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# Implied Fortitude: California's Defense of Duress

## I. INTRODUCTION

This article will examine the development and present requirements of the defense of duress in California. When one person threatens another with immediate injury if that person does not commit a certain crime, the person acting pursuant to the threat is said to be acting under duress. The defense of duress is not a recent development of the law<sup>1</sup> but has been recognized since antiquity as an excuse for conduct which would otherwise be criminal, providing that the particular requirements of the forum jurisdiction have been met.<sup>2</sup> Lord Bacon, an early proponent of the defense of duress, felt that when an actor was put in the situation of having to make a choice between two evils, that circumstance should carry a privilege in itself.<sup>3</sup>

The underlying principle supporting the defense of duress is that criminal liability must not be visited on the blameless. If a person commits an act under the duress of threatened violence, "responsibility for the act cannot be ascribed to him, since in effect, it was not his own desire, or motivation, or will, which led to

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1. 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 105 (1883).

2. L. Newman & L. Weitzer, *Duress, Free Will, and the Criminal Law*, 30 S. CAL. L. REV. 313, 314 (1957) [Hereinafter cited as Newman & Weitzer].

If "duress" was to excuse it had to be shown that the compulsion was in its nature such as would induce a well grounded apprehension of death or serious bodily harm. The compulsion had to arise without the negligence or fault of the person claiming aid from the doctrine, and the compulsion had to be instant, present, imminent and impending. The force complained of by the victim must have lasted during the whole time required for the performance of the criminal act. The "duressed" had to show resistance to the point of death (or at least to the instant of serious and grievous bodily harm) before he capitulated and acted. The force had to be exerted, if not on the victim, then on someone close to the victim, such as a wife or child. The "duressed" had to avail himself of any opportunity to avoid or escape from the force.

3. The law chargeth no man with default where the act is compulsory and not voluntary, and where there is not a consent and election: and therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself.

LORD FRANCIS BACON, THE WORKS OF FRANCIS BACON 343 (Shedding, Ellis & Heath 1859).

the act.”<sup>4</sup> Clearly, when an actor commits a crime through fear of death or serious bodily injury, he cannot be said to be acting of his own volition. In fact, he is very probably acting in a manner completely contrary to that dictated by his own free will. As a recent Michigan Court explained, “(a) successful duress defense excuses the defendant from criminal responsibility for an otherwise criminal act because the defendant was compelled to commit the act: the compulsion or duress overcomes the defendant’s free will and his actions lack the required *mens rea*.”<sup>5</sup>

The development of duress is, no doubt, a judicial concession to human frailty. It incorporates a degree of flexibility into the otherwise strict requirements of the law. Generally speaking, the court must balance the severity of the threatened force with the gravity of the crime subsequently committed. By way of illustration, if a defendant alleges he was forced to commit the crime of shoplifting because another person threatened to break his arm if he did not comply, most American juries would probably excuse his actions. On the other hand, if the crime subsequently committed was rape or murder, it is doubtful that any jury would excuse the defendant. In order to effectuate the defense of duress, it is necessary to determine the requisite degree of threatened force that would excuse a particular crime.

Modernly, it has become an accepted legal principle that an act, which would otherwise constitute a crime, should be excused if done under duress that was present, imminent, and impending, and of a nature to induce a well-grounded apprehension of death or serious bodily injury if the act is not performed.<sup>6</sup> Whether the defendant acted in fear of immediate serious bodily injury has been considered the relevant criteria in a wide variety of situations. A sampling of the charges in which the defense of duress under threat of serious bodily injury has been raised would in-

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4. Newman & Weitzer, *supra* note 2, at 313.

5. *People v. Luther*, 394 Mich. 619, 622, 232 N.W.2d 184, 186 (1975). In this case, defendant, a minimum security prison inmate, was confronted in the prison lavatory by six assailants who made homosexual demands of him. When defendant refused, he was beaten and threatened with a knife, and chased off the prison grounds. The Supreme Court of Michigan upheld the defendant’s right to assert the defense of duress to the charge of prison escape.

6. 1 R. ANDERSON, *WHARTON’S CRIMINAL LAW AND PROCEDURE* § 123, at 262 (1957); 1 H. BRILL, *CYCLOPEDIA OF CRIMINAL LAW* §166, at 306 (1922); W. CLARK & W. MARSHALL, *A TREATISE ON THE LAW OF CRIMES* 359 (7th ed. 1967); J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 443 (2nd ed. 1960); S. KADISH & M. PAULISON, *CRIMINAL LAW AND ITS PROCESSES* 545 (2nd ed. 1969) (Hereinafter cited as *KADISH & PAULISON*); W. LA FAVE & A. SCOTT, *CRIMINAL LAW* §49, at 379 (1972); J. MILLER, *CRIMINAL LAW* 164-165 (1934); R. PERKINS, *CRIMINAL LAW AND PROCEDURE* 537 (3rd ed. 1966); 1 F. WHARTON, *WHARTON’S CRIMINAL LAW* §384, at 514-515 (12th ed. J. Ruppenthal 1932); 1 B. WITKIN, *CALIFORNIA CRIMES* §156, at 149 (1964).

clude the sale of drugs,<sup>7</sup> being in the country illegally,<sup>8</sup> perjury,<sup>9</sup> forgery,<sup>10</sup> being on a public road while intoxicated,<sup>11</sup> attempted robbery,<sup>12</sup> escape,<sup>13</sup> armed robbery,<sup>14</sup> rape,<sup>15</sup> receiving stolen

7. *United States v. McClain*, 531 F. 2d 431, 438 (9th Cir. 1976). Defendant alleged that a third person had coerced him into handling cocaine by beating him until he agreed to cooperate. The court applied the serious bodily injury test, but denied the applicability of the defense because defendant failed to establish that there was no reasonable opportunity to escape. *See also United States v. Gordon*, 526 F. 2d 406, 407 (9th Cir. 1975).

