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François Lareau

A NEW CODIFICATION OF NECESSITY AND DURESS

Graeme Coffin
Advanced Criminal Law
Professor Martin Friedland, Q.C.
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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. As we approach the recodification of the criminal law, and the creation of a new General Part of the Criminal Code, we have an opportunity to clear away the uncertainties and inconsistencies. The purpose of this paper is to propose a new formulation of these defences that will embody coherent and complementary principles of exculpation and liability - the hope is to create something which is both logical and principled, yet satisfactory to those who are anxious not to excuse too many. ✓

Admittedly, deciding when, and on what basis, the perpetrators of criminal acts are to be excused from liability is a tricky and frustrating business. It seems impossible to arrive at a set of black-letter pronouncements which produce fully satisfactory results; no matter how lengthy, complex, and confusingly subtle one makes the language, it always seems possible to devise an extreme scenario which makes nonsense of the attempt to achieve justice. Perhaps it was the impossibility of providing for all possibilities that led the Law Reform Commission of Canada (LROC) to propose such spartan provisions in its codification of these defences; the LROC's section on duress consists of a scant 36 words. No doubt there is a certain virtue in simplicity, especially since whatever is devised will inevitably be applied by lay juries that cannot be expected to understand a provision designed only for lawyers and philosophers. Too much subtlety is self-defeating, especially in an area of law that relies heavily upon a visceral and intuitive appreciation of justice. Nevertheless, it seems unwise to draft a new code which, by its simplicity, forecloses too many options, and prevents the consideration of mitigating circumstances in too many cases. !

Provisions of some length are required if the new code is to avoid the imposition of arbitrary and inhumane results.

The draft provisions which conclude this paper are thus rather more lengthy and involved than those advanced by the LROC - they are more akin to those contained in the Model Penal Code of the American Law Institute¹ (ALI) and the draft criminal code of the English Law Commission.² There seems to be no simple way to "cover all the bases," especially since, as the bulk of this paper will indicate, the questions raised by the defences of necessity and duress leave so many bases to cover. 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 to make recommendations on the formulation of the new provisions which will be incorporated into the draft presented at the conclusion of the 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. The philosophy here is similar to that embodied in the other general defences of insanity, intoxication, and self-defence; for one reason or another, the actor is not freely and deliberately breaking the law, either because of an inability to appreciate the consequences of his actions, or because external circumstances force the actor to do what would otherwise be culpable. Self-defence bears a particularly close resemblance to duress and necessity because the basis for the exculpation in all three cases is the same: compulsion. Self-defence, of course, contemplates a situation in which

I guess there are cases where you act to save 100 by sacrificing one innocent person. You may not have been "compelled" to act.

the guilty party is the one who is harmed; when the actor defends himself against unlawful force, the person harmed deserves what he gets. Duress and necessity are reserved for situations in which the actor has, in succumbing to compulsion, done something to harm the innocent, or has at least put the interests of the innocent at some risk by breaking the law. 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. ✓

Since compulsion is the rationale no matter which defence is pleaded, it is not immediately obvious that separate provisions for duress and necessity are required. Necessity, as a defence at common law, has been developed in Canada to take account of circumstances not contemplated by existing legislation - the types of compulsion not included within the Criminal Code's definition of duress are addressed by the doctrine of necessity. Given the opportunity to begin again from scratch, it is arguable that the more rational approach would be to eliminate illogical distinctions between varieties of compulsion. It would be possible to design a single provision which would apply to all cases, exclusive of self-defence, in which the accused argued that breaking the law was the only option available under the circumstances. If we are to retain separate defences, there ought to be some rational and logical basis for distinguishing between the types of compulsion that might have left the accused with no good choice but to break the law.

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."³ 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 the seminal case of Perka v. The Queen.⁴ The accused in this case had been forced to bring a drug-laden ship into a Canadian port by a storm at sea, which threatened to sink his vessel - a classic case of compulsion arising out of circumstances. The language of Perka, which is concerned primarily with defining the urgency of threat that the law requires, and developing the doctrine of proportionality (whereby an excuse will be granted only when the harm avoided exceeds the harm created by the criminal act), does not explicitly rule out human threats not covered by section 17 of the Criminal Code, but neither does it rule them in. It seems unlikely that Justice Dickson, the author of the decision in Perka, was concerned with this issue.

The potential for a messy overlap between the defences is perpetuated by the proposal of the Law Reform Commission of Canada. The draft provisions of the LROC seem, when one reads the commentary included in its Report 31, 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," which presumably means other persons.⁵

The proposals of the American Law Institute seem to take a position similar to that of the LROC, duress in the Model Penal Code being "threats to use unlawful force against the person" (such could, obviously, be made only by other persons), while "choice of evils" (analogous to necessity) is conduct

"necessary to avoid a harm or evil", language broad enough to encompass threats made by persons against property.⁶

The English Law Commission adopted a more strict approach of distinguishing between human threats and compulsion arising out of events. The draft code for England and Wales contains sections entitled "Duress by Threats" and "Duress by Circumstances," which are mutually exclusive; either one's choice is coerced by other persons, or by natural events which might have had some human origin, but are now quite independent of human action.⁷

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? There is, after all, a factual difference between riding a horse and riding a mule, but there exists no principled distinction between the two, any more than there is between a reaction to duress of human origin, and a response to duress of circumstances. Events can be just as lethal as people and subject the actor to the same sorts of pressures; whether the accused felt herself under pressure from human wrongdoing or the force of circumstances would not seem to make much difference, inasmuch as her motivations in either situation would be exactly the same. ✓

