

I wish to thank Graeme Coffin for his permission to reproduce his part of the brief.

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NECESSITY AND DURESS

Graeme Coffin

The law of necessity and duress is currently an ambiguous mix of statutory dictates and common law principles that is badly in need of reform. The following discussion will attempt to resolve, in sequence, seven of the most pressing issues arising from the literature and jurisprudence on these defences, and make recommendations on the formulation of the new provisions which will be incorporated into the draft provisions appended to this paper.

The Distinction Between Necessity and Duress:

The basic premise of both defences as they exist today is that those who lack free will in the commission of criminal acts ought not to be held to account for such acts. Whether one pleads duress or necessity, the fundamental argument is the same; the accused responds to the prosecution by claiming that he had no choice, but was compelled to break the law by forces beyond his control. The traditional view is to regard duress as involving threats of harm made by other persons, whether against oneself or another, and necessity as involving threats arising out of circumstances apart from direct human action, whether against oneself or another. Section 17 of the *Criminal Code*, for example, defines duress as "threats by a person".¹⁰⁶ Necessity, as a defence at common law, has been developed in Canada to take account of types of compulsion not included within the *Criminal Code's* definition of duress. It is not altogether clear whether certain situations involving threats made by people could be included within the doctrine of necessity as developed by the Supreme Court of Canada in Perka v. The Queen.¹⁰⁷

The proposals of the Law Reform Commission of Canada on duress and necessity would seem to reserve duress for situations of threats against the person made by other people; necessity is left as a residual provision to cover threats against persons arising out of circumstances, and threats to property arising from circumstances or from "some other source", perhaps including people.¹⁰⁸ The English Law Commission settles for a straight distinction between "duress by threats" (i.e., threats made by people) and "duress of circumstances".¹⁰⁹ The American Law Institute (ALI) proposals seem to take a position similar to those of the LRCC, duress being "threats to use unlawful force against the person", choice of evils (analogous to

¹⁰⁶ *Criminal Code*, R.S.C. 1985, c. C-46, s. 17.

¹⁰⁷ Perka v. The Queen, [1984] 2 S.C.R. 232 [hereinafter Perka].

¹⁰⁸ *Supra*, note 20 in the commentary following article 3(9) at page 36.

¹⁰⁹ See *supra*, note 24, Volume I, clause 42 at 60, "Duress by Threats", and clause 43 at 61, "Duress of Circumstances".

necessity) being conduct necessary to avoid a harm or evil to oneself or another; the wording is broad enough to encompass threats made by persons against property.¹¹⁰

There is certainly a factual difference between threats made by people and threats arising out of events, but is that a sound basis for creating distinct *Criminal Code* defences? Events can be just as lethal as people and subject the actor to the same sorts of pressures; whether the accused felt himself under pressure from human wrongdoing or the force of circumstances would not seem to make much difference, inasmuch as his motivations in either situation would be exactly the same. What matters more than the source of the compulsion is the motive of the actor - was the person trying to protect herself at the expense of the innocent, or doing her best to minimize harm to the innocent in a no-win situation? The principled distinction is between threats of harm against oneself and threats against others.¹¹¹ In the former instance, one is compelled to break the law by self-interest or the instinct of self-preservation; in the latter, one intervenes out of empathy, conscience, or a sense of duty. It is recommended, then, that the General Part should incorporate provisions entitled "Duress" and "Choice of Evils". The distinction between them should be the difference between promotion of one's own interests at the expense of society, and promotion of the interests of society irrespective of personal cost.

Preservation of Property:

Section 17 of the *Criminal Code* limits the scope of duress to exclude consideration of threats made against property. The common law doctrine of necessity as expounded in *Perka* does not explicitly rule out anxiety over property as a possible source of excusable conduct, but Justice Dickson stresses "moral involuntariness" and "urgent immediate *peril*"¹¹² in a manner that suggests he conceived of necessity as an excuse when self-preservation was the motive.

The English Law Commission would not allow a defence, either under duress by threats or duress of circumstances, unless the accused sought to avoid death or serious bodily harm. The LRCC was prepared to consider avoidance of serious damage to property as grounding a defence of necessity, but not of duress. The ALI also limited the consideration of threats against property to its choice of evils provision.

A reasonable solution would be to allow threats against property to serve, generally, as sufficient compulsion within both defences, and to then rule out the exculpation of an accused who put the preservation of property, however valuable, above the life and health of other people. In other cases, the question of when to allow a defence to someone motivated by a

¹¹⁰ See *supra*, note 22, Part I, section 2.09, "Duress", and section 3.02, "Choice of Evils".

