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Impelled Perpetration Restated

By Rollin M. Perkins*

A choice between two evils, however desperate the situation, must not be confused with no choice at all. The distinction may be illustrated by comparing two hypothetical situations. Suppose that $D$, $A$, and $X$ are standing near the edge of a high cliff. In one instance, $D$ suddenly grabs $A$ and shoves her so violently against $X$ that $X$ is forced over the edge and falls to his death. In the second situation, $D$ does not touch $A$ but instead points a pistol at $A$ and threatens to kill her if she does not push $X$ off the cliff. Firmly believing that she will be killed instantly if she does not obey, $A$ reluctantly shoves $X$, causing $X$ to fall to his death. In either case, $D$ has caused the death of $X$; $A$, however, has caused $X$’s death only in the latter case. In the first situation, $A$’s body was simply used as a tool to cause the death of $X$; $A$ did not perpetrate the killing. In the second example, despite her reluctance $A$ intentionally killed $X$; $A$ was subjected to impelled perpetration. The difference is between compulsion applied to the body and compulsion applied to the mind.

The doctrines of impelled perpetration—duress and necessity, with the exception of the “inexcusable choice,” and the choice of evils—have long been recognized to excuse certain otherwise legally punishable conduct. Unfortunately, however, these tenets have too often been viewed narrowly and applied rigidly. In this Article, therefore, they are reexamined.

The “Inexcusable Choice”

The common law has always held firm to the proposition that one may not choose between oneself and another, who may live and who must die, by intentionally killing an obviously innocent and unoffend-

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* Connell Professor of Law, Emeritus, University of California, Los Angeles, 1957; Professor of Law, Emeritus, University of California, Hastings College of the Law, 1975. A.B., University of Kansas, 1910; J.D., Stanford University, 1912; S.J.D., Harvard University, 1916.

1. See text accompanying notes 37-48 infra.
ing\textsuperscript{2} person to preserve one's own life. Such a killing is criminal homicide.\textsuperscript{3} It has been argued that an excuse should be recognized when a person, under threat of instant death, commits a terrible deed: if his or her own conscience will not prevent the deed, no threat of what the law may do at some distant time could have any deterring influence.\textsuperscript{4} The argument, although persuasive, misses the point. The criminal law is a moral code and the recognition of an excuse under these circumstances would declare such an intentional killing to be morally acceptable. The consistent refusal of common-law judges to excuse such an act serves to emphasize the strength of the moral prohibition against a killing of this kind.\textsuperscript{5} As Blackstone contended, a person "ought rather to die himself than escape by the murder of an innocent."\textsuperscript{6}

The common-law principle that "no man can excuse himself, under the plea of necessity or compulsion, for taking the life of an innocent person,"\textsuperscript{7} has been repeated, in substance, time and again.\textsuperscript{8} For example, the famous American case, \textit{United States v. Holmes},\textsuperscript{9} arose

\textsuperscript{2} Use of deadly force is justified if it was necessary to save the actor's life from a raving maniac, even if the maniac is "innocent" of crime because of his or her mental disorder. At times the word "unoffending" has been added to provide for this situation, although some other word, such as "harmless," might be more appropriate. The use of "innocent and unoffending" for this purpose dates back at least to the time of Lord Coleridge. \textit{See} The Queen v. Dudley & Stephens, 14 Q.B.D. 273, 286, 15 Cox C.C. 624, 636 (1884). More frequently today the idea is left to be understood without the use of any such word.


\textsuperscript{4} \textit{G. Williams, Criminal Law: The General Part \S 246} (2d ed. 1961).

\textsuperscript{5} \textit{See} \textit{Sauer v. United States}, 241 F.2d 640, 648 (9th Cir. 1957) ("[a]t least one purpose of the penal law is to express a formal social condemnation of forbidden conduct."); \textit{Arp v. State}, 97 Ala. 5, 12, 12 So. 301, 303-04 (1893). "Knowledge of the wrong of killing an innocent person even to preserve one's own life can be inculcated by the dramatic instruction of the criminal courts." \textit{J. Hall, Principles of Criminal Law} 418 (1947).

\textsuperscript{6} \textit{4 Blackstone, supra} note 3, at \*30. Hale pointed out that, even facing death, a person has no excuse for killing an innocent victim; the killing of the threatener, however, may be excused. \textit{1 Hale, supra} note 3, at \*51. \textit{See also} \textit{Leach v. State}, 99 Tenn. 584, 595, 42 S.W. 195, 197 (1897).

\textsuperscript{7} \textit{Arp v. State}, 97 Ala. 5, 12, 12 So. 301, 303 (1893).


\textsuperscript{9} 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383).
after a ship struck an iceberg and sank in midocean. Before the vessel went down, boats were lowered, carrying the passengers and members of the crew. These boats quickly scattered. One was so overloaded that its occupants were barely able to move in their crowded positions. The next day a squall developed, threatening to send the overcrowded craft, which was not a modern lifeboat, to the bottom. That night, the officer in charge ordered the crew to jettison some of the occupants. Holmes and the other sailors seized sixteen passengers and threw them overboard. Thus lightened, the boat managed to ride the waves until a rescue ship arrived the following day. The officer and most of the crew disappeared after landing, but Holmes went on to Philadelphia, where he was arrested for the federal crime of murder on the high seas. Although all conceded that the boat would not have survived the storm had the load not been lightened, the court would not recognize any excuse for Holmes's actions.

*The Queen v. Dudley & Stephens,*\(^{10}\) an equally famous English case, arose out of similar circumstances. At the trial of two men indicted for willful murder, the jury returned a special verdict stating the following findings of fact. The defendants and another sailor, able-bodied English seamen, and the deceased, a boy of about seventeen, the crew of an English yacht, were cast away in a storm on the high seas 1,600 miles from land and were compelled to escape in an open boat. They consumed all their provisions in twelve days and, after eight days without food and six days without water, the defendants perceived that there was no appreciable chance of survival except by killing someone for the others to eat. The defendants decided to kill the boy. Lying weak and helpless on the bottom of the boat, the boy was unable to resist. The sailors fed upon the body and blood of the boy for four days, and then were picked up by a passing vessel. The jury further found that at the time of the killing there appeared to the defendants every possibility that, unless they fed upon the boy, or one of themselves, they would die of starvation. However, the boy did not assent to his own killing and the jury found no more compelling reason to kill the boy than to kill any of the others. The court held that this special verdict revealed no justification or excuse for the killing and was, in effect, a verdict of guilty of willful murder.

