situational defences are all based on “good reasons” for wrongdoing. Duress, necessity and self-defence all consider self-preservation to be a “good reason” for committing many crimes. Self-preservation trumps the other interests at stake.²⁴

But there may be other good reasons for committing crimes as well. Without prejudging or asserting a position on any such claims, many might believe that assisting a terminally ill person in their wish to die might be a “good reason” for committing what would otherwise be viewed as a murder. Protection of property might also be a good reason to commit a crime, if the crime committed involved only damage to other property. For instance, it might be thought to be morally acceptable for someone to steal a fire extinguisher from a neighbour in order to put out a fire in her house. Certain acts of civil disobedience might also be done for what are thought to be good reasons, for instance, property crime aimed at blocking a shipment of arms to a military dictator in a war-torn country or to halt a construction project that would have devastating environmental impact on local community.

²² One might reply that “having no choice” was the good reason. In my view this is not the correct locus of excuse, as I described in Chapter 3. The good reason is better characterized as “to avoid the threatened harm”, which can be evaluated as a moral value.

²³ T. Morawetz, “Reconstructing the Criminal Defenses: The Significance of Justification” (1986) 77 J. Crim. L. & Criminology 277 at 303.

²⁴ Note the current uncertainty about whether necessity and duress can excuse murder.

Again, I do not wish to prejudge any of these claims or to suggest that the individuals own private ethics should govern the outcome of a case. My point here is that there may claims of “good reasons” for committing a crime in certain circumstances that the courts, juries and the public find acceptable. Each claim should be examined on its own merits. A principle of excuse that requires “no realistic choice” fails to provide a mechanism for evaluating these other claims.

I should also note that an open-ended approach such as “reasons for action” is likely more vulnerable to the concerns raised above about a moralized theory of excuse. Without a specific moral test (e.g. balance of harms) it would be more difficult to ensure that decisions are made fairly and equitably, and not on the basis of discriminatory or prejudicial views. I have suggested on possible model which could address the moral dimension of the excuses. Much work still needs to be done on the philosophical theory on which this suggestion is grounded. I would therefore encourage legal scholars to follow those developments closely with a view to exploring whether or not the approach can be adopted into criminal law theory and provide a basis for evaluating a variety of claims of excuse.

CONCLUSION

This thesis is concerned with excusing crime on account of the external circumstances. In the title I posed the question: what's choice got to do it? In other words, what does the notion of choice (in terms of action) have to do with our desire to excuse criminal behaviour. This is the question I have been trying to answer. The Supreme Court of Canada, in its recent decision *Ruzic*, has grounded some requirement for "realistic choice" into section 7 of the *Charter*, thereby making it a constitutional requirement for criminal liability. As a result, its absence must result in an acquittal (subject to reasonable limits under section 1 of the *Charter*). For the Supreme Court, at least until it revisits its reasons in *Ruzic*, choice has everything to do with excusing crime.

In my view, this approach is incorrect for a number of reasons that I have tried to explain in detail in the preceding chapters. What *does* choice have to do with excusing criminal conduct? Many philosophers believe that excusing responsibility (at least moral responsibility) does not depend *at all* on how we characterize the choice situation an actor was facing. Rather, what matters is whether some other person has acted unjustly in trying to manipulate the actor. Some theories of coercion that I briefly outlined in Chapter 1 take just this approach; coercion exists, and excuses the actions of A, if some other person (B) acted wrongfully. A's actions, beliefs or available choices are irrelevant. It is B's conduct that results in A's excuse.

For others, it may be that choice is one part of the responsibility equation. For instance, a constrained choice situation *coupled with* a moral assessment of the choice as acceptable leads to an excuse. This would be akin to the defences of necessity and duress in many common law jurisdictions.

I am not so bold as to offer a definitive answer to the question posed above. But I do have significant concerns with the Supreme Court's answer. The Supreme Court's conception of moral involuntariness is based on a choice theory of excuse, and thereby adopts the empirical, non-moral approach to responsibility and excuse. In talking about excuses in

terms of “involuntariness” and “hindrance by external constraint”, the Supreme Court has shifted the inquiry away from a moral assessment of the act chosen, to an empirical inquiry into the unknowable entity called “the will” and the mysterious quantification of its degree of freedom, which is very difficult if not impossible to measure or discern.

In my view, choice alone is not a sufficient criterion for making decisions about excuse. For one thing, it opens the door to a variety of “no choice” situations that we would not wish to excuse. This reveals that the Court’s emphasis on choice lacks a crucial element, namely some mechanism for making a moral assessment of the choice made. The balance of harms test that is normally part of our law of necessity and duress is a common mechanism for making this kind of evaluation. However, by constitutionalizing the choice aspect of the excuses, the Supreme Court may have rendered unconstitutional the balance of harms test. One way for the Court to remedy this problem would be to revisit its reasons in *Ruzic* and constitutionalize the balance of harms test in a future case.

Further, by emphasizing “no realistic choice” as the benchmark for why we excuse, the Court has missed the truly interesting and relevant factor in excuses. When we wish to excuse people for their actions, we are interested in *why* they did what they did, in the *reasons that motivated their choices*, and not simply their (figurative) claim that they had no choice. Indeed, Ms. Ruzic might well have proclaimed: “Please excuse me but I imported drugs into Canada and possessed a false passport because if I didn’t, my mother would have been hurt and possibly killed. That was my *reason*.” Outside a courtroom, we would evaluate that reason and make a decision about whether or not Ms. Ruzic should be blamed for having done what she did.

There are a multitude of other claims of “good reason” that we may wish to consider in the context of criminal behaviour, such as assisted suicide, certain acts of civil disobedience or even others that can not be so easily categorized such as providing medical marijuana to sick and suffering individuals or kidnapping a child from a custodial parent who is abusing them. If “good reasons” are what ground the existing excuses, then in my view it would have been preferable for the Court to constitutionalize some conception of that moral inquiry so novel

claims could be evaluated on their own merits, either as categories of excuse or on a case by case basis. To be sure, such an approach would be very broad potentially permit a myriad of claims never before accepted. This is not necessarily a drawback. But there would also be a need to ensure that individuals are not excused for crimes based on their own private codes of morality. It ought not be sufficient for an actor to say “*I think my reason is a good one therefore you must excuse me*”. Some objective standard would need to be applied to ensure that the community shared the motivation asserted by the individual.

If the criminal law is to treat agency (i.e. inculcation) as a non-moral inquiry into freedom and choice, then morality must be given a prominent and *explicit* role in the excuses. In my view, the Court could have taken this opportunity to enrich Canadian criminal law with a progressive and compassionate principle of excuse.

My objective has been the modest one of attempting to demonstrate that choice is not an adequate grounding theory for the situational excuses because it does not address the moral question. It is my hope that moral philosophers and legal theorists will develop the idea of a moralized theory of excuse further. In *Ruzic*, the Supreme Court evaded this difficult task. Excuses are about hard choices, and just like the actor who faces a dilemma, these hard choices must be confronted directly.

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