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## Canadian Contractual Duress and Criminal Duress: "Irrational, Anomalous, Perverse, Illogical and Fundamentally Wrong" or Just Misunderstood?

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## CANADIAN CONTRACTUAL DURESS AND CRIMINAL DURESS: “IRRATIONAL, ANOMALOUS, PERVERSE, ILLOGICAL AND FUNDAMENTALLY WRONG”<sup>†</sup> OR JUST MISUNDERSTOOD?

FRANCES E. CHAPMAN\*

### ABSTRACT

*The contractual and criminal bases for duress in Canada, the United States, and the Commonwealth are currently in disrepair. Contract law serves to enforce binding agreements that are reflective of our choices, but duress threatens to nullify that very purpose. In addition to the contractual basis of duress, the law of duress has developed from a criminal defense perspective, but it has been difficult to apply. Controversy surrounds the defense particularly where the threats involve the sacrifice of an innocent person. Only by examining the philosophical, historical, and current state of this defense in the civil and criminal context can one begin to repair and reformulate the defense of duress for future application.*

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<sup>†</sup> R. v. Ruzic (1998), 41 O.R. 3d 1 (Can. Ont. C.A.), supp. reasons 165 D.L.R. (4th) 574 (Can.), (per Laskin J.A., referring to criticisms of Fish J.A. in R. v. Langlois (1993), 54 Q.A.C. 87 (Can. Que. C.A.)).

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## INTRODUCTION

The contractual and criminal bases for duress in Canada, the United States, and the Commonwealth<sup>1</sup> are currently in disrepair on certain issues

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1. For the purposes of this Article, the Commonwealth includes the United States, Canada, New Zealand, Australia, England, and a brief reference to India.

after a long and sordid history. For that reason, there is a real need to examine the state of the duress defense in both realms. Contract law is more than an allowance to make binding agreements reflecting our choices; contract law also protects those who do not make agreements of their own free will. Contract law responds to duress because to “enforce agreements made by fraud or coercion would nullify the point of allowing binding agreements in the first place.”<sup>2</sup>

Historically, contractual duress was applied in narrowly circumscribed situations.<sup>3</sup> A contract could only be vitiated if it had been “procured as a result of actual or threatened physical violence (‘duress of the person’)” obtained through aggression or threat of crime or tort.<sup>4</sup> For example, individuals could avoid a contract in 1642, according to Lord Coke, if there was a “fear of losse of life, 2. of losse of member, 3. of mayhem, and 4. of imprisonment; otherwise it is for fear of battery, which might be very light, or for burning of his houses, or taking away, or destroying of his goods or the life, for there he may have satisfaction in damages.”<sup>5</sup> Yet, even in these cases, recovery occurred for “duress of goods” only on a restrictive basis.<sup>6</sup> Duress of goods was increasingly recognized by the Commonwealth as well as U.S. courts, and the duress defense began to develop more fully.<sup>7</sup> This recognition also extended to the more inclusive concept of “economic duress” as well as “business compulsion.”<sup>8</sup> Yet, defining the test for contractual duress has encountered difficulties.

In addition to the evolution of duress from a contract law standpoint, the law of duress has also developed from a criminal law basis. The goal of criminal law is to “create a set of rules that best implements our collective sense of justice.”<sup>9</sup> But, when it comes to the criminal defense of duress, centuries of development have failed to produce a workable basis

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2. ALAN WERTHEIMER, COERCION 20–21 (1987).

3. CHRISTINE BOYLE & DAVID PERCY, CONTRACTS: CASES AND COMMENTARIES 710 (6th ed. 1999).

4. *Id.* at 710.

5. See E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 432 (1990) (citing Lord Coke, E. Coke, Second Institute 482–83 (1642)). This list was interpreted by courts many years later, see *Rubenstein v. Rubenstein*, 120 A.2d 11, 14 (NJ) as “(1) For fear of loss of life; (2) For fear of loss of limb; (3) For fear of mayhem; (4) For fear of imprisonment.”

6. BOYLE & PERCY, *supra* note 3, at 710.

7. Herbert Fingarette, *Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape*, 42 WASH. & LEE L. REV. 65, 86 n.55 (1985).

8. FARNSWORTH, *supra* note 5, at 433. For the purposes of this paper, duress in its more physical and overt form will be discussed. For a discussion of business compulsion see *Pharmacy Care Systems Ltd. v Attorney General* [2004] CA 198/03 16 Aug. 2004, para. 92 (N.Z.).

9. Paul H. Robinson, *Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 1 (1985).

capable of supporting a common law or codified version of the defense.<sup>10</sup> Over time, the defense of duress (also called compulsion, compulsion by threats, or coercion)<sup>11</sup> was conceptualized as a full defense in criminal law, as a “concession to human infirmity in the face of an overwhelming evil threatened by another.”<sup>12</sup> Controversy, however, surrounds the defense where the threats involve the sacrifice of one innocent life to save another innocent life creating a “love-hate relationship” with the defense in the criminal law context.<sup>13</sup> In other words, our emotional reaction to duress is linked to our feelings about those who “allow” themselves to be coerced.<sup>14</sup> Joshua Dressler notes that when we are concerned about locating “victims and villains,” it is hard to classify someone who has succumbed to a threat.<sup>15</sup> He offers the classic example of an individual with a gun to his head who agrees to kill a child to escape death, and Dressler questions whether this person is a victim or a villain whose “aversion to dying was greater than his aversion to killing?”<sup>16</sup> These are difficult questions with no simple answers.

The law of criminal duress has become even more complicated in Canada with the advent of the *Canadian Charter of Rights and Freedoms* in 1982 (*Charter*).<sup>17</sup> Generally, if a Canadian court decides that a case deals with an issue under the Canadian Constitution, it must then determine if a guaranteed right of all citizens has been infringed upon. The *Charter* sets out the “fundamental freedoms” of all Canadians.<sup>18</sup> In criminal law, the courts routinely review the definition of criminal *offenses* to ensure conformity with the *Charter*; however, when examining *Charter* challenges to *defenses*, the cases are rare and often unsuccessful.<sup>19</sup>

10. *Id.* at 1 n.2.

11. See J. LI. J. Edwards, *Compulsion, Coercion and Criminal Responsibility* 14 MOD. L. REV. 297, 297 (1951). The terms coercion and duress will refer to the same legal principle. For a further discussion, see Fingarette, *Victimization*, *supra* note 7.

12. DON STUART, *CANADIAN CRIMINAL LAW: A TREATISE* 462 (4th ed. 2001). A “full defense” in Canadian criminal law may result in a complete acquittal in contrast to a “partial defence” which goes either to part of the action or to mitigation rather than resulting in a full acquittal.

13. Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1331 (1989).

14. *Id.* at 1332.

15. *Id.*

16. *Id.* at 1332 (citing Alan Brudner, *A Theory of Necessity*, 7 OXFORD J. LEGAL STUD. 339, 353 (1987)).

17. Constitution Act, 1982, *being* Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11; Canadian Charter of Rights and Freedoms, Part I of the Constitution, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

18. This includes freedoms of association, speech, expression, and religion.

21. Stanley Yeo, *Challenging Moral Involuntariness as a Principle of Fundamental Justice*, 28 QUEEN'S L.J. 335, 339 (2002).

Despite these developments of duress in both civil and criminal law, the defense of duress requires more analysis to best protect unwitting victims. By examining the philosophical, historical, and current state of the defense in both civil and criminal law, there is a chance for a clearer formulation for duress.<sup>20</sup> Through this analysis, it seems the intent of the earliest framers of the law was that the defense of duress would not be fully codified but rather it would remain flexible through the use of the common law. This Article contends that a new, more flexible standard should replace the current, more stringent version of the defense.<sup>21</sup> Undeniably, there has been an “extraordinary expansion of the scope of duress” in the contractual realm, while there has been an absolute narrowing of the criminal defense so that it is hardly used successfully in any modern case.<sup>22</sup> The following analysis shows that the current state of the duress defense is “irrational, anomalous, perverse, illogical and fundamentally wrong,”<sup>23</sup> and it is deeply misunderstood. This Article examines the law in Canada as well as a few U.S. and Commonwealth cases.<sup>24</sup> Part I examines the historical development of the defense and the writings of Sir James Fitzjames Stephen, one of the first major modern theorists on duress, as well as the development of the civil law formulation of duress. Part II examines the definition of contractual and criminal duress including the state of those concepts today in their respective disciplines, and the modern state of duress. Part III addresses the problematic issues in both civil and criminal contexts including the “overborne will” theory, excluded offenses, threats to third parties, the Canadian “objective-subjective standard,” and the burden of proof.

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20. For the purposes of this Article, only duress that is overtly physical or overtly illegitimate is examined. There is a great amount of debate about what constitutes duress that falls on the divide between legitimate and illegitimate pressure. NELSON ENONCHONG, *DURESS, UNDUE INFLUENCE AND UNCONSCIONABLE DEALING* 8 (2006). Additionally, this Article focuses only on duress of the person, both in the mental and physical forms of duress. This Article does not discuss other forms of duress that Enonchong aptly identifies: the duress of goods; economic duress; illegitimate threat of legal action (including illegitimate threat of criminal proceedings and illegitimate threat to institute civil proceedings); duress *colore officii* (where an individual gives money because of an unlawful demand by a public official, including implied threats or a threat to sue); the “Woolwich” principle (where there is an *ultra vires* demand for tax based on invalid legislation); and payments made pursuant to an unlawful demand by a person other than a public official. *See id.* at 7.

21. This flexible approach to the codified defense was used in the recent case of *R. v. Ryan* (2011), 301 NSR (2d) 255 (Nova Scotia Court of Appeal), discussed later in this Article.

22. FARNSWORTH, *supra* note 5, at 448.

23. *R. v. Ruzic*, [2001] 1 S.C.R. 687 (Can.).

24. A full discussion of the state of contractual duress in the United States is beyond the scope of this Article, rather the limited discussion is used to contrast the position of the law in other Commonwealth countries.

Finally, Part IV compares and contrasts the problems with duress in both contexts, and concludes with a look at the future for these concepts.

## I. THE HISTORY OF DURESS

This Part discusses the history of the defense of duress in both contract law and in criminal law.

### A. *Historical Underpinnings of Contractual Duress*

Contractual duress has a long history starting with the Romans. However, it has been said that the “law in relation to [contractual] duress is not as clear as one might wish.”<sup>25</sup> Included in the *edictum perpetuum* of the Roman Emperor Hadrian was the phrase “*Quod metus causa gestum erit, ratum non habebō*” which translates to “[w]hat is done through fear I will not uphold.”<sup>26</sup> In this earliest of forms, this fear had to be felt by a “man of the most resolute character” and not a “weak-minded man.”<sup>27</sup> Many forms of this edict exist in relation to “fear of personal harm, such as death, harm to physical integrity and loss of freedom, and possibility also fear of harm of an economic nature. Threats of harm to family are also covered.”<sup>28</sup> The form of duress envisioned by the Romans was to address “compulsion through ‘bending’ the will of the victim (‘mental’ fear or *vis compulsive*).”<sup>29</sup> These complex theories about the nature of free will has ancient origins.

The earliest types of duress in civil law were those which had an overt physical element.<sup>30</sup> These cases involved general contracts where the pressured parties were forced to sign an agreement and were little more than a “mere mechanical instrument” and their actions were not considered to “manifest assent.”<sup>31</sup> Lord Scarman summarized the history of contractual duress in *Barton v. Armstrong* saying that duress of this kind was limited:

[A]t a comparatively early date equity began to grant relief in cases where the disposition in question had been procured by the exercise of pressure . . . considered to be illegitimate—although it did not

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25. *Royal Boskalis Westminster N.V. v. Mountain*, [1999] Q.B. 674,726 (Can. C.A.).

26. JACQUES E. DU PLESSIS, *COMPULSION IN ROMAN LAW* 9 (1997).

27. *Id.* at 8.

28. *Id.*

29. *Id.* at 30.

30. FARNSWORTH, *supra* note 5, at 430.

31. *Id.* at 430–31.

amount to common law duress . . . [t]here is an obvious analogy between setting aside a disposition for duress or undue influence and setting it aside for fraud.<sup>32</sup>

Lord Scarman cited Justice Holmes in *Fairbanks v. Snow* stating that relief can be provided where the “party has been subjected to an improper motive for action.”<sup>33</sup>

Duress in the civil law has been among the “vitiating factors long recognized by the common law,”<sup>34</sup> however, the scope of the vitiation has been changing for centuries. The need to draw the line between permissible pressure in all contractual negotiations and pressure that is illegitimate has been the overwhelming consideration.<sup>35</sup> The modern conception of contractual duress includes not only those physical threats to the person but also to one’s “personal liberty.”<sup>36</sup>

Similarly, the 1847 English case of *Cumming v. Ince* dealt with the forcible confinement in a “private lunatic asylum” of a mother by her two married daughters and their husbands.<sup>37</sup> After the daughters had forcibly committed their mother to the institution, they said that they would not pursue the finding of lunacy against her if she would sign over certain title deeds.<sup>38</sup> Cumming alleged that the contract that was not binding because it was obtained by duress. Her lawyer’s clerk testified that he believed that she “acceded to the arrangement only from fear of these consequences.”<sup>39</sup> The court held that even if her confinement was legitimate it was a “restraint on her will, which prevented any contract made under that duress from binding her.”<sup>40</sup> Justice Denman noted that “she was induced to resign them by fear of personal suffering brought upon her by confinement in a lunatic asylum by the act of the defendants” and that the contract which resulted was not of her own free will.<sup>41</sup> The court determined that Cumming was induced to sign the documents so she would be released from the asylum and the judge asked: “[i]s not this truly described as

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32. *Barton v Armstrong*, (1975) 2 W.L.R. 1050 ¶ 14 (Austl.).

33. *See id.* (citing *Fairbanks v. Snow*, 13 N.E. 596, 598 (Mass. 1887)).

34. ENONCHONG, *supra* note 20, at 7.

35. *Id.* at 8.

36. *Id.* at 57.

37. *Cumming v. Ince*, (1847) 116 Eng. Rep. 418 (Q.B.) (Eng.).

38. *Id.* at 420.

39. *Id.* at 421.

40. *Id.* Interestingly, the court also questions, how “those who apply for the commission affirm that the lunatic is able to negotiate an agreement of which his pecuniary interest and the proper care of his person are the only subjects?” *Id.*

41. *Id.*



duress?”<sup>42</sup> This rhetorical question led the court to confirm the verdict of the lower court: the contract was void for duress.

There are a few important Canadian examples of contractual duress. One of the clearest examples is the 1877 case of *Armstrong v. Gage*.<sup>43</sup> In *Armstrong*, the court was faced with a plaintiff of “advanced years” who was “wholly unacquainted with legal matters” and who was accused of defrauding the defendants by changing tickets of weight measurements for grain.<sup>44</sup> The defendants were described as “men of great shrewdness” who convinced the plaintiff that he was guilty of forgery, and if he could not prove otherwise, he would be convicted of a crime and sent to jail.<sup>45</sup> The plaintiff was not allowed to consult with anyone, and was told that if he left the defendant’s office he would be immediately arrested. The plaintiff was kept confined for at least four hours and told that the only resolution would be for him to immediately execute a mortgage for \$600 on his property.<sup>46</sup> The defendants claimed that the plaintiff was “cool, clear, and collected” when he mortgaged the property.

As a threshold matter, the court in *Armstrong* had to address the critical issue of who had the burden of proof. The court ruled that it is the plaintiff’s burden to show that the mortgage was secured through duress, but “no presumption is to be made against the plaintiff of being indebted to any amount; and the burden is thrown upon the defendant.”<sup>47</sup> The court found that the plaintiff was under duress as the defendants were “violent and threatening” and that the plaintiff was afraid of arrest if he attempted to leave to obtain legal advice.<sup>48</sup> Finding for the plaintiff, the court set aside the mortgage, made no presumptions against the plaintiff, and placed the burden on the defendants to prove that the grain transactions were inaccurate.<sup>49</sup>

Later, *Piper v. Harris Manufacturing Co.*,<sup>50</sup> concerned the sale of a mowing machine in return for a chattel mortgage on a horse for the price of the mower.<sup>51</sup> In the course of this deal, the company became dissatisfied with their security and sought to give back the horse for a mower. The plaintiff, who was already subject to one criminal proceeding, claimed the

42. *Id.*

43. *Armstrong v. Gage*, [1877] O.J.No. 199, 25 Gr. 1 602. (Can.).

44. *Id.* at 2.

45. *Id.* at 2–3.

46. *Id.* at 3.

47. *Id.* at 21.

48. *Id.* at 23.

49. *Id.* at 30.

50. *Piper v. Harris Manufacturing Co.*, [1888] O.J. NO 46 (Ont. C.A.).

51. *Id.* para. 2.

defendants threatened him with another criminal action.<sup>52</sup> Although he was not “afraid of personal violence, or of the horse being taken by force,” the plaintiff said that he believed the criminal case threatened by the defendants would injure his prior criminal case if the threat did indeed manifest into another criminal charge.<sup>53</sup> Justice Osler clarified that duress must involve a fear for loss of life, bodily integrity, mayhem, or imprisonment.<sup>54</sup> The court found that in this case there was “no warrant, no immediate imprisonment was possible, nor could there have been caused by what was said a reasonably grounded fear of restraint of liberty.”<sup>55</sup> Even though the court found that there was no evidence of duress on the facts of *Piper*, its reasoning solidified the grounds for duress in Ontario.<sup>56</sup>

Like the plaintiffs who argued duress in *Armstrong* and *Piper* for confinement or threats of detention, there are several historic examples of courts finding duress under circumstances of unlawful confinement and the threat of detention. In one of the earliest cases, *The Earl of Northumberland’s Case* of 1583, the plaintiff imprisoned the defendant and assigned auditors to investigate an account “made by duress,” which acknowledged the concept.<sup>57</sup> Similarly, in the 1872 case of *Bromley v. Norton*, the court examined a situation where Thomas Bromley, his wife Clara, and his six children were staying at a hotel in Germany for over three months.<sup>58</sup> Mr. Bromley absconded without paying the debt, leaving Mrs. Bromley to answer for her husband’s obligations.<sup>59</sup> Mrs. Bromley was arrested and placed in custody for three days as a means of “obtaining some security for his debt.”<sup>60</sup> The evidence showed that no credit was given to Mrs. Bromley, but only to her husband. In his decision, the Vice-Chancellor noted that placing “Mrs. Bromley under the custody of the police was a most tyrannical proceeding,” and that no law of any nation in Europe would authorize a “hotel keeper to arrest a wife for the debt of an absconding husband.”<sup>61</sup> Mrs. Bromley was only freed because an agent of her father was sent from England to secure her release.<sup>62</sup> Before she was

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52. *Id.* para. 3. The nature of the threatened criminal action was not clearly described. *See id.*

53. *Id.*

54. *Id.* para. 7.

55. *Id.* para. 8.

56. *Id.* para. 11.

57. *Earl of Northumberland’s Case*, [1583] 74 Eng. Rep. 750 (Eng.).

58. *Bromley v. Norton*, (1872) 27 L.T. 478, 478 (Eng.).

59. *Id.* at 478.

60. *Id.* at 479.

61. *Id.*

62. *Id.* at 478.

let go she signed a memorandum claiming the debt as her own.<sup>63</sup> The court found that the inn-keeper knew that the debt was not hers and that “while Mrs. Bromley was under duress, he compelled her to make an acknowledgement which he knew to be untrue.”<sup>64</sup> Thus, the court saw this action as illegitimate pressure and did not uphold the memorandum because of the duress she experienced when she signed the document.<sup>65</sup>

### B. *The History of the Criminal Defense of Duress*

Just as in the history of contractual duress, the defense at criminal law dates back to the Romans<sup>66</sup> and ancient Hebrews.<sup>67</sup> Aristotle wrote about compulsion and the voluntary nature of one’s acts, saying, “an individual may resist the threat and suffer the evil rather than do what he thinks to be wrong; he will then be praised, and his resistance will show that it was not inevitable that a person should submit to the threat.”<sup>68</sup>

Lord Matthew Hale was one of the primary theorists to discuss actions performed under duress or compulsion. In *Pleas of the Crown*, Hale stated:

if a man can be menaced with death, unless he will commit an act of treason, murder or robbery, the fear of death doth not excuse him, if he commit the fact; for the law hath provided a sufficient remedy against such fears by applying himself to the courts and officers of justice for a writ or precept *de securitate pacis*.<sup>69</sup>

After pointing to the institutional assistance available in the form of writ, Hale concludes that one needs not resort to crime, saying instead that if a person is

desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant’s fury he will kill an innocent

63. *Id.*

64. *Id.*

65. ENONCHONG, *supra* note 20, at 58.

66. Eugene R. Milhizer has traced justification and excuse back for many centuries and has examined duress from the perspective of the Romans. See Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN’S L. REV. 725, 767 (2004).