In *Holmes,* the evidence indicated that the captain, who was in another boat when some of the victims were thrown overboard, had given instructions that lots should be cast if such an emergency arose.

\(^{10}\) 14 Q.B.D. 273, 15 Cox C.C. 624 (1884).
and the trial court indicated that this was "the fairest mode, and, in some sort, as an appeal to God, for the selection of the victim." 11 Such a suggestion was disapproved in dictum in Dudley, 12 but it seems to have much to commend it. If an actual case arises in which the fatal selection is shown to have been made fairly by lot, the procedure probably will be approved.

While the common law consistently condemns, in a choice between oneself and an obviously innocent person, the intentional killing of the latter, certain superficially similar choices may be excusable and thus escape the common law's absolute prohibition. Consider, hypothetically, a man and a child, total strangers, driven through the countryside in a small horse-drawn vehicle. Suddenly, at a remote spot, they are attacked by ferocious beasts. The driver attempts to elude them, but the horse cannot outdistance the beasts. At the last moment, the man throws the child to the beasts. They stop to devour the child, thus enabling the man and his driver to reach safety. The man insists that had it not been for his foresight in tossing the child to the beasts, he, the child, and the driver would have been destroyed; although the act was unfortunate, it was the best act under the circumstances. In a proper case, the saving of two at the expense of one, all else being equal, would be morally right. Here, however, the man had a different choice: he could have ensured the safety of two by heroically jumping out and facing the animals himself. As he intentionally chose to kill the child to save his own life, he has no excuse at common law.

In contrast is the following example. Two men, B and C, are climbing a mountain, roped together for mutual protection. As they inch along a narrow ledge, B suddenly slips off, dragging C over with him. C manages to get a firm grip as he goes over the ledge, but hangs there, with B dangling unconscious at the end of the rope some feet below. C can hold on temporarily with one hand but cannot pull up B with the other. C holds on grimly until he senses that momentarily his grip will slip and both will plunge to their deaths. At that instant, C cuts the rope, letting B drop to his death. Without the extra weight of B, C is then able to pull himself up to safety. In this case, C did not choose between himself and B: B was doomed. C could not do anything to save B. C's choice was either to save his own life, or to submit to his own and B's deaths. While C may have violated the mountaineer's code, he has not violated the law; C's act was excusable. 13

11. 26 F. Cas. at 367.
12. 14 Q.B.D. at 285, 15 Cox C.C. at 635.
13. Nevertheless, C did commit homicide: by cutting the rope, an intentional act done
would have been morally wrong for C to sacrifice his own life merely because he could not save B.

The following pair of situations further highlights the distinction. A ship suddenly sinks in midocean, leaving nothing on the surface of the water except X, Y, and one life preserver. The weather is so rough that the only hope of survival lies in firmly securing oneself to the preserver. In the first situation, X reaches the preserver first and has it firmly fastened when the more powerful Y arrives. Unable to survive without the preserver, Y wrests it from X, but does not inflict any physical injury upon X. Without the preserver, X drowns. In the second situation, Y reaches the preserver first and swims away with it; X drowns because he has no life preserver. In the first example, Y killed X. He chose to sacrifice an obviously innocent person and has no excuse even though the act was necessary to save his own life. In the second situation, Y did not kill X; no act of Y deprived X of life. He did not take the life preserver from X because X never had it. X’s drowning for want of a preserver cannot be attributed to Y.

Courts today, as at common law, generally do not recognize an excuse for the intentional killing of an obviously innocent person, even if necessary to save oneself from death. The refinements of this proposition, however, have not been adequately considered. If the victim had no chance to survive in any case, or if no act of the survivor caused the victim’s death, the survivor’s choice to save his or her own life should be excused. Moreover, even when moral considerations require the rejection of any claim of excuse, they do not require that mitigating circumstances be overlooked. A killing in such an extreme situation is far removed from murder, and should be held to be manslaughter. Although at least one court has expressly rejected such a claim, other courts have indirectly acknowledged mitigating circumstances.

for the purpose of saving his own life, he advanced the death of B by at least a few seconds. His choice, however, was excusable; C would make the “inexcusable choice” only when, absent C’s act, B may otherwise have been saved.

14. A few of the new penal codes do not include the “inexcusable choice.” See, e.g., CONN. GEN. STAT. ANN. § 53a-14 (West 1972); N.Y. PENAL LAW § 40.00 (McKinney 1975). One statute that did not include the “inexcusable choice” was amended to correct this omission. “The Criminal Law Study Committee’s Notes on the enactment of [Georgia] Code Ann. § 26-906 explain the addition to the former law, Code Ann. §§ 26-401, 402, removing the defense of coercion to a charge of murder, as adopting the common law approach that one should die himself before killing an innocent victim.” Thomas v. State, 246 Ga. 484, 486, 272 S.E.2d 68, 70 (1980).


16. In Holmes, the grand jury refused to indict for murder, indicting instead for man-
thermore, some of the new penal codes expressly provide that such a killing is only manslaughter.17

It has been suggested that duress cannot be recognized as an excuse for felony-murder even if the defendant did not do the killing, but only joined the others in the commission of the felony to save his or her life.18 This suggestion is untenable: an excusable felony does not exist, because if the act is excused it is not a felony. A prohibited act committed under excusable duress is not a crime.19 For example, if \( D \) is compelled under threat of death to provide a getaway car for robbers, she is not guilty of robbery.20 In addition, if one of the guilty parties causes death in the perpetration of the robbery, all the robbers are guilty of felony-murder,21 unless a statute provides an exception,22 but \( D \), who is not a robber, is not guilty of homicide committed in the perpetration of a felony.23 She cannot be a perpetrator of a robbery of which she is innocent. This situation must be distinguished from that in which one who, having willingly joined in a robbery, asserts that he or she was compelled during the perpetration to do something against his or her will. This assertion will be rejected because the accused incurred culpability by joining in the felony.24