Rollin Perkins, in a 1981 article entitled "Impelled Perpetration Restated," proposed that duress and necessity should be combined into one defence to take account of situations in which the actor was under the sort of pressure that reasonable people could not resist. He further proposed that a second defence of choice of evils should be invented to cover cases in which the actor made a rational choice to minimize the harm that was inevitable under the circumstances.⁸ This is an idea that merits development. ✓

very attractive

Rather than concentrating on the source of the compulsion as the distinction between necessity and duress, the new provisions should focus on the motivations of the actor, as Perkins suggests. When one is personally threatened, one acts out of self-interest, or an instinct for self-preservation, and it makes sense to create a special defence that recognizes the inability of an accused to resist natural impulses when faced with certain kinds of threat. There are, however, other circumstances under which a person might feel that breaking the law is necessary - even absent threats against himself, an actor might feel compelled to intervene to assist others. Perkins felt that an accused might be exculpated for criminal acts, even absent compulsion which created irresistible impulses, if by breaking the law the harm that resulted was outweighed by the harm that would have occurred had the law been obeyed. If this notion is taken one step further, a truly principled difference between duress and necessity (or choice of evils) can be discerned: self-interest on the one hand, and altruism on the other. family?

The person who breaks the law in order to do as much as possible to preserve the lives or property of others is acting under the compulsion of a much different set of motivations than the one who acts under duress; rather than obeying natural instincts of self-interest, the person who intervenes to help others is reacting to the dictates of conscience, empathy, and a sense of duty. The actor under duress puts his own interests ahead of others', and always creates harm to society at large, even if saving himself from relatively greater harm in the process. The actor who risks criminal sanction purely to help others has minimized the harm to society at large, probably at the cost of having to defend himself against a suspicious state, and very

possibly in spite of what natural instincts were indicating was the right course of action.

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. (As will be discussed infra, this separation between duress and choice of evils also facilitates the distinction between excuse and justification.) No distinction should be made, in either provision, between duress by persons and duress of circumstances. What matters is the imminence of harm, and who is threatened, not the source of the threat.

*very persuasive
so far*

Preservation of Property

There is no consensus, either in existing law or in the proposals of reformers, as to whether the threat of harm to property can be sufficient compulsion to provide a defence for breaking the law. Section 17 of the Criminal Code limits the scope of duress to exclude considerations of threats made against property, it being necessary to demonstrate "compulsion by threats of immediate death or bodily harm."⁹ 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 (as he then was) stresses "moral involuntariness" and "urgent immediate peril"¹⁰ in a manner that suggests he conceived of necessity as an excuse when self-preservation was the motive. Perhaps threats against property, if

sufficiently severe, could be interpreted to fall within the Perka doctrine as well.

The Law Reform Commission of Canada was prepared to consider avoidance of "serious" damage to property as grounding a defence of necessity, but not of duress, which is defined in terms of "immediate serious harm"; "harm" as defined by the LROC does not include damage to property.¹¹ The American Law Institute also limited the consideration of threats against property to its choice of evils section; duress in the Model Penal Code requires the use or threat of unlawful force against the person.¹² This is simply a matter of definitions. Both the LROC and the ALI would allow an accused to raise a defence in many situations of threats to property, whether made by people or arising out of circumstances, and whether the threat was to the property of the accused or to that of another. It was merely decided not to label this sort of compulsion as duress.

The English Law Commission, by contrast, would not allow a defence, under either "Duress by Threats" or "Duress of Circumstances," unless the accused sought to avoid death or serious personal harm.¹³ No threat against property would suffice, no matter how severe, and no matter how minor the crime that was committed.

The English position is that materialistic impulses are not sufficient excuse to defy the law; undoubtedly a high-minded view, but one which perhaps lacks common sense, not to mention a proper sense of proportionality. We live in capitalist societies - our well-being, and much of how we define ourselves, depends upon the wealth and material objects we have managed to accumulate. Much of our law, including the Criminal Code, is designed to protect this property. It seems hypocritical to acknowledge within the Code the crucial

importance of possessions, and then instruct individuals that no threat to property can ever excuse a breach of the law, however trivial.

A more reasonable solution would be to allow threats against property to serve as sufficient compulsion as a general matter, within both defences, and to then carve out an important exception for cases in which the accused has caused death or serious harm to others. The new provisions should 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 desire to salvage material goods can be answered by resort to a general requirement of proportionality. The basic premise is that the accused should only be exculpated when the harm avoided outweighs the harm created by breaking the law; this basic premise was articulated by the ALI in its provision on choice of evils,¹⁴ adopted by Justice Dickson in Perka,¹⁵ and echoed by the LROC in its provision on necessity.¹⁶ (Some refinements to the calculation of proportionality will be suggested infra.) Meeting the requirement of proportionality should provide no obstacle to those who have harmed property or broken some other law (short of causing death or injury) in order to avoid death or injury; in cases in which the accused has harmed property or broken some other law (short of causing death or injury) in order to save property, it will be up to the trier of fact to weigh the relative harms. The language of the LROC, 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 it prevents a successful defence in ridiculous situations which might otherwise meet the

criteria - an accused might claim, for example, that it was entirely proper to sacrifice the neighbours' \$500,000 home in favour of her own \$550,000 home.