67. Peter Rosenthal, *Duress in the Criminal Law*, 32 CRIM. L.Q. 199, 200 (1990) (citing S. MENDELSON, *THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS* 30 (2d ed. 1968)).

68. GLANVILLE WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 625 (2d ed. 1983) (citing ARISTOTLE, *NICOMACHEAN ETHICS*, bk. 3, ch. 1, (Dordrecht, Holland: D. Reidel Pub. Co., 1975)).

69. 1 SIR MATTHEW HALE, *HISTORIA PLACITORUM CORONAE (THE HISTORY OF THE PLEAS OF THE CROWN)* 51 (1736) (describing a writ for someone fearing bodily harm from another, as when the person has been threatened with violence); see also HENRY CAMPBELL BLACK, *BLACK’S LAW DICTIONARY* (7th ed. 1999).

person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent.<sup>70</sup>

Hale pointed specifically to the crimes of murder, treason and robbery as being excluded from the defense and that one should rather sacrifice oneself than commit these crimes.

It is unclear where this list of excluded offenses identified by Hale originated. What is clear is that it is unrealistic to expect someone who is under duress to commit a crime to be able to halt the crime in order to apply for a writ under law to protect herself from the person pressuring her to commit the crime. Such a notion to apply for a writ to protect oneself from duress assumes that the intended crime occurs a sufficient period of time after the duress. However, after this ancient writ was eliminated, “the exclusion of murder from the defense may be an anachronism, there being no clear reason why the exclusion should be maintained.”<sup>71</sup> One might be able to prove duress in the case of murder, but nonetheless there is an historic aversion to allow a murderer to use this defense.

One of the earliest references to a case of duress in the common law was in 1321<sup>72</sup> as a defense to treason,<sup>73</sup> but the history of criminal duress is intertwined with contractual duress as the two have developed from the same line of cases. The legal principles of compulsion as the basis for a defense evolved as early as 1552 in the context of civil law when the courts began to grapple with the difficult question of voluntariness and the overborne will, and what one may do to preserve oneself. In the 1552 civil case of *Reniger v. Fogassa*,<sup>74</sup> the court spoke about a defense of compulsion as a principle of law from which the defense of duress

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70. HALE, *supra* note 69, at 51. The argument against this protection is that “there would in all probability be no time or opportunity to resort to the protection of the law.” See Edwards, *supra* note 11, at 299.

71. WARREN J. BROOKBANKS, THE DEFENCE OF COMPULSION AN OVERVIEW 9 (1981) [hereinafter BROOKBANKS, OVERVIEW].

72. The case is unnamed, but referred to in the abstract by Lord Bingham of Cornhill, in the case of *R. v. Hasan*, [2005] UKHL 22 (U.K.), who stated:

[T]he common sense starting point of the common law is that adults of sound mind are ordinarily to be held responsible for the crimes which they commit. To this general principle there has, since the 14th century, been a recognized but limited exception in favor of those who commit crimes because they are forced or compelled to do so against their will by the threats of another.

*Id.* at 321.

73. There are a wide variety of meanings and situations that are encapsulated by the term treason. See, e.g., SIR MATTHEW HALE, PLEAS OF THE CROWN: A METHODICAL SUMMARY 9–10 (P.R. Glazerbrook ed., 1972) (1678).

74. *Reniger v. Fogassa*, (1550) 1 Plowd 1, 18 (Eng.).

developed. In that case, to prevent a vessel from sinking during a brutal storm the captain of the ship was forced to throw part of their shipment of woad<sup>75</sup> overboard to save the men and other goods aboard. When he arrived at port with only a partial load of material, Fogassa paid a portion of the customs fees due and asked for time to assess the money owing on the uncertain amount of remaining product.

The agreement to allow time for payment in *Reniger* was later challenged, allowing the court to comment on necessity, compulsion and duress. Counsel for the defendant argued that this was a situation where “a man may break the words of the law, and yet not break the law itself” because of elements beyond his control.<sup>76</sup> He continued that the words of the law will be “broken to avoid greater inconveniences, or through necessity, or by compulsion . . . .”<sup>77</sup> The court said that there is “a tempering of the rigor of the Law” in that “*necessitas non habet legem*” or necessity does not submit to law.<sup>78</sup> Thus, “if the arm of any man is drawn by compulsion, and the weapon in his hand kills another, this shall not be Felony, or be damnified, because he did it by compulsion.”<sup>79</sup> The argument was established that if an individual is forced and compelled to break the law, they should not suffer the subsequent penalties.

The development of the defense was slow during the following centuries, but in the 1746 case of *R. v. M’Growther*<sup>80</sup> and the 1831 case of *R. v. Crutchley*,<sup>81</sup> the courts struggled with whether the defendant would be able to escape punishment for treasonous acts.<sup>82</sup> The defendant in *M’Growther* provided evidence that the Duke of Perth had coerced individuals to join ranks in the rebellion by threatening that if they did not join they would have their “houses burnt” and their “goods spoiled.”<sup>83</sup> The

75. A European cruciferous plant used to yield blue dye. See ROBERT E. ALLEN, *THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH* (8th ed. 1990).

76. *Reniger*, 1 Plowd at 18. See Finbarr McAuley, *Necessity and Duress in Criminal Law: The Confluence of Two Great Tributaries*, 33 IR. JUR. 120, 133 (1998). This was a case where the court was grappling with the idea that an individual could be in technical breach of the statute, but “did the best he could in the circumstances to discharge his obligations under it.” *Id.* at 133.

77. *Id.*

78. *Id.* at 19.

79. *Id.*

80. *R. v. M’Growther* (1746) 168 Eng. Rep. 8 (Eng.).

81. *R. v. Crutchley* (1831) 172 Eng. Rep. 909 (Eng.).

82. The lack of historical cases on this subject is not simply a British or Canadian phenomenon. Warren Brookbanks, in his article *Compulsion and Self-Defence*, noted that the “statutory defence of compulsion has been a part of New Zealand criminal law since 1893. During a period of nearly 100 years the defence has remained largely unchanged, and has given rise to surprisingly little case law.” Warren Brookbanks, *Compulsion and Self-Defence*, 20 VICTORIA U. WELLINGTON L. REV. 95, 96 (1990).

83. *M’Growther*, 168 Eng. Rep. at 8.

court found that these threats were “no excuse in the eye of the law for joining and marching with rebels.”<sup>84</sup> It was found that the only crimes that this would excuse is

force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man, who makes force his defence, to shew [*sic*] an actual force, and that he quitted the service as soon as he could.<sup>85</sup>

The court in *M'Growther* disallowed the duress defense because it found that the accused did not take advantage of a chance for escape.<sup>86</sup> That is, public policy concerns encouraging escape precluded application of the defense.<sup>87</sup> Despite these concerns, the court in *R. v. Crutchley*, found that duress was successfully invoked in defense to the criminal charge of destruction of property, and the malicious damage to a threshing machine that occurred during a riot.<sup>88</sup> Unlike the earlier defendants, the defendant Crutchley was successful because the court found that he was compelled to cause damage to the machines and he escaped at his first opportunity.<sup>89</sup>

One of the first recorded cases where duress was argued as a defense to murder was in 1838 in the English case of *R. v. Tyler and Price*.<sup>90</sup> The defendants asserted that they were under duress by an individual who called himself “Sir William Courtenay” who had coerced them with promises of “plenty in this world and happiness hereafter, and that he asserted that he was above all earthly authority, and was the Saviour of the world.”<sup>91</sup> If the individuals did not join freely, the “Saviour” threatened them with physical harm.<sup>92</sup> Lord Denman found that, where individuals are “induced to join a mischievous man, it is not their fear of violence to themselves which can excuse their conduct to others . . . no man, from a

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84. *Id.* There is a note in the English Reports version of the case that says “if threats of this kind were an excuse, it would be in the power of any leader in a rebellion to indemnify all his followers.” *Id.* at 8. This theme was also explored by Halsbury in *LAW OF ENGLAND* (Hailsham ed. 1931), cited in *The Assizes: Shooting with Intent*, 10 J. CRIM. L. 182, 183 (1946).

85. *M'Growther*, 168 Eng. Rep. at 8. Note that the word “excuse” was used.

86. See McAuley, *supra* note 76, at 165.

87. See *Arp v. State*, 12 So. 301 (Ala. 1893) (facing a situation where the defendant testified that he was under duress by a group of individuals).

88. *R. v. Crutchley* (1831) 172 Eng. Rep. 909, 909 (Eng.).

89. *Id.* at 909. Note that another member of the mob testified on Crutchley’s behalf that they had agreed to run away and that, in fact, the witness got away from the mob after ten minutes, and the defendant joined him a “quarter hour after that time.”

90. *Regina v. Tyler and Price*, (1838) 8 Eng. Rep. 616 (Eng.).

91. *Id.* at 643.

92. *Id.*

fear of consequences to himself, has a right to make himself a party to committing mischief on mankind.”<sup>93</sup> Lord Denman advised that “it cannot be too often repeated, that the apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal.”<sup>94</sup> Again, because the defendants did not take an opportunity for escape and because of the lack of evidence of imminent danger, the court disallowed the defense.<sup>95</sup> Again, this supported the premise that one is better to sacrifice oneself rather than succumb to a threat.

### C. *The Codification of the Canadian Criminal Defense of Duress*

After centuries of sparse decisions, the movement toward codification in the United Kingdom began with Thomas Babington Macaulay who first drafted the *Indian Penal Code* in 1835.<sup>96</sup> This Code was enacted in 1858 and went into effect in 1862.<sup>97</sup> Jurists note that the duress defense “might with advantage be abolished” and that the first draft of the *Indian Penal Code* in 1835 proposed to wholly eliminate the defense;<sup>98</sup> however, the

93. *Id.* at 645.

94. *Id.* (citing WILLIAM HAWKINS, WILLIAM HAWKINS’S PLEAS OF THE CROWN, bk. 1, ch. 13, s. 15 (1716)).

95. *Id.* at 645.

96. Wright, Barry, *Macaulay’s Indian Penal Code: Historical Context and Originating Principles*, in CODIFICATION, MACAULAY AND THE INDIAN PENAL CODE, 19 (Wing-Cheong Chan, Barry Wright & Stanley Yeo ed., 2011).

97. Indian Penal Code of act XLV of 1860 (Krishen Lal & Co. Law Publishers, 1929). Section 94 of the Indian Penal Code of 1860 concerned duress and was entitled “Act to which a person is compelled by threats” and provided that:

Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1- A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2- A person seized by a gang of dacoits, and forced, by threat of instant death, to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

*Id.*

98. See 6 REPORT OF THE ROYAL COMMISSION APPOINTED TO CONSIDER THE LAW RELATING TO INDICTABLE OFFENCES: WITH AN APPENDIX CONTAINING A DRAFT CODE EMBODYING THE SUGGESTIONS OF THE COMMISSIONERS 371 (1879) [hereinafter DRAFT CODE]; Graham Parker, *The Origins of the Canadian Criminal Code*, in ESSAYS IN THE HISTORY OF CANADIAN LAW 249 (David H. Flaherty ed., 1981).

final draft of the *Indian Code* in 1860 contained a section “more lenient than that originally proposed.”<sup>99</sup> In England, codification and its impact on the defense of duress culminated with a series of reports first published in 1841. The reports criticize the unwritten and unorganized system of law which a common man could not decipher.<sup>100</sup>

Any analysis of the duress defense in the Commonwealth inevitably begins with Sir James Fitzjames Stephen who was the English Secretary to the Council in India in the nineteenth century.<sup>101</sup> Upon return from his post, he was “disturbed by the lack of system in the law of his own country” and, with the support of the Attorney General, he introduced a *Criminal Code* in the English Parliament in 1878.<sup>102</sup> Even before the *Code*, Stephen published extensively on duress,<sup>103</sup> arguing a “choice of evils” theory and discussing the nature of voluntary actions.<sup>104</sup> His ideas about criminality stemmed from his beliefs on morality. Sir Stephen wrote that “indefinite and unscientific as the terms may be in which morality is expressed, the administration of criminal justice is based upon morality.”<sup>105</sup> He saw the laws of a country as reflecting this morality.

Although Sir Stephen acknowledged that an individual could physically manipulate another, he believed that threat of physical harm was much different. Since “even in extremis, when acting under the threat of death, an individual is still exercising the ability to choose whether to act in a particular way.”<sup>106</sup> Sir Stephen believed that even the “very

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99. See DRAFT CODE, *supra* note 98, at 411. Stanley Yeo has noted, in his article, *Considerations of Time and Space in Duress*, that “[t]he defence of duress is contained in s. 94 of the Penal Code (Cap 224, 1985 Rev. Ed.) which has remained unchanged since it first appeared in the *Indian Penal Code* of 1860.” Stanley Yeo, *Considerations of Time and Space in Duress*, 16 SAC. L.J. 354, 354 (2004).

100. Parker, *supra* note 98, at 250–51. Specifically, a commission was appointed in 1840 to review the statute law of Upper Canada, and the later commission appointed in 1858 led to the Consolidated Statutes of 1859. *Id.* at 252. Despite the critics of the law, the English criminal code including the duress defense was the basis for the Canadian *Criminal Code*.

101. A.J. MacLeod & J.C. Martin, *The Revision of the Criminal Code*, 33 CAN. B. REV. 3, 4 (1955).

102. *Id.* at 4.

103. *Id.* See JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (London, MacMillan 1883) [hereinafter STEPHEN, HISTORY]; see also SIR JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW (CRIMES AND PUNISHMENT) (3d ed. London, MacMillan 1883) [hereinafter STEPHEN, DIGEST]; JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND (London and Cambridge, MacMillan & Co. 1863) [hereinafter STEPHEN, GENERAL].

104. STEPHEN, GENERAL, *supra* note 103.

105. *Id.* at 82.

106. K.J.M. SMITH, JAMES FITZJAMES STEPHEN: PORTRAIT OF A VICTORIAN RATIONALIST 66 (Cambridge Univ. Press 1988).



strongest forms of compulsion do not exclude voluntary action.”<sup>107</sup> To illustrate his theory, Sir Stephen argued that

a criminal walking to execution is under compulsion if any man can be said to be so, but his motions are just as much voluntary actions as if he was going to leave his place of confinement and regain his liberty. He walks to his death because he prefers it to being carried. This is choice, though it is a choice between extreme evils . . . [a] man is under compulsion when he is reduced to a choice of evils, when he is so situated that in order to escape what he dislikes most he must do something which he dislikes less, though he may dislike extremely what he determines to do.<sup>108</sup>

For Sir Stephen, choice was still autonomous even if subject to severe compulsion.<sup>109</sup>

Sir Stephen’s attitudes toward duress were based, in part, on his writings in his *Digest*.<sup>110</sup> Sir Stephen loathed to apply duress to felonies and said duress “does not apply to high treason or murder. It probably does not apply to robbery. It applies to uttering counterfeit coin. It seems to apply to misdemeanors generally.”<sup>111</sup> Sir Stephen’s reasoning for these assertions is wholly absent leading one to believe that these statements were purely conjecture. When speaking of duress particularly, Sir Stephen noted that “hardly any branch of the law of England is more meagre [sic] or less satisfactory than the law on this subject.”<sup>112</sup> He noted that, after

nearly thirty years’ experience at the bar and on the bench, during which I have paid special attention to the administration of the criminal law, I never knew or heard of the defence of compulsion being made . . . and I have not been able to find more than two reported cases which bear upon it.<sup>113</sup>

Sir Stephen was one of the Commissioners called upon in 1879 to prepare the *Draft Code* for England.<sup>114</sup> A “note” section, Section 23, is dedicated to compulsion.<sup>115</sup> In that section, the Commissioners noted that

107. STEPHEN, HISTORY, *supra* note 103, at 102.

108. *Id.*

109. *Id.*

110. *See* STEPHEN, DIGEST, *supra* note 103.

111. *Id.* at 23.

112. STEPHEN, HISTORY, *supra* note 103, at 105.

113. *Id.* at 106. This is in direct opposition to the statements made by Stephen and the Commission in the *Draft Code*. Perhaps Sir Stephen was referring to successful cases.

114. DRAFT CODE, *supra* note 98, at 371.

115. *Id.*

“the case of a person setting up as a defence that he was compelled to commit a crime is one of everyday occurrence.”<sup>116</sup> This statement seems to be in contradiction to Sir Stephen’s comments that he had not known of a case of compulsion in his thirty years as a lawyer and judge. However, the Commission concluded by saying that “we have framed section 23 of the *Draft Code* to express what we think is the existing law, and what at all events we suggest ought to be the law.”<sup>117</sup>

The English *Draft Code* received a lukewarm reception by the House so a Royal Commission was appointed to examine the proposal.<sup>118</sup> This led to a revised draft bill in 1879, which died with the change of Ministry in 1880 and put an end to Stephen’s attempt to codify English law.<sup>119</sup> However, the Commissioners noted in their Report that the common law defense should be retained so that no individual is deprived of a defense, pointing to a need for flexibility under the *Draft Code*.<sup>120</sup>

Although the *Draft Code* was not adopted in England, it formed the basis for the Canadian *Criminal Code*. Section 23 of the English *Draft Code* is almost identical to the current section of the Canadian *Criminal Code*.<sup>121</sup> The Canadian Code was introduced to Parliament in 1892 by Sir John Thompson,<sup>122</sup> who was the Minister of Justice for Canada.<sup>123</sup> The bill passed the House and received Royal Assent on July 9, 1892, and came into force on July 1, 1893.<sup>124</sup> Many argue that there was an absence of detailed inquiry that one might expect for the first Criminal Code of Canada.<sup>125</sup> Nonetheless, Canada was unquestionably on the “forefront of the codification movement”<sup>126</sup> and “by any standard the bill of 1891 was a considerable work of legal scholarship.”<sup>127</sup> The lack of debate on each of

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116. *Id.* at 411.

117. *Id.* The Commissioners also make it clear that necessity “should in no case be a defence.” *Id.* at 412.

118. MacLeod & Martin, *supra* note 101, at 4.

119. *Id.* at 4–5.

120. DRAFT CODE, *supra* note 98, at 378.

121. *Id.* at 436. *The Criminal Code*, 1892, S.C. 1892, c. 29, s. 12.

122. MacLeod & Martin, *supra* note 101, at 5.

123. *Id.* at 5.

124. *Canada Bill 7, The Criminal Code*, 1st Sess., 25th Parl., 1892, 55-56 Vict. c. 29, cited in Alan. W. Mewett, *The Criminal Law, 1867–1967*, 45 CAN. BAR R. 726, 728 (1967). Thompson introduced Bill 7 in March, 1892 with one sentence as “there were no questions.” See DESMOND H. BROWN ED., *THE BIRTH OF A CRIMINAL CODE: THE EVOLUTION OF CANADA’S JUSTICE SYSTEM* 36 (1995).

125. Mewett, *supra* note 124, at 727.

126. Allan M. Linden & Patrick Fitzgerald, *Recodifying Criminal Law*, 66 CAN. BAR R. 529, 530 (1987).

127. DESMOND H. BROWN, *THE GENESIS OF THE CANADIAN CRIMINAL CODE OF 1892*, 126 (1989).

the sections of the Code was because “the minister of justice knew exactly what he needed in his bill to assure its smooth passage through Parliament, and he instructed his draftsmen accordingly.”<sup>128</sup> However, the idea that the defenses in the *Code* could be improved after its initial drafting was largely unrealized at the time.<sup>129</sup>

The 1892 version of Section 23 in the English *Draft Code* excluded a total of ten offenses, and, although the origin of the list of exclusions is unclear,<sup>130</sup> it is plausible that Canadian criminal law of the duress defense is the legacy of Hale and Stephen’s personal opinions. Other than a brief mention by the Honorable Mr. Davies, duress was not discussed in Parliament.<sup>131</sup> Sir Stephen’s conclusions seem to adhere to a moral condemnation of a guilty person escaping just punishment rather than an actual examination of the case law and existing principles. Indeed, the restricted development of the duress defense may have been a “reflection of Sir James Stephen’s antipathy to the defence.”<sup>132</sup> Even though Sir Stephen’s very limited view of duress was not fully reflected in the codification, it may account for the Canadian defense of duress “being one of the most restrictive to be found and certainly narrower than the English common law of 1892 or today.”<sup>133</sup>

The codified form of the law of duress in Canada was amended in 1955 with the introduction of the revised *Criminal Code*.<sup>134</sup> Although this may have been an opportunity to amend the laws regarding duress, the relevant section was not substantially altered. Instead of engaging in a meaningful discussion of the defense of duress, the Honorable Stuart S. Garson simply replied that the current legislation “stood the test of time” and that they would not change the law purely for the sake of change.<sup>135</sup> The defense of duress was slowly developing through case law,<sup>136</sup> but there were very few

128. *Id.*

129. *Id.*

130. *Id.*

131. OFFICIAL DEBATES OF THE HOUSE OF COMMONS OF THE DOMINION OF CANADA 2711 (May 17, 1892) (statement of Mr. Davies).

132. *Rosenthal, supra* note 67, at 202.