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17. E.g., MINN. STAT. ANN. § 609.20 (West 1964); WIS. STAT. ANN. § 939.46 (West 1958).
18. See People v. Petro, 13 Cal. App. 2d 245, 248, 56 P.2d 984, 95 (1936); State v. Moretti, 66 Wash. 537, 540, 120 P. 102, 104 (1912). In neither case was duress established by the evidence.
21. In Commonwealth v. Allen, 475 Pa. 165, 175, 379 A.2d 1335, 1340 (1977), the court noted: “As has been stated the cases are legion which provide that a participant in a robbery, such as appellant, ‘acts with the kind of culpability’ which is necessary to hold her responsible in a death caused by a co-defendant acting in furtherance of the conspiratorial scheme.” Accord McKinney v. Sheriff, Clark County, 93 Nev. 70, 560 P.2d 151 (1977).
22. Some of the new penal codes provide an affirmative defense to a charge of felony-murder when the killing was committed by an accomplice, and the defendant did not in any way solicit, command, induce, procure, counsel, or aid in its commission. See, e.g., ARK. STAT. ANN. § 41-1501(2) (1977).
24. This defense often is asserted by conspirators because frequently one conspirator is in fear of the other “to a certain extent.” Regina v. Tyler, 8 Car. & P. 616, 620, 173 Eng. Rep. 643, 645 (1838). However, in People v. Merhige, 212 Mich. 601, 611, 180 N.W. 418, 422 (1920), the court reasoned: “Such compulsion must have arisen without the negligence or fault of the person who insists upon it as a defense.” Accord Ross v. State, 169 Ind. 388, 82
The Rule of Duress

The common law recognizes no excuse for the intentional killing of an innocent person, even if necessary to save oneself from death, but this is an exception to the rule of duress. The rule of duress provides that a prohibited act is not a crime if the actor reasonably believed it to be necessary to save himself or herself from imminent death or great bodily injury. This excuse has been recognized not only in prosecutions for such offenses as reckless driving, malicious mischief, receiving stolen goods, and escape, but also for such grave felonies as burglary, robbery, kidnapping, and arson. Even one who joins the enemy forces in time of war is not guilty of treason if he or she does so in reasonable fear of death or great bodily injury, and escapes at the first reasonable opportunity without having engaged in homicidal


25. Generally, a defendant must raise the defense of duress, but once raised, the prosecution bears the burden of proving the absence of duress. However, this is not a constitutional requirement. United States v. Calfon, 607 F.2d 29, 30-31 (2d Cir.), cert. denied, 444 U.S. 1085 (1979).

26. This rule applies only to acts less grave than killing. “It appears to be established, however, that although coercion or necessity will never excuse taking the life of an innocent person, it will excuse lesser crimes.” R.I. Recreation Center, Inc. v. Aetna Cas. & Sur. Co., 177 F.2d 603, 605 (1st Cir. 1949). “We hold that duress is a defense available in New Mexico except when the crime charged is a homicide or a crime requiring intent to kill.” Esquivel v. State, 91 N.M. 498, 501, 576 P.2d 1129, 1132 (1978).


30. In People v. Strock, 42 Colo. App. 404, 600 P.2d 91 (1979), rev'd on other grounds, — Colo. —, 623 P.2d 42 (1981), the defendant was entitled to an instruction about duress in view of evidence that there had been an attempt to kill him, that there was a “contract on his life,” and that he had received a note threatening him on the night of his escape. In United States v. Bailey, 444 U.S. 394 (1980), the Supreme Court, noting that escape is a continuing offense, held that “in order to be entitled to an instruction on duress or necessity as a defense . . . , the escapee must first offer evidence justifying his continued absence from custody as well as his initial departure and that an indispensable element of such an offer is testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force.” Id. at 412-13 (footnote omitted).


33. State v. Ellis, 232 Or. 70, 374 P.2d 461 (1962). The court recognized that duress may excuse kidnapping, but held that duress had not been established.

34. Ross v. State, 169 Ind. 388, 82 N.E. 781 (1907). In this case, although compulsion was not established, the court did not question that a reasonable fear of immediate death would have excused the burning of the dwelling.

35. Oldcastle's Case (1419), 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND *10; I E. EAST, A TREATISE ON THE PLEAS OF THE CROWN 70-71 (London 1803); M. FOSTER,
Nature of the Compulsion

Not every fear of loss or harm will support the excuse of duress. It has been said that no fear of loss or destruction of property, however well grounded, will be recognized as a sufficient compulsion to excuse the defendant's crime, including fear based on a threat “to burn his house to the ground, to destroy all his cattle and stock of corn and to lay waste all that belonged to him.” This limitation is implicit in the requirement that a cognizable defense of duress must be based on a well-grounded apprehension of imminent death or great bodily injury. No excuse is available to one who had an obviously safe avenue of escape before committing the prohibited act.

The requirement of a threat of imminent death or great bodily injury, however, has not been uniformly applied. Some courts have drawn a line between levels of duress acceptable in civil, but not in criminal cases; that is, what may be legally recognized as compulsion in a civil case may not necessarily be sufficient for an excuse in a criminal prosecution. Although this line is readily perceptible, it would be more appropriate to measure the degree of compulsion in light of the gravity of the offense; the degree of compulsion sufficient to excuse petty larceny may not be sufficient to excuse armed robbery. This approach is supported by the U.S. Supreme Court in its decision in United States v. Greiner, 26 F. Cas. 36, 39 (E.D. Pa. 1861) (No. 15,262); United States v. Vigol, 2 Dall. 346, 347 (C.C.D. Pa. 1795); Respublica v. M'Carty, 2 Dall. 86 (Pa. 1781) (defendant not excused because he was still with the enemy forces eleven months after he claimed to have been forced to join them).

39. "Duress is a defense to a crime only when another's unlawful threat of death or serious bodily injury reasonably causes the defendant to do a criminal act in a situation in which there was no opportunity to avoid the threatened danger." United States v. Hernandez, 608 F.2d 741, 750 (9th Cir. 1979) (quoting United States v. Michelson, 559 F.2d 567, 569 (9th Cir. 1977)). "The jury was properly instructed on Bates' coercion defense, which requires a 'well-founded fear of impending death or serious bodily injury.'" United States v. Bates, 617 F.2d 585, 589 (10th Cir. 1980).
42. See McCoy v. State, 78 Ga. 490, 497, 3 S.E. 768, 769 (1887); Ross v. State, 169 Ind. 388, 390-91, 82 N.E. 781, 781 (1907).
IMPELLED PERPETRATION

...proach has long been overlooked; when the problem has been squarely presented, however, courts generally have held that a threat of something less than death or great bodily injury may be recognized as an excuse in some prosecutions. Thus, in a case in which a relatively minor offense was alleged, the court held that the jury should have been instructed that the defendant had a defense if he had been compelled to act under "such violence or threats . . . as are calculated to operate on a person of ordinary firmness and inspire a just fear of great injury to person, reputation, or property."