Death and Serious Harm

Whether or not to allow a defence when the accused has caused death or serious harm is another contentious issue, and one liable to provoke a powerful emotional response. The current law is very much opposed to a defence under such circumstances, reflecting a longstanding tradition in Anglo-Canadian jurisprudence that the maiming and killing of the innocent can never be excused (much less justified). The Criminal Code rules out duress as an excuse when the accused has caused all manner of harms, including murder, sexual assault, and assault causing bodily harm. At common law, the doctrine of necessity has never contemplated an excuse for murder; the classic cases on killing as an inexcusable choice are The Queen v. Dudley and Stephens (1884), 14 Q.B.D. 273, and United States v. Holmes (1842), 26 Fed. Cas. 360. 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; it is doubtful that necessity as it stands could be raised successfully under any circumstances involving a deliberate killing. Whether the causing of serious injury could be judged proportionate to the saving of lives is at present an open question.

There are many cases dealing with this

The Law Reform Commission of Canada takes the position that there can be no defence, either in duress or necessity, for those who have purposely caused

death or serious bodily harm. Within the comment on duress, the Commission states that "no one may put his own well-being before the life and bodily integrity of another innocent person,"¹⁷ and this reasoning is adopted in the comment on necessity. Since both duress and necessity, in the LROC's version of the defences, embrace circumstances in which the threat of harm is directed entirely towards others, the Commission is really saying that it is always immoral to weigh life and bodily integrity in the balance, whatever the circumstances.

In England, the Law Commission decided to leave the matter open. There is no indication that a defence is to be ruled out when the accused is charged with causing serious injury, but there is optional language within the sections on duress by threats and duress of circumstances which would prohibit a defence in cases of murder or attempted murder.¹⁸

The American Law Institute, by contrast, was of the opinion that a defence should never be ruled out, whatever the crime. The Model Penal Code provisions on duress and choice of evils would require full exculpation on even a murder charge, provided the circumstances met the established conditions. It was the view of the ALI that murder was to be excused as a response to dire threats that the ordinary person could not resist,¹⁹ and justified if the killing saved a greater number of lives.²⁰

There is something to be said for both of the extremes represented by the positions of the LROC and the ALI. Life is a sacred value; there is something distasteful in a decision to kill or maim in order to save oneself, and something disquieting in a reasoned choice to trade one innocent life for others. Yet duress may take the form of terrible threats that no one but the exceptionally heroic could resist, and life sometimes forces disquieting

decisions upon us; indeed much of our public policy is characterized by ugly choices between lives, and decisions on how many of the innocent society can afford to save. From time to time we send young people to war, expecting that some of them will die in order to secure some greater good for the rest of us. This we find acceptable. To then take the moral high ground, and assert that the circumstances contemplated by the defences of necessity and duress can never provide any sort of defence to deliberate killing or causing serious harm, has a certain appeal, but it also seems harsh and fundamentally dishonest. Terror can break almost anyone, and choosing between evils by balancing the relative value of human lives is part of the fabric of our social existence.

The difficulty of the policy choice in this matter is exacerbated by an insistence on the "all or nothing" approach that is typical of both the existing law and the majority of reform proposals. Black letter provisions which permit no tolerance for ambiguity, for degrees of culpability, cannot possibly provide a satisfactory disposition in all cases; depending on the circumstances, an act of killing or harming might be fully justified, or wholly inexcusable, or something in between. Nor can a simple principle such as proportionality provide a complete answer; acts may produce disproportionate results yet still, given the threats involved, be something less than fully culpable. A few examples will serve to illustrate.

Suppose a policeman, alerted to the presence of a bomb in a crowded football stadium, sees a bystander reaching for the box that contains the device, which he knows will explode the moment it is disturbed, killing and injuring hundreds. Suppose, too, that the hapless bystander is too far away to be reached in time, and cannot hear the shouted warnings of the officer

over the din of the crowd. The policeman shoots and kills the innocent but lethal bystander. Should we punish the officer?

Suppose that a hostage held by terrorists is told, after days of captivity, that she must shoot a fellow prisoner or face death by being doused in gasoline and set on fire. Terrified, she shoots the other hostage. Is her conduct utterly indefensible?

Suppose a parent is distraught enough to kill an innocent third party in order to save the life of her child. Is there a difference between this and the choice of a person who decides, at the moment of crisis, that he would rather break a stranger's leg than suffer a broken leg himself?

The LRCC would not allow a defence for any of these people. Yet many of these situations cry out for a defence. We may be content to let the man who foisted the broken leg upon the stranger suffer the full weight of the law, though it is hard to accept that this person is just as guilty as, say, the loan shark who would break the stranger's leg as a reminder that a debt remains unpaid. But what of the policeman? It seems absurd to hold him guilty of anything. What of the woman who shoots her fellow hostage? It is well and good to make lofty pronouncements about inexcusable choices, but imagine her dilemma. Worn out after days of terror, her resistance broken, faced with the prospect that once she was dead, the heartless terrorist would simply choose another victim and repeat the process - how could she be expected to resist? What of the person who kills a stranger in order to save the life of her own child? This may not be a decision we can accept, but it doesn't seem to create unmitigated culpability, either - why should the parent in this sort of no-win situation be just as guilty as the psychopath who killed for the fun of it? There has to be a better way to assess liability.

If we make proportionality our only guide, the potential for injustice remains. The policeman in the foregoing scenario would, at least, escape legal sanction, provided we allowed for the relative value of human lives to be weighed according to a basically utilitarian calculus. The hostage, however, would be punished; she traded an innocent life for her own. The parent would be found to be just as guilty as the mafia hit man; she, too, traded one life for another. Proportionality is a blunt instrument when applied to situations of enormous stress and terrible stakes. The accused who acted under duress, or a compulsion to choose between evils, may not be totally innocent, but neither is he necessarily wholly culpable. What is needed is a compromise option that would allow the court to take account of subtle distinctions between the motivations and mental states of persons subjected to a wide variety of highly coercive circumstances.