8. *United States v. Palmer*, 458 F. 2d 663, 665 (9th Cir. 1972). The defendant in this case contended that he entered the country illegally to give a deposition in a civil suit in order to avoid "financial ruin." The court held that in order for duress to provide a defense, it must induce a well founded fear of immediate great bodily harm or death. Fear of "financial ruin" was insufficient.

9. *United States v. Mickels*, 502 F. 2d 1173, 1177 (7th Cir. 1974). Defendant police officer alleged that his grand jury testimony, which subsequently resulted in his conviction for perjury, should be suppressed because it was given under the duress of an unconstitutional police department rule prohibiting officers from refusing to give evidence before the grand jury. The court stated that it would follow the common law rule, which required, at a minimum, that the defendant feared serious bodily injury.

10. *United States v. Birch*, 470 F. 2d 808, 812 (4th Cir. 1972), *cert. denied*, 411 U.S. 931 (1972). In this case the defendant was a civilian employee of the U.S. Defense Department stationed in Germany. Both he and his wife were convicted in Germany of mistreating their servant and sentenced to prison. The defendant obtained forged identity cards and both he and his wife fled Germany to return to the United States. The defendant alleged concern over the judgment of the German Court as the reason for committing forgery. The court, however, held the defendant had failed to establish an apprehension of serious bodily harm.

11. *Haywood v. State*, 43 Ala. App. 358, 361, 190 So. 2d 725, 727 (1966) *cert. denied*, 280 Ala. 171, 190 So. 2d 728 (1966). Defendant was a passenger in an automobile involved in a collision. After the collision, defendant left the car in which he was seated and stepped out on the highway obviously intoxicated. The following jury charge was upheld by the Supreme Court of Alabama: "(I)f you believe from the evidence that the defendant honestly believed he was in danger of bodily harm if he stayed in his automobile at the scene of the accident, then I charge you he had a right to remove himself to a place of safety."

12. *Koontz v. State*, 204 So. 2d 224, 226 (Fla. Ct. App. 1967). In this case, defendant Koontz freely admitted using a shotgun in an attempt to rob a service station attendant. However, Koontz contended his criminal actions were compelled by threats against himself and members of his family. The trial court refused to instruct the jury that an otherwise criminal act could be excused if it was committed pursuant to an apprehension of death or serious bodily harm. The Florida District Court of Appeals subsequently reversed the conviction for failure to give the instruction. *See also Hood v. State*, 313 N.E. 2d 546, 547 (Ind. App. 3rd Dist. 1974).

13. *People v. Lovercamp*, 43 Cal. App. 3d 823, 832, 118 Cal. Rptr. 110, 115 (1975). In a novel opinion by Presiding Justice Gardner, Fourth District Court of Appeal, a new inroad was created in California's recognition of the defense of necessity. The case itself involved two women inmates who had been threatened continuously by a group of lesbian inmates who told them to "fuck or fight". After one fight and numerous threats, the women escaped the institution and were promptly captured. The defendant wisely asserted the defense of necessity, rather than duress, because California requires a threat of *immediate death* to establish duress.

property,<sup>16</sup> and murder.<sup>17</sup>

Despite general acceptance by legal commentators that an individual can be compelled to commit a crime by a threat of *serious bodily injury*, California, by statute, requires that the defendant must have believed that *immediate death* would follow if the crime was not performed as requested, in order for the affirmative defense of duress to be viable.<sup>18</sup> California does not consider threats which are less serious than immediate death to be sufficiently grievous to excuse *any* criminal conduct, however trivial the offenses are in light of the threatened injury sought to be avoided by the defendant. California also considers mere threats of death or serious bodily injury to one's family as insufficient to excuse any criminal conduct. Moreover, the jury may be entirely precluded from even considering that any threats had ever been

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CAL. PENAL CODE §26 (7). The assertion of necessity was unusual because it is generally applied only when the choice of evils was created by forces of nature rather than by other individuals. The major drawback of necessity, as opposed to duress, is that it requires the defendant to prove his defense by a preponderance of the evidence. *People v. Condley*, 69 Cal. App. 3d 999, 1014, 138 Cal. Rptr. 515, 522 (1977). Duress merely requires raising a reasonable doubt. *People v. Graham*, 57 Cal. App. 3d 238, 240, 129 Cal. Rptr. 31, 32 (1976). Justice Gardner enunciated several factors which must be alleged before the defense of necessity is applicable to a prison escape. The most relevant factor provides that the prisoner must be "faced with a specific threat of death, forcible sexual attack or *substantial bodily injury* in the immediate future." See also D. Maraghy, *Availability of the Defense of Duress in Prison Escapes: People v. Lovercamp*, 12 WAKE FOREST L.R. 1102 (1976); *People v. Harmon*, 53 Mich. App. 482, 486, 220 N.W. 2d 212, 214 (1974).