There is also some authority for the proposition that the acts may be excused if the harm threatened is directed not at the actor, but at members of the actor's family. Such a threat may be more coercive than a threat to the actor. A person might be willing to chance that a threat to kill, if directed at that person, was only a bluff, but may not be willing to chance it if it was a threat to kill his or her spouse or child. The validity of the excuse, however, should not depend upon the relationship of the threatened party to the actor; a threat of harm to any person should suffice. If the only choice is between the loss of human life and the loss of property, a decision in favor of life is morally re-

43. Professor Hitchler noted that "the courts have not carefully graduated the injury which must be threatened to the enormity of the crime for which it is invoked as excuse." Hitchler, 


In People v. Pryor, 70 A.D.2d 805, 806, 417 N.Y.S.2d 490, 492 (1979), the trial court "instructed the jury that to find that the defendant acted under duress they must find that 'the compulsion must be present and immediate and of such a nature as to induce a well-founded fear of impending death or serious bodily injury.'" The Appellate Division directed a new trial, holding that "the standard imposed by Trial Term is a more stringent one than required by statute and is based on section 859 of the old Penal Law." Id.

In refusing to relax the requirement of fear of immediate death as an excuse for perjury, the court in State v. Rosillo, 282 N.W.2d 872, 874 (Minn. 1979), said that, while there may be reason for some relaxation of the requirement, this would be a matter for legislation.


46. R.I. Recreation Center, Inc. v. Aetna Cas. & Sur. Co., 177 F.2d 603, 606-07 (1st Cir. 1949) (Magruder, C.J., concurring). An occasional statute includes threats of harm to others. KAN. STAT. ANN. § 21-3209 (1974) ("spouse, parent, child, brother or sister"); Wis. STAT. ANN. § 939.46 (West 1958) ("another"). The case law tends to speak only of harm threatened to the actor; however, a more inclusive statement has usually not been warranted by the facts.

A few statutes explicitly limit the defense to threats directed only at the actor. E.g., CAL. PENAL CODE § 26 (West 1970); GA. CODE ANN. § 26-906 (1977); see People v. Jones, 105 Cal. App. 3d 1, 20-21, 164 Cal. Rptr. 124, 134-35 (1980).
Consider, for example, a case in which a bank robber, holding a woman with a knife pressed against her throat, threatens to kill her unless the teller hands over a bag filled with money. The teller, reasonably believing that the woman, a complete stranger, would be killed unless he obeys, complies with the robber's demand. Even though the teller had never seen the woman before, it is almost beyond belief that, under these circumstances, the teller could be successfully prosecuted for embezzlement: the charge would be defeated on the ground that the teller had acted under duress.\textsuperscript{48}

\textbf{Command or Order}

Under the rule of duress, some types of commands are deemed to be a sufficient compulsion to excuse an otherwise criminal act. Under the English "rule of coercion," the bare command of the husband was a complete defense to any acts of the wife, except for a few severe crimes such as treason or murder.\textsuperscript{49} This rule, the product of peculiarities of English procedure and social custom,\textsuperscript{50} has no proper place in the law today, and many states now hold that it has been completely abrogated.\textsuperscript{51} In addition, although the command of a parent has been held no excuse for a child who commits a prohibited act without compulsion,\textsuperscript{52} the jury may find that a child under fourteen years of age lacks criminal capacity if the child committed the deed in obedience to the

\textsuperscript{47} "The law deems the lives of all persons far more valuable than any property." United States v. Ashton, 24 F. Cas. 873, 874 (C.C.D. Mass. 1834) (No. 14,470).

\textsuperscript{48} Cf. People v. Lawson, 65 Mich. App. 562, 237 N.W.2d 559 (1976) (L entered S's store, grabbed a woman from behind, held a gun to her head and said to S, "Give me your money or she will get it." S took some money from the cash register and placed it in a brown bag which was delivered to L. L's conviction of armed robbery was affirmed. The court said that L's action had placed S in fear.).

\textsuperscript{49} Blackstone wrote that, except for crimes to which the defense is not available, if a wife commits an act "by the coercion of her husband; or even in his company, which the law construes a coercion; she is not guilty of any crime." BLACKSTONE, supra note 3, at *28. Even before Blackstone, the rule was stated that the "command of a husband, without other coercion" is sufficient to excuse the wife from criminal guilt. Anonymous, Lib. Ass. 27, f. 137, pl. 40 (1353).

\textsuperscript{50} The rationale underlying the rule was "that if the husband and wife commit burglary and larceny together, the wife shall be acquitted, and the husband only convicted . . . because otherwise for the same felony the husband may be saved by the benefit of his clergy, and the wife hanged." 1 HALE, supra note 3, at *45.


\textsuperscript{52} Cagle v. State, 87 Ala. 38, 6 So. 300 (1888); People v. Richmond, 29 Cal. 414 (1866).
parent's command.\textsuperscript{53}

As military discipline does not permit a subordinate to conduct a collateral inquiry to determine the lawfulness of an order received, military command is ordinarily a complete defense for the soldier who executes it. Accordingly, a soldier is fully protected even if the order is unlawful, assuming that under some circumstances the order would be lawful. If, however, the illegality of the order is readily apparent to a reasonable person, a soldier who obeys it is not protected.\textsuperscript{54} For example, a command to a sentry to kill anyone using opprobrious words, an obviously unlawful order under all circumstances, would not justify or excuse such a killing.\textsuperscript{55} Similarly, an order to a soldier to assist his superior in the perpetration of rape is not a lawful command related to military duty and would not excuse the crime.\textsuperscript{56} A peace officer's request to a deputy is no defense for making an obviously illegal arrest;\textsuperscript{57} the orders of a foreign government to its subject provide no immunity for an illegal act committed in this country.\textsuperscript{58}

Under circumstances involving a mistake of fact, an order or command may excuse an innocent agent's illegal act, if the command was not obviously wrongful and was carried out in ignorance of the criminal purpose intended. This situation may arise, for example, when an employer commits larceny by directing an employee to take another's property and place it in the employer's house or store. The employee is not guilty if he or she carries out this instruction in the innocent belief that it is the employer's chattel.\textsuperscript{59}