It is futile to attempt to craft a set of hard and fast rules to govern all scenarios. A better approach was 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.²¹ This sort of discretion could be left to the trier of fact in cases involving the causing of serious harm as well. Provided that threats to property are categorically excluded as a sufficient source of compulsion when the accused has deliberately caused death or serious harm, there is no compelling reason to choose a less flexible approach. Provocation, in our system of justice, provides a partial excuse to murder; it seems reasonable that threats of death or serious harm should do at least as much, and indeed more in some extreme circumstances. The trier of fact can

best decide how much mitigation of liability a given set of circumstances should provide.

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 LROC.²² This seems too restrictive. What if one is threatened by unlawful imprisonment, or irreparable damage to reputation? Is that person not under duress? What if a person under duress commits sexual assault, without causing any significant physical damage - has that person not caused serious harm? 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; this may create the risk of inconsistent verdicts, but such is preferable to the injustice of holding, for example, that a woman who was held prisoner and threatened with sexual assault was not under duress.

The Parameters of the Defence, and the Problem of Objectivity

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threats to
"loved ones".*

Duress and choice of evils, like any defence, present a number of difficult problems in defining the circumstances under which they should operate. Once the draughter has decided what sorts of compulsion will ground a defence (whether to include threats against property is a key question here), 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. Obviously, the principal criterion in assessing moral culpability is the actor's state of mind at the moment of committing the unlawful act, and it might seem, at first blush, that justice could be served by an inquiry concerned exclusively with the subjective perceptions of the accused. Once one begins a detailed inquiry, however, a number of policy concerns emerge which make an at least partially objective assessment of circumstances seem more desirable.

To begin with, what level of threat should suffice to ground a defence - how severe must the apprehended harm have been before the actor can be exculpated for breaking the law in order to avoid it? Duress, under most codes,²³ 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 s.17 is a typical example). Necessity, at common law, although it requires "urgent immediate peril" and "moral involuntariness" (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. Proportionality might be taken to provide

a complete answer - so long as we require that the accused has acted to avert substantially more harm than she created, why insist that the harm avoided was also beyond a certain level of seriousness? Why condemn people if they mean to accomplish more harm than good?

The counterpoint is the need to uphold the law (a requirement which becomes increasingly important if, as will be recommended, the law's calculation of proportionality takes account of the harm that was meant to be caused and avoided, rather than concentrating on what was actually achieved). 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. It is one thing to allow citizens to disregard the law in the face of emergencies and dire threats, and quite another to enshrine as a principle of law that citizens should be encouraged to ignore the Criminal Code whenever it seems to produce a disadvantageous result. It would expose the law to ridicule if its provisions allowed, for example, a person to steal an inexpensive item in order to avoid a hard slap across the ~~across~~^{the} face. What is needed is a threshold that makes allowance for unlawful behaviour only when the stakes are relatively high. Use of a word like "serious," which is employed by the LROC in this context, provides such a threshold, without eliminating flexibility.

What amounts to a serious threat will have to be decided by the trier of fact, relying on objective criteria. Again, it would make a mockery of the law if an accused could avail himself of a defence because the impending harm, though trivial by community standards, was serious to him. This would not necessarily rule out any consideration of idiosyncratic characteristics of the accused; if a person had a terrible fear of heights, and could prove that

being confined on the balcony of a seventieth storey apartment would create genuine psychological trauma, then such might constitute "serious harm" even though no one on the jury would be coerced by the threat of being sent out onto a comfortable balcony. But it cannot be left open to the accused to argue that, as far as he was concerned, a scratch on the paint of his prize Ferrari was serious. Thus, language such as "harm the accused perceived as serious" should be avoided.

The next problem is 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? This issue boils down to a decision on whether we should punish the weak and the stupid, people who would unreasonably misperceive the facts, or panic in the face of threats that others among us might resist, in spite of their seriousness. One can imagine a healthy young man, threatened with death by an old woman with a knife - should we demand that the man defend himself? Suppose he has been stabbed before, and is deathly afraid of knives - does that make a difference? This sort of problem might arise in a situation of choice of evils, as well as duress - suppose an obvious lunatic, armed with nothing but a soggy shoebox, grabs a passerby, claims he has a bomb, and threatens to blow up the neighbourhood unless the passerby steals something for him. Do we punish the passerby for honestly believing the transparent nonsense of the lunatic?

The LROC has opted for an objective approach, the wording of the provision on duress being "No one is liable for committing a crime in reasonable response to threats."²⁴ The American Law Institute echoes some

common law decisions²⁵ in its section on duress by requiring that the threat be of a sort that a person of "reasonable firmness" could not resist.²⁶ The English Law Commission, by contrast, 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.²⁷

On balance, this is an issue that is best resolved according to principles of subjectivity. The criminal law, ideally, is meant to punish moral culpability, malicious intent or an immoral departure from community standards; it does not seem proper to brand those who are merely gullible, or less than heroic in the face of threats, as worthy of criminal sanction. 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.