14. *People v. Adcock*, 29 Ill. App. 3d 917, 920, 331 N.E.2d 573, 576 (1975). The defendant contended that his participation in an armed robbery was compelled by threats of violence from a co-participant in the robbery. The Appellate Court of Illinois reversed defendant's conviction for the trial court's failure to instruct the jury that a person is not guilty of a punishable offense if his otherwise criminal conduct was performed pursuant to a threat of death or great bodily harm.

15. *People v. Patton*, 25 Ill. App. 3d 840, 844, 322 N.E. 2d 592, 595 (1975). In this case the defendant appealed from his conviction for rape, contending he was deprived of competent representation by counsel because of his counsel's failure to request an instruction on the defense of duress. The court held that counsel's failure to tender the instruction did not result in prejudice because "the defense of compulsion is not applicable in a situation in which there was no apprehension of death or serious bodily harm."

16. *Robinson v. State*, 141 Tex. Crim. 380, 386, 148 S.W. 2d 1115, 1118 (1941). The court held that if a defendant was put in fear of death or serious bodily injury, and, while laboring under such fear assisted in concealing stolen goods, he is not liable to punishment for his act.

17. *Wentworth v. State*, 29 Md. App. 110, 121, 249 A. 2d 421, 428 (1975). "(A)n 'imperfect' defense of duress may not exculpate a defendant in an unlawful homicide case but may supply that mitigation necessary to lower the degree of guilt from murder to manslaughter. . ." *Id.* at 490.

18. CAL. PENAL CODE §26 (7) (West Supp. 1977).

All persons are capable of committing crimes except those belonging to the following classes: Seven. . . . Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.

made.<sup>19</sup>

## II. THE FORMATION OF STANDARDS

### A. Relevant Considerations

Like California, the majority of states have statutorily provided for the defense of duress.<sup>20</sup> In drafting such a statute, initially it is necessary for the legislature to consider whether values are absolute or relative and to what extent an acceptable end may justify an otherwise offensive means. If the legislature makes the preliminary determination that values are relative, and that in certain circumstances an otherwise offensive means may justify an acceptable end, some type of standard is then necessary to determine the degree of threatened force which will excuse otherwise criminal conduct.

Since any member of society could find themselves in a situation in which they are compelled by threatened violence to commit an unlawful act, the standard must be drawn in light of the

19. *People v. Richards*, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969). At trial, the defendant offered testimony to establish that his escape from prison was caused by the threats of other inmates to force the defendant to submit to sodomy. The prosecution's objection to the testimony was sustained. Defendant thereupon rested without presenting further evidence. The First District Court of Appeal upheld defendant's conviction on questionable reasoning, stating that it was necessary for the threat to be "accompanied by a direct or implied request that the actor commit the criminal act. In this case there was no offer to show that anyone demanded or requested that the defendant escape." The court concluded with the dreadful note, "(H)e (defendant) was given alternative courses of action. The submission to sodomy, abhorrent as it may be, falls short of loss of life." See also R. Berger, *Escape From Prison—Defenses—Duress—Homosexual Attacks*, 8 AKRON L.R. 352, 357 (1974-75); M.R. Gardner, *The Defense of Necessity and the Right to Escape from Prison—A Step Towards Incarceration Free from Sexual Assault*, 49 S. CAL. L. REV. 110, 127 (1975-76); J.T. Griffith, *Duress is a Defense to a Prison Escape*, 43 UNIV. CIN. L. REV. 956, 959 (1974).

20. ARIZ. REV. STAT. §13-134 (West 1956); ARK. STAT. ANN. §41-208 (1977); COLO. REV. STAT. §18-1-708 (1973); CONN. GEN. STAT. ANN. §53a-14 (West 1958); DEL. CODE tit. 11, §431 (1974); GA. CODE ANN. §26-906 (1977); HAW. REV. STAT. §703-301 (1976); IDAHO CODE §18-201 (Supp. 1978); KY. REV. STAT. §501.090 (1969); LA. REV. STAT. ANN. §14:18 (West 1974); MONT. REV. CODES ANN. §94-201 (1969); NEV. REV. STAT. §194.010 (1965); N. H. REV. STAT. ANN. §626:1 (1974); N. M. STAT. ANN. §21-1-1 (Rule 8 (c)) (Supp. 1975); N. Y. PENAL LAW §40.00 (McKinney 1975); N. D. CENT. CODE §12.1-05-10 (1976); OKLA. STAT. ANN., tit.21, §156 (West 1958); OR. REV. STAT. §161.270 (1976); PA. STAT. ANN., tit. 18, §309 (Purdon 1959); S. D. COMPILED LAWS ANN. §§22-5-1, 22-5-2 (1967); TEX. PENAL CODE ANN. tit.2, §8.05 (Vernon 1974); UTAH CODE ANN. §76-2-301 (1977); WASH. REV. CODE ANN. §9A.16.060 (1977); WIS. STAT. ANN. §939.46 (West 1958). It should be noted that, of the above statutory provisions for duress, only Arizona, Idaho and Montana require the defendant fear actual death in order to invoke the defense of duress.

average citizen. "A law which punished conduct which would not be blameworthy to the average member of the community would be too severe for that community to bear."<sup>21</sup> The standard must necessarily allow for consideration of mankind's natural infirmities. The average citizen is not a hero who will predictably stand fast in the face of danger. If this were the case, mankind would not hold heroes in such high esteem. It is more likely that the average citizen is deeply ingrained with an instinctual desire for self-preservation. As the Alabama Appellate Court succinctly noted in *Browning v. State*, "Upon the question of self-preservation, even a dumb animal is thus imbued."<sup>22</sup>

Allowances must also be made for the varying influences capable of usurping an individual's free will. Threats of death, threats of serious bodily injury, threats to one's family, reputation, or property, are all capable of influencing an individual's freedom of choice. The suddenness with which these situations may arise can also affect an individual's freedom of choice. A person faced suddenly and inescapably with threatened violence may react in an entirely different manner than they would have, had they had the opportunity to objectively contemplate their predicament.