In some jurisdictions, certain employers may be authorized to direct their employees to perform acts that would otherwise be unlawful, such as carrying a gun from one business location to another, and acts performed under such authority are lawful.\textsuperscript{60} Generally, however, the mere existence of an order or command by an employer constitutes no excuse for the intentional perpetration of a prohibited act,\textsuperscript{61} even if it is by an employee whose job depends upon obeying his or her employer's

\begin{thebibliography}{99}
\bibitem{53} Commonwealth v. Mead, 92 Mass. (10 Allen) 398 (1865).
\bibitem{54} Riggs v. State, 43 Tenn. (3 Cold.) 85, 87 (1866).
\bibitem{56} State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951).
\bibitem{57} Roberts v. Commonwealth, 284 Ky. 365, 144 S.W.2d 811 (1940).
\bibitem{58} Giugni v. United States, 127 F.2d 786, 791 (1st Cir. 1942).
\bibitem{60} Cassi v. State, 86 Tex. Crim. 369, 216 S.W. 1099 (1919).
\bibitem{61} See, e.g., Thomas v. State, 134 Ala. 126, 132, 33 So. 130, 132 (1902); Hately v. State,
This rule will be recognized at once as an echo of the ancient view that nothing less than a well-grounded fear of imminent death or great bodily injury can be recognized as duress. As the modern trend is to modify this strict position by conceding that less may be sufficient for duress in some criminal cases, the employer's command should be reassessed. It is not necessary to punish the employee on the theory that otherwise the crime must go unpunished, because the employer who gave the order is clearly guilty and may be punished for the crime. The fact that the employer caused the crime to be committed by the employee might be considered in the determination of the employer's punishment if the determination is discretionary. If the employee's job is at stake, or at least the employee believes the job to be at stake, the coercive force of the employer's command may be very great. The excuse thus should be recognized in certain situations.

**Future Harm**

Although it often has been repeated that no threat of future harm will constitute a viable duress defense, courts have not hesitated to disregard this principle when presented with an extreme case. To insist that no threat of future harm could ever be sufficient to excuse a prohibited act, no matter how grave the threat or small the offense, is utterly unrealistic. The time has come to reject the notion that there is any substantially impelling influence that could never constitute a duress defense in any criminal case. It should be emphasized that the wording of the rule of duress had to be extreme for it to be recognized

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"Loyalty to a superior does not provide a license for crime." United States v. Decker, 304 F.2d 702, 705 (6th Cir. 1962). Acting in the capacity of an employee is no defense for one who has intentionally violated the law. People v. McCauley, 192 Colo. 545, 548, 561 P.2d 335, 337 (1977).


63. "[A] person who causes an innocent party to commit an act which, if done with the requisite intent, would constitute an offense may be found guilty as a principal even though he personally did not commit the criminal act." United States v. Gleason, 616 F.2d 2, 20 (2d Cir. 1979), cert. denied, 444 U.S. 1082 (1980). In legal theory one has done what one has caused another to do. Commonwealth v. Nabried, 264 Pa. Super. 419, 399 A.2d 1121 (1979).


65. Perryman v. State, 63 Ga. App. 819, 12 S.E.2d 388 (1940). In this case an inmate was threatened by a guard. Although there was a threat of present harm, it was not a deadly threat. The threat of constant repetition, however, made it particularly coercive.
as a valid rule of law. The formulation of a rule of law, however, does not exhaust the possible situations that can be covered by the rule.

The Duress Standard

The age-old rule of duress, that the commission of a prohibited act is not a crime if reasonably believed to be necessary to prevent death or great bodily injury, together with the equally ancient exception, the "inexcusable choice," are as vital today as ever.\textsuperscript{66} They provide the answers whenever applicable. These precepts, however, are not applicable in every situation. In the areas that fall beyond the parameters of the rules, two conclusions emerge: (1) an excuse should be recognized in some of these situations, and (2) a case-by-case analysis should be employed.

For example, a threatened unlawful physical injury might be very painful without approaching death or great bodily injury. On the other hand, such threatened harm may be moderate. Similarly, the prohibited act committed to avoid the threatened harm may be a grave felony without involving death or great bodily injury, or it may be a minor misdemeanor. Moreover, the harm threatened and the act done to avoid that harm could, in various degrees of gravity, create unlimited possibilities. An attempt to regulate this field with rules and exceptions would be futile and should not be made. Only a standard could be effective here,\textsuperscript{67} and the appropriate standard is that of a reasonable person in like circumstances. The Model Penal Code has adopted a similar, but incomplete, version of this standard.\textsuperscript{68}

\textsuperscript{66} A few states have modified this rule by statute. \textit{See}, e.g., \textit{Conn. Gen. Stat. Ann.} § 53A-14 (West 1972); \textit{N.Y. Penal Law} § 40.00 (McKinney 1975). In these statutes, the defense is based upon a threat that a person of reasonable firmness would have been unable to resist.

\textsuperscript{67} A standard is a legal device employed to enable the factfinder to apply common sense to the complicated facts of a particular situation. \textit{See} \textit{R. Pound, Justice According to Law} 58-59 (1951). Some complain that a standard is not certain. If it were certain, however, it would not be a standard, but a rule, which is a device for attaching a clear-cut legal consequence to a clear-cut state of facts. \textit{Id.} at 56. Thus, it is a rule of the common law that there is no homicide (a clear-cut legal consequence) unless death followed the harm within a year and a day (a clear-cut set of facts). A standard is employed when rules are not practicable. The best-known example is that used to distinguish between due care and negligence: the care a reasonable person would employ in like circumstances.

\textsuperscript{68} The Model Penal Code's reasonable-person standard for duress refers to "a person of reasonable firmness." \textit{Model Penal Code} § 2.09(1) (Proposed Official Draft 1962). These words do not change the standard, because a reasonable person would be reasonably firm. However, the section unwisely does not provide for the "inexcusable choice." Quite properly, § 2.09(1) includes a threat of "unlawful force against his person or the person of another," thus adopting the modern trend in two respects: it does not limit duress to (1) a
In summary, whenever the compulsion is less than a threat of death or great bodily injury, and the threatened harm is avoided without the killing of an innocent person, it is necessary to weigh the compulsion against the harm. If, under all the circumstances, a reasonable person would have been impelled to avoid such threatened harm by doing what was done by the defendant, the defense should be recognized; otherwise it should not. It is for the judge to instruct the jury that this is the law, and for the jury to decide, as a matter of fact, whether or not the standard has been met.

Necessity: “Duress of Circumstances”

If, as the result of natural forces, and not the compulsion of another, a person must either suffer detriment or commit an act that violates the letter of the law, that person acts out of “necessity.”

The “inexcusable choice” doctrine applies here, as in the law of duress. One may not intentionally kill an innocent person even if necessary to save one’s own life. The best-known cases in this field, United States v. Holmes and The Queen v. Dudley & Stephens, were both cases of “necessity.” On the other hand, if circumstances have generated a well-grounded belief that, without a prompt act of avoidance, death or threat of deadly force, or (2) a threat of violence against the actor. Additional defects of the Model Penal Code are discussed in notes 99-109 & accompanying text infra.

