

The Troubled History of the Defence of Duress and Excluded Offences: Could the Reasoned Use of Mitigation on Sentencing Prevent Duress from (Further) Becoming Archaic, Gendered, and Completely Inaccessible?

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ABSTRACT

One of the most controversial, and least discussed, elements of the defence of duress is the list of excluded offences that appears in s. 17 of the Canadian *Criminal Code*. In the seminal cases of *R v Ruzic* and *R v Ryan*, the Supreme Court refused to address the excluded offences and left the discussion to “another day.” This article examines the historical development of the defence through the earliest case law and the writings of Sir James Fitzjames Stephen who was one of the first theorists on duress and a major figure in drafting the *Criminal Code*. Stephen’s dislike of the defence of duress seems to be the only reason for the statutorily restrictive defence. This article traces the few cases following *Ryan* using a historic lens and current perspective to determine what is next for the embattled defence, including the place for duress and mitigation upon sentencing.

Keywords: Sir James Fitzjames Stephen; Duress; History; Mitigation; Sentencing; Defence; *Ryan*; Gender, Excluded Offences; Domestic Violence; *Ruzic*; Comparative Law

If... someone is really threatened with death or serious injury unless he does what he is told to do is the law to pay no heed to the miserable agonising plight of such a person? For the law to understand not only how the timid but also the stalwart may in a moment of crisis behave is not to make the law weak but to make it just. In the calm of the courtroom measures of fortitude or of heroic behaviour are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and the well-disposed.¹

I. DURESS: AN OVERVIEW

A. Introduction

The purpose of criminal law is to formulate rules which satisfy our nation's broad sense of justice.² Laws are created through legislative and judicial interactions and the general progression of societal norms. While the development of laws may be a lengthy process, laws are nonetheless products of broad movements.³ However, when it comes to the criminal defence of duress, centuries of growth have failed to

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¹ *Director of Public Prosecutions for Northern Ireland v Lynch*, [1975] UKHL 5 at 670, [1975] AC 653, Lord Morris of Borth-y-Gest [*Lynch*].

² Paul H Robinson, "Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine" (1985) 71:1 Va L Rev 1 at 1, online (pdf): <scholarship.law.upenn.edu/faculty_scholarship/623> [perma.cc/XZ3J-S39Y].

³ Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law*, (Oxford, UK: Oxford University Press, 2012) at 42, states that one of the most important concepts in law is that "doctrines of the current era are seen as the products of the broad movement over time from informal practices of exculpation, to informal standards for criminal responsibility and legal subjectivity." Loughnan's illustration emphasizes that laws are not simply developed and written overnight.

produce a workable basis capable of supporting a codified version of the defence.⁴ As will be discussed below, the wording of the provision has been unchanged in nearly 150 years because of the controversy that surrounds the defence, particularly where the threats involve the sacrifice of a life. Over time, the defence of duress (also called compulsion, compulsion by threats, or coercion)⁵ was conceptualized as a full defence: as a “concession to human infirmity in the face of an overwhelming evil threatened by another.”⁶ This has led to the observation that our society has a very complicated relationship with the criminal defence of duress.⁷

Often confusing and potentially gendered, as discussed below in the case of *R v Ryan*, the defence may exclude a female accused from using the defence. This article first examines the historical development of the defence which culminates with the earliest case law and writings of Sir James Fitzjames Stephen (“Stephen”), who, at the time of modern codification and the creation of our Canadian Code, was one of the first modern theorists to write on the defence of duress.⁸ Stephen’s questionable opinions about the defence of duress seem to be the dominant reason that the provision is so statutorily restrictive today, as this disdain was wholly transplanted into the 19th century movement towards codification. Even when the defence is traced to Stephen and his early writing on the topic, it is still unclear why so many offences were excluded.⁹ As will be discussed, the Canadian

⁴ Robinson, *supra* note 2 at 1.

⁵ See J L I J Edwards, “Compulsion, Coercion and Criminal Responsibility” (1951) 14:3 Mod L Rev 297 at 297, online: <doi.org/10.1111/j.1468-2230.1951.tb00208.x> [perma.cc/6YRR-YHQK].

⁶ Don Stuart, *Canadian Criminal Law: A Treatise*, 2nd ed (Toronto: Carswell, 1987) at 394.

⁷ Joshua Dressler, “Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits” (1989) 62:5 S Cal L Rev 1331 at 1331.

⁸ 1829–1894.

⁹ *The Legal News Journal* of 1894 reports on Sir James Fitzjames Stephen shortly after his death. “The Late Mr. Justice Stephen” (1894) 17:7 Leg News 104. The article notes that “[Stephen’s] contributions [to *Saturday Review* and *Cornhill Magazine*] being marked by a thoroughness of thought and lucidity of phrase which rendered them very acceptable reading even to those who did not share the conclusions at which he arrived” at 105. *The Legal News* confers with this notion, stating that “on many an occasion the editor would receive two articles on topical subjects from [Stephen’s] pen before ten o’clock in the morning, and that their argumentative power and phraseology would not be inferior to his more studied contributions to the reviews” (*ibid*). It is unclear whether Stephen’s works were indeed based in law. If anything, this proves that Stephen had the ability to write quickly and convince the editors of his position.

Criminal Code was adopted almost entirely from the Code drafted for England, meaning that the provision on duress originated directly from Stephen, who was one of the chief drafters of the English Code. Duress was codified in the late 19th century without any discussion or focus on the philosophical underpinnings and the need for such a defence in our system.¹⁰ This article also reviews the last missed opportunity to shape the defence through the 1955 amendments to the Canadian *Criminal Code*.

The article will then explore the statutory defence of duress today and will note the formative cases that have defined the defence in Canada including the list of excluded offences that appears in s. 17 of the Canadian *Criminal Code*.¹¹ In the seminal case of *R v Ruzic*, the Supreme Court did not address the issue of excluded offences and said simply, “this appeal does not concern the constitutional validity of the list of excluded offences.”¹² Even though the Court of Appeal for Ontario declared that s. 17 of the *Criminal Code* be of no force and effect only to “the extent that it prevents an accused from relying on the common law defence of duress preserved by s 8(3) of the Code,”¹³ the court of appeal in *Ruzic* added an addendum to the decision saying that this declaration was not to apply to the excluded offences in s. 17.¹⁴ The court left the decision as to the validity of the excluded offences to another case which, as of yet, has not materialized.

Next, this article will examine how duress once again came into the spotlight with the divisive Supreme Court decision in *R v Ryan*. Nicole (Ryan) Doucet attempted to hire someone to kill her abusive husband after years of physical, emotional, and financial abuse in which he repeatedly threatened to kill her and their young daughter.¹⁵ In a controversial approach to the case, Jason MacLean *et al* have noted that the court in *Ryan* “failed to consider duress within the particular context of domestic violence and coercive control,” leading to a gendered application of the defence.¹⁶ The court in *Ryan* also ignored the issue of why certain offences were

¹⁰ *Ibid* at 105–06.

¹¹ RSC 1985, c C-46, s 17 [*Criminal Code*].

¹² *R v Ruzic*, 2001 SCC 24 at para 19 [*Ruzic* SCC].

¹³ *R v Ruzic*, 41 OR (3d) 1 at para 109, [1998] OJ No 3415 [*Ruzic* CA].

¹⁴ *R v Ruzic*, 41 OR (3d) 38 at para 1, [1998] OJ No 4732 [*Ruzic* CA Addendum].

¹⁵ *R v Ryan*, 2013 SCC 3 at paras 4–5 [*Ryan* SCC].

¹⁶ Jason MacLean, Nadia Verrelli & Lori Chambers, “Battered Women under Duress: The Supreme Court of Canada’s Abandonment of Context and Purpose in *R. v. Ryan*” (2017) 29:1 CJWL 60 at 61, online: <doi.org/10.3138/cjwl.29.1.60> [perma.cc/794W-U3RF] [MacLean et al].

excluded. This article attempts to trace the history of the defence so that modern cases can be understood in a broad context rather than the arcane and unsatisfactory state of the defence at present. If the conclusion is that there is no legally sound reason why this defence should not be available to a battered spouse like Nicole Ryan (or the next Nicole Ryan), then there is no reason why certain offences (such as murder) are excluded. Yet, we are left with a situation in Canada that offences are excluded, and some offenders are not permitted to use the defence.¹⁷ By excluding a considerable number of offences (originally 22), offenders (particularly women) are cut off from a defence that could be vital to the recognition of the coercion and control to which they are subjected.

At first blush, the historical underpinnings of this defence may seem unimportant. However, after tracking the development of the defence, it is concerning that such an unprincipled approach by a single English theorist still defines the defence, particularly for women who are using duress in the context of domestic violence. There seems to be no reason why duress is restricted in 2021. Although the application of the defence to women who experience unthinkable violence was almost certainly un contemplated in 1879, today we need a reasoned and pragmatic understanding of those who act under such coercion.¹⁸ The piecemeal fashion in which duress has been used in sentencing in recent years needs reform, and this article traces that development. The use of the duress defence in *Ryan*, and the few cases which have followed, clearly show that duress is an important and needed defence in Canadian society.¹⁹

¹⁷ Excluded offences stretch across a broad spectrum which includes infanticide and mental incapacity laws. See Loughnan, *supra* note 3, where she uncovers various issues relating to the lack of recognition of excluded offences in modern law.