If it is enough that the accused believed an unlawful act was necessary to avoid the threatened harm, it does not necessarily follow that the floodgates will open to a torrent of bogus defences based on reactions to fabricated or unconvincing threats. The accused will still have to satisfy the court that she did, in fact, believe the threat - a tall order when the threat was fanciful or unlikely to be carried out on any dispassionate evaluation of the circumstances. Recall the example of the passerby accosted by the lunatic with the soggy shoebox; one can well imagine the Crown Attorney, incredulity in his voice, asking the accused if he really expects the court to accept that he believed the person had a bomb in there. The

accused will still bear the tactical burden of establishing some rational basis for his belief. ✓

A comparison can be made here to reform proposals on the law of self-defence. The LROC provision on "Defence of the Person," for example, declares that "no one is liable if he acted as he did to protect himself or another person against unlawful force by using such force as was reasonably necessary to avoid the hurt or harm apprehended."²⁸ What matters is that harm was threatened and believed; the force used in response must be "reasonable," but this means reasonable given the nature of the harm that was subjectively apprehended, not given the harm that objective analysis suggests was actually in the offing (the provision does not say "to avoid the hurt or harm reasonably apprehended"). A person threatened with what he was told and believed was a gun would not, then, be deprived of his defence simply because the ordinary person, in a situation of calm, would have discerned that the weapon was a toy. This is a sensible approach, and it makes sense to extend it to the defences of duress and choice of evils as well. ✓

The final problem concerns the immediacy of the threat, and the possible presence of legal alternatives to responding to compulsion by committing unlawful acts. The policy concern here is that the law should discourage self-help, and encourage people to seek the assistance of lawful authority or some other legal means of avoiding the harm whenever possible. Those who reject a lawful alternative, it can be argued, do not deserve a defence. 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."²⁹ The existing Criminal Code provisions on duress, and most reform proposals, also

stress a requirement of immediacy, section 17 going so far as to allow a defence only when the threatener was present when the crime was committed. However, some common law formulations of duress allowed for threats that will only be carried out in the future.³⁰

It seems obvious that those who consciously reject lawful alternatives should not be allowed a defence, but the problem is more complicated when dealing with people who did not perceive a legal alternative even though one existed, or who believed that the legal alternative - such as seeking the aid of authority - 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.

As for immediacy, it is proposed 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. 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.

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. There is no sense in punishing someone for failing to choose a legal alternative that she could not have been expected to discern.

Proportionality and Mistake

It seems odd that, in establishing their definitions of proportionality, both the LROC and the Supreme Court of Canada, in Perka, settled upon an ex post calculation of the harm sought to be avoided as against the harm actually created. The language of the LROC, borrowing from Perka, requires that the harm avoided "substantially outweighed the harm or damage resulting from the crime."³¹ In the majority of cases, such would probably present no difficulties, but there may be situations in which the accused chose an admittedly illegal course of conduct which ended up causing much more harm than he anticipated or would have desired.

Suppose a worker in a bakery notices a gas leak in one of the ovens. There is no time to get help - he knows from the smell in the air that substantial quantities have leaked, and he fears that an explosion is imminent. In order to prevent this, he does a number of things that would otherwise be culpable - he breaks down the locked door to the room containing the shut-off valves, and cuts off the gas, ruining the day's output of baked goods, still in the ovens. Well and good - a simple case of choice of evils. Now suppose that the shut-off valves are mislabelled, and by turning them to the position marked "off" the worker actually turns them full on. The explosion thus occurs. By the Perka / LROC formula, the accused has no

defence, since he created more harm than good with his unlawful acts, in spite of his intention to accomplish the opposite. This would obviously be a harsh and undesirable result; the formulation of proportionality ought to contain some provision to excuse mistakes and unintended consequences.

The question then becomes, should all mistakes be excused, or only those that were objectively reasonable? It is easy to accept that the worker in the foregoing scenario should not be culpable, since he had no way of knowing that his actions would produce the unfortunate result. What of the person who makes a far less sympathetic miscalculation - someone who steals clearly labelled gasoline and throws it on a fire, thinking it to be water, or someone who breaks down doors and turns off the gas even though there is no reasonable basis for perceiving a leak? As distasteful as it may seem, there is no *doesn't seem distasteful to me* principled reason to subject such persons to criminal liability. Unreasonable and stupid the accused may have been, but this, on its own, does not amount to guilt. 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. In such a case there is no mens rea to commit the offence. In the scenarios presented here, the accused understands enough of the factual circumstances to satisfy the mental element of numerous offences, and classic mistake of fact doctrine would not provide a complete excuse (or else there would be no need to resort to a defence of duress or choice of evils). Nevertheless, there was a mistake of fact concerning circumstances affecting the consequences of the illegal acts. 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.

Mere mistakes of judgement should be treated with lenience as well. It might be that, even absent any mistaken perceptions or assumptions, a person in the midst of urgent circumstances could select a course of action that hindsight reveals to have been misguided. Surely this is understandable. We are dealing, after all, with decisions made under pressure, in conditions of at least perceived crisis. Whether the threat was against the accused herself or entirely directed at others, the decisions that were made were liable to have been anything but cool and dispassionate. Terrible stress sometimes produces terrible mistakes, 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, and think before they leap.

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.

great!
stuff

Prior Fault

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; a crisis has been foisted upon her by some outside force, human or natural, and now she has to decide what to do to avert harm, the

threat of which has nothing to do with anything she has done. 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. Those who are the architects of their own misfortune should have the fault that attaches to the creation of the dilemma transferred to the choice that must then be made - choices which would otherwise be faultless.

Section 17 of the Criminal Code blocks a defence of duress when the accused was a party to a conspiracy or association whereby he became subject to compulsion. The idea here is that one picks his associates, and thus has to live with his choices. Someone who joins the mafia, for example, does so knowing that in time he will probably be asked to do something illegal, on pain of death should he refuse - such a person should be denied a defence of duress when that time comes. In a sense, the accused in that situation chose to be under duress.