69. The elements of the defense of necessity “are that defendants must have reasonably believed that their action was necessary to avoid an imminent threatened harm, that there are no other adequate means except those which were employed to avoid the threatened harm, and that a direct causal relationship may reasonably be anticipated between the action taken and the avoidance of the harm.” United States v. Cassidy, 616 F.2d 101, 102 (4th Cir. 1979). “Generally, necessity is available as a defense when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law.” State v. Diana, 24 Wash. App. 908, 916, 604 P.2d 1312, 1317 (1979).

70. One of the earliest references is Pollard’s argument for the defendant that “a man may break the words of the law, and yet not break the law itself,” as when the words are broken “through necessity.” Reniger v. Fogossa, 1 Plowd. 1, 18, 75 Eng. Rep. 1, 29 (1550). Pollard included a biblical reference to the excuse for eating sacred bread, normally forbidden, because it was through “necessity of hunger.” Matthew 12:3, 4. Professor Stephen refers to “compulsion by necessity.” 2 Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 105 (1883). State v. Diana, 24 Wash. App. 908, 916, 604 P.2d 1312, 1317 (1979), provides a modern example of necessity: “To summarize, medical necessity exists in this case if the court finds that (1) the defendant reasonably believed his use of marijuana was necessary to minimize the effects of multiple sclerosis; (2) the benefits derived from its use are greater than the harm sought to be prevented by the controlled substances law; and (3) no drug is as effective in minimizing the effects of the disease.”


great bodily injury will result, the commission of any prohibited act necessary for safety will be excused if it does not involve the "inexcusable choice."

The reference in the Book of Jonah to the jettison of the cargo of a vessel to save the lives of those on board, an act that is unquestionably excusable if it is reasonably necessary for the purpose, has its counterpart in modern cases. What would otherwise constitute attempted revolt on the high seas may be excused if the sailors returned to port, in violation of the captain's orders, because the vessel was not seaworthy and they were in danger of imminent death from the elements. Similarly, the master of a vessel may take refuge in any port during a violent storm for the safety of all on board, even if an embargo forbids the vessel to enter that port.

In some cases of necessity, as opposed to duress, the courts have not hesitated to recognize that something less than utter catastrophe would constitute an excuse. Thus, a father is not guilty of the offense of withdrawing a child from school without first obtaining permission of the school board, if the absence is necessary because of the child's illness. One unavoidably caught in a traffic jam is not guilty of violating the law that prohibits stopping at that place. A carrier does not violate a statute requiring a specified coach if the failure to provide that coach on a particular occasion is due to an unavoidable accident that ordinary prudence could not have prevented. One who kills a deer does not violate the game law if this killing was necessary to prevent substantial damage to the deer killer's property. Moreover, an emergency may excuse what would otherwise be a violation of the speed law. These are not situations, it should be noted, in which no choice was made: the driver in heavy traffic elected to stop rather than proceed until the vehicle was brought to a halt by actual contact with the one ahead; the carrier could have avoided sending the train without the specified coach by sending no train at all; the deer killer could instead

73. *Jonah* 1:5.
78. Chesapeake & Ohio Ry. v. Commonwealth, 119 Ky. 519, 84 S.W. 566 (1905).
80. A speed of 67 miles an hour in a 50-mile zone was excused when it was necessary in an emergency to avoid a traffic accident. People v. Cataldo, 65 Misc. 2d 286, 316 N.Y.S.2d 873 (1970). Military necessity is a defense to a charge of violation of the state speed law. State v. Burton, 41 R.I. 303, 103 A. 962 (1918).
have allowed the property to be damaged; the speeding driver could have ignored the demands of the emergency.

The problem that seems to have aroused the most discussion, and the least litigation, is that of taking food. Lord Bacon said that "if a man steals viands to satisfy his present hunger, this is no felony nor larceny." Hale, Blackstone, and East disagreed: Hale argued that "by the laws of this kingdom sufficient provision is made for the supply of such necessities by collection for the poor," and Blackstone thought it "impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature." By skirting the real issue, however, these writers undercut the force of their opposition to Lord Bacon.

The hunger defense must be distinguished from the defense of "economic necessity." As it has been used, this defense does not necessarily imply an actual need to satisfy hunger; thus, it is not an acceptable defense to a criminal charge. The law cannot excuse an act merely because a "false sense of shame" has induced a person to steal rather than to make application to the proper authorities. Such thievery is prompted not by necessity but only by convenience.

In contrast, if a mountaineer, trapped for several days in a remote spot by a sudden blizzard, breaks into an empty cabin and eats some of the owner's food to satisfy his or her hunger, the act would be excused because of necessity. The mountaineer had no alternative. Moreover, the excuse would be recognized even if he or she would not actually have died of starvation.

**Choice of Evils**

A person entirely without fault, and in no danger of injury or

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81. The applicability of the defense of necessity in cases involving the taking of food "has occasioned great speculation among the writers . . . ." BLACKSTONE, supra note 3, at *31.
82. The Maxims of the Law, regula V, in 4 Works of Francis Bacon 34 (London 1819).
83. BLACKSTONE, supra note 3, at *31-32; 2 E. East, A Treatise on the Pleas of the Crown 698-99 (London 1803); HALE, supra note 3, at *53-55.
84. HALE, supra note 3, at *54-55.
85. BLACKSTONE, supra note 3, at *32.
88. The defense of necessity is not available if the threatened harm could reasonably have been avoided by means other than those taken. United States v. Cassidy, 616 F.2d 101 (4th Cir. 1979).
89. See MODEL PENAL CODE § 3.02, Comment (Tent. Draft No. 8, 1958).
harm, may inadvertently cause injury or harm to some other innocent person. Such an unavoidable accident carries no implication of criminal guilt. A different situation arises when a person has a choice about which of two or more persons will suffer because of the inadvertent act. If the same type of harm would result regardless of the decision made, the actor has no real choice. If, however, a different degree or type of harm may ensue, the actor is confronted with a true choice of evils.

The following hypotheticals may illuminate the distinction drawn above. Suppose a motorist, driving with due care, is suddenly confronted with a terrible situation. Three small children dash into the street in front of her, leaving her with no possibility of avoiding all three. If the motorist does nothing to minimize the harm, all three will be killed. In the first instance, the driver swerves quickly to the left, avoiding two but killing one. In the second situation the driver swerves suddenly to the right, thus avoiding one but killing two. Both situations are unavoidable accidents, which do not implicate criminal guilt, because they offer no opportunity for a deliberate choice. The driver must make a split-second decision in an effort to minimize unavoidable harm. In the first situation, she accomplished the best result possible under the circumstances; in the second, she did not. Actions taken under emergency conditions do not always achieve the best possible result, and the law cannot require the best possible result in such situations.