¹⁸ As a point of comparison, an example of a defence that disregards women is, ironically, infanticide. The *Criminal Code* sets out and defines infanticide as a female person who wilfully causes the death of her newborn child within the time frame (first 12 months after giving birth) where she has not fully recovered from the effects of giving birth. See *Criminal Code*, *supra* note 11, s 233. As recently as 2016, in the case of *R v Borowiec*, 2016 SCC 11 [*Borowiec*], the structure of the wording in the *Code* has been contemplated. However, just as with duress, the law of infanticide has not significantly changed in its structure of meaning since its implementation in the *Code*.

¹⁹ *Ryan* SCC, *supra* note 15. It is important to note how paragraph 38 of *R v Ryan* cites s. 17 of the present *Code*, which mirrors s. 12 of the 1892 *Criminal Code*. An exact comparison of the lack of change and development of s. 17 can be found in *Dunbar v The King*, [1936] 4 DLR 737, 67 CCC 20 (specifically s. 12 of the 1892 *Code*, which was the section titled “compulsion by threats” (later changed to duress)). While these two

This article will conclude by considering the few cases that have come after *Ryan*, how they deal with the issues of excluded offences, and how future cases may be more successful in using duress as a mitigating factor. The authors then address a “near-duress” situation which should be a factor in mitigation upon sentencing, but there is little research on how this would function. It is the position of the authors that a review of duress in sentencing would allow duress to have a real impact on individual offenders. Formalizing this view of duress in sentencing may add coherence to a defence that substantially lacks coherence. The final portion of this article shows that mitigation is a real solution and, perhaps, the future of duress to prevent it from becoming (or remaining) an archaic, gendered, and inaccessible defence. This discussion of the history of the defence from a British and then Canadian perspective will show that the defence of duress is in serious need of reformulation given the uncertain foundation on which it was based. Presently, s. 17 of the *Code* is not the product of broad movements; it is, as it originally was, simply reflective of the Victorian sensibilities of a white man named Sir James Fitzjames Stephen.

II. THE HISTORY OF THE DEFENCE OF DURESS

A. Methodology, Definition, and Philosophy

Some suggest that our emotional reaction to duress is linked to our beliefs about those who find themselves coerced.²⁰ Joshua Dressler notes that the need for the “good” and “bad” actor is prioritized in law, and “it is unclear which appellation more fairly describes a person who accedes to an unlawful threat.”²¹ He goes on to suggest the example of a person who, with a “gun pointed at his head, kills an innocent child at the behest of a terrorist. Is he a victim who merely chose life over death? Or, is he the villain because ‘his aversion to dying was greater than his aversion to killing?’”²² These are

pieces of legislation are written over a century apart, they are nearly word for word in their structure and meaning. The conceptualization of duress was set in stone, so to speak, in 1892 and has yet to change since that date. Over time, the defence of duress has been put into question, before many courts, yet the very law of duress that Canada upholds has never changed and has never been amended. This realization is, in essence, detrimental to the laws of duress in Canada.

²⁰ Dressler, *supra* note 7 at 1332.

²¹ *Ibid.*

²² *Ibid.*, citing Alan Brudner, “A Theory of Necessity” (1987) 7:3 *Oxford J Leg Stud* 339 at 353.

difficult questions with no easy answers. It is because of these difficult questions that tracing the historical basis of the defence may lend some clarity for the future of duress. It is important to note that this article is not a traditional historical analysis with archival research. This is an analysis comprised of the writings of Stephen and those around him who were writing on this topic at the time when the defence was being established. Thus, the methodology adopted in this article is only quasi-historical, sociological, and grounded in a feminist perspective. In the paper, historical sources will be used to explore the contemporary issues with the defence as it exists today. Of course, there are undoubtedly justifications used by theorists which are not readily apparent today, but the following analysis attempts to explore the existing sources outside of pure archival research.²³

It goes without saying that from 1892 and the conception of the *Code*, to the 1985 amendments, Canada has changed in both a legal and social sense. Certain acts which were once regarded as acceptable, such as assaulting one's wife, became newly labeled criminal acts.²⁴ Considering the power imbalances that existed in those 100 years and the unstable foundation that the *Criminal Code* was built on, it was inevitable that the defence of duress would need reconfiguration. This ultimately leads to the question of why there has not been an evolution of the law of duress. In the fields of medicine, law, and psychology, there have been vast and extensive developments of the human mind and its correlation with committing crimes. Yet, none of this has been analyzed and applied to the development of the law of duress.

To comprehend the defence of duress, one must understand its historical underpinnings. While the defence of duress is "of venerable

²³ This article cannot be all things to all readers, but a much more detailed historical analysis of Stephen can be found in the first author's LLM dissertation at Western University titled, Frances E Chapman, *Under Pressure: The Canadian Criminal Defence of Duress* (LLM Dissertation, Western University) [unpublished]. For those wishing a more archival look at Hansard when it comes to the defence of duress may find more analysis there. Similarly, a detailed analysis of the works of George Fletcher and other authors who wrote extensively on the defence are highlighted in my dissertation. See George P Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978) [Fletcher, *Rethinking*]; George P Fletcher, "The Individualization of Excusing Conditions" (1974) 47:4 S Cal L Rev 1269 [Fletcher, "Individualization"]; George P Fletcher, "The Right and the Reasonable" (1985) 98 Harv L Rev 949 [Fletcher, "The Right"].

²⁴ Don Stuart & Steve Coughlan, *Learning Canadian Criminal Law*, 13th ed (Toronto: Carswell, 2015) at 577.

antiquity and wide extent,²⁵ it has proven to be a very elusive term as it is difficult to trace its uncertain history with relatively few reported cases.²⁶ In fact, the defence may have dated back to the Romans²⁷ and ancient Hebrews.²⁸ Aristotle wrote about duress saying, “on some actions praise indeed is not bestowed, but forgiveness is, when one does what he ought not under pressure which overstrains human nature and which no one could withstand.”²⁹ Despite its longevity, the defence remains vague and has an unstable foundation.³⁰ The imprecision in the terms “duress,” “coercion,” and “compulsion” has done little to rectify the problem. If the usage of the terms is examined, it is apparent that:

Compulsion... appears to be the expression first used in the context of overbearing threats which induce criminally proscribed action and is the expression commonly used by the common law commentators. It is also the expression preferred by Stephen and presumably through his influence on the Draft Criminal Code of 1879... [d]uress however, is the term preferred by Blackstone and is now widely used in Anglo-American law. Both expressions, however, continue to be used interchangeably in the case-law ‘without definition, and regardless that in some cases the legal usage is a term of art differing from popular usage.’³¹

Clearly, even the definition of the concept on which the defence is based is tenuous.³²

²⁵ *R v Howe*, [1986] UKHL 4 at 428, [1987] AC 417, Lord Halisham LC.

²⁶ *Lynch*, *supra* note 1 at 686.

²⁷ Eugene R Milhizer has traced justification and excuse back for many centuries and has examined duress from the perspective of the Romans. See Eugene R Milhizer, “Justification and Excuse: What They Were, What They Are, and What They Ought To Be” (2004) 78:3 St John’s L Rev 725, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1499850> [perma.cc/2SCJ-B7UH].

²⁸ Samuel Mendelsohn, *The Criminal Jurisprudence of the Ancient Hebrews*, 2nd ed (New York: Hermon Press, 1968) at 30, cited in Peter Rosenthal, “Duress in the Criminal Law” (1990) 32:2 Crim LQ 199 at 200.

²⁹ Jonathan Barnes, ed, *The Complete Works of Aristotle*, vol 2 (Princeton, NJ: Princeton University Press, 1984) at 1753.

³⁰ Warren J Brookbanks, “The Defence of Compulsion: An Overview” (1981) [unpublished] at 5, online: <www.nzlii.org/nz/journals/NZLRFOF/1981/20.html> [perma.cc/XD2T-G8T8]. Brookbanks provides a historical review of the defence of duress in England and applies it to the current situation in New Zealand.

³¹ *Ibid*, citing *Lynch*, *supra* note 1 at 688.

³² For the purposes of this paper, the modern term “duress” will be used. To undertake an examination of duress, it is necessary to assess the historical development of the defence in Britain and then in Canada. David M. Trubek noted in his works, “Max Weber on Law and the Rise of Capitalism” (1972) 1972:3 Wis L Rev 720, that bourgeois capitalism was the very foundation of European law and the basis of

Treason and murder were historically excluded, and both remain an excluded offence today; in fact, several of the early unsuccessful treason cases involved murder. The classic statement which solidified the position of duress and murder again came from Sir Matthew Hale in what became known as his “stern” rule. In *Pleas of the Crown*, Hale stated that:

If a man be menaced with death, unless he will commit an act of treason, murder or robbery, the fear of death doth not excuse him, if he commit the fact; for the law hath provided a sufficient remedy against such fears by applying himself to the courts and officers of justice for a writ or precept *de securitate pacis*.³³ Again, if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant’s fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent: but if he cannot otherwise save his own life, the law permits him in his own defence to kill the assailant; for by the violence of the assault, and the offence committed upon him by the assailant himself, the law of nature, and necessity, hath made him his own protector.³⁴

Hale excluded murder, treason, and robbery in times of peace as one should rather sacrifice oneself. Putting aside, however, the impracticality of stopping a situation of duress and going to the court to apply for a writ to cease a situation of duress, the writ no longer exists, and some have

Stephen’s bills in India, England and Canada. Additionally, Trubek describes Weber’s thoughts on the relation of law and capitalism, noting that “a system controlled by capitalists will presumably be quite predictable, at least from the capitalists’ point of view” (*ibid* at 748). This thought is very provoking, especially when applying its concept to the laws of duress. However, it becomes evident that Stephen’s duress concept is only valid to those of a certain bourgeoisie class, the class that he was a part of, which puts Stephen’s work, most specifically his *Digest*, into question. The creation of this enigma leads to the understanding that the *Canadian Criminal Code of 1892* was entirely structured to accommodate the upper classes making it difficult to understand why 21st century Canada is still using these laws.