133. STUART, CRIMINAL LAW, *supra* note 12, at 463.

134. The 1955 *Code* was substantially shorter with 753 sections, compared with the more than 1,100 in the previous *Code*; with 289 pages rather than 418 pages in the Revised Statutes of 1927. MacLeod & Martin, *supra* note 102, at 11.

135. OFFICIAL DEBATES OF THE HOUSE OF COMMONS OF THE DOMINION OF CANADA 1256 (Jan. 19, 1954) (statement of Mr. Garson).

136. 6 REPORT OF THE ROYAL COMMISSION APPOINTED TO CONSIDER THE LAW RELATING TO INDICTABLE OFFENCES: WITH AN APPENDIX CONTAINING A DRAFT CODE EMBODYING THE SUGGESTIONS OF THE COMMISSIONERS 226 (1879). This report is also available in the appendix of the Senate Hansard, May 14, 1952.

cases that used this defense during this time period, and even fewer that were successful.<sup>137</sup>

It is important to note that the 1892 Canadian *Criminal Code* maintained an important underlying principle: the common law defenses were not superseded by the *Code*.<sup>138</sup> Although the court would eventually find that there was an “uneasy tension in some cases between interpretation of a detailed statutory provision and application of a common law defence,”<sup>139</sup> the result was the availability of the common law defense, and the ability to call on the common law in certain circumstances where the codified defense was too restrictive. This would allow the case law to dictate what the defense would look like.<sup>140</sup> The framers of the Canadian *Code* wanted to preserve the flexibility in the use of duress,<sup>141</sup> and arguably they made a political decision in their codification choices.<sup>142</sup> The bottom line is that even though duress is clearly important to the justice system, little thought was given to the codified defense at the time of the inception of the Canadian *Criminal Code*, despite opportunities to do so, but the common law defense was still available leading to this duality of the modern criminal defense.

## II. THE DEFINITIONS AND MODERN FORMS OF DURESS

### A. *The Definition of Contractual Duress*

Contractual duress advanced significantly in the Commonwealth with the foundational Australian case of *Barton v. Armstrong*.<sup>143</sup> This 1976 Privy Council case involved some of the clearest forms of an individual under duress that is found in any of the Commonwealth countries. In this case the chairman, Armstrong, exerted pressure on the managing director of a company, Barton, to sign deeds. Barton eventually brought an action to say that a deed that he had signed was executed under duress and that it

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137. For example, see the Quebec decision in *Rex v. Farduto*, [1912] 10 D.L.R. 669 (Can. Que.). See also *Dunbar v. The King*, [1936] 4 D.L.R. 737 (Can.).

138. This provision continues today. See *Canada Criminal Code*, R.S.C. 1985, c. C-46, s. 8(3).

139. STUART, *CRIMINAL LAW*, *supra* note 12, at 452.

140. Even Stephen noted the importance of the common law defenses, noted in commentary to the Draft Code, as cited by G.L. Williams, *Necessity*, *CRIM. L. REV.* 128, 129–30 (1978).

141. DESMOND H. BROWN ED., *THE BIRTH OF A CRIMINAL CODE: THE EVOLUTION OF CANADA'S JUSTICE SYSTEM* 126 (1995).

142. As for the alternative, “some ‘Codes’ were introduced in the United States, but the Benthamite-Austinian concept of a Code which would supplant the common law and provide a totally new approach, ‘a fundamental rethinking of the law’ was ‘never more than an ideal.’” Parker, *supra* note 98, at 249.

143. *Barton v Armstrong* (1975) 2 W.L.R. 1050 (P.C.) (Austl.).

was voidable in relation to his part of the deal.<sup>144</sup> Lord Scarman succinctly summarized the contractual elements involved and the lack of precedent on point: “A threatens B with death if he does not execute some document and B, who takes A’s threats seriously, executes the document it can be only in the most unusual circumstances that there can be any doubt whether the threats operated to induce him to execute the document.”<sup>145</sup> To support this theory, the court was provided with significant evidence of duress.

During the fifty-six day trial, Barton alleged that Armstrong threatened him in numerous ways including statements that he would have him murdered.<sup>146</sup> Barton alleged that Armstrong made the statement, among others, that the “city is not as safe as you may think between office and home. You will see what I can do against you and you will regret the day when you decided not to work with me.”<sup>147</sup> For months, Barton received calls at 4:00 and 5:00 in the morning five consecutive nights at a time with heavy breathing and occasionally a voice saying “[y]ou will be killed.”<sup>148</sup> Barton eventually recognized this voice as Armstrong’s and, indeed, the trial court found that Armstrong was responsible for these calls.<sup>149</sup> The court also found that Armstrong said “I will show you what I can do against you and you had better watch out. You can get killed,” and that Armstrong told Barton that he had the support of the police, organized crime was growing, and \$2,000 would be sufficient remuneration for killing him.<sup>150</sup> In direct relation to the contract, Barton relayed that Armstrong said “[y]ou had better sign this agreement—or else” and “[u]nless you sign this document I will get you killed.”<sup>151</sup>

However, the trial court did not find that all of these threats alleged were made. The trial court explained its mixed findings saying: “on many occasions [Armstrong] had threatened Barton with death, and that Barton was justified in taking [sic] and did take these threats seriously” but while Barton was in “fear for the safety of himself and his family, these threats and the fear engendered by them did not in fact coerce him into entering into the agreement.”<sup>152</sup>

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144. *Id.*

145. *Id.* at 1060.

146. *Id.* at 1055.

147. *Id.* at 1056.

148. *Id.*

149. *Barton v Armstrong* (1975) 2 W.L.R. 1050, 1056 (P.C.) (Austl.).

150. *Id.*

151. *Id.* at 1057.

152. *Id.* at 1055.

On appeal, all three judges of the Court of Appeal found that Armstrong made threats that were “intended by him to induce and were understood by Barton to be intended to induce him to enter into the agreement.”<sup>153</sup> In *Barton*, Lord Scarman adopted the reasoning in *Reynell v. Spyre*<sup>154</sup> in that if there is anything like deception involved, a contract cannot stand, and that the same principle should apply to duress: if “Armstrong’s threats were ‘a’ reason for Barton’s executing the deed he is entitled to relief even though he might well have entered into the contract if Armstrong had uttered no threats to induce him to do so.”<sup>155</sup> Thus, duress need only be a factor, not the only factor, that leads an individual to sign a contract under duress.<sup>156</sup> Later, the New Zealand court in *Pharmacy Care* adopted similar reasoning saying that “[i]t is not necessary to show that duress was the sole cause inducing the agreement. It is enough if it was ‘an’ inducement of the requisite character.”<sup>157</sup> In *Barton*, the court also held that, once the defendant establishes that duress existed, “the burden is placed upon the party issuing the threat to establish that the threat did not contribute to the decision to enter into the agreement.”<sup>158</sup>

The widely-accepted modern definition of contractual duress comes from Lord Scarman in the 1983 British case of *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation*.<sup>159</sup> Lord Scarman said there are two elements to contractual duress including “(1) pressure amounting to compulsion of the will; and (2) the illegitimacy of the pressure exerted.”<sup>160</sup> One must first examine the consent of the complainant and the pressure that impairs the decision-making of that individual as the “defendant must have behaved in a way which makes the pressure affecting the complainant’s consent to be regarded as illegitimate . . . it is the combination of the two elements that constitute duress.”<sup>161</sup> The court in *Universe Tankships* stated that the nature of the pressure will

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153. *Id.* at 1059.

154. *Reynell v. Spree*, (1852) 1 De GM & G 660, 708 (Eng.).

155. *Barton v Armstrong* (1975) 2 W.L.R. 1050, 1061 (P.C.) (Austl.).

156. JOHN MCCAMUS, *THE LAW OF CONTRACTS* 370 (2005).

157. *Pharmacy Care Systems Ltd. v Att’y General* [2004] CA 198/03 para. 90 (N.Z.).

158. MCCAMUS, *supra* note 156, at 370. See section below on burden of proof.

159. *Universe Tankships of Monrovia v. International Transport Workers’ Federation*, [1983] 1 A.C. 366, 400 (H.L.) (Eng.).

160. *Universe Tankships of Monrovia*, 1 A.C. at 400; see also Rick Bigwood, *Coercion in Contract: The Theoretical Constructs of Duress*, 46 U. TORONTO L.J. 201, 208 (1996) [hereinafter Bigwood, *Coercion*]. For the purposes of this Article, all references to situations that could be considered ordinary “commercial pressure” will be eliminated. This Article is concerned only with those situations which can be considered falling wholly within the realm of duress in its most serious form. See *id.* at 203.

161. ENONCHONG, *supra* note 20, at 8.

often be easily defined as illegitimate, but this is not always the case.<sup>162</sup> When the pressure is clearly decisive, one needs to be absolved from the “normal moral or legal consequences of one’s actions. Hence, as a result of coercion . . . contracts are not binding: the ‘consent’ brought to them is treated in law as revocable.”<sup>163</sup> The law reflects these arguments: proven contractual duress is a vitiating defense when the pressure is clearly decisive.<sup>164</sup>

There has been much written on the issue of whether a contract is void or voidable when completed under duress. Many judges have sought to treat the agreements as voidable rather than “void *ab initio*,” or void from the moment a contract is entered into, so that the aggrieved party can choose whether or not to enforce the contract.<sup>165</sup> Lord Simon of Glaisdale stated in the decision in *Lynch v. D.P.P. of Northern Ireland*, that duress “again deflects, without destroying, the will of one of the contracting parties . . . . The contract procured by duress is therefore not void: it is voidable—at the discretion of the party subject to duress.”<sup>166</sup> As noted by Justice Hammond in *Pharmacy Care*, however, if “duress is to be asserted, it may be lost by affirmation.”<sup>167</sup> In *North Ocean Shipping Co. Ltd. v. Hyundai* the court cites *Chitty on Contracts* saying that a

person who has entered into a contract under duress, may either affirm or avoid such contract after the duress has ceased; and if he has so voluntarily acted under it with a full knowledge of all the circumstances he may be held bound on the ground of ratification, or if, after escaping from the duress, he takes no steps to set aside the transaction, he may be found to have affirmed it.<sup>168</sup>

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162. *Id.* at 11.

163. Bigwood, *Coercion*, *supra* note 160, at 204.

164. See Hamish Stewart, *A Formal Approach to Contractual Duress*, 47 U. TORONTO L.J. 175, 177 (1997). He notes that while

both duress and unconscionability will often be present in a given fact situation . . . they are logically distinct aspects of contractual unfreedom. Further, contracts may be unenforceable for other reasons, also logically distinct from duress, such as undue influence, fraud, mistake, and frustration; and contracts may be unenforceable for reasons unrelated to consent, for example, when they are illegal or contrary to public policy. While these other reasons may well have to do with freedom in a larger sense, they are not instances of coercion or duress, and to describe them as such is misleading. *Id.*

For the purposes of this Article, duress, which is distinct from the related concepts of undue influence and unconscionability, is the only element examined.

165. MCCAMUS, *supra* note 156, at 368.

166. *Dir. of Pub. Prosecutions v. Lynch* [1975] A.C. 653 (H.L.) [670] (appeal taken from N. Ir.).

167. *Pharmacy Care Systems Ltd. v. Att’y Gen.* [2004] CA 198/03 para. 97 (N.Z.).

168. *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.*, [1979] Q.B. 705, 720 (Eng.) (citing JOSEPH CHITTY, *CHITTY ON CONTRACTS COMMENTARIES* 207 (24th ed. 1977)). See also

One consequence of making contracts voidable rather than void is that third parties have a greater chance for protection for any reasonable reliance on a contract formed under duress.<sup>169</sup> The victim may assert duress as a defense to a breach action or void a contract by starting an action for rescission at a reasonable time after the threat has ended.<sup>170</sup>

The case law indicates that economic pressure renders the contract not only voidable but also actionable as a tort for damages.<sup>171</sup> In *Universe Tankships*, Lord Scarman noted that the law of civil duress was comprised of illegitimate pressure to the victim:

[The] practical effect of [these elements] is compulsion or the absence of choice. Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him.<sup>172</sup>

In addition to this definition, the pressure must be such that the law views it as wrongful which Lord Wilberforce and Lord Simon of Glaisdale aptly noted in their dissent in the case of *Barton v. Armstrong*.<sup>173</sup> The court in *Attorney-General for England and Wales v. R.* added to this definition of contractual defense saying that all cases of duress involve the "but for" test that without this pressure they would not have entered into the contract.<sup>174</sup> That pressure can come in various forms "to the person or to economic

FARNSWORTH, *supra* note 5, at 443 n.1, noting that although there are provisions for threats to third parties in contract law the

victim can still avoid the contract against the other party unless that party in good faith and without reason to know of the duress either gives value or relies materially on the contract. In that case the other party is protected for reasons analogous to those that apply to the good faith purchaser.

169. MCCAMUS, *supra* note 156, at 368–69. See also FARNSWORTH, *supra* note 5, at 431 n.2, who makes the point that a "void contract" is not a contract. He also notes that duress "renders the obligation of the party a nullity" and is a "real defence to an asserted obligation on a negotiable instrument, i.e., a good even when the instrument is in the hands of a good faith purchaser (known as a 'holder in due course.')." *Id.*

170. FARNSWORTH, *supra* note 5, at 443.

171. See *Universe Tankships of Monrovia v. International Transport Workers' Federation*, [1983] 1 A.C. 366, 400 (H.L.) (Eng.); see also *Barton v. Armstrong* [1975] 2 W.L.R. 1050 (P.C.) (Austl.), and *Pao On v. Lau Yiu Long* [1980] A.C. 614 (P.C.) (Eng.).

172. *Universe Tankships of Monrovia v. International Transport Workers' Federation*, [1983] 1 A.C. 366, 400 (H.L.) (Eng.). This case involved the use of a trust set up by a trade union for the needs of the crew on a ship registered in Liberia but docked in Britain.

173. *Barton v. Armstrong*, 2 W.L.R. 1050, para. 19.

174. *Att'y Gen. for Eng. & Wales v. R.*, [2002] 2 NZLR 91(CA) ¶ 61, *aff'd* in [2003] UKPC 22, [2004] 2 NZLR 577 (P.C.).



interests and can also involve social, professional or moral elements. The pressure may be direct or indirect, and its impact requires an examination of the circumstances in which the party under pressure is situated as a result of the pressure.”<sup>175</sup> Thus, the threat can be inferred by speech or by the behavior of the individual in question.<sup>176</sup> This definition allows for a very broad interpretation of what comes within the realm of duress in civil law, and covers a very large range of conduct.

### *B. Modern Contractual Duress*

One of the most recent pronouncements on civil duress in the Commonwealth is in the 2004 New Zealand case of *Pharmacy Care Systems Ltd. v. Attorney General*, which both endorsed and expanded upon the test of *Universe Tankships*.<sup>177</sup> *Pharmacy Care* expanded the test to a seven-part “elements of duress” test:

First, there must be a threat or pressure. Secondly, that threat or pressure must be improper. Thirdly, the victim’s will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced. Fourthly, the threat or pressure must actually induce the victim’s manifestation of assent. Fifthly, the threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative. Sixthly, duress renders the resulting agreement voidable at the instance of the victim . . . Seventhly, the victim may be precluded from avoiding the agreement by affirmation.<sup>178</sup>

Even though the plaintiff Pharmacy Care met the elements of the elaborate test created by the court, it lost on the issue of duress because it did not quickly seek to rescind the deed.<sup>179</sup> Leave to appeal to the Supreme Court of New Zealand was refused on the basis that the “law of New Zealand on the subject of duress is sufficiently clear and settled.”<sup>180</sup> While it had been unclear how widely this new expanded test would be used, the Court of Appeal for New Zealand recently commented on this expanded test in

175. *Id.*

176. FARNSWORTH, *supra* note 5, at 431.

177. *Pharmacy Care Sys. Ltd. v Att’y Gen.* [2004] CA 198/03 (N.Z.).

178. *Id.* para. 98.

179. *Id.* para. 112.

180. Rick Bigwood, *When Exegesis Becomes Excess: The Newborn Problematics of Contractual Duress in New Zealand*, 21 J. CONT. L. 208, 209–10 (2005). Bigwood objects to this as *Attorney-General* is an English case.

*McIntyre v. Nemesis DBK Ltd.*<sup>181</sup> In that case, the court said that what was set down as “elements” of duress were actually only “legal propositions of relevance to duress.”<sup>182</sup> After the seven-part element test was criticized as unworkable, the court instead endorsed the *Universe Tankships* test.<sup>183</sup> With this clarification, the law of contract remains broad and relatively simple today.

### C. Definition of Criminal Duress

The current state of the criminal law defense of duress is much more complicated and unclear than its counterpart in the law of contract. While duress is “of venerable antiquity and wide extent,”<sup>184</sup> it has proven to be an “elusive juristic concept”<sup>185</sup> as it is difficult to trace its uncertain history with relatively few reported cases and a vague and unstable foundation.<sup>186</sup> The imprecise and overlapping definitions of “duress,” “coercion” and “compulsion” has done little to rectify the problem. Instead, the interchangeable usage of the terms add to the confusion of their meaning:

[c]ompulsion . . . appears to be the expression first used in the context of overbearing threats which induce criminally proscribed actions and is the expression commonly used by the common law commentators . . . . Duress however, is the term preferred by Blackstone and is now widely used in Anglo-American law. Both expressions, however, continue to be used interchangeably in the case-law ‘without definition, and regardless that in some cases the legal usage is a term of art differing from popular usage.’<sup>187</sup>

The current codified version of the defense is found in Section 17 of the *Canadian Criminal Code*:

17. A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply

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181. *McIntyre v. Nemesis DBK Ltd.* [2010] 1 NZLR 463 (CA) (N.Z.).

182. *Id.* para. 22.

183. *Id.* para. 25.

184. *R. v. Howe & Burke*, [1987] A.C. 417 at 428 (H.L.) per Lord Hailsham L.C.

185. *Dir. of Pub. Prosecutions v. Lynch* [1975] A.C. 653 (H.L.) [686].

186. BROOKBANKS, OVERVIEW, *supra* note 71, at 5.

187. *Id.*

where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).<sup>188</sup>

The codified defense of duress in Canada is undeniably restrictive, and it could be reasoned that this is so because a successful defense of duress results in a complete acquittal.

Alternatively, in *R. v. Ruzic*, Justice LeBel found several factors that comprise the common law defense. The first factor was a safe avenue of escape judged on the objective-subjective standard of a reasonable person similarly situated.<sup>189</sup> Second, the court found that proportionality was an element of the common law defense, again measured on the standard according to a reasonable person similarly situated.<sup>190</sup> Third, the court in *Ruzic* established that, in relation to the threat, the “accused should be expected to demonstrate some fortitude and to put up a normal resistance to the threat. The threat must be to the personal integrity of the person.”<sup>191</sup> Justice LeBel also voiced the need for a court to instruct a jury that there was a real threat affecting the accused at the time of the offense and the “need for a close temporal connection between the threat and the harm threatened.”<sup>192</sup> The accused must raise the defense and introduce some evidence, and the court must determine if it has an “air of reality.”<sup>193</sup> The court found that those who are parties rather than perpetrators to the statutorily excluded offenses, such as aiders or abettors, will continue to be able to use the common law defense because the two groups are treated differently under Canadian law.<sup>194</sup> This common law definition of the defense is much more expansive than the codified version.

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188. Canada Criminal Code, R.S.C. 1985, c. C-46, s. 17; Canada Criminal Code, R.S.C. 1985, c. 27 (1st Supp.), s. 40.

189. *R. v. Ruzic* [1998], 1 S.C.R. 687, para. 61 (Can.).

190. *Id.* para. 62.

191. *Id.*

192. *Id.* para. 96.

193. *Id.* para. 100.

194. *See R. v. Paquette*, [1977] 2 S.C.R. 189 (Can.).

#### D. Modern Criminal Duress

The pivotal Canadian Supreme Court decision in *R. v. Ruzic*<sup>195</sup> surveyed the troubled history of criminal duress. Justice LeBel, writing for the Court, acknowledged the concerns Justice Lamer expressed a few years earlier in the Supreme Court case *R. v. Hibbert*:<sup>196</sup> “the law relating to duress has been plagued, nonetheless, with some uncertainties and inconsistencies since the beginning of its development. This is understandable. Duress involves the resolution of conflicts between individual rights and duties to others or obligations as a citizen.”<sup>197</sup> The call for a universal analysis of duress was overdue, and many theorists were hopeful that *Ruzic* would answer the fundamental questions about the defense. The Supreme Court noted in *Ruzic* that, “[i]n the realm of criminal law, the courts routinely review the definition of criminal offenses to ensure conformity with *Charter* rights.”<sup>198</sup> When examining *Charter* challenges to defenses, however, the cases are “rare and had never been successful before the Supreme Court until *Ruzic*.”<sup>199</sup> The need for certainty and a solution to the problem of duress was required. To understand the modern form of this defense, it is important to have an understanding of this case and why it has prompted renewed interest in duress.