By comparison, consider an emergency, similar to the one above, in which time permits an evaluation and a deliberate choice. In this case, an act that is bound to kill one, but is necessary to avoid killing the other two, would be morally right and have no suggestion of criminal guilt; however, an act that is bound to kill two, but is necessary to avoid killing one, would be so morally wrong as to require punishment. Although the actor may have thought that the loss of the one saved would have been a greater harm than the death of the other two, for these purposes at least, the law regards all alike.

The “inexcusable choice” exception involves, in essence, the choice of oneself over another. The “choice of evils” would not be a

90. Although more than two people may be involved, the actual “inexcusable choice” is always between the actor’s own life and the life of another. Assume the pilot of a large ship, with hundreds on board, is faced with a sudden emergency in which she must either swerve suddenly to the right or else wreck the vessel with consequent great loss of life. To make this turn she will run down and undoubtedly kill a man in a rowboat. Obviously the pilot must do what is necessary to save the ship in such a situation, and she will do this without criminal guilt. She will intentionally kill the rower and save her own life, but that is a small part of the whole picture. She will not make a choice between herself and the man
defense to an actor who made this "inexcusable choice" because what was avoided—loss of the actor's own life—would never be viewed as a harm greater than the death of another, innocent person. Thus, in the hypothetical case in which the man threw the child to the pursuing beasts, he could have achieved the result of sacrificing one to save two by jumping out and facing the animals himself. In The Queen v. Dudley & Stephens, in which the sailors killed the boy so that they might live, each sailor could have saved three at the expense of one by offering to sacrifice himself. Instead, each chose to sacrifice another to save his own life. If the choice was between the certain death of two and the certain death of one, however, with no possibility of realignment, the only morally acceptable choice would be to save the two. This would be true even if the actor making the choice was one of the two saved.

Differences in the fault or responsibility of the parties, however, may alter this balance. For example, in United States v. Holmes, the court noted that, according to the tradition of the sea, sailors should sacrifice themselves for the safety of passengers, except that a "sufficient number of seamen to navigate the boat must be preserved." In an extreme situation involving fault, such as attempted murder, the killing of two or more would-be murderers is justifiable if reasonably necessary to save the life of one innocent victim. One who is free from fault is privileged to use deadly force if this action reasonably seems necessary to save an innocent victim from murder. The scales in such

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91. Some may take it for granted that the "inexcusable choice" is duly covered by the Model Penal Code's section on choice of evils. MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962). This section provides, in substance, that an actor who has committed an act that violates the letter of the law has a defense if what he or she avoided would have caused a greater harm than was caused by the act. This would be no defense to an actor who had made the "inexcusable choice" because what he or she avoided (loss of his or her own life) would never, in the legal view, be greater than the harm caused by killing an innocent person. But an actor who has no defense under this section may still have an "affirmative defense" under the section on duress. Id. § 2.09.

92. See text following note 12 supra.


95. Id. at 367.

96. The common law authorizes the use of deadly force if it is reasonably necessary to prevent a forcible felony. Storey v. State, 71 Ala. 329, 339 (1882); State v. Nyland, 47 Wash. 2d 240, 242-43, 287 P.2d 345, 347 (1955); State v. Sorrentino, 31 Wyo. 129, 137-38, 224 P. 420, 422 (1924); BLACKSTONE, supra note 3, at *180. This view is incorporated in some of the new penal codes. For example, the Illinois statute provides that deadly force may be
a case are used not to weigh numbers, but to weigh innocence against guilt.

As is true in cases of duress, if the choice is between the destruction of life and the destruction of property, a decision in favor of life is morally right, while a decision in favor of property is so morally wrong as to require punishment. If the threat to person is only of a minor nature, however, a decision to prevent great property loss would be morally acceptable. Thus, a sudden and violent shove of an innocent person would be excusable if necessary to prevent the loss or destruction of very valuable property.

The choice of evils is not a substitute for the duress standard. In the ordinary duress case, the issue is whether the duress or necessity was such that a reasonable person under like circumstances would have been impelled to do what was done by the defendant. The choice of evils, on the other hand, is used only in exceptional situations: when only persons other than the actor were endangered, or when human life is at stake but the rules relating to duress do not apply.

The choice-of-evils doctrine, however, may be employed to compensate for deficiencies in the rule of duress. For example, the Model Penal Code section on duress unfortunately fails to include duress in any form other than actual or threatened personal injury. The Model Penal Code section on choice of evils has been interpreted as governing the problems of impelled perpetration omitted by the duress section. The choice-of-evils section provides that conduct believed to be necessary to avoid harm or evil to the actor or to another is justifiable if the harm avoided is greater than the harm sought to be pre-

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97. See note 47 supra.
98. Model Penal Code § 2.09(1) (Proposed Official Draft 1962) uses the phrase: “would have been unable to resist.” This phrase, however, does not apply in the choice-of-evils section. Id. § 3.02.
99. Id. § 2.09. This section is forward looking in many respects. The section is not limited to a threat of death or great bodily injury, or to a threat directed against the actor.
100. The section would be improved if, under the heading “duress and necessity,” it allowed every type of substantially impelling influence to be a defense if a person of reasonable firmness in like circumstance would have been impelled to do what was actually done, and this did not involve the “inexcusable choice.”
102. The Code provides that when conduct of the actor would otherwise be justifiable under the choice-of-evils section, the duress section does not preclude the choice-of-evils defense. Id. § 2.09(4).
vented by law. However, several problems inhere in using this section for all situations involving impelled perpetration.

On the surface, one rule of law in such a case appears obvious. In regard to the death of innocent persons, a court could recognize that, as a rule of law, the greater the number of deaths, the greater the harm. In a choice between the loss of life and the loss of property, the law regards the loss of life as a greater harm than the loss of any property.¹⁰³

This rule may, however, be too inelastic in some circumstances. Suppose, for example, an employee is ordered by his employer to perform a task that will necessarily involve an unlawful application of force to an innocent person, although without any risk of death or serious bodily injury; the employee knows that he will be fired if he does not obey. There is no possible rule of law providing that loss of a job is a greater harm than such a battery, because a job may be only temporary or otherwise relatively unimportant, whereas even such a battery may be serious and very painful. In addition, there is no possible rule of law that the loss of a job is not a greater harm than such a battery, because a job may be very important and a battery moderate. No rigid rule is appropriate in this situation. As rules are not feasible here, it is again necessary to establish a standard, such as a standard that would allow a defense if a reasonable person, so situated, would have believed that the harm avoided was greater than the harm caused. The Model Penal Code section on choice of evils, unfortunately, is concerned with actuality rather than with belief.¹⁰⁴ Some state statutes may offer better models than the Model Penal Code. For example, the Illinois penal code section on choice of evils¹⁰⁵ refers to a defendant who reasonably believed that his or her conduct was necessary to avoid greater harm than it caused. The Oregon choice-of-evils statute¹⁰⁶ has been interpreted to recognize a defense if “it was reasonable for the defendant to believe that the need to avoid the injury was greater than the need to