³³ Writ for someone fearing bodily harm from another, as when the person has been threatened with violence. See Henry Campbell Black, *Black’s Law Dictionary*, 7th ed by Bryan A Garner (St. Paul, MN: West Group, 1999) sub verbo “*securitate pacis*”.

³⁴ Sir Matthew Hale, *Historia Placitorum Coronae (The History of the Pleas of the Crown)*, 1736 vol 1 (London, UK: Professional Books Ltd, 1971) at 51. The argument against this protection is that “there would in all probability be no time or opportunity to resort to the protection of the law,” see Edwards, *supra* note 5 at 299. This passage is rarely cited in full. Most commentators highlight the phrase “ought rather to die himself, than kill an innocent” and not “but if he cannot otherwise save his own life, the law permits him in his own defence to kill the assailant.” This passage is far less clear than some commentators believe.

suggested that “the exclusion of murder from the defence may be an anachronism, there being no clear reason why the exclusion should be maintained.”³⁵

Some would argue one would most need the defence of duress in the case of murder, but there developed an aversion to allowing a murderer to use this defence. Stephen went even further, saying that:

Criminal law is... a collection of threats of injury to life, liberty, and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder, If you do it I will hang you. Is the law to withdraw its threat if some one else says, If you do not do it I will shoot you?³⁶

As the defence continued to develop in England, it became clear that duress could apply to a range of offences including “possession of ammunition, larceny, conspiracy, arson, and perjury.”³⁷ Using the defence in the case of treason continued to be resisted, perhaps based on Hale’s historic principle that the defence could only be used in wartime. Theorist Finbarr McAuley has said that:

[I]t is worth remembering that the argument for excluding treason comes down from Hale, having been a component part of that writer’s theory that duress, at least as an answer to serious crimes, was unavailable in peacetime. As that theory has long since been discredited, does it not follow that the basis for any residual exclusionary principle has also fallen away?³⁸

Even though questions about the benefits of continuing the exclusions continued for decades, these pronouncements on exclusions by Hale, and later by Stephen, are widely cited as the fundamental basis for disallowing the defence of duress to murder. Stephen was the pioneer behind the formation of the modern defence, but, as will be noted, Stephen had a particular dislike for duress and attempted to make the Canadian defence as stringent and unavailable to offenders as possible. The resulting codification is a section that is largely the section found in the *Code* today.³⁹

³⁵ Brookbanks, *supra* note 30 at 9.

³⁶ Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol 2 (London, UK: Macmillan and Co, 1883) at 107 [Stephen, *History*].

³⁷ Finbarr McAuley, “Necessity and Duress in Criminal Law: The Confluence of Two Great Tributaries” (1998) 33 *Ir Jur* 120 at 167.

³⁸ *Ibid* at 168.

³⁹ See Desmond H Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University of Toronto Press for the Osgoode Society, 1989) [Brown, *Genesis*]. He notes a letter on this subject from Sir John “Sleepy Jack” Holker, an attorney General in

A study of the history of the defence must also briefly include a discussion of the philosophical basis, including discussions of the voluntary actions of individuals and their culpability. This includes a “theory of personal responsibility [which] assumes that all humans are morally responsible agents who possess free will and, accordingly, are personally accountable for their intentional conduct – even conduct that is somehow ‘caused.’ Exceptions to this principle, like the excuse of duress, are sparingly granted and severely restricted.”⁴⁰ Given the “choices” to be made in duress, it is not surprising that the results of the inquiry are often controversial.

England at the time, to Lord Chancellor Cairns, a powerful political chief advisor. The letter describes the interactions Holker had with Stephen regarding the codification of Canadian laws. Holker’s most important lines include that “[t]here is a feeling in [Canada] which is rapidly gaining strength that something ought to be done in this direction,” where “this” was referring to the codification of Canadian laws (*ibid* at 27). Holker goes on further to note that Stephen agreed with this statement and that “[Stephen] has addressed to [Holker] a letter containing suggestions for a measure for the amendment of the criminal law, which would be a fitting preparation for its ultimate codification” (*ibid*). Holker also states that he is “fully convinced that Sir James Stephen would merely in consequence of the deep interest he takes in the question and not with any expectation of remuneration for his labour, afford every assistance in his power to secure the production of a satisfactory Bill, and need hardly say [Holker himself] would devote all [his] energies to the same object” (*ibid* at 27–28). This statement demonstrates the sheer will and desire Stephen had to find a means to codify the criminal law. Following his time in India, Stephen was denied the ability to codify laws in England; his bills were ignored and set aside. Stephen had a goal of codification and would not stop, even if it meant receiving no compensation for his work. What is even more curious is that on August 2, 1877, Lord Cairns “commissioned Stephen ‘to draw a Penal Code and a Code of Criminal Procedure [for Canada] at once’” (*ibid* at 29). Stephen was to be paid twelve hundred pounds for his work, which was later increased to fifteen hundred guineas. Stephen was to complete the matters at once, and so he used his own pre-written *Digest* to complete this task. The creation of the Canadian Code was fueled by the desire to have the power to publish a Bill in unchartered territory coupled with potential greed. In essence, with the notation of Stephen in Brown’s work, the creation of a clear path between Canadian and English laws was formed. The sense that England and Canada held close legal visions was quickly dismantled when Stephen accepted the task to formally conceive the Canadian *Code*. Although he was of English birth, his time spent abroad in different English commonwealth countries clearly left a great impact on his work, specifically in that the laws formulated in the 1892 *Code* are intrinsically and morally different from those of standard English common law. See also Sir James Fitzjames Stephen, “A Penal Code” (January-June 1877) 27 *Fortnightly Rev* 362 [Stephen, “Penal Code”].

⁴⁰ Laurie Kratky Doré, “Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders” (1995) 56:3 *Ohio St LJ* 665 at 755.

Many theorists have focused on “choice” and the autonomy of the actor. The dilemma is that:

A person who is subjected to duress *chooses* to perform her compliant actions after deciding that her performance of them offers the least unattractive option from a set of unpalatable alternatives with which she is faced. Since she thus desires to perform these actions, and this desire moves her to perform them, it seems, *prima facie*, plausible to claim that she is fully self-directed, fully autonomous, with respect to their performance. However, to claim that a person who is *forced* to perform a series of compliant actions by being subjected to duress is a paradigm of someone who is engaged in autonomous self-direction seems clearly mistaken.⁴¹

The irony is that the actor suffers from “impaired autonomy” in that she may wish to comply and relinquish control to her duressor to avoid serious consequences.⁴² Even in an individual who is acting rationally and clearly and has willed action, one may find it impossible to comply with certain behaviour where there is no “normatively acceptable option” to choose.⁴³ Although the actor has a choice, it is a constrained choice because it is made between “two bad outcomes, neither of which the actor would consider worthy of choice in itself or in better circumstances.”⁴⁴ Choice makes duress an “atypical excuse” because the actor “chooses” the offence rather than the consequences which is a choice that is very difficult in that it is “unwilling, but it is not unwilled.”⁴⁵ Thus, it is not “impaired capacity,” as many argue, that one lacks to conduct oneself in the proper manner, but it is “lack of opportunity to do so.”⁴⁶ The individual, from all appearances, seems to be acting in a voluntary way. The key difference is in responding to the duressor’s demands and deciding whether she should resist.⁴⁷ This results in the impossibility that plagues the defence of duress in that one is simultaneously autonomous and not autonomous.⁴⁸ Taking this

⁴¹ James Stacey Taylor, “Autonomy, Duress, and Coercion” (2003) 20:2 Soc Phil & Pol’y Found 127 at 150 [emphasis in original].

⁴² *Ibid* at 154.

⁴³ Brenda M Baker, “Duress, Responsibility, and Deterrence” (1985) 24:4 Dialogue: Can Philosophical Rev 605 at 609.

⁴⁴ *Ibid* at 605.

⁴⁵ Dressler, *supra* note 7 at 1356, 1360 [emphasis in original]. Dressler argues that “[i]f law is paramount, so the argument might proceed, a person who knowingly places his own interests above that of the community, as represented by the law, should not be excused.”

⁴⁶ Baker, *supra* note 43 at 609.

⁴⁷ Taylor, *supra* note 41 at 154.