In *Ruzic*, Marijana Ruzic was charged with importing two kilograms of heroin into Canada on April 29, 1994, valued approximately at \$1 million Canadian dollars,<sup>200</sup> in violation of Section 5(1) of the *Narcotic Control Act*.<sup>201</sup> Ruzic was also charged with the possession and use of a false passport in violation of Section 368 of the *Criminal Code*.<sup>202</sup> Ruzic testified that she was forced to bring the drugs to Canada or her mother in Belgrade in the former Yugoslavia would be harmed or even killed.<sup>203</sup> She testified that a man named Mirko Mirkovic knew personal information about the accused and approached Ruzic on several occasions.<sup>204</sup> He claimed to know that Ruzic’s mother was ill and that they lived

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195. *R. v. Ruzic* [1998], 1 S.C.R. 687 (Can.).

196. *R. v. Hibbert* [1995] 2 S.C.R. 973 (Can.).

197. *R. v. Ruzic*, [2001] 1 S.C.R. 687, para. 58 (Can.).

198. *Id.* para. 22.

199. Yeo, *supra* note 19, at 335, 339. An important element in *Ruzic* was the discussion of moral involuntariness, but a full discussion of this element is beyond the scope of this Article.

200. *Ruzic*, 1 S.C.R. 687, para. 6.

201. R.S.C. 1985, c. N-1.

202. *Ruzic*, 1 S.C.R. 687, para. 2.

203. *R. v. Ruzic*, [2001] 1 S.C.R. 687, para. 5 (Can.).

204. *Id.* para. 4.

together.<sup>205</sup> Ruzic, who was only 21 years old at the time, was the sole caretaker for her mother, and did not want to cause her mother concern.<sup>206</sup> She testified that she felt she could not seek the assistance of the police in Belgrade because of their potential involvement with criminal organizations: “[P]eople die in the streets. We don’t have a law; it’s corruption. And the crime it’s very high and so people are afraid.”<sup>207</sup> In Belgrade, Mirkovic showed Ruzic a knife and said that he liked to “cut people.”<sup>208</sup> He started sexually touching the defendant and told her that he would like to have sex with Ruzic and her mother.<sup>209</sup> The violence escalated, and Mirkovic burned the defendant with a lighter and injected her with a needle of a substance that she believed to be heroin.<sup>210</sup>

Mirkovic strapped three packages of heroin to Ruzic’s body and told her that she had to travel to Canada with the drugs or he would “do something to her mother.”<sup>211</sup> Upon entering the country, Ruzic lied to Canadian immigration officers, but eventually the packages of heroin were discovered in her possession.<sup>212</sup> At trial, defense counsel argued that Ruzic did not meet the “immediacy” or “presence” requirements of Section 17, which had been restrictively interpreted until this point; they hoped to use the more inclusive interpretation in the common law provision.<sup>213</sup> The defense thus sought a declaration that Section 17 violated Section 7 of the *Charter* and that it was not saved by Section 1<sup>214</sup> because the aggressor was not present with the threatened party, the threat was to a third party, and there was not an immediate threat to the victim.

The trial judge ruled that Section 17 did violate the *Charter* and instructed the jury on the common law defense of duress.<sup>215</sup> Ruzic was acquitted of both charges on December 9, 1994.<sup>216</sup> At the Court of Appeal, Justice Laskin, writing for the unanimous court, agreed with the trial judge that Section 17 violated the *Charter* because it infringed Section 7 and was

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205. *Id.* para. 3.

206. *Id.* para. 7.

207. *Id.* para. 16.

208. *Id.* para. 20.

209. *R. v. Ruzic*, [2001] 1 S.C.R. 687, para. 20 (Can.).

210. *Id.* paras. 22–24.

211. *Id.* para. 25.

212. *Id.*

213. *Id.* para. 39.

214. Constitution Act, 1982, *being* Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11; Canadian Charter of Rights and Freedoms, Part I of the Constitution, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

215. *R. v. Ruzic*, [2001] 1 S.C.R. 687, para. 1 (Can.).

216. *Id.* paras. 2–3.

not saved by Section 1.<sup>217</sup> The court declared Section 17 of no force or effect “to the extent that it prevents an accused from relying on the common law defense of duress preserved by section 8 (3) of the Code.”<sup>218</sup> Accordingly, the Crown’s appeal was dismissed, and the case went to the Supreme Court. Justice LeBel, writing for the unanimous court, articulated:

[a]lthough moral involuntariness<sup>219</sup> does not negate the *actus reus* or *mens rea* of an offence, it is a principle which, similarly to physical involuntariness, deserves protection under s. 7 of the Charter. It is a principle of fundamental justice that only voluntary conduct—behaviour that is the product of a free will and controlled body, unhindered by external constraints—should attract the penalty and stigma of criminal liability. Depriving a person of liberty and branding her with the stigma of criminal liability would infringe the principles of fundamental justice if the accused did not have any realistic choice. The ensuing deprivation of liberty and stigma would have been imposed in violation of the tenets of fundamental justice and would thus infringe s. 7 of the Charter.<sup>220</sup>

The court used this reasoning to strike down the “immediacy” and “presence” requirements of Section 17 of the *Criminal Code*. As Justice LeBel noted in the decision “[t]he plain meaning of s. 17 is quite restrictive in scope. Indeed, the section seems tailor-made for the situation in which a person is compelled to commit an offence at gun point.”<sup>221</sup> As this language shows, the defense is more nuanced than the restrictive paradigmatic example provided in *Ruzic*. Not every case involves a gunman who is present and threatening immediate force.

However, the unfortunate result of *Ruzic* is that it has “allowed moral involuntariness to require an acquittal even when the accused’s behaviour is morally blameworthy.”<sup>222</sup> Thus, it may be possible that someone who acted in a morally involuntary way but who *was* morally blameworthy would nonetheless be acquitted.<sup>223</sup> This finding does not accord with the

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217. *Id.* para. 14.

218. *Id.* para. 109.

219. The concept of moral involuntariness is a fundamental concept that will be discussed in detail later in the text.

220. *Ruzic*, 1 S.C.R. 687 para. 47.

221. *R. v. Ruzic*, [2001] 1 S.C.R. 687, para. 50 (Can.).

222. Stephen G. Coughlan, *Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change*, 7 CAN. CRIM. L. REV. 147, 196 (2001).

223. The court also cited Dennis Klimchuk who states that “normatively involuntary actions share with actions that are involuntary in the sense relevant to negating *actus reus* the exculpatory relevant

principle formed in past cases that there should not be a focus on the *actus reus* or *mens rea* in order to analyze duress.<sup>224</sup> The court in *Ruzic* decided to base the defense on an extremely tenuous foundation. Instead of taking the opportunity to clarify the defense and square it with the lower court's conception of duress, the court raised more questions.

The fundamental basis of the decision is that the Supreme Court created this new principle of fundamental justice because they were worried about the ramifications of equating moral involuntariness with moral innocence: they denied that morally involuntary behaviour is necessarily not blameworthy. Their fear was that to identify the two would have unintended consequences for the justice system.<sup>225</sup>

It seems that “in their haste to keep the cap on the toothpaste, the Supreme Court may have cut the bottom off the tube.”<sup>226</sup> Again, as seen below,<sup>227</sup> *Ruzic* left open the issue of whether the excluded offenses in Section 17 remain and how they may be removed by Parliament or the courts.<sup>228</sup> So far, this question has remained unanswered. Although the court softened the defense of duress in *Ruzic*, the defense remains very confusing.<sup>229</sup> Stanley Yeo argues that although the Supreme Court made the concept of moral involuntariness a principle of fundamental justice, it “lacks sufficient constraint and is too imprecise to qualify as a principle of fundamental justice.”<sup>230</sup>

The decision in *Ruzic* was not clear on whether Section 17 was completely struck down or if only the two portions—presence and immediacy—were impacted. Justice LeBel stated, “I prefer to ground the *partial striking down* of s. 17 on the fundamental principle that criminal liability should not be ascribed to physically or morally involuntary behaviour.”<sup>231</sup> The reference to “partial striking down” is ambiguous, and it is not clear whether the court intended to strike down only the presence and immediacy requirements (thus addressing only the specific questions

feature that renders the latter immune from criminal censure, namely, that involuntary actions resist imputation to the actor putatively responsible for their commission.” *Ruzic*, 1 S.C.R. para. 46.

224. See *R. v. Hibbert* [1995] 2 S.C.R. 973 where the Supreme Court made it clear that duress did not affect the *actus reus* nor the *mens rea* of the offense apart from exceptional circumstances.

225. Coughlan, *supra* note 222, at 149.

226. *Id.*

227. See Dennis Klimchuk, *Moral Innocence, Normative Involuntariness, and Fundamental Justice*, 18 CRIM. REP. 96, 104–05 (1998).

228. STUART, CRIMINAL LAW, *supra* note 12, at 457 (citing *Ruzic*, 1 S.C.R. 687, para. 91, where Justice Laskin uses *R. v. Rodriguez*, [1993] 3 S.C.R. 519 as authority).

229. Don Stuart, ‘Moral Involuntariness’ Becomes Charter Standard for Defences, 41 CRIM. REP. 37, 42 (2001).

230. Yeo, *supra* note 19, at 335.

231. *R. v. Ruzic*, [2001] 1 S.C.R. 687, para. 93 (Can.) (emphasis added).

before the court) or whether the court intended to go further and to strike down the whole of the first part of Section 17 and to *substitute* the common law defense for that portion of Section 17. The very recent case of *R. v. Ryan*<sup>232</sup> below indicates that this has not been the result.

However, the analysis in *Ruzic* is consistent with the hypothesis that courts are trying to take into account the intent of the earliest framers of the law, who suggested that duress was not meant to be entirely codified:

[T]o strike down only a portion of the defense is more complex. If we were literally only to partly strike down the defense, by removing the imminence and presence requirements, then we would be left with a section that allows anyone to invoke duress when they act under compulsion by threats. It is clear that this is not the Court's intention, and that they want some restrictions on what sort of threats will be required. Their intention is to read into the statute the more relaxed common law standard . . . . But this intent would be made much clearer if the Court actually spoke in *Ruzic* about 'reading in', rather than simply about 'striking down.'<sup>233</sup>

It seems as if the court meant the test of duress was meant to be flexible, and a new, more flexible standard should now be adopted.<sup>234</sup> This approach seems to be consistent with the most recent Canadian criminal case to come through the Nova Scotia Court of Appeal.

*R. v. Ruzic* attempted to answer some of the questions inherent in duress. One of the most important findings was that the common law version of the defense had "freed itself from the constraints of immediacy and presence and thus appears more consonant with the values of the *Charter*"<sup>235</sup> and acknowledged that the common law defense was an important part of the criminal law of Canada.

The court found that with respect to future harm the "underinclusiveness" of the duress defense in Section 17 infringes on the right to life, liberty and security of the person protected under Section 7 of the *Charter* "because the immediacy and presence requirements exclude threats of future harm to the accused or to third parties. It risks jeopardizing the liberty and security interests protected by the *Charter*, in violation of the basic principles of fundamental justice."<sup>236</sup> Upholding the

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232. *R. v. Ryan* (2011), 301 NSR (2d) 255 (Nova Scotia Court of Appeal).

233. Coughlan, *supra* note 222, n.33.

234. See discussion *supra* Part I.

235. *Ruzic*, 1 S.C.R. 687, para. 56.

236. *R. v. Ruzic*, [2001] 1 S.C.R. 687, para. 90 (Can.).



*Charter*, future harm was identified as an important element to preserve within the common law defense.<sup>237</sup> The court, however, noted that, in the future, the “trial judge should instruct the jury clearly on the components of this defense including the need for a close temporal connection between the threat and the harm threatened.”<sup>238</sup> The Supreme Court permitted future harm within a time limitation.

In *Ruzic*, Justice LeBel also found that standard of immediacy is less strict in the common law defense. He stated that, although the defense requires the person imposing duress require “immediate” action by the defendant, this immediacy requirement has been “interpreted in a flexible manner by Canadian jurisprudence and also as appears from the development of the common law in other Commonwealth countries, more particularly Great Britain and Australia.”<sup>239</sup> Instead of the strict presence and immediacy requirements of Section 17, the common law simply provides for a “close connection in time, between the threat and its execution in such a manner that the accused loses the ability to act freely.”<sup>240</sup> If this temporal connection is absent it would be doubtful that the individual could argue he or she did not have a safe avenue of escape. While there is much debate on the individual elements of this definition, these considerations seem to be the current test employed by Canadian courts. Still, as Coughlan has noted, “there is murkiness below the surface.”<sup>241</sup>

The duress defense continues to evolve. Although the list of excluded offenses to which the duress defense is unavailable seems unaffected by the *Ruzic* decision, at least one court has permitted a defendant to claim the duress defense in robbery even though robbery is listed as one of the twenty-two excluded offenses.<sup>242</sup>

Finally it must be noted that the future use of the common law defense of duress is not without problems. Some commentators have noted that even if “s. 17 is constitutionally invalid, it does not follow that the common law is constitutionally valid if, as it stands, it too would allow for

237. *Id.* para. 73.

238. *Id.* para. 96.

239. *Id.* para. 65.

240. *Id.*

241. Coughlan, *supra* note 222, at 160.

242. After *Ruzic*, the excluded offense of robbery was successfully challenged and the court acquitted the accused and allowed a duress defense. *R. v. Fraser*, (2002), 3 C.R. (6th) 308 (Can. N.S. Prov. Ct.). In the Nova Scotia Provincial Court, it was found that “Section 17 of the *Criminal Code*, at least in relation to the offence of robbery, was in violation of s. 7 of the *Charter [of Rights and Freedoms]* and was declared inoperative. Therefore, the common law defence of duress was applicable.” *Id.*

the conviction of a person who is ‘morally innocent.’<sup>243</sup> Thus, by simply finding Section 17 unconstitutional, questions remain about the common law and how to ensure that the same constitutional challenge does not occur under any new common law formulation of duress.

A very recent case has sought to clarify the statutory law of duress. In *R. v. Ryan*,<sup>244</sup> the Nova Scotia Court of Appeal had the opportunity to discuss the confusing nature of duress which was, again, commented to be “a rather confusing amalgam of statutory and common law.”<sup>245</sup> This case has very unique facts. The defendant, Ms. Ryan, decided that after a life of “constant abuse at the hands of her husband,” to contract an individual to murder her husband.<sup>246</sup> She in fact contracted with an undercover R.C.M.P. officer, and was charged with counseling to commit murder under the *Criminal Code*.<sup>247</sup> The trial judge and the Court of Appeal both outlined a life of domestic violence where Ms. Ryan feared for her life and the life of her daughter during her husband’s “reign of terror,” and lived in “constant terror.”<sup>248</sup> Mr. Ryan described to his wife how he would kill her and their young daughter and then he would bury them behind where they lived.<sup>249</sup> Ms. Ryan called the police more than nine times, spoke to Victim Services approximately 11 times, and attempted to obtain a peace bond to no avail.<sup>250</sup>

The Court of Appeal evaluated whether the defense of duress would apply in this non-traditional situation because the defense of self-defense would not apply because Ms. Ryan contracted someone else to carry out the act of murder. Although the Court of Appeal asked whether the “defence of duress [could] go where it had never gone before,” they concluded that Ms. Ryan had no way out, and that the defense should not be limited simply because it could not “fit neatly into the traditional parameters of one of our enumerated defences.”<sup>251</sup> The court determined that Ms. Ryan was the principal to the offense rather than a party, and her offense was not one of the excluded offenses in Section 17; therefore, she would come within the codified defense.

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243. Patrick Healy, *Innocence and Defences*, 19 CRIM. REP. 121, 126 (1993).

244. *R. v. Ryan* (2011), 301 NSR (2d) 255.

245. *Id.* para. 76.

246. *Id.* para. 1, 4.

247. *Id.* para. 1.

248. *Id.* paras 10, 29.

249. *Id.* para. 40.

250. *R. v. Ryan* (2011), 301 NSR (2d) 255, paras. 46, 48, 50. A peace bond is commonly referred to as a restraining order.

251. *Id.* paras. 73–74.

The Court of Appeal first analyzed the safe avenue of escape and the immediacy and presence requirements, and went back to the Supreme Court decision in *Ruzic*. Extraordinarily, the court in *Ruzic* actually references this type of situation where a battered woman may use the duress defense when coerced by her spouse to commit a crime. The court specifically noted that

Even though her partner is not present when she commits the offence and is therefore unable to execute it immediately, a battered woman may believe nonetheless that she has no safe avenue of escape. Her behaviour is morally involuntary, yet the immediacy and presence criteria, strictly construed, would preclude her from resorting to s. 17.<sup>252</sup>

The Court of Appeal concluded that the defense of duress would apply in this situation even though the victim was the aggressor rather than a third party,<sup>253</sup> and that there was no other safe avenue of escape on the subjective facts of the case.<sup>254</sup>

For all of these reasons, the court found that the statutory form of the duress would apply, there was no safe avenue of escape, the defense had an air of reality, and subsequently upheld the acquittal of the defendant. This case has now gone to the Supreme Court of Canada, and arguments were heard and decision reserved on June 14, 2012 just before the publication of this Article. This is a good opportunity for the court to clarify the defense of duress and ameliorate some of the questionable elements outstanding from *Ruzic*. The Crown wishes to retry the case arguing that self-defense has been confused with the defense of duress, that there was a misapprehension of the evidence, that there was not an air of reality to the defense, and that the common law defense would not apply to someone who has hired a hitman.<sup>255</sup> This is a great opportunity to discuss all of these duress issues, but it is likely that some of the elements from *Ruzic* will not be considered in this upcoming decision, leaving some ambiguity.

252. *Id.* para. 88.

253. *Id.* para. 99.

254. *Id.* para. 108. These factors included Mr. Ryan's history of violence to Ms. Ryan and others, his control of Ms. Ryan, his possession of firearms, the specific threats concerning how he would kill Ms. Ryan and their daughter, and his lack of response to those in authority. *See id.* para. 108.

255. *R. v. Ryan: The Defence of Duress*, THE LAWYERS WEEKLY (Can.), June 8, 2012, at 4.

### III. THE ESSENTIAL ISSUES: WILL, EXCLUDED OFFENSES, THREATS TO THIRD PARTIES, THE CANADIAN “OBJECTIVE-SUBJECTIVE STANDARD,” AND BURDEN OF PROOF

There are several elements which are common to both civil and criminal duress. For example, the courts in both civil and criminal law have referred to the “will,” excluded offenses, threats to third parties, the Canadian “objective-subjective” standard, and the burden of proof. These issues have been examined with various rates of success by each system. By comparing what the courts have done in the two types of duress helps to clarify the preferable approach for both.

#### A. *The “Will” of the Individual*

The truth about both criminal and contractual duress is that the literature on this topic is replete with difficult rhetoric. This rhetoric is most evident in the “overborne will” element of contractual duress. Duress or coercion is said to be “‘overcoming,’ ‘overbearing,’ ‘overpowering,’ ‘breaking,’ ‘destroying,’ ‘subverting,’ ‘removing,’ ‘neutralizing,’ or otherwise through some traumatic inner ordeal, rendering the individual’s will impotent . . . a ‘pressure’ that ‘compels the will to yield,’ or on the other hand as a ‘suction process’ that ‘drains it of its capacity for free choice.’”<sup>256</sup> Yet, as Fingarette notes, the language is “rich, dramatic, and correspondingly lacking in objective specificity of meaning.”<sup>257</sup> This was certainly true in Blackstone’s objective requirement that the duress overcome the will of a “person of ordinary firmness.”<sup>258</sup> The standard was then transformed to something more subjective, and asked if the victim was deprived of his or her “free will.”<sup>259</sup> The concept of free will was discussed in depth in the New York state case of *Austin Instrument Inc. v. Loral Corp.*, where the court concluded that a “contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will.”<sup>260</sup> However, courts have also adopted another

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256. Fingarette, *supra* note 7, at 71.

257. *Id.* at 72.

258. See FARNSWORTH, *supra* note 5, at 440 n.1 (citing W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 131 (1765)).

259. *Austin Instrument Inc. v. Loral*, 272 N.E.2d 533, 536 (1971).