¹¹¹ Such a proposal was suggested by Rollin M. Perkins, "Impelled Perpetration Restated" (1981) 33 *Hastings L. J.* 403 at 424.

¹¹² *Supra*, note 107 at 259.

desire to salvage material goods can be answered by resort to a general requirement of proportionality. The language of the LRCC, that the harm avoided should "substantially" outweigh the harm created, is desirable for two reasons; it dispenses with the necessity to judge minute differences between harms, and prevents a successful defence in ridiculous situations which might otherwise meet the criteria.

Causing Death or Serious Harm:

The *Criminal Code* rules out duress as an excuse when the accused has caused all manner of harms, including murder and assault causing bodily harm. The doctrine of Perka, with its requirement of proportionality between the harm caused and the harm avoided, might seem to create a logical opportunity for the granting of an excuse to murder, given circumstances in which the death of one secures the survival of many. Yet the common law has always found it repugnant to weigh the relative value of lives; the classic cases on killing as an inexcusable choice are The Queen v. Dudley and Stephens¹¹³ and United States v. Holmes¹¹⁴. Whether the causing of serious injury could be judged proportionate to the saving of lives is at present an open question.

The LRCC takes the position that there can be no defence, within these sections, for those who have purposely caused death or serious bodily harm. The ALI takes a contrary view, and places no restriction on the sorts of crimes for which a defence can exist, while the English Law Commission has left the matter open in the case of murder or attempted murder.

I prefer the flexible approach advocated by the Victoria Law Commission in Australia, which recommended that, in cases of murder, it should be left open for the jury to weigh the circumstances and to decide whether the accused should be fully exculpated, partially exculpated, or judged wholly culpable in spite of any compulsion.¹¹⁵ This sort of discretion could be left to the trier of fact in cases involving the causing of serious harm as well.

Under the provisions proposed here, it would be possible for the jury to limit or reject a defence for those who have deliberately killed or injured. The question of deliberateness needs to be resolved; it seems fair to include a subjective advertence to a significant risk of serious harm or death among the states of mind which may deprive the accused of a defence. The jury should, therefore, have the option of limiting or rejecting a defence whenever the accused has purposely or recklessly caused death or serious harm.

The notion of "serious harm" also requires definition. One approach is to define "harm" or "injury" for the purposes of these defences as meaning physical injury; that is the position of the

¹¹³ (1884), 14 Q.B.D. 273.

¹¹⁴ (1842), 26 Fed.Cas. 360.

¹¹⁵ John Dixon, "A Blueprint for Heroism or a Rational and Humane Code?" (1983) 7 Crim. L. J. 132 at 137-138, discussing the recommendations of Sir John Minogue, Q.C., Victoria Law Reform Commissioner.

LRCC.¹¹⁶ This seems too restrictive. It is recommended that, for the purposes of the defences of duress and choice of evils, the definition of "serious harm" should be broad enough to include the serious psychological harm that can result from acts like sexual assault, blackmail, and forcible confinement. It will have to fall to the trier of fact to assign a proper weight to the threatened harm.

The Parameters of the Defence, and the Problem of Objectivity:

Once the draughter has decided what sorts of compulsion will ground a defence, it has to be decided what level of threats will suffice, how dire, credible, and immediate they must be, and whether to require an actor faced with such threats to display intestinal fortitude, or pursue legal alternatives to the unlawful act that seems necessary.

(i) Threshold level of the threat:

Duress, under most codes, can only be argued if the threat to the actor was of some magnitude - death, bodily harm, unlawful force against the person, and so on (the current section 17 is a typical example). Necessity at common law, though it requires "urgent immediate peril" *per Perka* (implying that certain low-order threats will not suffice), sets up a less restrictive standard of proportionality between the harm caused and the harm avoided, without specifying anything about severity. Given the incorporation of a standard of proportionality in the proposed provisions, is there any need to insist as well that the threatened harm was "serious"? Encouraging obedience to the law is a value of sufficient importance to merit the creation of a standard which discourages individuals from making their own assessment of the costs and benefits of doing so. The defence should make allowance for unlawful behaviour only when the stakes are relatively high. What amounts to a serious threat will have to be decided by the trier of fact, relying on objective criteria. This would not necessarily rule out any consideration of idiosyncratic characteristics of the accused.