⁴⁸ Although it is beyond the scope of this paper to briefly examine moral/normative involuntariness, a crucial place to begin is with the findings of the court in *Perka v The*

philosophical and moral position in history, Stephen took this defence towards formal codification in Canada.

B. The 19th Century Movement Towards Codification

Canada moved towards codification guided by principles from commentators like Sir William Blackstone who believed that, generally, the law was “certain, immutable, and unambiguous.”⁴⁹ While Blackstone believed that crimes and punishment were “ascertained and notorious; nothing is left to arbitrary discretion,”⁵⁰ Jeremy Bentham disagreed and had a passion for analyzing the criminal law. Bentham believed that there was vast uncertainty in the common law which was a “fathomless and boundless chaos made up of fictions, tautology and inconsistency,”⁵¹ and that legislation was needed to solve the problems of discrepancy.⁵² Thus, when a

Queen, [1984] 2 SCR 232 at 249 [*Perka*] adopting the reasoning of Fletcher, which was extended to duress in *R v Hibbert*, [1995] 2 SCR 973 at para 53 [*Hibbert*]. *Ruzic* SCC, *supra* note 12 approved of the reasoning in *Perka* that “[a]t the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable” at para 29. The Supreme Court elevated the principle of moral involuntariness to the status of a principle of fundamental justice. Fletcher notes that an individual acting under duress is under what he calls normative involuntariness in that “were it not for the external pressure, the actor would not have performed the deed.” Fletcher, *Rethinking*, *supra* note 23 at 803.

⁴⁹ Graham Parker, “The Origins of the Canadian Criminal Code” in David H Flaherty, ed, *Essays in the History of Canadian Law*, vol 1 (Toronto: University of Toronto Press for Osgoode Society, 1981) 249 at 250. Interestingly, Parker notes that to call this legislation a “code”, “was something of an afterthought suggested by Judge James Gowan, who strongly influenced the conversion of the criminal law of Canada to statutory form. Whether this constitutes ‘codification’ is a matter of debate” (*ibid* at 249). Parker distinguishes between different codification movements which took the form of (a) legal housekeeping through consolidations, (b) law reform, or (c) systemization and reform.

⁵⁰ William Blackstone, *Commentaries on the Laws of England in Four Books*, vol 1 (Oxford: Clarendon Press, 1862) at 416, cited in Parker, *supra* note 49 at 250.

⁵¹ Parker, *supra* note 49 at 250, citing Jeremy Bentham, *A Comment on the Commentaries: A Criticism of William Blackstone’s Commentaries on the Laws of England*, ed by CW Everett (Oxford: Clarendon Press, 1928).

⁵² *Ibid* at 250. J.L. Austin, however, believed that codification was a task for many, but one which should start with a digest. Parker notes that although the criminal law was largely where Austin began on this task, he had difficulty in making his classifications of private law fit with the criminal law model and his theory never “progressed beyond a very sketchy framework.”

complete *Draft Code* was offered to Canada from Britain, it was appealing. Despite scathing criticisms,⁵³ the Code was introduced to Parliament in 1892 by Sir John Thompson,⁵⁴ who was the Minister of Justice for Canada.⁵⁵ The Bill passed the House and received Royal Assent on July 9, 1892, and came into force on July 1, 1893.⁵⁶ At the second reading of Bill No 7 in 1892, Thompson stated the purpose of such a codification, quoting the *Draft Code* which stated that codification, was “a reduction of the existing law to an orderly written system, freed from needless technicalities, obscurities, and other defects which the experience of its administration has disclosed.”⁵⁷ The Code was based on the *Draft Code* prepared in 1879, Stephens’ *Digest of the Criminal Law* of 1887, Burbidge’s *Digest of the Canadian Criminal Law* of 1889 and Canadian statutory law.⁵⁸

C. Sir James Fitzjames Stephen and Morality

Stephen was the English Secretary to the Council in India in the 19th century. Upon return from his post, he was unsatisfied with the state of codification in Britain and with the support of the Attorney General, he introduced a criminal code in the English Parliament in 1878.⁵⁹ Even before the *Draft Code*, Stephen published on duress,⁶⁰ and his conception was

⁵³ Some theorize that the criticisms of the bill by Lord Chief Justice Sir Alexander Cockburn may have assisted in the rejection of the Code. See AJ MacLeod & JC Martin, “The Revision of the Criminal Code” (1955) 33:1 Can Bar Rev 3 at 4-5.

⁵⁴ *Ibid* at 5. Thompson asked Mr. Robert Sedgewick, the Deputy Minister of Justice who was appointed to the Supreme Court of Canada in 1893, to draft the bill.

⁵⁵ The original Code was not without criticism; it was seen as having “inconsistencies, ridiculed for its archaisms, disparaged for its verbosity and derided for its ambiguities.” *Ibid* at 3.

⁵⁶ Bill 7, *The Criminal Code*, 2nd Sess, 7th Parl, 1892, 55-56 Vict, c 29, cited in Alan W Mewett, “The Criminal Law, 1867-1967” (1967) 45:4 Can Bar Rev 726 at 728. Thompson introduced Bill 7 in March 1892 with one sentence as “there were no questions.” Desmond H Brown, ed, *The Birth of a Criminal Code: The Evolution of Canada’s Justice System* (Toronto: University of Toronto Press, 1995) at 36.

⁵⁷ “Bill 7, The Criminal Code”, 2nd reading, *House of Commons Debates*, 7-2, vol 1 (12 April 1892) at 1312 (Sir John Thompson) [*Debates 12 April 1892*].

⁵⁸ *Ibid*. See Sir James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments)*, 4th ed (London, UK: MacMillan, 1887) [Stephen, *Digest*]. See also George Wheelock Burbidge, *A Digest of the Criminal Law of Canada (Crimes and Punishments)* (Toronto: Carswell, 1890).

⁵⁹ MacLeod & Martin, *supra* note 53 at 4.

⁶⁰ *Ibid* at 4. See Stephen, *History*, *supra* note 36 at 102. See also Stephen, *Digest*, *supra* note 58; Sir James Fitzjames Stephen, *A General View of the Criminal Law of England* (London,

linked to a “choice of evils” theory and the nature of the voluntary action. His ideas about criminality seemed to stem from his beliefs on morality. Stephen wrote that even though terms like “morality” may be “indefinite and unscientific,” criminal justice should remain rooted in morals.⁶¹ He saw the laws of a country as reflecting this morality, and the terms he used reflected this idea. Stephen said that “it will be found in practice impossible to attach to the words ‘malice’ and ‘malicious’ any other meaning than that which properly belongs to them of wickedness and wicked.”⁶² In the October 1861 issue of the *Edinburgh Review*, Stephen published an article on English jurisprudence.⁶³ His purpose in publishing this work was to “define the province of jurisprudence.”⁶⁴ Among the propositions he puts forth for achieving his purpose, he noted:

Men set laws to each other; those who set them are called sovereigns, and those to whom they are set are subjects. In every independent political society there is a sovereign and there are subjects; and the tests by which an independent political society may be known are, first, that the bulk of the given society are in a habit of obedience to a determinate and common superior; let that common superior be an individual or an aggregate of individuals. Secondly, this common superior must not be in the habit of obedience to a determinate human superior.⁶⁵

This proposition unveiled the way in which he views the world: two separate classes of people, one that is obedient and the other that is all-powerful and knowing. From the *Genesis of the Criminal Code of 1892*, it has been confirmed that Stephen was so desperate to have his works (namely

UK: MacMillan, 1863) [Stephen, *General*]. While writing *A History of the Criminal Law of England*, Stephen admitted that the writing had become “more or less the plague, and also one of the great pleasures of my life,” and near its completion he said that he “experienced a sense of loss bordering on bereavement.” KJM Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge, UK: Cambridge University Press, 1988) at 53 [Smith, *Stephen*].

⁶¹ Stephen, *General*, *supra* note 60 at 82. Of course, Stephen is drawing from morality and well-established philosophical questions about the defence but he seemed to add to this with his personal beliefs.

⁶² *Ibid.* In this chapter, Stephen also wrote on what he called “moral insanity” which he believed was a “specific inability to understand or act upon the distinction between right and wrong, a sort or moral colour-blindness, by which persons, sane in all other respects, are prevented from acting with reference to established moral distinctions” (*ibid* at 95).

⁶³ Sir James Fitzjames Stephen, “English Jurisprudence” (July-October 1861) 114 *Ed Rev* 233.