260. *Id.* at 535.

standard that takes into account whether the victim had “no reasonable alternative.”<sup>261</sup>

### 1. *Overborne Will and Contractual Duress*

Modern contractual duress eliminates the common law focus on an overborne will and the destruction of will in order to “negate” consent.<sup>262</sup> Instead, this conception of duress still involves coercion, just not to the extent of destruction of the will of the person. In fact, Bigwood goes as far as to say “the overborne will theory was nonsensical: the victim who hands over his possessions to the highwayman acts ‘intentionally,’ consciously and freely choosing this alternative to the promised violence.”<sup>263</sup> Theorist Patrick Atiyah is also incredulous about the concept of an overborne will in contractual duress because the theory would “divert attention into quite irrelevant inquiries into the psychological motivations of the party pleading duress.”<sup>264</sup> Duress can be best conceptualized as constraint rather than a psychological condition, and the duress doctrine really has little to do with a party’s “willingness.”<sup>265</sup> Wertheimer concludes that “the moral question is whether [the party under duress] is responsible for his action and not whether he is *happy* about it.”<sup>266</sup> When contractual duress is concerned, the concern is whether the defendant should have been free from any coercion rather than being overborne.<sup>267</sup>

Furthermore, the court in *Attorney-General* found that “vitiating consent” is no longer the focus in duress cases.<sup>268</sup> Instead, the focus is now on consent and the “quality of that consent” and whether it was true consent.<sup>269</sup> However, the court also adds the proviso that if consent has been given where there is a justification for relief in that “the party who acted under duress may avoid the contract, unless it has been affirmed once the circumstances amounting to duress have ceased to operate.”<sup>270</sup> Although most theorists thought that the criminal case of *Lynch*<sup>271</sup> had put

261. FARNSWORTH, *supra* note 5, at 440. See *Leeper v. Beltrami*, 347 P.2d 12, 19 (1959).

262. Bigwood, *Coercion*, *supra* note 160, at 207.

263. *Id.* at 207 n.28.

264. Patrick S. Atiyah, *Economic Duress and the ‘Overborne Will’*, 98 L.Q.R. 197, 202 (1982).

265. Bigwood, *Coercion*, *supra* note 160, at 207.

266. WERTHEIMER, *supra* note 2.

267. Bigwood, *Coercion*, *supra* note 160, at 208.

268. *Att’y Gen. for England and Wales v R.* [2002] 2 NZLR 91 (CA) para. 60 (N.Z.).

269. *Id.*

270. *Id.*

271. *Dir. of Pub. Prosecutions v. Lynch* [1975] A.C. 653 (H.L.).

the theory of overborne will to rest, Justice Hammond acknowledged the debate in contract in *Pharmacy Care* saying that the “victim’s will must be overborne by the improper pressure so that his or her free will and judgment have been displaced.”<sup>272</sup> Many say that Justice Hammond did not intend to restart the overborne will debate, but rather he merely intended to add that the victim “succumbed to pressure.”<sup>273</sup> The term is not a danger to the discussion but “can be safely left, like other chameleon phrases, to take its colour from its context.”<sup>274</sup> The rhetoric around contractual duress has been freed from the fruitless debates of the actor and his will which is a lesson the criminal law has not learned.

## 2. *Overborne Will and Criminal Law*

As discussed above, the discussion of an overborne will has led to the confounding of the concepts of moral blameworthiness and moral involuntariness in the criminal law. Section 17 of the *Criminal Code* was found to violate the principles of fundamental justice because it is wrong to convict someone who behaves in a “morally involuntary” way.<sup>275</sup> Debates about the individual and will, from a moral and voluntariness standard, flourish in the criminal system.

Some have noted that the definition of moral involuntariness used in *Ruzic* is quite broad and “[o]n its face, it captures a whole range of human conduct, most of which would not ordinarily be classified as conduct performed under duress.”<sup>276</sup> Theorist Martha Shaffer suggests that the threatened person lacks the autonomy to have real choice. Shaffer claims:

An accused who acts to avoid threatened harm is morally blameworthy of the harm that she causes because she intended to bring about that harm (assuming that moral blameworthiness is limited to considerations of *mens rea*). Nonetheless, she is not criminally responsible for her actions because the basic precept of criminal responsibility—that the accused was a freely choosing actor—is not made out. A person whose actions were morally involuntary does not by definition enjoy the autonomy that the law demands for an attribution of criminal responsibility. Consequently,

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272. *Pharmacy Care Systems Ltd. v Att’y Gen.* [2004] CA 198/03 para. 98 (N.Z.).

273. TINA YEE, *THE ETHRIDGE INFLUENCE ON UNDUE INFLUENCE* 97 (2008) (unpublished manuscript) (on file with author).

274. *Id.*

275. See Coughlan, *supra* note 222.

276. *R. v. Ruzic* [1998], 1 S.C.R. 687, para. 47 (Can.).

such a person cannot be held criminally responsible for the harm that she causes.<sup>277</sup>

Shaffer believes that the presence and immediacy requirements are “inadequate proxies” for ascertaining moral involuntariness.<sup>278</sup> Elevating moral involuntariness to the level of a principle of fundamental justice has very serious ramifications which might not yet be fully appreciated.<sup>279</sup>

Unlike Shaffer, Justice LeBel in *Ruzic* found that the concepts of moral involuntariness and moral blameworthiness had to be separate and distinct because “morally involuntary conduct is not always inherently blameless. Once the elements of the offense have been established, the accused can no longer be considered blameless.”<sup>280</sup> He went on to say that the “indefinable and potentially far-reaching nature of the concept of moral blamelessness prevents us from recognizing its relevance beyond an initial finding of guilt in the context of Section 7 of the *Charter*. Holding otherwise would inject an unacceptable degree of uncertainty into the law.”<sup>281</sup> For example, if a lost alpinist forces entry (a criminal act) into a cabin in order to save his own life it is difficult to see the alpinist as completely blameless, but the state does not punish “because the circumstances did not leave him with any other realistic choice than to commit the offense.”<sup>282</sup> What would function better is that the excuse should focus not on the act but on the circumstances and the ability of the individual to avoid the results.<sup>283</sup> Thus, instead of eliminating this debate as has been done in contract law, the overborne will is alive and well in the criminal law. This confusion between moral involuntariness, moral blame, fundamental justice and the overborne will adds very little to the discussion.

Again the concept of “realistic choice” surfaces but many scholars argue that this concept is value-laden and greatly undermines using moral involuntariness as a principle of fundamental justice.<sup>284</sup> As the actor was left with no realistic choice, there was not much doubt that the “presence” and “immediacy” portions of Section 17 would eventually be found to

277. Martha Shaffer, *Scrutinizing Duress: The Constitutional Validity of S. 17 of the Criminal Code*, 40 CRIM. L.Q. 444, 460–61 (1998) [hereinafter Shaffer, *Scrutinizing Duress*].

278. *Id.* at 466.

279. For a full discussion of the principles of fundamental justice and its history, see PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 44.10(a) (2005).

280. *Ruzic*, 1 S.C.R. 687, para. 41.

281. *Id.*

282. *Id.* para. 40.

283. *R. v. Ruzic* [1998], 1 S.C.R. 687, para. 40 (Can.).

284. See Yeo, *supra* note 19, 335; Coughlan, *supra* note 222, at 196.

violate Section 7 of the *Charter*. The real issue was “*why* they violate section 7.”<sup>285</sup> The court found that to convict one acting in a morally involuntary manner is “a violation of the principles of fundamental justice. In other words, they gave the concept of moral involuntariness the same status as moral blameworthiness, rather than having the former rely on the latter. On this basis, the presence and immediacy requirements could be struck down directly.”<sup>286</sup> Philosopher George Fletcher’s comments on the overborne will were widely cited by the Supreme Court in *Ruzic*:

excuses absolve the accused of personal accountability by focussing [sic], not on the wrongful act, but on the circumstances of the act and the accused’s personal capacity to avoid it. Necessity and duress are characterized as concessions to human frailty in this sense. The law is designed for the common man, not for a community of saints or heroes.<sup>287</sup>

Although *Lynch*<sup>288</sup> purported to settle this discussion not only in the criminal law but in contracts as well, this term continued to cloud the discussion throughout the development of duress. *Pao On*, decided after *Lynch*, again said that “[d]uress, whatever form it takes, is a coercion of the will so as to vitiate consent.”<sup>289</sup> Atiyah notes that this analysis “is totally inconsistent with the speeches in the House of Lords in the *Lynch* case.”<sup>290</sup> In that case, all five justices rejected the concept of overborne will.<sup>291</sup> The real encapsulation of duress from both a civil and a criminal standpoint can be found in the Latin term *coactus volui*, or “[h]aving been forced I was willing.”<sup>292</sup> Lord Wilberforce in *Lynch* made the connection to this term, differentiating between the civil and criminal law. He noted that there is a good analogy between contracts and criminal law because in a civil example “duress does not destroy the will, for example, to enter into a contract, but prevents the law from accepting what has happened as

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285. Coughlan, *supra* note 222, at 186.

286. *Id.*

287. *Ruzic*, 1 S.C.R. 687, para. 40.

288. Dir. of Pub. Prosecutions v. Lynch [1975] A.C. 653 (H.L.) [670].

289. *Pao On v. Lau Yiu Long* [1980] A.C. 614 [635] (P.C.) (Eng.).

290. Atiyah, *supra* note 264, at 199.

291. *Id.*

292. See R.J. Schork, *Joyce and Justinian: U 250 and 520*, 23 JAMES JOYCE QUARTERLY 77 (1985), who has translated this material and notes that this phrase came from Justinian’s *Digest* IV.2.21.5 in a sixth century discussion of “force and fear on the validity of a ‘contractual’ action.” The full discussion means “*si metu coactus adii hereditatem, puto me heredem effici, quia quamvis si liberum esset noluissem, tamen coactus volui.*” (If I have been forced by fear to accept a legacy, I judge that I am made a legatee, because, although I would not have been willing had it been freely offered, nevertheless, having been forced, I was willing.). *Id.*



a contract valid in law . . . .”<sup>293</sup> The criminal defense is a strange hybrid; the subject has to admit that he has done the act, *but* they should not be responsible.<sup>294</sup> However, others note that, in fact, those instances of “more extreme pressure were precisely those in which the consent expressed was *more* real; the more unpleasant the alternative, the more real the consent to a course which would avoid it.”<sup>295</sup> Atiyah cites the example of the “victim of the modern mugger who surrenders his wallet with a knife at his throat certainly knows what he is doing, and intends to do it.”<sup>296</sup> Atiyah concludes that “overborne will” is really not a factor in either contractual or criminal cases, given the statements in *Lynch* which are fundamental to duress and not simply confined to one system or the other.<sup>297</sup> Furthermore, Atiyah asserts that the overborne will theory is “internally inconsistent and contradictory” and should be “consigned to the historical scrapheap.”<sup>298</sup> Based on these assertions, it is reasonable to conclude that perhaps all discussions of “will” in contracts and criminal law should be eliminated. Although matters are more emotional in the criminal realm, a page should be taken from the contractual approach.

### *B. Excluded Offenses—Criminal and Contractual*

In regards to contractual duress in the civil law, it has become quite clear that the court is willing to extend the concept to family law, estates, business relationships, property disputes, and a host of other situations. Unlike criminal duress, there has never been any consideration that the duress is barred as an unavailable defense against certain civil offenses. The explanation for this completely divergent approach is scarcely mentioned in the case law or in scholarly comment.

It is imperative that the court reconsider the excluded offenses for criminal duress: the choice of excluded crimes does not make practical sense because of the random selection of the list. There is a long history in Canada of recognizing the criminal defense of duress, despite its inadequacies and the fact that it was seen as “too pregnant with potential

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293. *Dir. of Pub. Prosecutions v. Lynch* [1975] A.C. 653 (H.L.) [680].

294. This is much different than a proposed defense of “brainwashing.” See Frances E. Chapman, *Intangible Captivity: The Potential For a New Canadian Criminal Defence Of Brainwashing and Its Implications for the Battered Woman* (2009) (unpublished Ph.D. dissertation) (on file with author).

295. John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 267 (1947).

296. Atiyah, *supra* note 264, at 200.

297. *Id.* at 201.

298. *Id.*

danger to permit of its recognition.”<sup>299</sup> Yet which offenses, if any, should be excluded continues to be controversial. Fletcher argues very directly that “[i]f duress in fact functions as an excuse, there should be no impediment to invoking the excuse to any wrongful act, including homicide.”<sup>300</sup> There is also serious question today whether any excluded offense can withstand *Charter* scrutiny.<sup>301</sup> Most importantly, Shaffer notes that “any attempt to put an offense, even one as serious as murder, completely outside of the scope of duress cannot be sustained under the Charter.”<sup>302</sup>

Thus, even if the excluded offenses are constitutionally challenged and removed from what is left of Section 17, it may still be necessary to retain some excluded offenses. As Justice Laskin noted in the Court of Appeal decision in *Ruzic*, that it may be the case that these restrictions, including the excluded offenses, are selected in such an arbitrary way that they are unfair and violate Section 7 of the *Charter*.<sup>303</sup> In the future, this argument might be very effective to explain why some offenses should have been excluded while more serious ones were not. The court in *Fraser* found that robbery was no longer an excluded offense.<sup>304</sup> The decision is brief stating that:

counsel for both the crown and defense have concur [sic] and this court concludes that § 17 of the Criminal Code in so far as it eliminates the defense of duress and/or necessity in offenses concerning robbery is of no force and effect as being contrary to the *Canadian Charter of Rights and Freedoms* and in particular § 7 of the *Charter*.<sup>305</sup>

With this evidence, there seemed to be general agreement that robbery should not be an excluded offense.

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299. George H. Crouse, *A Critique of Canadian Criminal Legislation*, 9 CAN. BAR REV. 545, 569 (1934).

300. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 831 (1978). Surprisingly, Fletcher notes that mass murder should be excluded as “the cost in human lives is sufficiently high we could properly expect someone to resist threats to his own life,” just pages after he said that duress should not exclude any offenses. *Id.* at 833.

301. Shaffer, *Scrutinizing Duress*, *supra* note 277, at 473.

302. *Id.* at 473. Interestingly, Shaffer notes that “[i]f the accused’s actions are truly morally involuntary, removing the defence of duress will not accomplish the goal of protecting third persons since the accused would have committed the action anyways.” *Id.*

303. *R. v. Ruzic* (1998), 41 O.R. 3d 1, para. 50.

304. *R. v. Fraser*, 3 C.R. (6th) 308 O.R. [2002] N.S.J. No. 401 (N.S.P.C.).

305. *Id.* para. 5.

Today's case law certainly questions the soundness of the included and excluded offenses, especially with respect to more serious cases like murder. For all of the reasons discussed in Part I the exclusion of these crimes seems to have been created wholly by Stephen's personal beliefs. There is no evidence that the bulk of the offenses were added for any particular reason. When one examines the excluded offenses more carefully today, certain absurdities become apparent. It has been noted that, even though offenses of murder would be excluded from the defense,

[t]here is nothing, however to prevent a duress argument in cases of manslaughter or infanticide. The latter seems an unlikely possibility, although if a new mother *did* kill her baby under duress while the balance of her mind was disturbed, the prosecutorial decision to lay an infanticide, rather than a murder, charge would at least leave the possibility of a complete acquittal open.<sup>306</sup>

This impractical and unprincipled use of excluded offenses does not add to the modern discussion of duress. To examine this issue, one needs only to look at murder as a representative offense to examine how excluded offenses will fit into the new common law defense of duress.

Scholars have said that the "modern debate between the 'legal pragmatists' and the 'ethicists' on the question of murder, is an historical anomaly."<sup>307</sup> If the defense of duress is available for other crimes, the

critical question here is whether heavily constrained choice should ever be accepted as an excuse for serious crime . . . [t]he issue is not whether the defendant has done the right thing in the circumstances . . . but whether we should be prepared to exculpate him for doing the wrong thing—because his freedom of choice was so heavily constrained by serious threats that . . . his 'choice' is no true choice at all [but] remorselessly compelled by normal human instincts.<sup>308</sup>

By allowing duress as a defense to murder, the system is not saying that it is praiseworthy to commit this crime, any more than it is to commit a non-excluded offense. It is illogical to exclude the defense of duress in the case of murder. To do so placates the antiquated views of a handful of historical theorists.

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306. ISABEL GRANT, DOROTHY CHUNN & CHRISTINE BOYLE, *THE LAW OF HOMICIDE* 6–64 (1999).

307. BROOKBANKS, *OVERVIEW*, *supra* note 71, at 13.

308. McAuley, *supra* note 76, at 173.

Interestingly, Lord Wilberforce stated in *Lynch* that “if the proposition is correct at all that duress prevents what would otherwise constitute a crime from attracting criminal responsibility, then that should be correct whatever the crime.”<sup>309</sup> Later, in reference to the excluded offenses that were added by Stephen without explanation, Lord Wilberforce noted that the excluded offenses were “not adopted in England,” and they “did not represent the law at the time and certainly [do] not now represent the law as it is.”<sup>310</sup> What the court needed to say was that the offender acted under an unfairly limited choice and that the offender’s actions were understandable.

The courts in each of the Commonwealth countries should be urged to remove excluded offenses from their provisions on duress. Clearly, fear by legislators of the consequences of expanding the duress defense to all crimes has existed since the inception of the defense. Judges have been quick to point out that “[w]e are not living in a dream world in which the mounting wave of violence and terrorism can be contained by strict logic and intellectual niceties alone. Common sense surely reveals the added dangers to which in this modern world the public would be exposed.”<sup>311</sup> Thus, at its fundamental basis, fear keeps the courts from fully accepting this sometimes tenuous defense and causes the artificial restraints on its use. Canada has the most number of excluded offenses of virtually any common law country including New Zealand,<sup>312</sup> England,<sup>313</sup> Australia,<sup>314</sup>

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309. *Dir. of Pub. Prosecutions v. Lynch* [1975] A.C. 653 (H.L.) [680–84].

310. *Id.* at 684.

311. *Abbott v. The Queen*, [1977] A.C. 755, 766 (P.C.) (appeal taken from Trin. & Tobago).

312. New Zealand’s law on duress also followed from the provisions of the *Draft Code*. See Gerald Orchard, *The Defence of Compulsion*, 9 N.Z.U. L. Rev. 105, 105 (1980). New Zealand’s provisions on compulsion have been far more restrictive than the Australian duress provisions and are more like Section 17 of the Canadian Criminal Code. As a result, their provision on duress is also extremely restrictive. Section 24 of New Zealand’s *Crimes Act* 1961, Public Act 1961 No 43, excludes 13 offenses and provides that:

(1) Subject to the provisions of this section, a person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is protected from criminal responsibility if he believes that the threats will be carried out and if he is not a party to any association or conspiracy whereby he is subject to compulsion.

(2) Nothing in subsection (1) shall apply where the offence committed is an offence specified in any of the following provisions of this Act, namely:

(a) section 73 (treason) or section 78 (communicating secrets):

(b) section 79 (sabotage):

(c) section 92 (piracy):

(d) section 93 (piratical acts):

(e) sections 167 and 168 (murder):

(f) section 173 (attempt to murder):

- (g) section 188 (wounding with intent):
- (h) subsection (1) of section 189 (injuring with intent to cause grievous bodily harm):
- (i) section 208 (abduction):
- (j) section 209 (kidnapping):
- (k) section 234 (robbery):
- (ka) Repealed
- (l) section 235 (aggravated robbery):
- (m) section 267 (arson).

(3) Where a woman who is married or in a civil union commits an offence, the fact that her husband or civil union partner was present at the commission of the offence does not of itself raise a presumption of compulsion.

313. England is in a more intermediary position, in terms of the restrictiveness of the defence. *R. v. Hasan*, [2005] H.L.J. No. 8, [2005] UKHL 22 (H.L.) is the highest court pronouncement on the defence of duress in England, and it sets down most of the elements that are being employed in England today with respect to duress. The House of Lords restored the conviction from the trial courts. Lord Bingham of Cornhill noted generally, it is “unsurprising that the law in this and other jurisdictions should have been developed so as to confine the defence of duress within narrowly defined limits.” *Id.* para. 21. However, on excluded offenses the court recognized that only three general offenses as they noted that:

(1) Duress does not afford a defence to charges of murder (*R v Howe* [1987] AC 417), attempted murder (*R v Gotts* [1992] 2 AC 412) and, perhaps, some forms of treason (Smith & Hogan, *Criminal Law*, 10th ed., 2002, p 254). The Law Commission has in the past (e.g. [sic] in “Criminal Law. Report on Defences of General Application” (Law Com No 83, Cm 556, 1977, paras 2.44-2.46, [1977] EWLC 83 )) recommended that the defence should be available as a defence to all offences, including murder, and the logic of this argument is irresistible. But their recommendation has not been adopted, no doubt because it is felt that in the case of the gravest crimes no threat to the defendant, however extreme, should excuse commission of the crime.

*Id.*

314. Australian Capital Territory and the Criminal Code Act of the Northern Territory of Australia provides in Sections 40 and 41 that:

(1) The excuse referred to in subsection (1) does not extend to an act, omission or event that would constitute a crime of which serious harm or an intention to cause such harm is an element; nor to a person who has rendered himself liable to have such a threat made to him by having entered into an association or conspiracy that has as any of its objects the doing of a wrongful act.