(ii) Threshold credibility of the threat:

Provided the first hurdle is cleared, and an objectively serious threat has been made, should the code also require that the accused's belief in the threat be reasonable - or is it enough that the accused simply does believe that the threat is genuine and will be carried out? The LRCC opted for the objective approach, whereas the English Law Commission decided to stay with subjectivity, making it enough that the actor "knows or believes" that the danger is real, and making allowance for personal characteristics that would tend to skew the perception of the threat.

¹¹⁶ *Supra* note 20. See the definition of "harm" contained in s.1 at 11.

The ALI echoes some common law decisions in its section on duress by requiring that the threat be of a sort that a person of "reasonable firmness" could not resist.

On balance, this is an issue that is best resolved according to principles of subjectivity. At this point in the inquiry, the accused has already demonstrated a perception of threats which, if they came to pass, would be objectively "serious". This imports a sufficient element of objectivity into the assessment of whether the accused was subject to compulsion. The accused will still bear the tactical burden of establishing some rational basis for his belief.

(iii) Threshold immediacy of the threat, and the requirement of recourse to authority:

The current law, and most proposed codes, insist that the threat be immediate, whether in the context of duress or necessity. A powerful policy rationale for this exists in that the law is designed to discourage self-help, and should prompt people to seek the assistance of lawful authority whenever practical. Thus the existing *Criminal Code* provision on duress requires that the threatener be present when the criminal act is performed, while Justice Dickson in *Perka* made absence of a reasonable legal alternative one of the requirements of necessity, and required as well that the threat be one of immediate harm - "imminent risk" and "urgent immediate peril". However, some common law formulations of duress allow for threats that will only be carried out in the future.¹¹⁷

It seems obvious that those who consciously reject lawful alternatives should not be allowed a defence, but what of those persons who did not perceive an existing legal alternative or who believed that the legal alternative offered no hope of averting the harm. An objective standard, in this context, offers a reasonable compromise between the impetus to encourage people to seek legal solutions and the desire to exculpate those who would have sought a legal solution but for a perception that none was available. Further, I propose that the defence should require an immediate threat, or if not immediate, then of such a nature that the accused reasonably believes that recourse to authority will not avert the harm.¹¹⁸

As regards legal alternatives, the provisions should disqualify the accused from raising a defence only when there was an absence of a reasonable and reasonably apparent legal means to avoid the harm. "Reasonable" in this context means proportionate - the legal means should be preferred over the unlawful one only if it, too, averts more harm than it creates. "Reasonably apparent" means simply that the legal alternative would have been discernible to the person of ordinary intelligence in the same situation.

¹¹⁷ See *Regina v. Hudson & Taylor* (1971), 56 Cr. App. R. 1 (Eng. C.A.).

¹¹⁸ There will be situations in which the accused was entirely correct in believing that official intervention would not provide much help; the position of the English Law Commission, that belief in the hopelessness of seeking official help provides no excuse, however well grounded that hopelessness may have been, seems unduly harsh in light of this fact.

Proportionality and Mistake:

It seems odd that, in establishing their definitions of proportionality, both the LRCC and the Supreme Court, in Perka, settled upon an ex post calculation of the harm sought to be avoided as against the harm actually created. What if the accused intended a proportionate result, but made a mistake? It is a general premise of the criminal law that those who make unreasonable mistakes of fact are not to be found culpable when the circumstances, had they been as the accused believed them to be, would not have amounted to a breach of the law. Inasmuch as honest but unreasonable mistakes are held to be exculpatory in relation to criminal mens rea, so too should allowance be made for them within the doctrine of proportionality. Mistakes in judgement should also be treated with lenience. Terrible stress sometimes produces terrible errors, and as long as the motives of the accused were pure, the law should acknowledge that it is too much to expect that those in the throes of a crisis should always get their facts straight.

The formula, then, should require that the harm sought to be avoided by the criminal act was substantially greater than the harm sought to be created. This is a mixed subjective/objective standard; the subjective intentions of the accused will be weighed in the balance, and the jury will decide, by objective criteria, whether what was intended was a proportionate result.

Prior Fault and the Availability of the Defence:

The theory behind the defences of duress and choice of evils is that the accused is not morally culpable because she has fallen prey to circumstances beyond her control. It makes sense, then, to disqualify a defendant from raising a defence of duress or choice of evils when she did have some role in bringing about the circumstances that created the compulsion. The current s.17 blocks a defence of duress when the accused was a party to a conspiracy or association whereby he became subject to compulsion. The common law of necessity also denies a defence to those responsible for their own misfortune. The LRCC, to the displeasure of the Working Group on the General Part, makes no provision for prior fault; the Working Group wants any new provision on duress to echo s.17 (while making no mention of the problem in its section on necessity).