Despite the many influences which may affect the exercise of an individual's free will, the preservation of society requires a certain amount of responsibility and fortitude from each of its members. Each citizen should be expected to possess a threshold of resistance capable of withstanding idle or trivial threats. This responsibility of resistance must necessarily be incorporated into any standard used to determine whether a defendant acted in a reasonable manner under circumstances coercing a choice between two evils.<sup>23</sup> This presumed strength of character permits the availability of the defense of duress only to those who protect an interest that is greater than the harm caused.<sup>24</sup> As Sanford Kadish and Monrad Paulison wrote in considering the responsibility of resistance each citizen is presumed to possess: "To make liability depend upon the fortitude of any given actor would be no less impractical or otherwise impolitic than to permit it to depend upon such other variables as intelligence or clarity of judgment,

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21. O. HOLMES, *THE COMMON LAW* 50 (1938).

22. 31 Ala. App. 137, 138, 13 So. 2d 54, 56 (1943).

23. Note, *Justification and Excuse in the Judaic and Common Law: The Exculpation of a Defendant Charged with Homicide*, 52 N.Y.U.L. Rev. 599 (1977). "Unless a person's conduct causes more benefit than harm, . . . justification analysis denies the accused the benefit of the defense. The public interest remains the underlying determinant, and the mode of analysis still a balancing of benefit against harm." *Id.* at 610.

24. G.P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1289 (1974).

suggestibility or moral insight."<sup>25</sup>

*B. The use of a Balancing Standard vs. a Fixed Standard*

After giving consideration to the human frailties of the average citizen for whom a standard must be tailored, it then becomes necessary to formulate the mechanics by which that standard is to be applied. Two distinct methods for determining whether criminal conduct occasioned by threats of violence should be excused present themselves. The first method, which I will refer to as the "balancing standard," would allow the trier of fact to consider, on a case-by-case basis, the threats which were made to the defendant. The judge should inform the jurors of the responsibility of each member of society to resist being compelled to commit a crime along with any other requirements which may be necessary for a valid showing of duress. In determining whether the defendant has sufficiently resisted such coercion, it may be provident to require that the harm sought to be avoided was greater than that caused by defendant's criminal conduct.

The balancing standard appears consistent with the thought process of the average citizen when suddenly compelled by threatened violence to commit an unlawful act. The balancing standard would necessarily take into consideration threats of serious bodily injury when the threatened harm avoided was greater than that subsequently caused by defendant's conduct. Allowing the jury to determine the culpability of defendant's conduct using the criteria of "reasonableness under the circumstances," builds into the determination allowances for mankind's infirmities and tailors the standard to the character of the average citizen.

A second method for determining whether the defendant's criminal conduct occasioned by threats of violence should be excused would be to establish a predetermined degree of force necessary to pardon any criminal conduct. For the purposes of this discussion, I will refer to this method for determining culpability as the "fixed standard". If the fixed standard is to be used, it is up to the legislature to determine the particular degree of threatened force which will be necessary for the defendant to establish duress. Unless the defendant shows that the predetermined degree of force was exerted against him, he may not use duress as a defense for any subsequent conduct. The obvious disadvantage of

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25. KADISH & PAULISON, *supra* note 6, at 542.



the fixed standard is that the designated degree of threatened force must be set very high in order to avoid anomolous results. If the requisite degree of force is not substantial, the defendant may be permitted to claim duress when the harm he caused was greater than the threatened violence.

### III. DURESS IN CALIFORNIA

#### A. *Present Requirements*

Nearly a century ago, the California Legislature chose to adopt the fixed standard as the proper method for determining whether the defendant's criminal conduct occasioned by threats should be excused.<sup>26</sup> That statute, which has remained virtually unchanged since before the turn of the century, requires that the defendant fear *immediate death* before he can be excused for *any* criminal conduct. California's requirements for the defense of duress have been best enunciated by the California District Court of Appeals in the 1927 decision of *People v. Sanders*,

In order for duress or fear produced by threats or menace to be a valid, legal excuse for doing anything, which otherwise would be criminal, the act must have been done under such threats or menaces as show that the life of the person threatened or menaced was in danger, or that there was reasonable cause to believe and actual belief that there was such danger. The danger must not be one of future violence, but of present and immediate violence at the time of the commission of the forbidden act. The danger of death at some future time in the absence of danger of death at the time of the commission of the offense will not excuse. A person who aids and assists in the commission of the crime, or who commits a crime, is not relieved from criminality on account of fears excited by threats or menaces *unless the danger be to life, nor unless that danger be present and immediate.*<sup>27</sup>

Thus, threats of dismemberment, disfiguration, severe brutality, or threats to one's spouse or children will not excuse a defendant from criminal liability in California. Perhaps the best that can be said for California's statute is that it is an easy standard to apply. If the defendant does not prove that he was threatened with immediate death, the defense is simply not available.

#### B. *The Serious Bodily Injury Test As Applied To Accomplices*

The stringent requirements of California's fixed standard have been lessened somewhat in a limited line of cases concerning accomplices.<sup>28</sup> This parallel line of cases has established that a showing that the defendant consented to the commission of cer-

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26. CAL. PENAL CODE §26 (7), *supra* note 18.