Thus, only those crimes that involve a conspiracy or association are excluded.

Some provisions are very close to the Canadian system, see, for example, the Criminal Code Act 1924, (No. 69 of 1924) now in effect in Tasmania, which provides that:

20 (1) Except as provided by section 64, compulsion by threats of immediate death or grievous bodily harm, from a person actually present at the commission of the offence, shall be an excuse for the commission, by a person subject to such threats, and who believes that such threats will be executed, and who is not a party to any association or conspiracy the being a party to which rendered him subject to compulsion, of any offence other than treason, murder, piracy, offences deemed to be piracy, attempting to murder, rape, forcible abduction, aggravated armed robbery, armed robbery, aggravated robbery, robbery, causing grievous bodily harm, and arson.

In Queensland, in the present Criminal Code Act 1899, No. 5C, the provision is quite different than the other states and territories; in that it provides in Section 31 that:

(2) However, this protection does not extend to an act or omission which would constitute the crime of murder, or an offence of which grievous bodily harm to the person of another, or an

and the United States.<sup>315</sup> If duress is a concession to human frailty which centers on moral involuntariness, then why should any offense be excluded?<sup>316</sup> The fundamental question of why any offense should be excluded should be re-examined.

### C. Threat<sup>317</sup>

Another issue in duress is the element of “threat.” The court has paid a considerable amount of attention to this element, and who this threat is directed towards.

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intention to cause such harm, is an element, nor to a person who has by entering into an unlawful association or conspiracy rendered himself or herself liable to have such threats made to the person.

315. It is difficult to generalize about the state of duress in the United States as various states have adopted differing ways to deal with the defense. Generally, the United States is similar to Australia in its inclusiveness. The Model Penal Code (“MPC”) provides in section 2.09 (2) that:

(2) The defense 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 defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

316. Shaffer suggests that if there were no excluded offenses, just an element of proportionality would be required to make sure that the actions matched the harm being avoided. See Martha Shaffer, *Coerced into Crime: Battered Women and the Defence of Duress*, 4 CAN. CRIM. L. REV. 271, 322–27 (1999) [hereinafter Shaffer, *Coerced*]; see also Gary T. Trotter, *Necessity and Death: Lessons from Latimer and the Case of the Conjoined Twins*, 40 ALBERTA L. REV. 817 (2003).

317. A note must be made that much of the discussion of contractual duress, and in particular economic duress, is the concern over what constitutes an “illegitimate threat.” Though beyond the scope of this paper regarding contractual duress generally, it is important to note that in *Universe Tankships*, the ultimate result was that the pressure was legitimate and did not constitute duress. *Universe Tankships of Monrovia v. Int’l Transp. Workers’ Fed’n*, [1983] 1 A.C. 366, 405–06 (H.L.) (Eng.). The debate on the line between legitimate and illegitimate in a business context lead to the result in *Attorney-General*, that the elements of pressure and illegitimacy are linked as “[i]llegitimate pressure may amount to duress even if there is a practical choice, but the absence of practical choice may suggest the pressure is illegitimate.” *Att’y Gen. for England and Wales v R.* [2002] 2 NZLR 91 (CA) para. 60 (N.Z.). The court went on to say, that in “all duress cases the Court must consider whether the pressure under which the plaintiff was acting should be regarded as legitimate or illegitimate and, in that respect, the nature of any alternatives reasonably open to the plaintiff will be of major importance.” *Id.* para. 62; see also *Gordon v. Roebuck* (1992), 92 D.L.R. 4th 670 (Ont. C.A.) (Can.) (adopting the test of Lord Scarman for economic duress and breaking the requirements into four factors). The Court named the four factors: “(1) Did he protest? (2) Was there an alternative course open to him? (3) Was he independently advised? (4) After entering the contract did he take steps to avoid it?” *Id.* Boyle and Percy have noted that trying to distinguish between “justified and unjustified economic duress rather than between economic pressure and economic duress” would be the preferable method of dealing with this question. BOYLE & PERCY, *supra* note 3, at 716.

### 1. *Threats to Third Parties in Contract Law*

It is clear that actual violence perpetrated in the name of a contract has been found to apply to threats to the other party's family as well as threats to oneself.<sup>318</sup> One of the earliest cases involving an illegitimate threat to a third party was the 1904 English Appeal case of *Kaufman v. Gerson*.<sup>319</sup> In this case the defendant, Mrs. Gerson, gave evidence that she was induced into an agreement with Kaufman in order to prevent Kaufman from bringing a criminal proceeding against Mr. Gerson. She agreed to repay a large sum of money over a period of years to preserve the "good name of Gerson's children, [and] his wife."<sup>320</sup> Even though the subject of the threat was not a party to the contract, the court found that indeed this was duress, regardless of its non-physical nature, because "[s]ome persons would be more easily coerced by moral pressure, such as was exercised here, than by the threat of physical violence."<sup>321</sup> Justice Collins found that it "seems to me to be impossible to say that it is not coercion to threaten a wife with the dishonour of her husband and children."<sup>322</sup> The court dismissed Kaufman's action for payment finding that the court "will not enforce a contract which has been obtained by means of such moral coercion as was here used . . . we ought to refuse to enforce a contract which ought never to have been made."<sup>323</sup> Thus, a threat to a third party outside of the contract was found to be duress even though the target was unaware of the threat of harm.

In the 1976 British Columbia Supreme Court case *Saxon v. Saxon*, Mrs. Saxon sought to set aside her conveyance of a half interest in the matrimonial home, and to set aside the execution of the separation agreement.<sup>324</sup> The plaintiff alleged duress, saying that her husband had threatened to murder the couple's two children, ages six and five, to induce the separation agreement.<sup>325</sup> The court weighed the evidence: the reliability of the testimony of both parties; the "gross dissimilarities" in signature of the plaintiff compared to that on the separation agreement; and previous acts of violence toward the plaintiff and others.<sup>326</sup> Justice

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318. MCCAMUS, *supra* note 156, at 369.

319. *Kaufman v. Gerson*, [1904] 1 K.B. 591 (Eng.).

320. *Id.* at 595.

321. *Id.* at 597.

322. *Id.*

323. *Id.* at 599.

324. *Saxon v. Saxon*, [1976] 4 W.W.R. 300-01, *aff'd* in [1978] 4 W.W.R. 327 (B.C.C.A.) (Can.).

325. *Saxon*, 4 W.W.R. at 301.

326. *Id.* at 301, 307.

Spencer found that the defendant “did much as he wanted, committed adultery, pressured the plaintiff to fly to England knowing that she feared to do so, badgered and harassed her with meanness and with belittling remarks in public” and that she was “cowed by her husband.”<sup>327</sup> The plaintiff was hit and kicked by the defendant who also threatened her with a knife.<sup>328</sup> The court found that the defendant did make threats “against the plaintiff and the children that he would kill them if she did not sign the agreement . . . two weeks after he had threatened her with a knife and hit and kicked her.”<sup>329</sup> The court concluded that the plaintiff was “oppressed and confused” and dominated after several years of marriage, and that she was deeply affected by the breakdown of the marriage and her husband’s suicide attempt.<sup>330</sup> The court found that all of these factors amounted to duress as she was not allowed to seek advice and was oppressed by the defendant. Given this and the threats to the third-party children, the court found the agreement and deed void *ab initio*.<sup>331</sup>

Threats to third parties were extended even further in the bitter family battle in the more recent 1990 British Columbia appeals case, *Byle v. Byle*.<sup>332</sup> In this case, a business agreement was reached amongst family members, including the mother, father, and several of their children.<sup>333</sup> The purpose of this agreement was to resolve outstanding disputes between two of their sons.<sup>334</sup> The first brother, JB, said that he would harm his brother, BB, unless this agreement was signed by their parents.<sup>335</sup> The parents subsequently argued that the agreement was unenforceable as they had entered into the contract for fear that JB would “blow [BB’s] head off.”<sup>336</sup> The trial court found that Mr. and Mrs. Byle only agreed to execute the agreement because “they feared that [JB] might carry out a threat of harm to [BB].”<sup>337</sup> The trial judge, Justice Legg, noted that Mrs. Byle was medically unstable and was suffering from bone cancer at the time of this agreement.<sup>338</sup> The meeting leading to the agreement was

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327. *Id.* at 309.

328. *Id.* at 310.

329. *Id.*

330. *Id.*

331. *Saxon v. Saxon*, [1976] 4 W.W.R. 300, 311.

332. *Byle v. Byle*, [1990] 65 D.L.R. 4th 641 (Can. B.C.C.A.).

333. *Id.* at 642.

334. *Id.* at 645.

335. *Id.* at 646.

336. *Id.*

337. *Id.* at 647.

338. *Byle v. Byle*, [1990] 65 D.L.R. 4th 641, 646 (Can. B.C.C.A.).



several hours long, and Mrs. Byle was in severe pain.<sup>339</sup> The trial court found that

both Mr. and Mrs. Byle were prepared to do almost anything to prevent the tragedy of an attack by [JB] upon [BB] . . . There was no opportunity for Mr. and Mrs. Byle to consider the text of the whole agreement . . . [and BB testified that] his father did not understand some of the provisions in the agreement which he had signed.<sup>340</sup>

One of the key arguments in the case was that JB made the statements to a third party who communicated them to Mr. and Mrs. Byle. JB argued that the “threat” was not duress because “it involved no intention of causing Mr. and Mrs. Byle to do anything.”<sup>341</sup> As affirmed by the Court of Appeal, the trial court found:

[I]t is sufficient to render the agreement void if a threat of harm is acted upon by the party against whom the agreement is sought to be enforced. That party himself need not be the party who is threatened with harm.<sup>342</sup>

The trial judge went on to say that although the couple had obtained legal advice, they were nonetheless frightened that these acts of violence would be carried out and that this amounted to “coercion of their will so as to vitiate their consent.”<sup>343</sup> Thus, threats to third parties may vitiate consent of the actors and courts may find the contract signed under such threats unenforceable.

Case law over the last 100 years has shown that there must be a certain relationship between the individual threatened and the party to the contract. Qualifying relationships include a “family relative, a friend, or some person for whom the contracting party is responsible, such as an employee or principal.”<sup>344</sup> The employer-employee relationship in this context was found to be the subject of duress in the 1999 British case of *Royal Boskalis Westminster N.V. v. Mountain*.<sup>345</sup> This case involved five Dutch companies who were dredging at a port in Iraq near the Kuwait

339. *Id.* at 647.

340. *Id.*

341. *Id.* at 649.

342. *Id.*

343. *Id.* at 650.

344. ENONCHONG, *supra* note 20, at 58–59.

345. *Royal Boskalis Westminster N.V. v. Mountain*, [1999] Q.B. 674 (Can. C.A.).

border when the Gulf War began in 1990.<sup>346</sup> The plaintiffs alleged substantial duress in finalizing an agreement to abandon claims under the dredging contract with the Iraqi government. The tenor of the negotiations was punctuated by the reality that the Iraqis refused to evacuate the company personnel near the Kuwait border until the contract was signed.<sup>347</sup> Justice Phillips gave the judgment of the court and concluded that there “remains a class of duress so unconscionable that it will cause the English court, as a matter of public policy, to override the proper law of the contract.”<sup>348</sup> In respect to the case at hand, Justice Phillips noted firmly that the “threat to use a large number of personnel as human shields was about as cogent and unconscionable a form of duress as one can imagine.”<sup>349</sup> It is clear that the courts will intervene in the context of an employee and employer. The law’s response to a threat to a complete stranger, however, has yet to be considered, but given the findings in *Royal Boskalis*, it may be a possibility.<sup>350</sup>

## 2. Threats to Third Parties in Criminal Law

Despite initial hesitation, threats to third parties are still relevant to judges’ decisions about the availability of the codified version of duress. *Ruzic* answered some of the questions about the application of the *Criminal Code* section,<sup>351</sup> but how threats to third parties impact the application of duress is still indecipherable to many commentators.<sup>352</sup> In *Lynch*, Lord Simon of Glaisdale questioned the defense of third parties

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346. *Id.* at 674–75.

347. *Id.* at 678–79.

348. *Id.* (quoting DICEY & MORRIS, *THE CONFLICT OF LAWS* (12th ed. 1993) “[N]o doubt there may be acts of coercion or duress (or fraud) which are so shocking that the court will not enforce the contract irrespective of whether it is valid under its governing law.”); DICEY & MORRIS, at 1279.

349. *Royal Boskalis Westminster N.V. v. Mountain*, [1999] Q.B. 730 (Can. C.A.).

350. ENONCHONG, *supra* note 20, at 59. But Enonchong does see that a threat to a stranger might constitute duress under the right circumstances. He notes that

[I]t would be unwise to rule out completely the possibility that in certain rare circumstances the complainant may be induced to enter into a contract by a threat to a third party. Suppose B, an escaping criminal, grabs a child from her mother in the street, puts a gun to the child’s head and threatens to shoot her unless A, a passerby, pays him a sum of money. If A pays the money the court is unlikely to refuse his claim to recover it from B as money paid under duress. The threat to the child and the demand from B puts A under a degree of moral pressure which is easy to recognize.

*Id.*

351. *R. v. Ruzic*, [2001] 1 S.C.R. 687, para. 103 (Can.).

352. See, for example, Shaffer, *Coerced*, *supra* note 316, at 318 in the context of battered women.

within duress from a criminal and contractual perspective.<sup>353</sup> He noted that although contractual duress is fairly broad, there is no clear answer in the criminal law and whether the “threat must be of harm to the person required to perform the act, or extends to the immediate family of the actor (and how immediate?), or to any person.”<sup>354</sup> Lord Simon asked,

[I]s it worse to have a pistol thrust into your back and a grenade into your hand, or to have your child (or a neighbour’s child) seized by terrorists and held at peril until you have placed in a public building a parcel which you believe to contain a bomb?<sup>355</sup>

In short, courts still examine the nature of the threat and to whom the threat is directed. Although threats to third parties are clearly within the scope of criminal duress at common law, it is likely that the defense will be available only if death or serious bodily harm results. The accused should still be expected to show some fortitude and assert some resistance to the threat. Justice LeBel also noted in *Ruzic* that “[n]either the words of s. 17 nor the Court’s reasons in *Carker* and *Paquette* dictate that the target of the threatened harm must be the accused. They simply require that the threat must be made to the accused. Section 17 may thus include threats against third parties.”<sup>356</sup> Again, these factors will have to be assessed on a case-by-case basis, but threats to third parties will continue to be an issue relevant to the availability of duress in the criminal law. Again, the criminal law could use the example of the civil system recognize other targets.<sup>357</sup>

#### D. Canada’s “Objective-Subjective” Standard

##### 1. Canada’s “Objective-Subjective” Standard in Contractual Duress

There are divergent opinions regarding how much pressure the plaintiff should withstand when measuring whether one was under contractual duress. The case law has been somewhat vague on what internal factors of the accused can be considered. One of the early duress cases, *Parmentier v. Pater*, noted that

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353. *Dir. of Pub. Prosecutions v. Lynch* [1975] A.C. 653, [1975] 1 All E.R. 913 (H.L.) at 670.

354. *Dir. of Pub. Prosecutions v. Lynch* [1975] A.C. at 686.

355. *Id.*

356. *R. v. Ruzic* [1998], 1 S.C.R. 687, para. 54 (Can.).

357. As discussed above, the Supreme Court will have an opportunity in *R. v. Ryan* (2011), 301 NSR 2d 255, to clarify the application further, including a threat to a child of the marriage and using a third party to kill an abuser.

[p]ersons of a 'weak or cowardly nature' are the very ones that need protection. The courageous can usually protect themselves. Capricious and timid persons are generally the ones that are influenced by threats, and it would be a great injustice to permit them to be robbed by the unscrupulous because they are so unfortunately constituted.<sup>358</sup>

Subsequent cases like *Rubenstein v. Rubenstein* have argued that "age, sex, capacity, relation of the parties and all the attendant circumstances must be considered."<sup>359</sup>

Similarly, Allan Farnsworth notes that finding a reasonable alternative, the standard of many of the modern cases, "depends on all the circumstances, including the victim's age and background, the relationship of the parties, and the availability of disinterested advice."<sup>360</sup>

Theorist Nelson Enonchong has argued that the subjective facts of the situation must be taken into account because the threat of further proceedings "may not put an experienced businessman under pressure, it may be a huge pressure when directed at an old lady or a person who is desperate to avoid the publicity that is likely to be generated by the proceedings."<sup>361</sup> Enonchong argues that what is important in duress is that the "will of the victim is not destroyed; it is directed or deflected. The victim who signs a contract under pressure amounting to duress intends to sign the contract as the lesser of two evils and is usually aware of the terms of the contract."<sup>362</sup> Again, this goes back to the concept that there is no other reasonable choice available.

The objective-standard is a historic relic in contractual duress that contrasts with the objective elements which still exist within the criminal law of duress. The thought that the law "required everyone to possess a certain minimum degree of firmness and certain types of illegitimate pressure were deemed to be insufficient to deflect the will of a person who possessed the ordinary degree of firmness" is an antiquated notion.<sup>363</sup> This notion precludes non-physical types of duress, which has been disproved in most modern case law.<sup>364</sup> This original standard did not protect those without "ordinary firmness" or other vulnerable members of society. This

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358. *Parmentier v. Pater*, 13 Ore. 121, 130 (1885); see also FARNSWORTH, *supra* note 5, at 442.

359. *Rubenstein v. Rubenstein*, 120 A.2d 11, 14 (NJ).

360. FARNSWORTH, *supra* note 5, at 442.

361. ENONCHONG, *supra* note 20, at 36.

362. *Id.* at 37.

363. *Id.* at 46.

364. *Id.*

result has lead commentators, viewing the situation from a contractual perspective, to say that a “law of duress which fails to protect the vulnerable is bound to be unsatisfactory.”<sup>365</sup> This statement is truly ironic given the state of the criminal law where these objective elements still exist. At least one purpose of criminal law is to protect victims who are arguably vulnerable to those more powerful, but we make the standard more difficult in the criminal law with objective elements. Conversely, the modern subjective test in contract law looks at whether the pressure on the individual complainant was illegitimate.

The importance of the subjective nature of the contractual defense of duress was discussed in the 1956 New Jersey Supreme Court case of *Rubenstein v. Rubenstein*.<sup>366</sup> This case involved several properties which were conveyed to the defendant wife under duress in return for the care of two minor children. The husband gave the property interests to the wife while under “fear of his safety and under duress.”<sup>367</sup> The wife’s father had been convicted of poisoning several people as a part of an “arsenic ring” to defraud life insurers, for which he was incarcerated at the time of the *Rubenstein* trial.<sup>368</sup> The husband claimed to be similarly threatened with arsenic if he did not convey the properties, that he was told that she would “prosecute [him] to the hilt,” and that she had told her husband that she would be “better off if [he] were dead.”<sup>369</sup> The plaintiff husband also gave accounts of what he called “gangster violence” that was used against him. The husband was arrested for desertion of his wife and non-support.<sup>370</sup>

Justice Heher concluded that the “controlling factor” in the basic premise of duress is the “condition at the time of the mind of the person subjected to the coercive measures, rather than the means by which the given state of mind was induced, and thus the test is essentially subjective.”<sup>371</sup> Justice Heher cited the 1912 case of *Fountain v. Bigham* for the proposition that it is the way the mind is induced so that there is no choice. The threat “must be of such a nature and made under such circumstances as to constitute a reasonable and adequate cause to control the will of the threatened person and must have that effect; and the act

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365. *Id.*

366. *Rubenstein v. Rubenstein*, 120 A.2d 11, 14 (NJ).

367. *Id.* at 12.

368. *Id.* at 16.

369. *Id.*

370. *Id.*

371. *Id.* at 14.

sought to be avoided must be performed by such person while in such condition.”<sup>372</sup>

The above principle was clarified by the court in that the important element is not the nature of the threatened action or words, but rather the “state of mind induced thereby in the victim.”<sup>373</sup> Thus, a very subjective test emerged for contractual duress. It has been established that the “doctrine of duress has expanded well beyond its early confines, and that a threat may be improper even though the person making it has a legal right to do the threatened act.”<sup>374</sup> This subjective test continued to broaden.

The subjective test has been developed through the subsequent common law. In the case of *Pao On v. Lau Yiu Long*, Lord Scarman set out principles to be considered in assessing a contractual duress case.<sup>375</sup> It was found that the following factors can be considered when determining if there was coercion or an otherwise voluntary act: (1) whether the defendant protested; (2) whether the defendant had alternative options, including any available legal remedies; (3) whether the defendant was “independently advised”; and (4) whether the defendant took steps to avoid the contract after formation.<sup>376</sup>

These factors permit fact-finders to use a defendant’s manifestations that can be objectively determined to ascertain her subjective *mens rea*, that being whether the pressure induced on that particular individual—not the reasonable person—constituted duress on the defendant to complete the contract.<sup>377</sup> This test was affirmed in *Pharmacy Care* noting that the “modern view is that the question is no longer anchored to what was threatened, but whether the effect of whatever was threatened was to bring about a ‘coercion of the will, which vitiates consent.’”<sup>378</sup> Justice Hammond discussed in *Pharmacy Care* that there is a “hybrid formulation” to the threat experienced by an individual.<sup>379</sup> The court stated that the “threat must have left the particular victim ‘no reasonable

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372. Rubenstein v. Rubenstein, 120 A.2d 11, 14 (NJ) (citations omitted).