The ALI proposal on prior fault provides a principled answer to the problem of prior fault; one is disqualified from raising a defence when one recklessly or negligently (if negligence is a sufficient mental element to ground the offence charged) exposed oneself to the likelihood of compulsion.¹¹⁹

¹¹⁹ *Supra*, note 23 at section 2.09. The ALI's formulation of duress contains the following clause:

The defence provided by this section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defence is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offence charged.

Justification or Excuse:

Is the accused to be excused for his actions, the implication being that we disapprove of what he did but can understand the forces that compelled him to do it, or justified, implying that we fully approve of the result as being in the spirit that the law intended, though contrary to the letter of the *Criminal Code* ?

The ALI sees choice of evils as a justification; the LRCC was not sure what to do, putting both duress and necessity in a section labelled "Justifications and Excuses"; the Working Group on the General Part agreed with Justice Dickson in Perka in holding that we cannot accept, as a matter of law, that any value transcends the values embodied in the law itself, and therefore criminal conduct can never be justified.¹²⁰

As regards the argument made in Perka, it seems more sensible to view the acceptance of a justification in some circumstances as an acknowledgement that sometimes the spirit of the law is best honoured when its specific provisions are ignored. Such is not a recognition of values superior to those embodied by the *Criminal Code*. It is simply the realization that the values of the law can on occasion be subverted by a blind adherence to its dictates.¹²¹

¹²⁰ *Supra*, note 107 at 248.

¹²¹ In Perka, two main arguments are made against the recognition of a justification under any circumstances: first, that no system of positive law can recognize a principle which would justify disobedience whenever an accused felt the law conflicted with some higher social value; second, that recognizing a justification would invite the court to go beyond its proper function by second-guessing the legislature as to the relative merits of social policies underlying criminal prohibitions.

In response to the first argument, it can be noted that a justification will not be granted simply because the accused perceived a higher value which conflicted with obedience to the law. The court will evaluate the merits of the subjective perceptions of the accused, and decide whether, had he achieved what he meant to accomplish, disobedience would indeed have been the best course of conduct.

Justice Dickson's second argument can be countered by two lines of reasoning. First, when a court recognizes a justification for disobedience in a given case, this will not, generally, be because the social policy behind the broken law is under attack. If speeding is justified in a case in which such was necessary to save a life, the general policy behind setting speed limits is not condemned, but it is recognized that another, more important social policy inherent in the law - protection of life - was also at stake. The *Criminal Code* itself, by providing a defence, will recognize that there will be circumstances within which the policies of the law will clash, and the more crucial values meant to be promoted by the *Criminal Code* will actually be subverted by a blind adherence to its dictates.

Moreover, if, in a rare case, the court decides that a law can never be obeyed without doing more harm than good, then the law itself has failed the test of proportionality. Parliament, presumably, has made a mistake. If this is not for the courts to decide, then one wonders what is going on with the application of the *Charter of Rights and Freedoms*. Clearly, in our system, weighing the relative merits of the social policies behind the law is very much a role for the court - it is strange to hear the author of the Oakes test claiming the contrary.

What, then, should be justified? The problem is simplified by making the distinction between duress and necessity the distinction between self-interest and altruism. The proposal is that duress should, in general, provide an excuse; the actor decides to break the law, perhaps harming the interests of the innocent, in order to salvage his own interests. We may feel that superior moral conduct would be to accept fate and do no harm to society, but given certain circumstances we will not insist upon saintliness. However, in cases of extreme proportionality, when death or serious harm is sought to be avoided without seeking to imperil the lives or health of others, the criminal act is justified. One should not, from any perspective, be praised for a decision to sacrifice one's own life or health to avoid comparatively minor breaches of the law, such as offences against property.

Choice of evils involves an intervention to save others from harm, and should, in general, provide a justification. One who is a bystander, with the option of doing nothing, yet decides to intervene and risk criminal sanction in order to minimize harm to society at large, is not doing the easy thing. Such action should be justified, provided that the intent of the accused was to achieve a result which meets the objective criteria of proportionality.

Proportionality, however, cannot provide a complete answer. We may still have qualms about justifying actions that harm or kill the innocent, even if such can be demonstrated to have been necessary in order to save substantially greater harm.