27. *People v. Sanders*, 82 Cal. App. 778, 785, 256 P. 251, 254 (1927) (Emphasis added).

28. As one court noted, "The cases in this state have greatly broadened the situation under which a person participating in the forbidden acts under threats of

tain sex acts because of threats of *serious bodily injury* is sufficient to remove him from the status of an accomplice. Application of a serious bodily injury test was necessary because a conviction could not be obtained upon the testimony of an accomplice unless it was corroborated.<sup>29</sup> California Penal Code section 1111 defines an accomplice as one who is liable to prosecution for the identical offense charged against the defendant on trial. The situation giving rise to the application of the serious bodily injury test occurs when the complaining witness alleges that he or she has been forced by the defendant to participate in a criminal sex act, and the defendant in turn, argues that the complaining witness' testimony cannot convict him because such witness "consented" to the act and was thus an accomplice under Penal Code section 1111.<sup>30</sup> If the strict requirements for excusing a criminal act under Penal Code section 26(7) were applied, the complaining witness would be required to show that he or she feared immediate death in order to remove themselves from the status of an accomplice. However, the fact that a person could be compelled to submit to sex acts by threats of violence less serious than death was given judicial recognition at an early date.<sup>31</sup> Without this judicial legislation, the complaining witness' testimony would have still required corroboration if the threats were only to do serious bodily injury.

### C. *The Otis Decision*

The argument in support of the recognition that a person can be forced to commit a criminal act by threats of harm less serious than immediate death is compelling. In 1959, Justice Tobriner, then of the First District Court of Appeal, considered the issue of whether fear of serious bodily injury would suffice as an excuse in

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*great bodily harm* should not be considered an accomplice." *People v. Anderson*, 264 Cal. App. 2d 271, 274, 70 Cal. Rptr. 231, 233 (1968) (Emphasis added).

29. CAL. PENAL CODE §1111 (West 1970).

A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant at trial in the cause in which the testimony of the accomplice is given.

30. J. Lesser, *Duress and the Prison Escape: A New Use for an Old Defense*, 45 S. CAL. L. REV. 1062, 1067 (1972).

31. *People v. Miller*, 66 Cal. 468, 469, 6 P. 99 (1885).

place of the fear of death requirement.<sup>32</sup> Consideration of the issue was by way of dicta because, in that case, the defense would have lacked the necessary element of immediacy. Justice Tobriner's opinion, consistent with the majority of legal commentators, was that the fine distinction between the two types of fear had become unrealistic in the light of recent psychological research.<sup>33</sup> Justice Tobriner reasoned that if duress frustrated or dominated willed action, it should affect and, sometimes, even excuse the legal consequences of acts which would otherwise be criminal. Particular emphasis was given to the modern discernment of the psychological factors of duress, which at least throw some doubt on the extreme niceties of the legal distinction between fear of serious bodily harm and fear of life itself. Justice Tobriner recognized, at least with respect to certain sexual violations, that an actor cannot voluntarily participate in the common intent and purpose with which the principal perpetrator commits a crime, if he or she merely consents to the act because of threats of serious bodily harm.<sup>34</sup>

#### IV. THE MODEL PENAL CODE

Contemporaneous with the *Otis* decision, the American Law Institute considered whether fear of serious bodily injury was sufficient to excuse criminal conduct. In 1960, *Tentative Draft No. 10* of the *Model Penal Code* was published by the Institute. Section 2.09 of this draft, entitled *Duress as a Defense*, provides that an affirmative defense can be established if the actor engages in the conduct charged because of threats of unlawful force against his person or the person of another, which a person of reasonable firmness in the same situation would have been unable to resist.<sup>35</sup> The availability of the duress defense, however, is precluded where the defendant recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable to a defendant who was negligent in placing himself in such a situation whenever negligence is sufficient to establish culpability.<sup>36</sup>

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32. *People v. Otis*, 174 Cal. App. 2d 119, 344 P.2d 342 (1959).

33. *Id.*

34. It should be noted that to allow threats of serious bodily injury as an excuse for otherwise criminal conduct will not produce a class of crimes for which no one can be held accountable. Penal Code §31 provides in part, "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or . . . by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed." CAL. PENAL CODE §31 (West 1970).

35. MODEL PENAL CODE §2.09 (Tent. Draft No. 10, 1960).

36. MODEL PENAL CODE §2.09 (Proposed Official Draft, 1962).

The Model Penal Code also provides a corollary defense for situations of necessity created by acts of nature. Section 3.02 of the Model Penal Code, entitled *Justification Generally: Choice of Evils*, provides that conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable when that harm or evil is greater than that sought to be prevented by the law defining the offense charged.<sup>37</sup> Like section 2.09, section 3.02 is not available to a defendant who has recklessly placed himself in the situation requiring a choice of evils. Additionally, the section requires that the issue of competing values must not have been foreclosed by a deliberate legislative choice. The general defense of necessity provided by section 3.02 is applicable when the situation requiring a choice of evils is caused by an act of nature, a non-volitional act. Section 2.09 is a more specific defense and applies when the choice of evils is precipitated by the threatened action of another person. However, section 2.09 specifically provides that it does not preclude the corollary defense of necessity when the conduct of the actor would otherwise be justifiable under section 3.02.