373. *Id.* at 15.

374. *Pharm. Care Sys. Ltd. v Att’y Gen.* [2004] CA 198/03, para. 93 (N.Z.). This is largely referring to business compulsion, economic duress, threat of criminal prosecution, and threats of civil process which are beyond the scope of this paper.

375. *Pao On v. Lau Yiu Long* [1980] A.C. 614 (P.C.) (Eng.).

376. *Id.* at 635.

377. ENONCHONG, *supra* note 20, at 47. But Enonchong argues that adding the severity of the illegitimate pressure adds an objective element that is not needed, and which is reminiscent of the reasonable firmness test. A detailed analysis of this argument and a detailed discussion of the economic duress case of *Pao On* is beyond the scope of this paper. *Id.* at 47–48.

378. *Pharm. Care Sys. Ltd. v Att’y Gen.* [2004] CA 198/03 para. 98 (N.Z.) (citing *Pao On v. Lau Yiu Long* [1980] A.C. 614 at 636 (P.C.) (Eng.)).

379. *Id.* para. 96.

alternative.”<sup>380</sup> Thus, the standard favors subjective factors in the civil law. This standard may again be a lesson to be learned from contract law which would provide a workable criminal standard.

## 2. Canada’s “Objective-Subjective” Standard in Criminal Duress

One of the most important philosophical debates in criminal duress has centered on the “objective-subjective” standard in duress.<sup>381</sup> *Hibbert* was one of the first cases to thoroughly address this issue because of its focus on a “safe avenue of escape.”<sup>382</sup> In *Hibbert*, the court analyzed this issue,<sup>383</sup> and Chief Justice Lamer noted that this element of duress was “analogous to that in the defence of necessity identified by Justice Dickson—the requirement that compliance with the law be ‘demonstrably impossible.’”<sup>384</sup> The court identified that, if an accused does not escape without “undue danger,” the action would become “a voluntary one, impelled by some consideration beyond the dictates of ‘necessity’ and human instincts.”<sup>385</sup> Chief Justice Lamer drew the same conclusion with respect to the defense of duress. The court discussed the objective-subjective standard and said that one who acts may be aware of the consequences of their actions even though they may not desire the outcome. The court used the example of a person with a gun to their head forced to drive an armed group to a bank. That person

will usually know that the likely result of his or her actions will be that an attempt will be made to rob the bank, but he or she may not desire this result—indeed, he or she may strongly wish that the robbers’ plans are ultimately foiled, if this could occur without risk to his or her own safety. In contrast, a person who is told that his or her child is being held hostage at another location and will be killed unless the robbery is successful will almost certainly have an active subjective desire that the robbery succeed. While the existence of threats clearly has a bearing on the motive underlying each actor’s respective decision to assist in the robbery, only the first actor can be said not to desire that the robbery take place, and neither actor

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380. *Id.*

381. See STEPHEN, HISTORY, *supra* note 103, at 103.

382. *R. v. Hibbert* [1995] 2 S.C.R. 973, para. 17 (Can.).

383. *Id.* para. 46. Ultimately, the Supreme Court found that the trial judge had erred in his instructions to the jury and ordered a new trial.

384. *Id.* para. 55.

385. *Id.*

can be said not to have knowledge of the consequences of their actions.<sup>386</sup>

Chief Justice Lamer went on to say that “excuse-based defences, such as duress, are predicated precisely on the view that the conduct of the accused is involuntary . . . he or she had no realistic alternative course of action available.”<sup>387</sup> Again, the voluntariness element is a factor in the court’s consideration of the appropriate standard.

Chief Justice Lamer concluded that the accused’s “perceptions of the surrounding facts can be highly relevant to the determination of whether his or her conduct was reasonable under the circumstances, and thus whether his or her conduct is properly excusable.”<sup>388</sup> Chief Justice Lamer stated that the Supreme Court had previously stated that when examining the

[R]easonableness of an accused’s conduct for the purposes of determining whether he or she should be excused from criminal responsibility, it is appropriate to employ an objective standard that takes into account the particular circumstances of the accused, including his or her ability to perceive the existence of alternative courses of action.<sup>389</sup>

Thus, when it comes to assessing the situation, the court should assess the matter on an objective basis, but the standard should include subjective elements of the particular human frailty of the accused which amounts to an “objective-subjective” standard.<sup>390</sup>

This exact objective-subjective standard was adopted from the 1990 case of *R. v. Lavallee*.<sup>391</sup> In this self-defense and Battered Woman Syndrome case, the court specifically stated that the question for the fact-finder is “whether, given the history, circumstances and perceptions of the appellant, her belief that she could not preserve herself from being killed by [the deceased] that night except by killing him first was reasonable.”<sup>392</sup> The subjective elements of the case now carried weight.

Similarly, the Supreme Court grappled with this issue in the 2001 necessity case of *R. v. Latimer* where Robert Latimer was convicted of

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386. *Id.* para. 24.

387. *Id.* para. 61.

388. *R. v. Hibbert* [1995] 2 S.C.R. 973, para. 61 (Can.).

389. *Id.* para. 59.

390. *Id.* para. 60.

391. *R. v. Lavallee*, [1990] 1 S.C.R. 852 (Can.).

392. *Id.* at 889.



second degree murder for the asphyxiation of his severely disabled child, Tracey.<sup>393</sup> In *Latimer*, the Court cited the case of *Perka* where Justice Dickson stated that necessity:

rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is.<sup>394</sup>

The Court added subjectivity to the standard but is careful to avoid the situation where a defense like necessity would “very easily become simply a mask for anarchy.”<sup>395</sup> The Court realized, as Chief Justice Dickson said in *Perka*, this type of defense needs to be “strictly controlled and scrupulously limited.”<sup>396</sup> Following this rationale, the Court in *Latimer* found that a “modified objective test” would apply to two of the three requirements for necessity, situating the appropriate standard somewhere between an objective and subjective standard.<sup>397</sup>

All of these developments in an objective-subjective test culminated in the Supreme Court decision in *Ruzic*.<sup>398</sup> The Court in *Ruzic* adopted the argument relative to “safe avenue of escape” from *Hibbert* and acknowledged that an objective-subjective standard should be used as the situation should be examined “from the point of view of a reasonable person, but similarly situated.”<sup>399</sup> The Court said that the offender’s “particular circumstances,” the availability of a “reasonable alternative,” as well as his “background and essential characteristics,” should be taken into account to provide a “pragmatic assessment of the position of the accused, tempered by the need to avoid negating criminal liability on the

393. *R. v. Latimer*, [2001] S.C.R. 3 (Can.).

394. *R. v. Hibbert* [1995] 2 S.C.R. 973 para. 52 (Can.) (quoting *R. v. Perka*, [1984] 2 S.C.R. 232, 248–49 (Can.)).

395. *Southwark London Borough Council v. Williams*, [1971] Eng. Rep. 175, 181 (cited in *R. v. Latimer*, [2001] S.C.R. 3, para. 27 (Can.)).

396. *R. v. Perka*, [1984] 2 S.C.R. 232, para. 38 (Can.).

397. *R. v. Latimer*, [2001] S.C.R. 3, para. 32 (Can.). The court found that the element of proportionality must still be measured on an objective basis. This modified objective test has arisen in various other contexts. See Eric Colvin, *Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility*, 27 *MONASH U. L. REV.* 197, 222 (2001).

398. *R. v. Ruzic*, [2001] 1 S.C.R. 687 (Can.).

399. *Id.* para. 61.

basis of a purely subjective and unverifiable excuse.”<sup>400</sup> Thus, the defendant’s subjective mental state again becomes a crucial consideration.

Fletcher commends the German system and its use of the term “zumutbarkeit” which is “roughly translated as attributability or imputability”<sup>401</sup> and what can be “fairly expected” of an accused in certain circumstances.<sup>402</sup> This term “captures the question whether an individual can be justly held accountable for violating a rule.”<sup>403</sup> This type of inquiry seeks to avoid the constructs courts have used to analyze the defense.

By adopting an objective-subjective standard, Canadian courts recognize the individual; perhaps this needs to be even further explored. In other words, “individualizing excuses complements rather than detracts from the rule of law”<sup>404</sup> by “relating to the character of the doer rather than to the quality of the deed.”<sup>405</sup> Fletcher admonishes those who think that a more individualized and subjective model cannot be adopted and he concludes that an individualized standard is essential in a situation where courts try to excuse, and have compassion for, an individual caught in a terrible situation with no easy escape.<sup>406</sup> Commentators have concluded that the “modified objective test does not just put the ordinary or reasonable person in the context of the accused. The objective test is personalized: the cognitive and volitional powers of the accused are incorporated in the standard against which the accused is measured.”<sup>407</sup> Again, placing the actor in the act is the best way to understand this complex defense. When this standard is applied, the criminal defense coheres with the contractual standard.

## *E. Burden of Proof*

### *1. Contractual Duress*

In contrast to the very detailed debates which have surrounded the onus and burden in the criminal law of duress as discussed below, contract law has been almost diametrically different. In *Huyton S.A. v. Peter Cremer*

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400. *Id.*

401. George Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1300 (1974).

402. N.J. Reville, *Duress: Sharp Shooting at Criminal Organisations*, 131 SOLICITORS J. 1302, 1304 (1987).

403. Fletcher, *supra* note 401, at 1300.

404. *Id.* at 1309.

405. *Id.* at 1272.

406. *Id.* at 1309.

407. Colvin, *supra* note 397, at 223.

*GmbH & Co.*, Justice Mance noted that the onus as it relates to the civil law of duress is a “relatively unexplored area.”<sup>408</sup> However, in *Barton*, Lord Scarman dictated the contractual onus in no uncertain terms. He noted that the plaintiff did not have to prove that but for the threats, he entered into the contract. Instead, in cases when the defendant was the person pressuring the plaintiff, the defendant had to establish that the “threats which he was making and the unlawful pressure which he was exerting for the purpose of inducing [the plaintiff] to sign the agreement and which [the plaintiff] knew were being made and exerted for this purpose in fact contributed nothing to [the plaintiff’s] decision to sign.”<sup>409</sup> In *Barton*, the Privy Council found that the plaintiff was in “very real mental torment” and that if “one man threatens another with unpleasant consequences if he does not act in a particular way, he must take the risk that the impact of his threats may be accentuated by extraneous circumstances for which he is not in fact responsible.”<sup>410</sup> The court found that this pressure was at least a factor in the signing of the documents and that the plaintiff was under duress, and thus the contracts are voidable by the plaintiff.<sup>411</sup> Lord Scarman concluded that duress “can, of course, exist even if the threat is one of lawful action: whether it does so depends upon the nature of the demand.”<sup>412</sup> Thus, as found in *Barton*, when the plaintiff proves that there was illegitimate pressure meant to induce the contract, then the “onus shifts onto the party denying duress to establish that the illegitimate pressure which he exerted for the purpose of inducing the victim to enter into the transaction in fact contributed nothing to the decision of the victim to enter into the transaction.”<sup>413</sup> Because of the shifted burden, the defendant in *Barton* could not prove that his illegitimate pressure did *not* make the plaintiff enter into the contract, and the Privy Council agreed that the defendant was a reason for entering into this contract.<sup>414</sup> While this makes for a very interesting burden shift, it is rarely discussed in the literature.<sup>415</sup>

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408. Huyton S.A. v. Peter Cremer GmbH & Co, [1999] 1 Lloyd’s Rep. 620 (K.B.) (Eng.); *see also* ENONCHONG, *supra* note 20, at 42.

409. *Barton v Armstrong* (1975) 2 W.L.R. 1050, 1062 (P.C.) (Austl.).

410. *Id.*

411. *Id.*

412. *Universe Tankships of Monrovia v. International Transport Workers’ Federation*, [1983] 1 A.C. 366, 400 (H.L.) (Eng.).

413. ENONCHONG, *supra* note 20, at 42.

414. *Id.*

415. Theorist Nelson Enonchong has said that there may or may not be a different test for economic duress, but that analysis is beyond the scope of this Article.

## 2. *Criminal Duress*

The burden of proof in the criminal law of duress has been relatively uncontroversial in the Commonwealth countries. Burden was discussed in the English case of *R. v. Gill*<sup>416</sup> where the court cited Glanville Williams who claimed that

[A]lthough it is convenient to call duress a ‘defense,’ this does not mean that the ultimate (persuasive) burden of proving it is on the accused . . . . But the accused must raise the defense by sufficient evidence to go to the jury; in other words, the evidential burden is on him.<sup>417</sup>

The court also noted that it is incumbent on the defense to make duress a “live issue” that is fit to be decided by the jury. Once this has been done “it is then for the Crown to destroy that defence in such a manner as to leave in the jury’s minds no reasonable doubt that the accused cannot be absolved on the grounds of the alleged compulsion.”<sup>418</sup>

Similarly, it was noted in the 1968 case of *R. v. Bone* that “[d]uress, like self-defence and like drunkenness, is something which must, in the first instance be raised by the defence; but at the end of the day it is always for the prosecution to prove their case, which involves negating the defence which has been set up.”<sup>419</sup> *Hasan* is the most recent decision of the House of Lords to address the burden of proof.<sup>420</sup> In that case, Lord Bingham of Cornhill cited *Lynch*<sup>421</sup> and found that “[w]here the evidence in the proceedings is sufficient to raise an issue of duress, the burden is on the prosecution to establish to the criminal standard that the defendant did not commit the crime with which he is charged under duress.”<sup>422</sup> Lord Bingham also cited the *Law Commission No. 218*<sup>423</sup> from 1993 and their recommendation that a burden, on the balance of probabilities, be placed on the defendant to establish a defense of duress.<sup>424</sup> He noted that “the

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416. *R. v. Gill*, [1963] 2 All E.R. 688, 691 (appeal taken from Bedford County Sessions).

417. WILLIAMS, *supra* note 68, at 762.

418. *R. v. Gill*, [1963] 2 All E.R. 688, 691.

419. *R. v. Bone*, (1968), 52 Crim. App. 546 (C.A.) 548.

420. *R. v. Hasan*, [2005] UKHL 22 (U.K.).

421. *Dir. of Pub. Prosecutions v. Lynch*, [1975] A.C. 653 (H.L.).

422. *R. v. Hasan*, [2005] UKHL 22, para. 20 (U.K.).

423. U.K. LAW COMMISSION NO. 218, LEGISLATING THE CRIMINAL CODE: OFFENCES AGAINST THE PERSON AND GENERAL PRINCIPLES (1993).

424. *Id.* at 59–60.

defence of duress is peculiarly difficult for the prosecution to investigate and disprove beyond reasonable doubt.<sup>425</sup>

Just as in England, the question of the burden of proof has also been an ongoing question in Canadian law. There is no onus on the accused to prove the defense of duress on the balance of probabilities or any other standard in Canada, however, the accused must show that the elements of the defense have an “air of reality,” or a standard of believability, in their particular situation.<sup>426</sup> The air of reality test was adopted by the Manitoba Court of Appeal in *R. v. Bergstrom*.<sup>427</sup> It was recognized in *Bergstrom* that the trial judge must place before the jury “any defence available on the evidence irrespective of whether defence counsel has advanced it”<sup>428</sup> but there must be an air of reality. As stated by Justice Cory in *R. v. Osolin*, there must be “some evidence capable of supporting the particular defence alleged by the accused . . . a juror should not be required to listen to instructions on defences which simply cannot be applicable to the case that they have heard.”<sup>429</sup> Some commentators predict that there may be a shift in this position following the reverse onus cases<sup>430</sup> of *R. v. Daviault*<sup>431</sup> and *R. v. Stone*;<sup>432</sup> however, there was no mention of this reversal in *Ruzic*. Coughlan notes that:

within the past few years [the Court has] placed the onus on the accused to prove, on balance of probabilities, that he or she was drunk to a state akin to automatism, or that he or she was an automaton for any other reason. This creates the anomaly that the onus is now on the accused to prove physical involuntariness, but still on the Crown to disprove moral involuntariness.<sup>433</sup>

Surprisingly, in *Ruzic* there was also no mention of the “presumption of voluntariness”<sup>434</sup> that Justice Bastarache invoked for a 5–4 majority in

425. *R. v. Hasan*, [2005] UKHL 22 [20] (U.K.).

426. See *R. v. Cinous*, [2002] 2 S.C.R. 3 (Can.); *R. v. T.L.C.*, (2004) A.J. No. 800, para. 73 (Can. Alta.). There has been little suggestion in other countries that there should be a shift in the burden of proof.

427. *R. v. Bergstrom* (1980), 13 Crim. Rep. 3d 342, para. 41 (Man. C.A.), *aff'd* in (1981), 20 Crim. Rep. 3d 347 (Can.).

428. STUART, CRIMINAL LAW, *supra* note 12, at 460 (citing *R. v. Squire* (1976), 2 S.C.R. 13 (Can.); *R. v. Martin* (1980), 53 C.C.C. 2d 425, 443–44 (Can. Ont. C.A.)).

429. *R. v. Osolin* (1994), [1993] 4 S.C.R. 595, paras. 189, 194 (Can.).

430. A concept in Canadian law where the onus is shifted to the defendant rather than the prosecution.

431. *R. v. Daviault*, [1994] 3 S.C.R. 63 (Can.).

432. *R. v. Stone*, [1999] 2 S.C.R. 290 (Can.).

433. Coughlan, *supra* note 222, at 185.

434. *R. v. Stone*, [1999] 2 S.C.R. 290 para. 3 (Can.).

*Stone*. It seems as if *Stone* will not affect duress, at least at this particular time, but there is a possibility that the automatism cases will be reconciled with duress in the future.

Justice Bastarache clearly noted that “since a defence of automatism amounts to a claim that one's actions were not voluntary, the accused must rebut the presumption of voluntariness. An evidentiary burden is thereby imposed on the accused.”<sup>435</sup> It has been noted by Stuart that “the majority in *Stone* expressly said that they were dealing with all claims of involuntariness.”<sup>436</sup> Yet, this presumption was not discussed in the case of duress.<sup>437</sup> Instead, Justice LeBel stated that:

[t]here was no misdirection either on the burden of proof. The accused must certainly raise the defence and introduce some evidence about it. Once this is done, the burden of proof shifts to the Crown under the general rule of criminal evidence. It must be shown, beyond a reasonable doubt that the accused did not act under duress.<sup>438</sup>

As noted, *Ruzic* adopted the air of reality test as “the accused bears an evidential burden of laying a factual foundation for the defense of duress (if no such foundation may be inferred from the Crown's case). Once the factual foundation is established, the Crown has the onus of disproving duress.”<sup>439</sup> Thus, although the defense must raise an air of reality, the Crown has the onus to disprove the defense beyond a reasonable doubt. *Ruzic* accords with the discussion of burden that comes from the 2002 Supreme Court case *R. v. Cinous*, where it was found that the court must ask whether there is

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435. *R. v. Stone*, [1999] 2 S.C.R. 290 para. 171 (Can.).

436. Stuart, *Moral*, *supra* note 229, at 38.

437. The Supreme Court in *Ruzic*, 1 S.C.R. 687, para. 43, did note that

[t]he principle of voluntariness was given constitutional status in *R. v. Daviault*, [1994] 3 S.C.R. 63, 102–03 (Can.) where Justice Cory held for the majority that it would infringe s. 7 of the *Charter* to convict an accused who was not acting voluntarily, as a fundamental aspect of the *actus reus* would be absent. More recently, in *Stone*, the crucial role of voluntariness as a condition of the attribution of criminal liability was again confirmed ( para. 1, per Justice Binnie, and paras. 155–58, per Justice Bastarache) in an appeal concerning the defence of automatism.

The court did not comment further on these cases that suggested a different burden.

438. *R. v. Ruzic* [1998], 1 S.C.R. 687, para. 100 (Can.).

439. *Id.* para. 71. For a recent discussion of the air of reality test in Canada, see *R. v. McRae*, (2005) 77 O.R. 3d 1. See also *R. v. Laughy*, (2006) 394 A.R. 265 (Alta. Q.B.); *R. v. Osemele* (2004), 65 W.C.B. 2d 530, [2004] O.J. No. 5842 (Ont. Ct. Just.); *R. v. Ferguson* (2004), 50 M.V.R. (4th) 267, [2004] Y.J. No. 7 (Yuk. T.C.).