Because there is no way to anticipate all the circumstances which will arise, and because the causing of death or serious harm is qualitatively distinct from lesser illegal acts such as the destruction of property, justification cannot be made mandatory whenever there is proportionality.¹²² As ever, the only option is to build in flexibility and trust the trier of fact to make a proper assessment of the particular circumstances.

Draft Provisions

Duress

- 1) **For the purposes of this provision, "harm" includes psychological harm.**
- 2) **Duress shall be available as a defence to any crime, whatever its severity. An accused shall be said to have acted under compulsion of duress when that accused was personally threatened by death or serious harm, or the**

¹²² It is always possible to create a nightmare scenario that horrifies even as it meets the test. Thomas Morawetz cites the example of a doctor who sacrifices one healthy patient in order to transplant eight body parts into eight other patients who would otherwise surely die. Thomas Morawetz, "Reconstructing Criminal Defenses: The Significance of Justification" (1986) 77(2) J. Crim. Law & Criminology 277 at 295.

- prospect of serious damage to property, whether the peril resulted from human threats or the force of circumstances, and
- a) the accused acted in the belief that the criminal act was necessary to prevent the impending harm or damage;
 - b) the threat was of immediate harm or damage, or, if not immediate then of such a nature that the accused reasonably believed that recourse to authority would not prevent the harm or damage; and
 - c) there was no reasonable and reasonably apparent legal alternative that would have prevented the harm or damage.
- 3) If the accused has purposely or recklessly caused death or serious harm to another person, or has attempted to do so, a case in which the sole compulsion was a threat of damage to property will not qualify as one in which a defence of duress can be raised. In other cases involving the purposeful or reckless causing of death or serious harm, it shall be decided by the trier of fact whether duress, if available as a defence, should provide
- a) a complete excuse;
 - b) in the case of causing death, a partial excuse, resulting in a reduction of a charge of murder to one of manslaughter;
 - c) in the case of causing serious harm, a partial excuse, resulting in a sentence one half of that which would normally be applied for a conviction of the offence charged; or
 - d) no excuse.
- 4) In all other cases, duress shall provide a complete excuse if the harm or damage the accused sought to avoid substantially outweighed the harm or damage the accused sought to be caused by the illegal act, with the exception that the defence shall provide a full justification if the accused sought to avoid death or serious harm.
- 5) Duress shall not be available as a defence if the accused recklessly created the circumstances in which compulsion was a likelihood, or negligently, if negligence would suffice to establish culpability for the offence charged.

Choice of Evils

- 1) For the purposes of this provision, "harm" includes psychological harm.
- 2) Choice of evils shall be available as a defence to any crime, whatever its severity. An accused shall be said to have acted under a compulsion to choose between evils when that accused acted to prevent death or serious harm to others, or serious damage to the property of others, and
 - a) the accused acted in the belief that the criminal act was necessary to prevent the impending harm or damage;
 - b) the threat was of immediate harm or damage, or, if not immediate then of such a nature that the accused reasonably believed that recourse to authority would not prevent the harm or damage; and
 - c) there was no reasonable and reasonably apparent legal alternative that would have prevented the harm or damage.
- 3) If the accused has purposely or recklessly caused death or serious harm to another person, or has attempted to do so, a case in which the sole compulsion was a threat of damage to property will not qualify as one in which a defence of choice of evils can be raised.
- 4) In a case involving the purposeful or reckless causing of death or serious harm, or an attempt to cause death or serious harm, the trier of fact shall have the discretion to decide that choice of evils provides a full justification, if the harm sought to be avoided by the accused substantially outweighed the harm sought to be caused. As an alternative, and in all other cases involving the purposeful or reckless causing of death or serious harm, or an attempt to cause death or serious harm, it shall be decided by the trier of fact whether choice of evils, if available as a defence, should provide
 - a) a complete excuse;
 - b) in the case of causing death, a partial excuse, resulting in a reduction of a charge of murder to one of manslaughter;
 - c) in the case of causing serious harm, a partial excuse, resulting in a sentence one half of that which would normally be applied for a conviction of the offence charged; or
 - d) no excuse.

- 5) **In all other cases, choice of evils shall provide a full justification if the harm or damage sought to be avoided substantially outweighed the harm or damage sought to be created by the illegal act.**

- 6) **Choice of evils shall not be available as a defence if the accused recklessly created the circumstances in which compulsion was a likelihood, or negligently, if negligence would suffice to establish culpability for the offence charged.**