⁶⁴ *Ibid.*

⁶⁵ *Ibid* at 237.

his *Digest*) published, that he proposed an offer to write the Code with no remuneration.⁶⁶

Even from these early publications, Stephen placed limits on the applicability of the defence, saying that it is only an excuse in the case of rebels or “rioters” and noting that there was “little authority upon this subject, and it is remarkable that there should so seldom be occasion to consider it.”⁶⁷ Although Stephen acknowledged that an individual could be physically manipulated by another, he believed that threat of physical harm was much different. Since “even in extremis, when acting under the threat of death, an individual is still exercising the ability to choose whether to act in a particular way.”⁶⁸ Stephen believed that even the “very strongest forms of compulsion do not exclude voluntary action.”⁶⁹ To illustrate his theory Stephen argued that:

A criminal walking to execution is under compulsion if any man can be said to be so, but his motions are just as much voluntary actions as if he was going to leave his place of confinement and regain his liberty. He walks to his death because he prefers it to being carried. This is choice, though it is a choice between extreme evils... [a] man is under compulsion when he is reduced to a choice of evils, when he is so situated that in order to escape what he dislikes most he must do something which he dislikes less, though he may dislike extremely what he determines to do.⁷⁰

For Stephen, choice was still autonomous, even if subject to severe compulsion. Even though Stephen’s very limited view of duress was not fully reflected in the codification, it may account for the Canadian defence of duress “being one of the most restrictive to be found and certainly narrower than the English common law of 1892 or today.”⁷¹ The *Code* was based, in part, on Stephen’s *Digest*.⁷² The only reference to duress in the *Digest*, other

⁶⁶ Brown, *Genesis*, *supra* note 39 at 28. One can only assume then that his egotistical and power-seeking personality, along with the payment of having “subjects” who must follow his code would be payment enough. It must, therefore, be asked whether Stephen’s purpose was to create laws or whether he was attempting to write for his own enjoyment and pure gratification, and thus the true conception of the Canadian *Code* is put into question.

⁶⁷ Stephen, *History*, *supra* note 36 at 106.

⁶⁸ Smith, *Stephen*, *supra* note 60 at 66.

⁶⁹ Stephen, *History*, *supra* note 36 at 102.

⁷⁰ *Ibid.*

⁷¹ Stuart, *supra* note 6 at 394-95, n 68, citing *Lynch*, *supra* note 1 at 680-84, Lord Wilberforce.

⁷² See Stephen, *Digest*, *supra* note 58.

than that to the concept as applied to a married woman, is found in Article 31 which stated that:

An act which if done willingly would make a person a principal in the second degree and an aider and abettor in a crime, may be innocent if the crime is committed by a number of offenders, and if the act is done only because during the whole of the time in which it is being done, the person who does it is compelled to do it by threats on the part of the offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offence.⁷³

Stephen cites no cases with reference to compulsion, but for the provision on the coercion of a married woman, a provision that was used to “denote the special defence available to wives who commit what would otherwise be an offence under pressure from their husbands.”⁷⁴ He cites 13 cases. Stephen notes that “it is uncertain how far this principle applies to felonies in general. It does not apply to high treason or murder. It probably does not apply to robbery. It applies to uttering counterfeit coin. It seems to apply to misdemeanors generally.”⁷⁵ Stephen offers no foundation for these assertions, leading one to believe that these statements were purely personal conjecture. When speaking of duress particularly, Stephen noted that “hardly any branch of the law of England is more meagre or less satisfactory than the law on this subject,”⁷⁶ noting he had 30 years of “experience at the bar and on the bench, during which I have paid special attention to the administration of the criminal law, I never knew or heard of the defence of compulsion being made... and I have not been able to find more than two reported cases which bear upon it.”⁷⁷

The restricted development of this defence may have been a “reflection of Sir James Stephen’s antipathy to the defence.”⁷⁸ Stephen rationalized that the definitions in this Code would not have to be fundamentally precise as an adjudicator would surely be able to morally judge whether an action was right or wrong.

⁷³ *Ibid* at 23-24.

⁷⁴ Brookbanks, *supra* note 30 at 5.

⁷⁵ Stephen, *Digest*, *supra* note 58 at 23.

⁷⁶ Stephen, *History*, *supra* note 36 at 105.

⁷⁷ *Ibid* at 106.

⁷⁸ Rosenthal, *supra* note 28 at 202.

Stephen's 1879 *Draft Code* for England contained a "note" section dedicated to compulsion.⁷⁹ The Commissioners quote Lord Hale's stern rule,⁸⁰ but they note that "[t]he case of a person setting up as a defence that he was compelled to commit a crime is one of every day occurrence."⁸¹ This statement is in complete contradiction to Stephen's writings on duress, both before and after this report. Although the Commission cites the case of *M'Growther* and the use of the rule that one who is compelled to serve in the army has a defence, the Commission says no more about this historical provision. The Commission concludes by saying that "[w]e have framed section 23 of the Draft Code to express what we think is the existing law, and what at all events we suggest ought to be the law."⁸² S. 23 of the *Draft Code* provides that:

Compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission of any offence other than high treason as herein-after defined in section 75 sub-sections (a) (b) (c) (d) and (e), murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson: Provided that the person under compulsion believes that such threat will be executed: Provided also, that he was not a party to any association or conspiracy the being party to which rendered him subject to such compulsion. No presumption shall henceforth be made that a married woman committing an offence in the presence of her husband does so under compulsion.⁸³

The English *Draft Code* received a "lukewarm" reception by the House, but a Royal Commission was appointed to examine the proposal.⁸⁴ This led to a revised draft bill in 1879, which died with the change of Ministry in

⁷⁹ *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences: With an Appendix Containing a Draft Code embodying the Suggestions of the Commissioners*, vol 6 (London, UK: Eyre & Spottiswoode, 1879) [*Draft Code*]. The members of the Commission were Colin Baron Blackburn, Charles Robert Barry, Sir Robert Lush and, of course, Sir James Fitzjames Stephen. In the introduction to the Commission Report, Stephen is described as "Our Trusty and Wellbeloved Sir James Fitzjames Stephen, Knight Commander of Our Most Exalted Order of the Star of India, one of Our Counsel Learned in the Law."

⁸⁰ See Hale, *supra* note 34.

⁸¹ *Draft Code*, *supra* note 79 at 43.

⁸² *Ibid* at 43-44. The Commissioners also make it clear that necessity "should in no case be a defence."

⁸³ *Ibid* at 68.

⁸⁴ MacLeod & Martin, *supra* note 53 at 4.

1880 and put an end to Stephen's attempt to codify English law.⁸⁵ This *Draft Code*, though not adopted in England, formed the basis for the Canadian *Criminal Code*.⁸⁶

The statement noted in the preparation of the *Draft Code* was not the only time Stephen contradicted himself. Throughout his time as a writer, Stephen wrote extensively in journals. Of the most prevalent to the issue of his own contradictions is his work *Penal Code* which was published in 1877 in the *Fortnightly Review*.⁸⁷ When highlighting the creation and codification of law, Stephen states that:

A person wishing to codify the law would propose to take it as it is, to throw it into as clear and rational a form as possible, and having done so, to ascertain both its merits and defects, to affirm the one and to remove the other. No one who understands anything about such matters would propose to sit down and write a code of laws which the public at large could be expected to obey, out of his own head, and without reference to the existing institutions of the country.⁸⁸

However, this seems to be largely what Stephen did in his quest for codification. Stephen took his *Digest* and converted it into a *Criminal Code* for Canada. This is not to say that Stephen was not in a position to write such a tome. However, it is evident that Stephen did just as he remarked in the *Penal Code* and created laws that ignored existing institutions and was seemingly the product of his opinions. The creation of the *Criminal Code* is partly derived from the English common and criminal law. However, for the select laws that are not direct derivatives of English Bills, it begs the question of where Stephen found the information to formulate them.

⁸⁵ *Ibid* at 4-5.

⁸⁶ In an article critique he wrote in 1869 in the *Pall Mall Gazette*, Stephen criticized John Stuart Mill's work, *The Subjection of Women*, 2nd ed (London, UK: Longmans, Green, Reader & Dyer, 1869), by disagreeing that women should be seen as equals in society. Stephen stated that "the happiness of [the nuclear family] is founded on the fact that each member of them, and especially the husband and wife, knows his or her place, and discharges its functions properly." Sir James Fitzjames Stephen, "Mr. Mill on the Subjection of Women", *Pall Mall Gazette* (23 August 1869). Stephen prefaced this comment by stating that he denies that "husbands and wives in such families [should] live together on terms of equality." It is evident that Stephen's views towards women and equality (not only in society, but in the *Code*) were not uncommon for the time, but the legacy continues. Sections of the *Code* of 1892 are arguably based on a misogynistic bias which is an ideal that 21st century Canadian society still upholds by not revisiting a section of the *Code* largely unaltered since 1892.

⁸⁷ Stephen, "Penal Code", *supra* note 39.

⁸⁸ *Ibid* at 364.

Further, this leads to the assumption that there are portions of the *Code*, such as the laws on duress, that are simply his own views.

D. Duress in the Canadian Criminal Code

Canadian sources were not to be the ultimate basis for the defence of duress. The final form of the defence in 1892 embodied in s. 12 of the *Code* was almost identical to that found in the *Draft Code*. S. 12 stated that:

Except as hereinafter provided, compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission, by a person subject to such threats, and who believes such threats will be executed, and who is not a party to any association or conspiracy, the being a party to which rendered him subject to compulsion, of any offence other than treason as defined in paragraphs *a*, *b*, *c*, *d* and *e* of sub-section one of section sixty-five, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson.⁸⁹

The 1892 version of the section excluded a total of ten offences, but again, it is unclear where the list originated.⁹⁰ The sum total of the debate on the defence of duress in 1892 was a question from the member from P.E.I., the Honourable Mr. Davies, who asked why the common law was being altered by the *Criminal Code* with respect to the “responsibility of married women.”⁹¹ Thompson replied that:

The presumption under the common law is in many cases a strained one. In many cases the wife commits an act of violence in spite of her husband, but under the common law it is presumed that she is acting under the compulsion of her husband if she does that in his presence. We now leave that to be a matter of

⁸⁹ Henri Elzéar Taschereau, *The Criminal Code of the Dominion of Canada, as amended in 1893* (Toronto: Carswell, 1893) at 9, online: <archive.org/details/cihm_42873> [perma.cc/6H4Z-BSV3] [emphasis in original]. Given the case law as reviewed above, the element of escape was conspicuously absent from the codified provision.