(1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true. The second part of this question can be rendered by asking whether the evidence put forth is reasonably capable of supporting the inferences required to acquit the accused. This is the current state of the law, uniformly applicable to all defences.<sup>440</sup>

In the United States, it seems resolved that the “[d]efendant must come forward with some evidence of the defense, but the State bears the ultimate responsibility to disprove the defense beyond a reasonable doubt.”<sup>441</sup> In *Washington v. Riker*,<sup>442</sup> the defendant argued that “she had to prove the defense only to the extent that it created a reasonable doubt in the minds of the jurors as to her guilt . . . [which is] a lower standard than ‘preponderance of the evidence.’”<sup>443</sup> However, the court found that it was up to the defendant to prove duress by the higher standard of a preponderance of evidence because with duress defenses, there is no doubt that the accused committed the crime, rather the question is whether the accused’s conduct should be excused.<sup>444</sup>

There is another school of thought in the United States that believes the prosecution has the burden for justifications, but that the defendant has the burden with excuses.<sup>445</sup> Another argument, most often heard in the context of Battered Woman Syndrome, is that “fear of fostering the ‘abuse excuse’ can perhaps be allayed by saddling the defendant with the ultimate burden of persuasion on her coercion defence.”<sup>446</sup> Although this matter seems relatively resolved, there is huge potential for change in the future, especially in the context of the battered offender because of the criticisms that Battered Woman Syndrome experiences today. Thus, this standard is being applied similarly in contractual and criminal duress.

440. *R. v. Cinous*, [2002] 2 S.C.R. 3, para. 82 (Can.).

441. *New Jersey v. Romano*, 809 A.2d 158, 167 (2002).

442. *Washington v. Riker*, 869 P.2d 43 (Wash. 1994).

443. *Id.* at 51; see also Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN’S L.J. 217, 314 (2003).

444. *Washington v. Riker*, 869 P.2d at 52.

445. Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1172 n.66 (1987). Dressler clarifies that this is “not a constitutionally based argument. As a matter of due process principles, a legislature may require the defendant to carry the burden of proof regarding any true. *Martin v. Ohio*, 480 U.S. 228, 237 (1987) (permitting legislature to place burden of proof on defendant to prove justification of self-defense). However, *Hill v. Mitchell*, 400 F.3d 308 (6th Cir. 2005), clarified that this is for the defendant to prove on a preponderance of evidence, and the state to prove beyond a reasonable doubt.

446. Laurie Kratky Doré, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 762–63 (1995).

#### IV. COMPARISON OF CONTRACTUAL AND CRIMINAL DURESS

Although there are many differences in the approach to criminal and contractual duress, there are a few points worth highlighting. Despite the similarities, there are some real problems comparing the contractual law of duress and the criminal defense given the lack of reported decisions, and many of the issues result from inherent problems with the criminal system. Wertheimer notes that

We know more of cases in which it was alleged that the trial court improperly *excluded* a duress defense. When, for example, a defendant allegedly assisted in a robbery under a threat of death, the appellate court ruled that he was entitled to have the jury consider his claim of duress.<sup>447</sup>

More often than not, cases of criminal duress are dismissed without a reported comment;<sup>448</sup> which can lead to several conclusions about the state of criminal duress. First, criminal duress does seem less burdensome to establish than civil duress, as can be seen in the 1887 case from Georgia, *McCoy v. State*.<sup>449</sup> This case was a rare opportunity for a state appellate court to comment on the difference between contractual and criminal duress. This was a murder case concerning the death of a revenue officer by the defendant McCoy.<sup>450</sup> The jury was given the wrong standard of duress by the trial judge: in response to a situation where a witness was threatened with his life if he testified against McCoy, the judge erroneously gave the jury the civil contractual standard rather than the criminal defense.<sup>451</sup> The state appellate court had an opportunity to respond to the comparison of the civil and criminal standard stating that

It must be obvious to the deliberate judgment of every reflecting mind that much less freedom of will is requisite to render a person responsible for crime than to bind him by a sale or other contract. To overcome the will, so far as to render it incapable of contacting a civil obligation, is a mere trifle compared with reducing it to that degree of slavery and submission which will exempt from punishment.<sup>452</sup>

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447. WERTHEIMER, *supra* note 2, at 153.

448. *Id.* at 154.

449. *McCoy v. State*, 3 S.E. 768 (Ga. 1887).

450. *Id.* at 768.

451. *Id.* at 769.

452. *Id.*



This seems to be a common undercurrent in cases; courts seem willing to believe one can be forced into a contract, but are less likely to recognize that one could be compelled to commit the most heinous of crimes.

In order to fully analyze contract and criminal law, one must also examine the remedies that are available to discern the value of this defense. In contract law, once the contract has been disaffirmed the victim is “entitled to restitution, either in kind, if it is possible to restore what the victim has given to the other party, or in the form of a money judgment based on the benefit that the victim has conferred. In return, the victim must make restitution.”<sup>453</sup> Similar relief is available under the system of equity through a “constructive trust on or to cancel a conveyance of property . . . benefited by services furnished to an equitable lien.”<sup>454</sup> The other options available to one who has entered into a contract under duress are

If the benefit is money, it is recoverable in restitution in an action for money had and received . . . if it is services, a claim for services rendered (*quantum meruit*) will lie; if it is a chattel, the property will normally remain in the transferor who will have his remedies in tort, otherwise there will be a claim for goods delivered (*quantum valebat*).<sup>455</sup>

Additionally, as seen in many of the above examples, deeds or contracts can be avoided if duress makes the document void.<sup>456</sup> Third parties may have to make restitution depending on the type of benefit given.<sup>457</sup>

Conversely, even though *Ruzic* has made the criminal defense somewhat more accessible by striking down the immediacy and presence requirements, criminal duress is still a gamble. There are not multiple remedies available in criminal law as in civil law. In Canada, the way that the defense has been recognized, many times, results in an all or nothing situation of a full acquittal or finding of guilt. Some have suggested that the defense be abolished, and all evidence be submitted purely as an element in the mitigation of sentence. Critics warn that individuals will be saddled with the burden of the stigma of conviction; however, from the brief examination of some of the recent cases which use duress in mitigation, the stigma is much worse with a penitentiary sentence after a

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453. FARNSWORTH, *supra* note 5, at 444.

454. *Id.*

455. LORD GOFF OF CHIEVELEY & GARETH JONES, *THE LAW OF RESTITUTION* 305 (7th ed. 2007).

456. *Id.* at 305–06.

457. *Id.* at 306.

full exculpatory defense of duress fails, and the sentencer is unsympathetic to the evidence of duress.<sup>458</sup> In cases where the defense has been used and rejected, the weight of duress on sentencing is relatively little.<sup>459</sup> Even though they would not have met the test for duress, where the accused has immediately entered a guilty plea (especially in some narcotic importation cases) the factors for duress were taken more seriously in mitigation.<sup>460</sup> Despite this, other cases have found overwhelming evidence of duress unconvincing. What is clear is that there must be consistent use of duress both as a defense and in mitigation.

If the defense of duress were factored into the sentencing phase of trial—with a clearly articulated sentencing principle of a mitigating excuse—the difficulties of applying duress in mitigation would be limited. Instead, courts would find an appropriate sentence for the offender acting under duress. Advocating a new system that makes duress an important factor can only improve the present sentencing system. However, it is unlikely that this principled approach will be a reality in the near future since this would involve a total rehashing of the historical and philosophical underpinnings which are unlikely to change.

The legitimate-illegitimate pressure debate that surrounds the contractual duress cases is not relevant to the criminal defense. As Wertheimer noted, it is “unlawful to coerce (or induce) someone to do something unlawful, there is no potential ‘lawfulness’ of the coercion to distinguish cases of duress from cases where there is no duress.”<sup>461</sup> There seems to be no level of criminal duress that is “okay”; the court views this type of pressure as the most serious of acts, but many have wondered why less pressure is needed to vitiate consent in contracts than is needed in the criminal law.<sup>462</sup> One obvious explanation is that one’s liberty is at stake in

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458. See P.R. Glazebrook, *Committing Murder Under Duress—Again*, [1976] CAMBRIDGE L.J. 206; B. Sneiderman, *Perspectives on the Latimer Trial: Latimer in the Supreme Court: Necessity, Compassionate Homicide and Mandatory Sentencing*, 64 SASK. L. REV. 511 (2001).

459. See *Lynch*, *supra* note 166, at 696. Lord Simon also recognized these limitations and said: “it is true that the Home Secretary can advise exercise of the royal prerogative of mercy, and that the Parole Board can mitigate the rigour of the penal code; but these are executive not forensic processes, and can only operate after the awful verdict with its dire sentence has been pronounced. Is a sane and humane law incapable of encompassing this situation? I do not believe so.”

See also *R. v. Hasan*, [2005] UKHL 22, paras. 69–70 (U.K.); André Gombay, *Duress and Free Will Symposium: Necessitating without Inclining*, 24 CAMBRIDGE J. DIALOGUE 579, 579 (1985).

460. *R. v. John Doe*, [2005] O.T.C. 719, 67 W.C.B. (2d) 256 (Ont. S.C.J.).

461. WERTHEIMER, *supra* note 2, at 161.

462. *Id.* at 162.

the criminal system, and it is not in the contractual context. Wertheimer goes one step further and says that, if

A gets B to *agree* to do X by wrongly applying pressure to B, a rule that excuses B from the agreement shifts the burden back to the wrongdoer (A) himself. If, as in the typical three-party case of criminal duress, A wrongly exerts pressure on B to commit a crime against C, a rule that excuses B shifts the harm to an innocent third party (C.)<sup>463</sup>

Thus, it may be the view of our society that it is worse for B to harm C (who is an “innocent” party) than to harm A, who is considered guilty. In fact, most of the contractual cases that have been examined have found the court rather unwilling to invalidate a contract when there is an innocent third party involved, as opposed to when A coerces B to contract with A himself. With an innocent third party involved, the case is much more like a typical criminal matter, and the court seems to find much more blame for A and B for involving C.<sup>464</sup> It may also be, as suggested by Wertheimer, that in criminal law society is concerned with blaming *all* parties responsible for certain actions. In contrast, in contract law society seems much more willing to accept that there may be only one party that deserves to be punished by revoking the contract, thus requiring a lesser burden.<sup>465</sup> Sadly, given the historic development of duress, it is still true that “courts state illogical or nonsensical tests for application of the doctrine and then apply the tests conclusorily or with implausible or impossible explanation of rationale.”<sup>466</sup> Unfortunately for the study of the doctrine, many appeals cases are simply a review of summary judgment motions and nothing much more is learned about the application of duress to contract law.<sup>467</sup> Furthermore, most appeals cases involve very sympathetic victims like Ms. Ruzic and are not the typical cases. Although the court has traditionally espoused the view that individuals should be free to contract, a review of the case law discussed throughout this Article shows that courts are willing to intervene in difficult circumstances

463. *Id.*

464. *Id.*

465. *Id.* at 163.

466. Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 446 (2005).

467. *Id.* at 446 n.18. Giesel notes at that she did a review of the American contractual duress cases from 1996 to 2003 and found that duress was an issue in eighty-eight cases, but in only nine did the court decide in favor of the duress victim. *Id.* at 447 n.19.

pushing the boundaries of contractual duress, but some courts have clearly misapplied doctrine. As some commentators have noted,

[a] review of recent cases reveals that a shocking amount of repair is necessary to salvage the doctrine. The doctrine originally existed as a tool to police bargains that were the product of significantly constrained choice when that constraint resulted from blameworthy conduct of the other party to the bargain. It should continue to do so as a way of maximizing justice. Courts of today have become mired in confusing precedent and related doctrines and have, thus, lost their way.<sup>468</sup>

It is possible to repair this doctrine by making sense of the definition of contractual and criminal duress and making the application of other vitiating factors more clear.

#### CONCLUSION

As John Dawson noted in 1947, the law of contractual duress “reflects the convergence of several lines of growth . . . . Its result has certainly not been a coherent body of doctrine, unified around some central proposition . . . .”<sup>469</sup> The sad truth is that “this field offers no great encouragement for those who seek to summarize results in any single formula.”<sup>470</sup> However, the lack of a single formula necessitates that each case be examined for the type of duress threatened, its impact on the victim, and the result for the parties involved.

The best summation of the law of contractual duress is that offered by Bigwood who noted that it is comprised of “illegitimate pressure” applied by a threat of improper conduct which “compels the will” of the victim.<sup>471</sup> What Bigwood means by compulsion of the will is to leave the victim with no reasonable alternative but to capitulate.<sup>472</sup> This effect of contractual duress is to make the contract voidable by the person under duress.

What one needs to keep in mind is a set of rules which “commands rational assent.”<sup>473</sup> The rules that dictate that a tortured individual had no contractual choice is negated by the court spending copious time analyzing what choices were available and “does not inspire confidence among

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468. *Id.* at 497.

469. Dawson, *supra* note 295, at 288.

470. *Id.* at 289.

471. Bigwood, *Exegesis*, *supra* note 180, at 208, 211.

472. *Id.*

473. Atiyah, *supra* note 264, at 201.

rational beings.”<sup>474</sup> This topic is so complex because it does question when it is permissible for a “victim of duress to reopen a question which has apparently been closed by his submission to the coercion.”<sup>475</sup> Again, this leads to a situation where one has to risk everything to admit to the court that the contract was signed with some level of consent, but the court should look beyond the obvious evidence. It is often difficult for many courts to look behind the contract to the imperfect actors, but overall the civil law system is doing a good job with the broad interpretation and application of duress.

Clearly, the criminal defense of duress has a troubled history. As Shaffer argues, “[t]he story of duress in Canada is the story of the law striving, rather unsuccessfully, to grapple with . . . policy questions.”<sup>476</sup> Little thought was given to the defense at the time of the inception of the *Criminal Code* because there were very few cases utilizing the defense. The original statutory conception of the defense was very restrictive, but only less restrictive because the codifiers did not wholly accept the views of Stephen. Stephen’s formulation was simply a compromise between disallowing a controversial defense completely and fear that it would become a free pass for criminals. Section 17, thus, reflects the ambivalence that has always characterized the duress defense, namely whether coercion should ever excuse the commission of a criminal offense.<sup>477</sup> Stephen’s personal focus on duress created an artificial and disproportionate suppression of the defense, despite the possible goals of its earliest framers.

Ultimately, despite the ambiguities in *Ruzic*, the message that has emerged is that punishing those under duress is “an agonizing choice. When the criminal law absolves an accused in such a case it is being compassionate, temperate and realistic rather than making moral judgments.”<sup>478</sup> Some of the cases show people making impossible choices in horrendous situations. The result is that hard cases make bad law because in much of the Commonwealth the development of the defense has been “anachronistic and independent of any proper theoretical or jurisprudential analysis. This situation . . . has led directly to the anomalies which at present surround the defence in most common law

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474. *Id.*

475. *Id.* at 202.

476. Shaffer, *Coerced*, *supra* note 316, at 277.

477. *Id.* at 278.

478. STUART, *CRIMINAL LAW*, *supra* note 12, at 455.

jurisdictions.”<sup>479</sup> Perhaps a future case will have the facts necessary to set a firm basis for the defense in Canada, the United States and beyond that fits the uniqueness of these offenders while taking into account that “a sentence must be proportionate to the gravity of the offense and the degree of responsibility of the offender.”<sup>480</sup> From a historical, philosophical, and pragmatic perspective, society should not leave such an important part of the criminal system to function without clear, and specific, guidelines. Duress should be completely exculpatory at one end of the continuum and continue to develop as a defense. On the other end of the spectrum, there should be mitigation, which could drastically affect the length of sentence.

Presently, it seems likely that the excluded offenses portion remains of Section 17 of the *Criminal Code*. Since it is more likely that these defenses will continue to be shaped by the common law rather than through wide legislative reform, it is important to determine what will inform the common law. It is arguable what, if any, of the excluded offenses will remain even though the retention of any excluded offenses is irrational judged by the historic and philosophical basis of the defense. The future of the defense will mean that a more strict interpretation will be employed; however, if the defense is strictly applied, it should also be logically employed. Duress is certainly not perfect, but it should determine how society makes concessions to human frailties for those caught in impossible situations. Theorists have noted that the reasoning in *Ruzic*, which is—mostly a policy decision recognizing human frailty, may be very difficult to apply by Canada’s Supreme Court in the future. However, change to the code needs to occur because choosing to continue to apply an unworkable section is no longer feasible; the codified version of the defense has remained unworkable for centuries, even after *Ruzic*. The code needs updating.

With change, the defense of duress may achieve a level of coherence for the first time in its long history. There is obvious frustration by theorists who are unable to distill a common ground for the defense. As recently as 2005, Gale notes that, in a British context, it is imperative for the legislature to consider options and decide on a “definition with which the judiciary can work, rather than leaving the judges in a position where it is clear they do not really like what has been created by their predecessors, but feel unable to change it for fear of accusations of usurping the role of Parliament.”<sup>481</sup> Trying to compartmentalize the defense has only led to

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479. BROOKBANKS, *supra* note 71, at 34.

480. Canada Criminal Code, R.S.C. 1985, c. C-46, s. 718.1.

481. Christopher Gale, *Confessions; Duress, R. v. Hasan*, 69 J. CRIM. L. 315, 318 (2005).

confusion, conviction and persecution of those who might not have deserved the punishment received.

This Article concludes with suggestions that any reformulation of the *Criminal Code* defense should take into account the following elements:

- a. The threat should be of serious harm or bodily injury, either mentally or physically, and can be to any third party or oneself;
- b. Duress should be a defense to all offenses, including all cases of murder and treason;<sup>482</sup>
- c. The offenders should have to demonstrate that they did not have a safe avenue of escape or, if they did, a reasonable excuse why they did not take that escape. Similarly, offenders should have to demonstrate that they desisted from the crime and contacted the police as soon as reasonably possible. Special consideration should go to those offenders who are in an abusive relationship in order to understand that police protection or escape may not have been a reasonable option;
- d. Those offenders who are acting under prior fault will be precluded from using the defense if they exposed themselves to the harm without reasonable excuse. This is the case if the accused had actual knowledge of the workings of a criminal organization, not negligence or presumed knowledge. This does not include the battered offender. The test would be a reasonable person similarly situated;
- e. Proportionality is already a factor of duress, and it should no longer be an additional factor to consider;

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482. As noted by the U.K. Law Commission in *A New Homicide Act for England and Wales? A Consultation Paper*, in the U.K. there are several arguments to extended the duress to all offenders as

- (1) With the enactment of a tightly defined defence the question of its application to murder can be considered on its merits, untrammelled by authority.
- (2) Innocent life is not effectively protected by a rule of which the actor is unlikely to be aware.
- (3) It is for the jury to say whether the threat was one "which [D could not] reasonably be expected to resist". "The law should not demand more than human frailty can sustain.
- (4) The defence is not available to a member of a criminal or a terrorist group. Innocent tools of terrorists should be excused if they could not have been expected to act otherwise. They should not be denied the right to raise a true defence because others may claim it falsely.

U.K. LAW COMMISSION NO. 177, *A NEW HOMICIDE ACT FOR ENGLAND AND WALES? A CONSULTATION PAPER* 181–82, para. 7.19 (2006) (internal citations omitted).

- f. An individual assessment of the individual offender has to occur in a reasoned, but limited way, to take the subjective elements of the accused into account;
- g. If the full defence fails for an offender, they should have the opportunity to fully present their case regarding the duress suffered and how this should amount to a mitigating factor;
- h. Finally, the accused should simply have to pass the “air of reality” test.<sup>483</sup>

The alternative argument of sentencing also could serve as a way of indirectly addressing the inconsistencies and difficulties in duress.

There is no denying that there has been an “extraordinary expansion of the scope of duress” in the contractual realm, while there has been an absolute narrowing of the criminal defense so that it is hardly used successfully in any modern case.<sup>484</sup> The courts in Canada, the United States, and the Commonwealth seem ready and able to expand these contractual principles to property law, family law, business law, maritime law, estate and trust law applying the factors in very disparate cases. At the same time, the criminal defense of duress is narrowing to the point that horribly abused individuals are unable to use the defense against their tormenters.<sup>485</sup> Perhaps both statements are correct. The law of duress is “irrational, anomalous, perverse, illogical and fundamentally wrong”<sup>486</sup> and it is misunderstood. The coming cases will decide which statement will prevail.

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483. The “air of reality” test is discussed in several cases. *See, e.g.*, *R. v. Laughy*, (2006) 394 A.R. 265 (Alta. Q.B.); *R. v. Osemele* (2004), 65 W.C.B. 2d 530, [2004] O.J. No. 5842 (Ont. Ct. Just.); *R. v. Ferguson* (2004), 50 M.V.R. (4th) 267, [2004] Y.J. No. 7 (Yuk. T.C.).

484. FARNSWORTH, *supra* note 5, at 448.

485. *See Chapman*, *supra* note 294.

486. *R. v. Ruzic*, [2001] 1 S.C.R. 687 (Can.).