The Model Penal Code is based on the supposition that culpability is essential to the rationality and justice of all penal prohibitions.<sup>38</sup> In determining to what extent duress should exculpate conduct which is otherwise criminal, the American Law Institute chose the test of whether a person of reasonable firmness in the same situation would have been able to resist the threatened force. In formulating this criteria, the Institute relied in part on an article written by Henry Hart.<sup>39</sup> In essence, Mr. Hart believed that the obligation of responsible conduct required of each member of society must be an obligation which normal members of the community would be able to comply with. According to the test of section 2.09, matters of individual temperament should not be considered in determining whether the defendant acted in a reasonable manner under the circumstances. However, the responsibility to resist coercive forces cannot exceed that which the average member of the community could be expected to meet.

In this respect, the responsibility to resist threatened force expected by the Model Penal Code differs substantially from the re-

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37. MODEL PENAL CODE §3.02 (Proposed Official Draft, 1962).

38. MODEL PENAL CODE §3.02, Comment (Tent. Draft No. 8, 1958).

39. H. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 414 (1958).

quirement of resistance expected of citizens of California. According to the Model Penal Code, an individual is expected to act in a reasonable manner under the circumstances, as determined by the trier of fact.<sup>40</sup> However, in California, an individual is expected to resist even non-serious criminal conduct unless death is imminent. California requires the individual to resist threatened force to the point of death, even though the average member of the community would probably not do so.<sup>41</sup> This is particularly obvious when the subsequent criminal conduct of the defendant is insignificant. In requiring a standard of conduct which its average citizen could not comply with, California is necessarily invoking penal prohibitions where moral culpability may not exist.

Unlike California's fixed standard, the Model Penal Code has adopted the balancing standard for determining the requisite degree of threatened force necessary to establish the defense of duress. Using the balancing standard, the trier of fact is permitted to determine the culpability of defendant's otherwise criminal conduct in light of the severity of the threatened violence.<sup>42</sup> Whether otherwise criminal conduct will be excused depends upon whether a person of reasonable firmness in the same situation would have been able to resist the threats.<sup>43</sup> The balancing standard necessarily allows consideration of threats of serious bodily injury made to the defendant. However, due to a citizen's implied responsibility to resist the commission of a crime, the threatened serious bodily injury should be greater than the crime subsequently committed.

Although threats to property or reputation would not be sufficient to establish the defense of duress under the requirements of the Model Penal Code, the necessary showing is still considerably less than California's requirement that the defendant fear immediate death.<sup>44</sup> The American Law Institute found no valid reason for limiting the coercive threats necessary to excuse otherwise criminal conduct to threats of death, or even serious bodily injury. Thus, threats of minor injury would be sufficient when the criminal conduct was *de minimis*.<sup>45</sup> The Institute further believed that the imperiled victim need not be the actor, nor need the injury portended be immediate.<sup>46</sup> Institute members felt it sufficient

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40. MODEL PENAL CODE §2.09, note 35 *supra*.

41. CAL. PENAL CODE §26 (7), note 18 *supra*.

42. MODEL PENAL CODE §2.09, note 35 *supra*.

43. *Id.*

44. *Id.*

45. MODEL PENAL CODE §2.09, Comment (Tent. Draft No. 10, 1960).

46. *Id.*

that such factors be given evidential weight, along with all other circumstances, in the application of the statutory standard.<sup>47</sup> The Model Penal Code was framed on the assumption that even homicide could sometimes be the product of coercion which was truly irresistible, that danger to a loved one could have greater impact on a man of reasonable firmness than a danger to himself, and finally, that long and wasting pressure could break down resistance more effectively than a threat of immediate destruction.<sup>48</sup>

#### V. CALIFORNIA'S JOINT LEGISLATIVE COMMITTEE FOR REVISION OF THE PENAL CODE

The California Legislature is not unaware of the various developments which have occurred relating to the defense of duress. As early as 1967, the *California Joint Legislative Committee for Revision of the Penal Code* proposed significant changes for California's present Penal Code section 26(7).<sup>49</sup> Section 520 of the Legislative Committee's Tentative Draft No. 1, entitled *Duress; Compulsion*, provided that a duress defense could be raised if the defendant engaged in the conduct otherwise constituting an offense because he was coerced into doing so by the threatened use of *unlawful force* against his person *or the person of another* in circumstances where a person of reasonable firmness would not have done otherwise. Subsection (2) further allowed the use of this defense where the defendant engaged in the otherwise criminal conduct in order to avoid death *or great bodily harm* to himself or another where a person of reasonable firmness would have acted in the same manner. The restrictions which the Legislative Committee placed upon the availability of the defense were that it would not apply if the offense charged was murder, or when the person claiming the defense intentionally, knowingly, or recklessly, placed himself in a situation in which it was probable that he would be subjected to duress.<sup>50</sup> Since no mention was made of the present case law requirement that the threatened violence be immediate or imminent, it would appear that the committee intended these requirements to remain in force. This is a slight departure from the Model Penal Code, which considered threats

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47. *Id.*

48. *Id.*

49. CALIFORNIA JOINT LEGISLATIVE COMMITTEE FOR REVISION OF THE PENAL CODE §520 (Tent. Draft No. 1, 1967).

50. *Id.*, §520.3.

over a long period of time as being just as capable of breaking down resistance as threats of immediate destruction. Perhaps the reason for this departure was the belief that when the threats were made over a long period of time the defendant would have the opportunity to seek the protection of the proper authorities.