¹⁰³. See note 47 supra.
¹⁰⁴. This section refers to conduct that “the actor believes to be necessary to avoid a harm or evil to himself or to another,” but the conduct is justifiable only if “the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the defense charged.” MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962). There is no reference comparable to “a person of reasonable firmness” found in the duress section. Id. § 2.09. Perhaps this language was chosen because of some skepticism regarding the ordinary person’s inclination to have any belief about the relative degree of harmfulness of unrelated harms.
avoid the injury the [other statute] seeks to prevent."107 In effect, the Oregon court has recognized that the defense is available if a reasonable person would have believed that the harm avoided was greater than the harm caused.108 These state statutes provide an acceptable standard, focusing on belief and not on actuality. The issue is not whether the harm avoided was in fact greater than the harm caused, but rather whether the defendant reasonably believed it to be so. To hold otherwise might result in the conviction of a defendant for doing what any ordinary person would have done under the circumstances, a patently unacceptable result.

The result reached under these state statutes, however, frequently may be the same as the result under the Model Penal Code. Although belief about the relativity of degree of competing harms may influence a defendant's action, the change in these state statutes towards focusing on the defendant's belief makes no useful contribution. To the extent that the result is to be determined by a standard, the law is left as before. The standard employed in these state statutes is less satisfactory than the one they replaced. The simplest and best way to present such a problem to the jury is one that, in effect, invites consideration of what each juror would have done under the circumstances, rather than one that invites the juror to consider whether the defendant acted reasonably in his or her belief.

The only useful purpose of a statute on choice of evils is to provide for situations in which it is proper for the law to dictate the choice that must be made because no other choice would be morally acceptable. Sometimes this purpose is emphasized in the statute itself. For example, the Colorado statute provides:

When evidence relating to the defense of justification under this section is offered by the defendant, before it is submitted for the consideration of the jury, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established,

107. State v. Burney, 49 Or. App. 529, 532, 619 P.2d 1336, 1339 (1980). The defendant was held to have a defense to a charge of being an ex-convict in possession of a firearm if he took possession to defend himself against a threat of great bodily harm and was arrested before he had a reasonable opportunity to divest himself thereof in a manner that would not create a public peril. Without the statute he would have had a defense under the common law of duress. Thus, a California court held that use of a concealable firearm in defense of self or others in an emergency situation does not violate the statute making it an offense for a felon or addict to have in his or her possession a firearm capable of being concealed on his or her person. People v. King, 22 Cal. 3d 12, 24-25, 582 P.2d 1000, 1007-08, 148 Cal. Rptr. 409, 416-17 (1978).

108. This interpretation of the opinion is likely to be followed because the only legal test of reasonableness, for such a purpose, is the reasonable-person test.
constitute a justification.\textsuperscript{109}

A provision of this type would allow the court to limit more effectively the choice-of-evils defense to its appropriate use.

\textbf{Conclusion}

The age-old rules of duress and necessity, with their equally ancient exception, are as sound today as ever, but they occupy only a part of the potential field. The rest of the field comprises situations so variable, however, that an effort to formulate rules and exceptions would be futile. Resort to a reasonable-person standard is necessary; thus, the factfinder should ask what a reasonable person would do in the same situation. Such a standard is sufficiently pliant to accommodate any fact situation that may arise along an endless spectrum of possibilities.

Legislation in this field might well consist of two statutes in substantially the following form:

\textit{Duress and Necessity.} Except for the intentional or reckless taking of human life, one who did not culpably cause, or enter into, the critical situation and is not otherwise at fault, has a defense if he or she acted under such compulsion, from whatever source, that a person of reasonable firmness in such a situation would have been unable to resist doing what the actor did.

\textit{Choice of Evils.} In a criminal prosecution, it shall be a defense if it can be established as a matter of law that the actor's conduct avoided greater harm than it caused, in the only way that seemed reasonably possible under the circumstances.

The first proposal relies upon the reasonable-person standard for all situations not within the inexcusable-choice exception. The second proposal allows the reasonable-person standard to determine whether the conduct, as such, is acceptable, but relies entirely upon the court to determine whether one harm was, or was not, greater than the other. For example, in a situation in which the conduct in question avoided the loss of two or more lives by causing the death of one, the harm avoided was greater than the harm caused. The proposed section, however, would not provide an excuse for the hypothetical man who threw the child to the beasts because there was another way, reasonably possible under the circumstances, to accomplish the result. His choice that the child be the one to die is not acceptable.

If most actual cases are tested by a reasonable-person standard, inevitably some defendants whose conduct caused greater harm than it

avoided will be acquitted. Although this result does not meet the test of strict morality, it is nevertheless unavoidable. The criminal law was never intended to be a complete moral code.\textsuperscript{110} Only when conduct falls far below proper moral behavior is punishment deemed appropriate.\textsuperscript{111} If extreme situations are governed by rules of law, leaving only lesser problems to be tested by the standard, conduct no worse than that of the ordinary reasonable person may at times fall short of the full measure of strict morality, but not very far short—not far enough to merit punishment.

The criminal law does not hesitate to dictate that no one may choose between oneself and another, who may live and who must die, by intentionally killing an obviously innocent person, but in general it is not primarily concerned with the relativity of different harms. In this regard, the law's chief concern is that, except for such an extreme situation,\textsuperscript{112} no one should be punished for doing what any reasonable person would have done.

\textsuperscript{110} "The criminal law cannot be simply a code of right behavior. It must be, rather, a specification of behavior so far below common standards that it identifies the actor as a dangerous and reprehensible person, who does not respond to the normal restraints of education, morality and custom." \textit{Model Penal Code and Commentaries} § 251.4, Comment 2 at 483 (1980).

\textsuperscript{111} "[T]he settled principle is that penal sanctions should be reserved for that which virtually the entire community is willing to condemn." \textit{Id.} Comment 4 at 489.

\textsuperscript{112} This statement is not intended to suggest that a reasonable person would intentionally kill an obviously innocent person in order to save his or her own life, but only that the law does not leave this determination for either the individual or the jury.