However, the wording of s.17 is, arguably, not subtle enough in that it simply says the accused is disqualified when party to an association "whereby the person is subject to compulsion," without making any reference to a conscious decision to risk coming under duress. On the bare wording, someone who joins a club not knowing that it has criminal purposes, and will coerce its membership into criminal acts, will be caught by the provision as well. Presumably, such situations will be extremely rare - few people join the mafia, or violent youth gangs, without knowing what they are about. Yet one can imagine a situation in which petty thieves decide to rob a convenience store, one of them acting in the belief that their weapons will not be loaded, and that they will bolt at the first sign of trouble. If it turns out that

the other was lying, and is, in fact, a psychopath who hands his partner a pistol with one round in it, points a loaded .45 at his head and orders him to shoot the poor fellow behind the cash register, should the availability of a partial excuse be denied? True, the actor made a conscious decision to do something criminal, and is not an innocent bystander like the classic victim of compulsion. Yet he has made no conscious choice to risk coercion, and it doesn't seem fair to impute such an intent whenever the actor was part of a conspiracy or association whereby he became subject to compulsion, simply because he is not wholly innocent of all criminal intent. He may well be guilty of robbery - but is he guilty of murder?

One option to circumvent this problem would simply be to deem prior fault irrelevant. Justice Dickson, in Perka, disapproved of this approach,³² but the draft provisions put forward by the LRCC - much to the displeasure of the Working Group on the General Part³³ - make no reference to prior fault at all. Ignoring degrees of blame would certainly simplify the problems of drafting a new provision, but it doesn't seem to create an entirely just result. In many cases, those who face compulsion will be at fault in some way, and intuitively, one reviles at the notion of allowing a defence for someone who, say, deliberately starts a brushfire and then claims a defence of choice of evils to the unlawful acts necessary to prevent it from spreading to other people's property. Yet, we wouldn't want to deny a defence to an accused in a similar but morally distinct situation - such as someone who deliberately started a fire, but did so in the reasonable expectation that it would not spread (perhaps he simply lit some newspapers in his own fireplace). It is not merely the factual creation of the crisis that should create

culpability, but moral blameworthiness, a subjective advertence to the risk of compulsion, or gross negligence in bringing such about.

The American Law Institute has arrived at an elegant solution to this problem, and it is recommended that the ALI provisions on prior fault be adopted within the new Canadian provisions. Within the ALI formulation of duress (but curiously, not within choice of evils) appears 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.³⁴

A few hypothetical examples will show how this provision would impose liability on the accused if it was adopted within both the duress and choice of evils provisions being proposed here.

In respect of a defence of duress, the mafia member would obviously be disqualified, as having recklessly placed himself in a situation in which it was probable that he would be subjected to duress (assuming we aren't dealing with someone who can establish a level of utter naivety sufficient to convince the court that he thought the mafia was just a social club, an unlikely enough scenario). The person who recklessly starts a brush fire, and then finds herself under duress of circumstances when it threatens her own home, would also be disqualified for a defence to any criminal acts necessary to save her property. She understood the risks and can take her punishment. If, however, the fire was not started recklessly, but in the mistaken belief that it posed no threat, yet the eventual spread of the danger was the result of criminal negligence, the liability of the accused would be slightly different. Suppose

she broke into a neighbour's home in order to get a fire extinguisher and put out the fire before it burned down her own home. Duress (of circumstances) might provide a defence to crimes requiring subjective mens rea, such as theft, or break and enter. (The accused would still have to contend with the disqualifying effect of the presence of reasonable and reasonably apparent legal alternatives, such as calling the fire department.) Suppose, though, that when faced with the locked door at the neighbour's house she decided to blow the entrance open with a shotgun, wounding somebody inside who was sleeping on the couch, oblivious to the mounting crisis. Although subject to duress of circumstances, the accused could still be charged with criminal negligence in the wounding, because she was negligent in the spread of the fire.

If, by contrast, the accused was not negligent or reckless in any way, though she may have started some sort of fire, she might conceivably be excused for wounding the sleeping occupant. She would, of course, have to satisfy all the other elements of the defence, including absence of legal alternatives and, for the purposes of proportionality, an honest belief that there was no one in the house when she opened fire with the shotgun.

Similar scenarios can be worked out in respect of choice of evils. Suppose someone plays a foolish prank on a friend, creating a life threatening injury - perhaps the friend now lies bleeding to death on the floor. Suppose, as well, that the only way to save the friend's life is to steal a neighbour's car, which the prankster knows has faulty steering and is dangerous to drive. On the way to the hospital, owing to the steering problems, he runs over a pedestrian. If recklessness can be proven in the commission of the prank, by the establishment of a subjective advertence to the risk of creating the

injury, then the accused can be convicted of theft as well as for running over the pedestrian. If the prankster was not reckless, but negligent in causing the injury, choice of evils would provide a defence to the theft charge, but not to a charge of criminal negligence in the operation of a motor vehicle.

The ALI solution provides a principled answer to the problem of prior fault. The accused should be deprived of a defence to crimes requiring subjective mens rea only when there was some subjective fault in creating the crisis in the first place. If the fault was negligent, the crisis being the product of actions betraying a marked and substantial departure from reasonable behaviour, then there is no subjective mens rea to be transferred to crimes committed under the subsequent compulsion, but there is still criminal negligence. The accused should be convicted of crimes requiring the same degree of fault as was, in fact, inherent in his actions at the outset.

Excuse or Justification?

Complicated material - I can see why the LRC avoided it. Still, the ALI proposal looks good.

One of the stickiest problems in this area of the law is deciding what to call the exculpation provided by the defences. 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?