It is at once evident that the legislative committee's proposed changes would substantially alter California's present requirements for the defense of duress and conform them to those of the Model Penal Code. The major change of course, was the abolition of California's present requirement that the defendant be threatened with immediate death in order to invoke the defense of duress. Under section 520 of the legislative committee's proposed revision, the defendant need only show a threat of unlawful force or of serious bodily injury to establish the defense. Another important change was the committee's acceptance of the fact that threats of injury to a man's wife and children, are just as coercive as threats made only to his personal well-being.<sup>51</sup>

In drafting section 520, the legislative committee abandoned California's present fixed standard for determining the degree of threatened force necessary to establish duress. The committee chose, instead, to follow the lead of the Model Penal Code, and adopt the balancing standard for determining whether the defendant's otherwise criminal conduct should be excused. Under the committee's Tentative Draft, the relevant test would be whether the defendant acted in a manner consistent with what a person of reasonable firmness would have done in the same situation.<sup>52</sup> This balancing standard would allow the reasonableness of the defendant's conduct to be examined on a case-by-case basis, whereas the present standard would preclude the defense unless the defendant established that he was threatened with immediate death.

The legislative committee sought to bring California's penal prohibitions in conformity with the theory that criminal culpability can only exist where there has been some exercise of free will. Any higher standard would not only be unfair to the person faced with the dilemma occasioned by threatened violence which other reasonable and normal members of the community would not have been able to withstand, it would be unenforceable. The committee felt that conduct, which results from a level of intimidation high enough to affect most others in the same situation, is simply not voluntary in any meaningful sense of the term. Thus, neither moral nor legal responsibility should attach to such conduct.

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51. *Id.* §520 at 42 Comment.

52. Note 48 *supra*.

From these propositions it follows that whenever compulsion overcomes the will of the actor, his conduct is involuntary and the defense of duress may be established.<sup>53</sup>

Unfortunately, debating the pros and cons of the legislative committee's Tentative Draft has become an idle gesture due to the draft's subsequent history. The final proposal, introduced as Senate Bill No. 27 by Senator Roberti on December 7, 1976, was entirely devoid of the revisions proposed by Tentative Draft No. 1.<sup>54</sup> Section 3304 of the Bill provided:

(a) In a prosecution for an offense other than murder, it is a defense that the defendant engaged in conduct constituting the offense because of threats or menaces sufficient to show that he had reasonable cause to and did believe *his life would be endangered* if he refused.

For all practical purposes, Senate Bill No. 27 will not change California's stringent requirement for the establishment of the defense of duress. The fixed standard, adopted nearly a century ago, will still be the method by which the reasonableness of the defendant's conduct will be measured. Thus, the degree of threatened force necessary to invoke the defense will continue to be threats of immediate death, the trier of fact will not be permitted to excuse criminal conduct occasioned by threats of serious bodily injury, the defendant will face criminal sanctions for his conduct, even though a man of reasonable firmness would have acted in the same manner in the same situation and, finally, threatened violence to one's wife and children will not be a viable defense.

The Joint Legislative Committee for Revision of the Penal Code felt that the proposed revisions of their first tentative draft were deleted because of the reluctance on the part of the District Attorney to support them.<sup>55</sup> From the standpoint of the prosecution, it is understandable why the revisions were not supported. California's present defense of duress, with its fixed criteria of threatened harm, precludes juror consideration as to when an acceptable end may justify an otherwise offensive means. Had the proposed revisions been enacted as law, the defendant would be permitted to allege by way of excuse that he committed the crime charged under fear of serious bodily injury and that he acted in the same manner as a person of reasonable firmness would have

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53. *Id.*

54. CAL. S.B. 27, Sess. 1977-78, §3304 (1976).

55. Telephone interview with Edward R. Cohen, Project Director, Joint Legislative Committee for Revision of the Penal Code, December 9, 1977.



acted under the circumstances.<sup>56</sup> It would then have been incumbent upon the District Attorney to disprove that the defendant acted in a reasonable manner. The added difficulty of this task may have been in part responsible for the District Attorney's reluctance to support the proposed revisions.

The District Attorney's burden would not have increased to a measurable extent when the offense charged was murder, or when the defendant intentionally, knowingly or recklessly placed himself in a situation in which it was probable that he would be subjected to duress. These factual circumstances would have precluded the availability of the defense under the proposed revisions.<sup>57</sup> The revisions might have been made more palatable to the District Attorney by requiring that the severity of the threatened violence exceed the gravity of the crime subsequently committed. This would have alleviated any justifiable concerns for the anomalous results which could occur if a defendant was permitted to claim duress as a defense to a crime more serious than the threatened violence sought to be avoided. By incorporating a responsibility to resist threatened violence less serious than the gravity of the crime subsequently committed into the concept of "a person of reasonable firmness," these results could have been entirely obviated.

The District Attorney's reluctance to support the proposed revisions is regrettable. The revisions would have brought California's criminal sanctions in line with the concept of moral culpability. The revisions would also have provided a degree of flexibility to the duress defense, making the defense more responsive to the sudden and unexpected factual circumstances which give rise to its application. A broader range of influences would have been recognized as being capable of usurping an individual's free will under the proposed revisions. Additionally, the determination of whether criminal conduct should be excused could be adjudicated on a case-by-case basis, without reliance upon a fixed standard of presumed fortitude.

## VI. CONCLUSION

Whatever revisions may be necessary for California's present defense of duress, it is not likely that the legislature will enact these changes in the near future. However, one bright star on the horizon offering hope that changes may be forthcoming may be a judicial attempt to find a method for allowing consideration of threats of serious bodily injury. Although Justice Tobriner's dis-

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56. Note 48 *supra*.