⁹⁰ This opacity goes again to the point noted above regarding Stephen’s work “Penal Code,” and his thoughts on the creation of laws. He states that law cannot come out of one’s mind, that it must be derived from already established materials and institutions. However, this puts into question where he obtained this information to create the list. Further, this impugns how he formulated the list and what materials he used for reference. See Stephen, “Penal Code”, *supra* note 39.

⁹¹ *House of Commons Debates*, 7-2, vol 2 (17 May 1892) at 2711 (Louis Henry Davies) [Debates 17 May 1892].

evidence, to be proved in the court, whether she acted under the compulsion of her husband or in spite of her husband.⁹²

Duress was not discussed further.

Commentators have concluded that the *Draft Criminal Code* of 1879 did not represent either the Canadian or British law on compulsion and “neither its general extension as a defence, nor the listed (excluded) offence, represent a logical development from the case law” and the fact that this draft was not adopted in England suggests “that the English legislature was unconvinced by the apparently arbitrary formulations of the Commissioners.”⁹³ Interestingly, most of the case law cited above was not referenced by Stephen. His conclusions seem rather to adhere to a moral condemnation of a guilty person escaping just punishment rather than an actual examination of the case law and existing principles.⁹⁴ Although it is true that the Romans, Hale, Blackstone, Bentham, and others were great contributors to the creation of the laws of duress, it is clear that Stephen was the last and potentially the most influential source of the defence of duress in Canada. While his contributions to the development of the defence did not singlehandedly create the laws on duress, they were pivotal in creating our modern form of the defence infused with his Victorian, male and upper-class brand. Again, the current Canadian criminal law on duress seems to be largely the legacy of Stephen’s personal and very specific views.

E. The 1955 Amendments in Canada

The next stage of the development in Canadian criminal law was to further codify the principle that had existed from the birth of the *Criminal Code*. There were amendments made in 1906 and 1927 but “neither of these

⁹² *Ibid* (Sir John Thompson). The 1892 version of the *Criminal Code* provided at s. 13 that “no presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband.”

⁹³ Brookbanks, *supra* note 30 at 12.

⁹⁴ This point demonstrates the sheer refutation of Stephen’s former words. In “Penal Code,” Stephen states, when describing the conceptualization and creation of a code, that “[w]e must start from what we have got; we must begin by rearrangement, by improving forms of expression, by ascertaining what is objectionable, what is technical, what belongs to a past age and generation; and, finally, we must adapt the result bit by bit to the present state of knowledge and feeling.” Stephen, “Penal Code,” *supra* note 39 at 364. In spite of his words, it is evident that Stephen does not follow his own advice. Rather, he goes off on his own thoughts and applies what he believes to be the proper and applicable law of duress.

could be called revisions.”⁹⁵ In 1955, there was a slight re-wording of the section preserving the common law.⁹⁶ Again, this was in anticipation that defining every possible defence was impractical, if not impossible.⁹⁷ Preserving these defences thus served a practical purpose and spawned discussion of the “morally” guilty and innocent. The defence as we know it based on Stephen’s scholarship was supposed to be the codification of the laws of a moral system.⁹⁸ Unfortunately, the codification was not an “attempt to look forward or to reshape the criminal law in terms of purpose and principle. The many amendments that have been made to the Code since its enactment have not changed its basic character. Even the major revisions of 1955 contemplated merely a restatement of the current law, rather than a fundamental reevaluation.”⁹⁹ For this reason, the Code provision for duress today is not very different than that of 1892.

The lack of proper revision and continued use of Stephen’s original work led to many issues involving the use and implementation of laws in the Canadian *Criminal Code*. Of the most relevant are the laws of insanity. In 1991, Martin Friedland wrote a comparative article about the laws of insanity. In his works, he compared the wording of insanity at the time of conception of the *Criminal Code* (specifically focusing on the case of Valentine Shortis) to the wording of insanity in 1991. He stated that “[t]here was no argument... that [Shortis] was unfit to stand trial. This would be true [in 1991] as well. Section 615 [as it then was] of the current *Criminal Code* looks to see whether the accused is ‘capable of conducting his defence’... It would be difficult for Shortis then or [in 1991] to meet this test.”¹⁰⁰ It is evident when examining the historical basis of numerous Canadian defences that there are many components of Canadian law that have not been properly revised to become fully applicable in the 21st century. Although the current *Criminal Code* is either equipped with a sleeve in its front cover for a booklet of immediate revisions or accessible with continuous (and sometimes frequent) amendments online, it is

⁹⁵ Mewett, *supra* note 56 at 728.

⁹⁶ See JC Martin, *The Criminal Code of Canada, With Annotations and Notes* (Toronto: Cartwright & Sons, 1955) at 32 (s 7(2)).

⁹⁷ Stuart, *supra* note 6 at 385.

⁹⁸ Stephen, *History*, *supra* note 36 at 75-76.

⁹⁹ Allan M Linden & Patrick Fitzgerald, “Recodifying Criminal Law” (1987) 66:3 Can Bar Rev 529 at 530.

¹⁰⁰ Martin L Friedland, “The Case of Valentine Shortis – Yesterday and Today” (1991) 36:3 Can J Psychiatry 159 at 160.

questionable why that same update does not apply to laws of insanity or duress. It is remarkable how intoxication laws change frequently, but mental disorder laws (insanity) and duress remain locked in the 19th century. Logically speaking, laws should follow society's evolution to ensure that they are applicable in the most meaningful way.

Although the 1955 amendments may have been an opportunity to amend the section regarding duress, the section was substantially unaltered.¹⁰¹ The discussion regarding this section seemed to be headed toward critical debate when the Honourable Mr. Nesbitt inquired:

There are a number of offences listed in this section which are separate. In spite of that, compulsion is no excuse for an offence. I should like to ask this question. Would there be some merit in separating the words 'immediate death or grievous bodily harm'? A person may believe that the person compelling him may carry out the crime of murder, let us say, at the point of a gun, and that may well be an excuse for committing this offence; whereas the threat of grievous bodily harm could very well not be accepted. Can the minister tell us whether any consideration has been given to that? This puts the person in a position where he might commit the crime of arson, of robbery or even of murder merely in order to save his own life? Has that been considered?¹⁰²

Instead of engaging in a meaningful discussion of the duress, immediacy, and bodily harm aspects of the legislation, the Honourable Stuart S. Garson simply replied that:

This new section 17, apart from one or two small consequential changes, is in substance identical with old section 20, which apparently through the years has stood the test of time. We thought if it had been challenged, or any difficulty had been found with it, that it would likely have had at least decided cases that would have resulted in our changing the wording somewhat. But we followed what I think is the right practice in that the sections of the old code that have been found to be

¹⁰¹ The 1955 *Code* was substantially shorter with 753 sections, compared with the more than 1,100 in the previous *Code*; with 289 pages rather than 418 pages in the Revised Statutes of 1927. MacLeod & Martin, *supra* note 53 at 11. The revised 1955 *Code* stated in s. 17 that:

A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm or arson.

Criminal Code, SC 1953-54, c 51, s 17.

¹⁰² *House of Commons Debates*, 22-1, vol 2 (19 January 1954) at 1256 (Hon Wallace Nesbitt), online: <parl.canadiana.ca/view/oop.debates_HOC2201_02/242?r=0&s=1> [perma.c/2Q3P-W7BH] [*Debates* 1954].

workable have been retained, and it is only those in connection with which difficulty has been experienced that we have changed. We have not changed for the sake of changing. Section agreed to.¹⁰³

Thus, another opportunity to clarify the duress defence was lost even though this was a stated purpose of the amendments.¹⁰⁴

Allen J. MacLeod was the draftsman charged with restructuring the Code in 1954; he said that “the Department of Justice view was that the exercise was to be not so much a ‘revision’ as a ‘restructuring’ of the Code, i.e., more form by far than substance.”¹⁰⁵ It is for this very reason that the statutory defence of duress has remained largely unchanged. In 1952, Garson, the Minister of Justice, said that “the revision was not undertaken for the purpose of effecting changes in broad principles. Our system of criminal jurisprudence embodying as it does the high principles of the British system provides as fair and just a system as it is possible to devise to ensure that justice will be accorded to all.”¹⁰⁶ Alan Mewett made the apt comment in 1967 that “it is not a cause for congratulation that Sir James Stephen would be quite at home with the Criminal Code of 1967.”¹⁰⁷ It is also true that Stephen would still be comfortable with the codification of duress at present.¹⁰⁸

¹⁰³ *Ibid* (Hon Stuart Garson).