Many actions are obviously the subject matter of excuse, whether complete or partial. Someone who deliberately harms or kills under duress has put his own life and health above the lives and health of the innocent, and we surely do not approve of that. Perhaps the duress was severe enough that we

understand why the accused did not resist, but it still seems right to indicate that we feel that true heroism would have produced a different outcome. We simply won't insist that people be heroic.

Yet what of the person who kills or harms one in order to save the lives of many? This is a much more difficult case, since on the one hand, by a purely utilitarian calculus, the best result for society has been achieved, while on the other, an innocent person has been killed or deprived of his health, a result which seems inherently unjust.

What of the person who destroys someone else's property in order to save her own property? Perhaps the damage caused is relatively minor, and the damage saved very great, a proportionate result. Yet the actor has placed her own interests above those of an innocent bystander, when, arguably, the superior moral choice would be to accept fate and let the innocent alone.

Someone who destroys someone else's property in order to save a much greater harm to the property of other people seems to be in a different position from the one who was acting in his own interest; again, the best result for society has been achieved.

Great minds has wrestled with this problem for a great many years. In Perka, Mr. Justice Dickson decided that even if the requirements of proportionality were met, breaking the law could never be justified, in part because a system of positive law could never recognize the right of citizens to decide that there are values superior to those embodied by the law itself.³⁵ The LROC, in its draft criminal code, could not, apparently, decide what to do, placing both duress and necessity in a section labelled "Justifications and Excuses." The ALI, by contrast, felt that proportionality was a principle that implied justification, and therefore labelled all

proportionate choices of evils as justified, including deliberate harming or killing, whether the accused was averting harm to himself or to others.³⁶

There is no entirely satisfactory answer to this problem, and admittedly this is, from the standpoint of the offender, one of the least important issues surrounding the debate. Whether we merely excuse, or fully justify, is not going to have much effect on the calculations of people in the midst of the crisis, and, so long as the disposition of their case is not affected, it probably won't matter much to them after the fact either. Yet the law does have a role to play in the characterization as well as the punishment of behaviour, and from a philosophical point of view, it is important to decide what we mean. Those who are merely excused still have some measure of stigma attached to them; the law says "You did not make a heroic choice, we wish you could have done better, but we can forgive you for being ordinary." This should not be the message we send, if what we really mean is that the accused, in fact, made the best of a bad situation and put society in the best possible position by intervening.

At this point, it is appropriate to respond to the concerns of Justice Dickson. 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.³⁷

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 test³⁸ claiming the contrary. Thanks to Justice Dickson, the courts judge the proportionality of the law on a frequent basis. Presumably, any criminal sanction which cannot, under any circumstances, prevail over a defence of justification would also have little hope of withstanding Charter analysis.

If choice of evils, as a defence, directs the court's attention to the basic unconstitutionality of the law, so be it.

If justification is not a concept to be rejected in principle, this still leaves the problem of what to justify. If we make the distinction between duress and choice of evils the difference between saving oneself and intervening to save others, the difficulty in choosing between excuses and justifications is somewhat simplified. In general, one should not put one's own interests above the interests of others. Just as one should not harm or kill the innocent in order to save oneself from harm or death, neither should one destroy the property of the innocent in order to save one's own property. True, a proportionate result may have been achieved; one may have averted more harm from oneself than was caused to others. But proportionality does not provide a full answer. The fact remains that the innocent, who need not have suffered any harm at all, were harmed because of the decisions of the actor under duress. Granted, the actor may well have been innocent herself, when the crisis developed, but that innocence dissipates the minute the decision is made to favour oneself over others. We may well understand, and can provide an excuse, but superior moral behaviour, true heroism, would have been to take what was coming and do no harm to others.

Of course, this reasoning breaks down at the extremes. The hackneyed example is the one of the mountaineers who find themselves freezing to death in the craggy heights, and break into a cabin in order to save their own lives. Would we really wish to say to them that the heroic choice would have been to die, rather than to trespass? Surely not. Such a choice would be foolishness, pointless martyrdom. No one, not even the owner of the cabin, would want a person to freeze to death on the doorstep rather than go inside.

The reasonable compromise, then, is to formulate duress such that, in general, it provides an excuse, but 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, as defined here, 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 actions, unlike those performed under duress, do not come naturally in response to instinct. On the contrary, an actor who chooses to break the law in order to accomplish the greater good may well be fighting the impulses of base instinct, and responding to a much higher order of motivation: compulsion of conscience, empathy, and altruism. When the urge to do what is right overwhelms the instinct to take no risks that are not necessary for self-preservation or self-advancement, that is courage. In general, it 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. This is not to say that causing death or harm can never be justified. Such a contention is untenable.

In the previous discussion concerning the preliminary question of whether any sort of defence, even an excuse, should be allowed in a case involving death or serious harm, it was noted that balancing the relative value of human lives is a large part of what society, as represented by government, must do as a matter of course. We do not usually feel that the difficult decisions made by those who must set social priorities require an excuse. Any choice, however distasteful, must be justified if it needs to be made to accomplish a greater good. It is on this basis that government can commit young people to battle.

There are good reasons for making the entitlement to balance lives a monopoly of the state. We do not, under normal circumstances, trust individuals to make such decisions. But in situations of extreme emergency, when something must be done to avert even greater harm, and the state is not in a position to help, individuals must decide. If we declare, in our criminal code, that the sacrifice of the innocent is always basically immoral, we are not being true to ourselves. So long as the requirements of proportionality are met, it ought to be open to the trier of fact to decide whether the accused made a proper, if regrettable, choice.