57. *Supra* note 48, at subsection (3).

cussion in the *Otis* decision asserting that fear of serious bodily injury should, in some cases, excuse criminal conduct has not yet been judicially recognized as law, the decision has been cited favorably by the judiciary on numerous occasions. In 1973, the California Supreme Court in *People v. Perez* noted:

Although a number of cases in this state have held that the fear must literally be of *death*, *People v. Otis* . . . suggests that the fine distinction between fear of danger to life and fear of great bodily harm is unrealistic. According to *Otis* . . . the threats must be of present, immediate harm, not future violence.<sup>58</sup>

Judging by the favorable reception given the *Otis* decision, the Court appears to be in favor of relaxing California's strict requirements for the establishment of the duress defense. One possible method for accomplishing this task may be for the Court to treat the issue of duress as being relevant to the defendant's lack of criminal intent.<sup>59</sup> Since *mens rea* is an element of almost every crime, the prosecution would be required to prove beyond a reasonable doubt that a person committing a crime pursuant to threats of violence was acting with sufficient *mens rea* for those acts to constitute a crime.<sup>60</sup> The burden should be on the prosecution to prove each essential element of the crime charged, including the issue of willfulness in carrying out the criminal acts.<sup>61</sup> As the Supreme Court of California noted in *People v. Tewksbury*,

Among such defensive assertions could be an accused's contention that the crime was committed under duress or compulsion. (See §26. subd. Eight) If in so asserting the accused contends that he is not guilty of the crime charged because his free will was so overcome he did not act in the exercise thereof, he necessarily attacks the prosecution's allegation that he acted with criminal intent. (See *People v. Otis* [citation omitted]) As *mens rea* is an element of the crime charged (§20), it must be established

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58. *People v. Perez*, 9 Cal. 3d 651, 657, 510 P.2d 1026, 1029, 108 Cal. Rptr. 474, 478 (1973) (Citation omitted).

59. CAL. PENAL CODE §20 (West 1970). "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."

60. J.M. Boyer, *The Constitutionality of Criminal Affirmative Defenses: Duress and Coercion*, 11 U.S.F.L. REV. 123, 143 (1976-77) (Hereinafter cited as J.M. Boyer).

(C) an it be said beyond a reasonable doubt that a person under duress does a criminal act with sufficient *mens rea* to constitute a crime? Placed this way, it becomes clear that the issue of duress, for one, is really the issue of *mens rea*. The existence of *mens rea* is an element of almost every crime, and as an element of a crime *mens rea* cannot be considered a distinct ground of defense 'not necessarily connected' with the crime charged. It is settled by the Supreme Court of the United States that, at least as to the actual elements of crimes, the burden of proof never shifts to the defendant. (Citations omitted).

61. *United States v. Johnson*, 516 F.2d 209, 213 (8th Cir. 1975); *cert. denied* 96 S. Ct. 112 (1975).

beyond a reasonable doubt if the accused is to be convicted: hence he need only raise a reasonable doubt that he acted in the exercise of his free will.<sup>62</sup>

Penal Code section 26 (7) provides as a matter of law that a person is not capable of committing a crime if he acts under fear that his life is in danger and if certain other requirements have been satisfied.<sup>63</sup> Once the various requirements for the defense of duress have been met, a defendant cannot be convicted of crimes (except those punishable by death) which were committed pursuant to the threat of death because the defendant is presumed to have been acting without the exercise of free will. It would not appear to be incongruous to also allow the defendant the ability to raise a reasonable doubt as to the existence of criminal intent when the defendant has been threatened with harm less serious than death. If the defendant can establish the requisite showing that his life was endangered, then, as a matter of law, he would be deemed to be incapable of committing a crime. However, if a defendant merely established that he was put in fear of serious bodily injury, it would then be up to the trier of fact to determine whether the threats were sufficient to overcome the defendant's free will and hence negate the element of criminal intent.

Whether the trier of fact will be permitted to consider threats of harm less serious than death as sufficient to overcome an individual's free will remains a matter of speculation. It does not, however, appear to be within the authority of the legislature to dictate what facts will be sufficient to constitute a reasonable doubt in the mind of the trier of fact.<sup>64</sup> A reading of the *Tewksbury* case reveals the idea that threats of serious bodily injury may also be capable of negating criminal intent, since such threats can also overcome an individual's exercise of free will. If so, a defendant who has committed a crime pursuant to threats of serious bodily injury should seek to introduce these threats in order to disprove criminal intent, rather than to establish the statutory defense of duress which would require a threat of immediate death. A defendant should only be required to carry the lesser burden of aducing some initial evidence of duress. Thereafter, the prosecution should be required to disprove duress beyond a reasonable doubt. The defendant's testimony should be sufficient to raise the defense theory and to allow a determination by the trier

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62. *People v. Tewksbury*, 15 Cal. 3d 953, 964 n.9, 544 P.2d 1335, 1343 n.9, 127 Cal. Rptr. 135, 143 n.9 (1976).

63. CAL. PENAL CODE §26 (7), *supra* note 18.

64. *Morrison v. California*, 291 U.S. 82, 90 (1933). "It is not within the providence of a Legislature to declare an individual guilty or presumptively guilty of a crime."

of fact.<sup>65</sup>

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65. J.M. Boyer, *supra* note 60, at 167.