¹⁰⁴ The stated purpose of the amendments in 1955 was to: “(a) revise ambiguous and unclear provisions; (b) adopt uniform language throughout; (c) eliminate inconsistencies, legal anomalies or defects; (d) rearrange provisions and Parts; (e) seek to simplify by omitting and combining provisions; (f) with the approval of the Statute Revision Commission, omit provisions which should be transferred to other statutes; (g) endeavour to make the Code exhaustive of the criminal law; and (h) effect such procedural amendments as are deemed necessary for the speedy and fair enforcement of the criminal law.” See William Melville Martin, *Report of Royal Commission on the Revision of Criminal Code: Reports of Special Committee on the Bill No. 93 “An Act Respecting the Criminal Law”* (Ottawa: Department of Solicitor General, 1954) at 3–4, online (pdf): <publications.gc.ca/site/eng/9.827905/publication.html> [perma.cc/YUR7-E2HH].

¹⁰⁵ Brown, *Genesis*, *supra* note 39 at 238, n 14, in a letter to Brown from AJ MacLeod dated May 11, 1988.

¹⁰⁶ MacLeod & Martin, *supra* note 53 at 19.

¹⁰⁷ Mewett, *supra* note 56 at 740. Brown, *Genesis*, *supra* note 39 takes this comment as a positive statement which “emphasizes the main characteristic of the work – its durability” at 151. When it comes to the defence of duress, durability, paired with a lack of workability, is not always a laudable characteristic.

¹⁰⁸ Stephen’s comfort, as stated by Mewett, would largely make sense in reference to the lack of change to the present-day laws of duress. However, Stephen did note in a publication from 1880 that law is a substance that must progress with society but still remain rooted in its past. See Sir James Fitzjames Stephen, “The Criminal Code (1897)”

Few cases used this defence in the intervening years, and even fewer were successful.¹⁰⁹

III. THE USE OF THE STATUTORY DEFENCE OF DURESS TODAY

A. *R v Ryan*, Domestic Violence, and Duress

In the intervening years, the court did not strike down the statutory provision on excluded offences evidenced by the state of s. 17 in our *Criminal Code* today, and as confirmed in *Ruzic*.¹¹⁰ The statutory defence remains almost untouched since Stephen. When the case of *Ryan* was eventually considered by the Supreme Court in 2013, the boundaries again stretched to consider “a novel question: may a wife, whose life is threatened by her abusive husband, rely on the defence of duress when she tries to have him murdered?”¹¹¹ To answer this very modern question (that may have

(1880) 7 Nineteenth Century 136 [Stephen, “Criminal Code (1897)”. In his publication, Stephen states at 144-45 that

It is perfectly true that the legislation of a nation so ancient, and composed of such varied classes and interests as our own, can never be deprived of its historical character and reduced to mathematical regularity; but it is no less true that large departments of it, perhaps in time the whole of it, may be far more distinctly, conveniently, and systematically arranged than they are at present, though that arrangement ought always to have reference as well to past history, and to proved convenience, as to theoretical symmetry.

While this does not fully contradict Mewett’s point, it does raise the question as to whether the choice not to alter the Code in 1954 was the correct choice. It is evident, as Stephen points out, that progression in society and law is inevitable. As he states, so as long as the core of each law remains, the law may be adapted to better serve the present society wherein it is used.

¹⁰⁹ See e.g. the Quebec decision *The King v Farduto*, 1912 CarswellQue 249, 21 CCC 144. There are many more duress cases over time. For more information see Chapman, *supra* note 23.

¹¹⁰ *Ruzic* SCC, *supra* note 12 at para 18. See *Criminal Code*, *supra* note 11, s 17, which says today:

Compulsion by threats

17 A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

¹¹¹ *Ryan* SCC, *supra* note 15 at para 1.

been unthinkable to ask in 1892), the court once again fell back on the historical roots of the defence. Although the trial court acquitted Ms. Ryan on the common law defence of duress, the Court of Appeal clarified that s. 17 would be open to Ms. Ryan because she was charged with “counselling offence that is not committed” instead of the excluded offence of attempted murder which was on the exclusion list and would likely be the charge against other women in her circumstances in the future. By again ignoring the excluded offences in *Ryan*, and the real need for this clarification, and given the possibility of a future case that might seek to rely on the statutory provision, the courts have given very little guidance on what to do in the future with duress cases involving domestic violence. In fact, they have given little guidance on all future duress cases. The Supreme Court in *Ryan* disagreed with the Court of Appeal finding that there was “no principled basis” to exclude the defence of duress in this case mandating that duress should be “available only in situations in which the accused is threatened for the purpose of compelling the commission of an offence,”¹¹² but chose to leave the discussion of excluded offences “to another day.”¹¹³

¹¹² *Ibid* at paras 16, 33.

¹¹³ *Ibid* at para 84. A comparison to the defence of infanticide is also informative. It was not until a 1948 amendment that infanticide was formally introduced to the *Criminal Code*. S. 262(2) of the Canadian *Code* mirrored the English Law on infanticide in that a woman who willfully caused the death of her newly born child was not guilty of murder or manslaughter if, at the time of the act or omission, “she had not fully recovered from the effects of giving birth” resulting in the “balance of her mind” being “disturbed.” See Lisa Silver, “Regina v Borowiec on Infanticide: Does the Crime Fit the Times?” (10 August 2015), online (blog): *CanLII Connects* <canliiconnects.org/perma.cc/P65F-E2VQ>. In 1954, through an amendment, the word “balance” from “balance of her mind” was replaced with “disturbed mind,” which expanded the offence by offering another possible reason for the “mind being disturbed.” Namely that infanticide could also occur when the “female person” was not fully recovered from “the effect of lactation consequent on the birth of the child.” *Borowiec*, *supra* note 18 at para 30. However, as Nancy Theriot sets out in her article on insanity, “[i]t is safe to assume that the exclusion of women from medicine in the early and mid-nineteenth century affected the ‘scientific’ view of women’s mental (and physical) illness.” Nancy Theriot, “Diagnosing Unnatural Motherhood: Nineteenth-century Physicians and ‘Puerperal Insanity’” (1989) 30:2 *Amer Stud* 69 at 79. S. 233 of the *Code* relies greatly on Victorian medicine and male-oriented understandings, rather than modern-day applicable medical terms. The creation of ss. 12 and 13, coupled with their lack of progression since their conception, has slowly created barriers for women in modern society. When faced with mental health crises surrounding the birth of their children, women are subjected to the punishments of the Victorian misogynistic biases of the

B. The Latest Cases Addressing Statutorily Excluded Offences in Duress

As there is so little Supreme Court guidance on duress, it is important to examine the lower court judgments which came after these landmark cases in the development of excluded offences. In the case of *R v Fraser*, which involved a robbery (post-*Ruzic*), Justice Sherar found that “[s]ince s. 17 of the *Criminal Code*, at least in relation to the offence of robbery, is in violation of s. 7 of the *Charter of Rights and Freedoms*; it is hereby declared to be inoperative. The crown is not, in this case, attempting to justify the constitutional violation under s. 1 of the *Charter of Rights and Freedoms*.”¹¹⁴ The court quotes from Martha Shaffer’s work where she derides the automatic exclusion of 22 offences from duress because “[e]ven though the offences excluded from the ambit of s. 17 are serious ones for the most part, there is no reason that any of these offences cannot be committed in a morally involuntary fashion.”¹¹⁵

Shaffer goes on to say that as much as “we might aspire to the principle that we should give up our own lives rather than cause the death of an innocent person, it is not reasonable for the law to demand that people do so or be penalized as a murderer.”¹¹⁶ It is admirable to hold our citizens to this standard, but it is just unrealistic to expect so without a pragmatic examination of the circumstances of the case. It has become clear to many theorists that excluding 22 offences simply because Stephen deemed it so is no longer tenable. The court did the right thing in *Fraser* by excluding robbery from the list of offences in s. 17. However, the case then must be tested on its merits. The defence may still be unsuccessful, but automatic exclusion simply does not work.¹¹⁷

The excluded offence of robbery was picked up in the 2012 case of *R v Mohamed*, but this case was not challenged on the constitutional validity of excluding robbery from s. 17, and so s. 17 of the *Criminal Code* “remains in full force and effect.”¹¹⁸ As a result, the defence of duress was not available

Code rather than a modern understanding of the human mind. This conclusion similarly parallels the issues that are evident in the laws of duress.

¹¹⁴ *R v Fraser*, [2002] NSJ No 400 at para 16, 3 CR (6th) 308 [*Fraser*].

¹¹⁵ Martha Shaffer, “Scrutinizing Duress: The Constitutional Validity of Section 17 of the *Criminal Code*” (1998) 40:3 & 4 *Crim LQ* 444 at 469.

¹¹⁶ *Ibid* at 470.

¹¹⁷ It appears that *Fraser*, *supra* note 114, was not appealed, but it has not been followed in many cases.