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. 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.³⁹ As ever, the only option is to

interest;
example-

build in flexibility and trust the trier of fact to make a proper assessment of the particular circumstances. Even given proportionality, it has to be possible for the jury to refuse any excuse at all, when the lives or well-being of the innocent have been destroyed. A choice of evils, even though intended to arrive at a greater good, may amount to an appalling departure from acceptable conduct, and there is no way to determine all cases in advance; in the end, the decision will have to be based on the moral intuitions of those who sit in judgement.

Did I miss any
discussion of using
duress to reduce
penalty of perjury?
manslaughter?
I see it on p. 37!
But your discussion
on p. 14 doesn't
mention manslaughter
or the $\frac{1}{2}$ the penalty
provision - or
and I missed it.

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 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 *interest of*
 - 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.

*Can you kill if
you are threatened
with 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.

ENDNOTES

1. See The American Law Institute, Model Penal Code and Commentaries (Philadelphia: The American Law Institute, 1985) Part I, section 2.09, "Duress", and section 3.02, "Choice of Evils". Both provisions are lengthier than those advanced by the LRCC, particularly "Duress".
2. See The Law Commission, A Criminal Code for England and Wales (London: Her Majesty's Stationery Office, 1989) Volume I, clause 42, "Duress by Threats", and clause 43, "Duress by Circumstances". Each provision runs to several subsections, six in the case of "Duress by Threats".
3. Criminal Code, R.S.C. 1985, c. C-46, section 17 states that "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", given that a number of conditions are met.
4. Perka v. The Queen, [1984] 2 S.C.R. 232 [hereinafter Perka].
5. The Law Reform Commission of Canada, Report 31: Recodifying the Criminal Law (Ottawa: Law Reform Commission of Canada, 1987) in the commentary following article 3(9) at page 36.
6. ALI, supra, note 1.
7. English Law Commission, supra, note 2. date?
8. Rollin M. Perkins, "Impelled Perpetration Restated" 33 Hastings L. J. 403 at 424.
9. Supra, note 3.
10. Perka, supra, note 4 at 259.
11. LRCC, supra, note 5. See section 3(9), "Necessity", and the definition of "harm" in section 1.
12. ALI, supra, note 1. See section 2.09, "Duress", ss.(1).
13. English Law Commission, supra, note 2.
14. ALI, supra, note 1, section 3.01, see "Choice of Evils", ss.(1)(a).
15. Perka, supra, note 4 at 252.
16. LRCC, supra, note 5; see section 3(9)(a)(ii).

17. Ibid. See the commentary following section 3(8).
18. English Law Commission, supra, note 2. See clause 42(2) and clause 43(3)(a).
19. ALI, supra, note 1. See the comment under section 2.09 at 375-377.
20. Ibid. See the comment under section 3.02 at 15.
21. John Dixon, "A Blueprint for Heroism, or a Rational and Humane Code?" 7 Crim. L.J. 132 at 137-138, discussing the recommendations of Sir John Minogue, Q.C., Victoria Law Reform Commissioner.
22. LRCC, supra, note 5. See the definition of "harm" contained in s.1.
23. The Model Penal Code, supra, note 1, section 2.09 requires in ss.(1) "the use of, or the threat to use, unlawful force against his person or the person of another." The draft code of the LRCC, supra, note 5, section 3(8), requires "threats of immediate serious harm to himself or another person." The draft code of England's Law Commission, supra, note 2, requires in both clause 42(3)(a)(i) and clause 43(2)(a) that there be threats of "death or serious personal harm to himself or another." See also s.17 of the Criminal Code, supra, note 3.
24. LRCC, supra, note 5, section 3(8).
25. See R. v. Graham, [1982] 1 W.L.R. 294 (C.A.).
26. ALI, supra, note 1, section 2.09(1).
27. English Law Commission, supra, note 2. See clause 42(3)(b) and clause 43(2)(b).
28. LRCC, supra, note 5, section 3(10).
29. Perka, supra, note 4 at 259.
30. R. v. Hudson and Taylor (1971), 56 Cr. App. R. 1 (C.A.).
31. LRCC, supra, note 5, section 3(9)(a)(ii).
32. Perka, supra, note 4. Dickson J., at 259, concluded that mere negligence or the presence of intent to perform some criminal act should not disentitle the accused to a defence. However, negligence or recklessness in the creation of the emergency would deprive the defendant of an excuse, Dickson J. saying, at 257, that

if the necessitous situation was clearly foreseeable to a reasonable observer, if the actor contemplated or ought to have contemplated that his actions would likely give rise to an emergency requiring the breaking of the law, then I doubt whether what confronted the accused was in the relevant sense an emergency. His response in that sense was not involuntary.

33. The Working Group on the General Part, Toward a New General Part for the Criminal Code of Canada (Ottawa: Department of Justice, 1991) at 97.

34. ALI, supra, note 1, s.2.09(2).

35. Perka, supra, note 4 at 248.

36. ALI, supra, note 1. See the comment following section 3.02 at 15. Section 3.02 is entitled "Justification Generally: Choice of Evils."

37. Perka, supra, note 4. At page 248, Justice Dickson says:

With regard to this conceptualization of residual defence of necessity, I retain the scepticism I expressed in Morgentaler, supra, at p.678. It is still my opinion that "no system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value." The Criminal Code has specified a number of identifiable situations in which an actor is justified in committing what would otherwise be a criminal offence. To go beyond that and hold that ostensibly illegal acts can be validated on the basis of expediency, would import an undue subjectivity into the criminal law. It would invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions. Neither is a role which fits well with the judicial function.

38. R. v. Oakes (1986), 24 C.C.C. (3d) 321 (S.C.C.).

39. T. Morawetz, "The Significance of Justification," 77(2) J. Crim. Law & Criminology 277 at 295.