¹¹⁸ *R v Mohamed*, 2012 ONSC 1715 at para 27 [*Mohamed*].

to Mr. Mohamed.¹¹⁹ *Fraser* was also followed in the subsequent case of *R v Sheridan* in 2010.¹²⁰ Interestingly, it was argued in *Sheridan* that a case-by-case analysis should be done even in the case of murder. Picking up from *Fraser*, the court considered whether the accused had a “realistic choice other than to murder the innocent person as an act of self preservation, as opposed to sacrificing their own lives” and whether, as a result, the act was “morally involuntary and constitutes *prima facie* a s. 7 *Charter* infringement.”¹²¹ Through a reasoned analysis, the court found that although innocent victims must be protected from murder, this absolute limitation is in violation of the accused’s s. 7 *Charter* right to have only a minimal limitation on their rights.¹²² Justice Ewaschuk found that because s. 17 violates s. 7 and is not justifiable under s. 1 of the *Charter*, the section is “constitutionally invalid in rare and limited circumstances.”¹²³ The court found in unique circumstances where there is: 1) an air of reality to be put to a jury; 2) immediate threats of death; 3) the presence of the threatener; 4) an act done by a principal; 5) that is proportional, and; 6) there is no safe avenue of escape, then s 17 must be read down.¹²⁴

At this time, the last word that we have on the constitutionality of s. 17 is the Saskatchewan lower court 2014 case of *R v Allen*.¹²⁵ Justice Kovach does a thorough examination of the law surrounding duress, as set out in the long history of the cases which came before. It is of note that no case has, as of yet, picked up on the reasoning in *Allen*, and the case was not appealed, but this is a precedent which is ripe for getting the law of duress back on track. *Allen* involved an individual who was the principal actor in a bank robbery and was charged with both robbery and assault with a weapon, which are both excluded offences under the current statutory provision in s. 17 of the *Criminal Code*. The accused had stated, and the evidence

¹¹⁹ *Ibid* at paras 29, 53. The court talks explicitly about the lack of credibility with the accused. Counsel attempted to launch a *Charter* challenge after the trial was over, but the court would not allow this at the strenuous objections of the Crown.

¹²⁰ [2010] OJ No 4884, 224 CRR (2d) 308 [*Sheridan*].

¹²¹ *Ibid* at 4.

¹²² *Ibid* at 9-10.

¹²³ *Ibid* at 10.

¹²⁴ *Ibid* at 11. Interestingly the court in *R v Aravena*, 2015 ONCA 250 noted the decision in *Sheridan* but found that without a successful constitutional challenge, the defence was not available for murder in this case, finding that the “constitutionality of the murder exception to the duress defence in s. 17 of the *Criminal Code* is not before the court” at para 86.

¹²⁵ 2014 SKQB 402 [*Allen*].

supported, that he was picked up by two individuals who threatened him with severe physical violence if he did not take a small knife and commit robberies at two banks. Employees testified that the accused was very polite and threatened no violence during the robberies, and the court found an “air of reality” to the defence of duress. Mr. Allen asserted that depriving him of the defence of duress violated three principles of fundamental justice including, “i) that a person’s actions be morally voluntary; ii) that laws not be arbitrary; and iii) that a law’s effects not be grossly disproportionate to its objective.”¹²⁶ Most fundamentally, the court found that only those who have made a “freely willed and conscious choice” may be blamed for their conduct, as “culpability rests only on those who deserve it.”¹²⁷ Thus, the court found that it is “abhorrent” to a free and democratic society to order a warrantless punishment that serves no purpose.¹²⁸ The court did a thorough analysis of the prior case law including *Ruzic*, *Hibbert*, *Rabey*, *Fraser*, *Sheridan*, and of course, *Ryan*.¹²⁹ Proportionality is, of course, a factor in the analysis.

It is also important to mention that the common law version of the defence remains operative. The 1892 *Criminal Code* maintained an important underlying principle: the common law defences were not superseded by the *Code*. When it came to the defence of duress specifically, the court would find that there was an “uneasy tension in some cases between interpretation of a detailed statutory provision and application of a common law defence.”¹³⁰ Using the judiciary to fill the gaps proved to be a difficult task.¹³¹ Yet, Thompson believed in the power of preserving the common law and said that his bill:

¹²⁶ *Ibid* at para 7.

¹²⁷ *Ibid* at para 21.

¹²⁸ *Ibid*.

¹²⁹ *Ruzic* SCC, *supra* note 13; *Hibbert*, *supra* note 48; *Rabey v R*, [1980] 2 SCR 513 [*Rabey*]; *Fraser*, *supra* note 114; *Sheridan*, *supra* note 120; *Ryan* SCC, *supra* note 15.

¹³⁰ *Stuart*, *supra* note 6 at 386.

¹³¹ See Glanville Williams, “Necessity” (1978) *Crim L Rev* 128 at 129–30. Even Stephen noted the importance of the common law defences in the commentary to the *Draft Code*, and explained that it was equivalent to giving “the benefit of a doubt... to a prisoner.” He reasoned that the “worst result that could arise from the abolition of the common law offences would be the occasional escape of a person morally guilty. The only result which can follow from preserving the common law as to justification and excuse is, that a man morally innocent, not otherwise protected, may avoid punishment.”

[A]ims at a codification of both common law and statutory law relating to these subjects, but... it does not aim at completely superseding the common law, while it does aim at completely superseding the statutory law relating to crimes. In other words, the common law will still exist and be referred to, and in that respect the code, if it should be adopted, will have the elasticity which has been so much desired by those who are opposed to codification on general principles.¹³²

Again, the framers of the *Code* wanted to preserve even more flexibility in the use of duress.¹³³ Perhaps this was the correct political decision at the time to placate those who wished for the continuation of the common law.¹³⁴ Although great strides had been made in codification and the benefits such a process brought with it, the “common law resisted eradication.”¹³⁵ Most interesting in *Allen* is that the court quotes from *Ryan* and notes that:

[T]he statutory defence applies to principals, while the common law defence is available to parties to an offence. The second is that the statutory version of the defence has a lengthy list of exclusions, whereas it is unclear in the Canadian common law of duress whether any offences are excluded... This is an unsatisfactory state of the law, but one which we think we are not able to confront in this case. Although we had the benefit of extensive argument about the parameters of the common law and statutory defences of duress, understandably no argument was presented about the statutory exclusions. In addition, some courts have found some of these exclusions to be constitutionally infirm. We accordingly leave to another day the questions of the status of the statutory exclusions and what, if any, exclusions apply at common law.¹³⁶

The court in *Allen* found that the accused testified that he feared for his life, but he was never threatened, and the knife was not used.¹³⁷ The court found that in a crime with no real violence, “self-sacrifice, while commendable, is an ideal” given that the accused was threatened with very

¹³² *Debates 17 May 1892, supra* note 91 at 1313 (Sir John Thompson).

¹³³ Brown, *Genesis, supra* note 39 at 126. Brown notes at 126 that Thompson achieved substantially the same result without formally annulling the common law as “[m]ost of the common law pertaining to crime had been incorporated in Bill 32. Once that legislation was enacted, such provisions became statute law and, ipso facto, the common law doctrine on the subject was abrogated.”

¹³⁴ See Parker, *supra* note 49 at 249 that, as for the alternative, “[s]ome ‘Codes’ were introduced in the United States, but the Benthamite-Austinian concept of a code which would supplant the common law and provide a totally new approach, a fundamental rethinking of the law, was never more than an ideal.”

¹³⁵ *Ibid.*

¹³⁶ *Ryan SCC, supra* note 15 at paras 83–84 [emphasis added].

¹³⁷ *Allen, supra* note 125 at para 48.

real violence if he did not comply.¹³⁸ Thus, the Saskatchewan court found that the “blanket exclusion of robbery and assault with a weapon from s. 17 prevents an accused from claiming duress in situations where he or she has no realistic choice but to commit the offence,” and thus the exclusion violates the principle of moral voluntariness.¹³⁹

The court then goes on to do a s. 1 analysis and finds that that the blanket exclusion is “not proportional to its deleterious effects.”¹⁴⁰ The Saskatchewan lower court was not comfortable with striking down s. 17 in its entirety because the Supreme Court had found that most “aspects of s. 17 pass constitutional muster” but that the words “robbery” and “assault with a weapon” were to be struck from the section while the other offences were “left for another day.”¹⁴¹ *Allen* has not been adopted by any cases between 2014 and 2021. Thus, we are left with a section that is far from perfect and still without the legislative will to revise this section of the *Criminal Code*, which we know violates our principles of fundamental justice. The courts cannot continue to wait for a fictional day in the future when they can wholly contemplate this important defence in a rational and well-reasoned way. Theorists like Kent Roach may be right that the “constitutionality of such categorical exclusions will have to be litigated on a case-by-case basis. Section 17 will only be invalidated when courts have struck down the last excluded offence... But it is not clear when or if that day will come.”¹⁴² Instead of wasting the court’s resources on a discussion of each of these excluded offences, which will likely take decades, we need action by our legislators.¹⁴³

¹³⁸ *Ibid* at para 55.

¹³⁹ *Ibid* at paras 59, 62.

¹⁴⁰ *Ibid* at para 84.

¹⁴¹ *Ibid* at para 88.

¹⁴² Kent Roach, “The Duress Mess” (2013) 60:2 *Crim LQ* 60 159 at 160.

¹⁴³ In recent years, there have been few cases where duress was used as a defence. The most recent use of the defence in Canada comes from a Manitoba case, *R v Ducharme*. Ducharme was charged with first-degree murder and accessory after the fact to the murder of a fellow inmate at Stony Mountain Institute. Defence counsel argued that his actions were done out of necessity and duress and that he had no part in the murder or anything thereafter. The tests of necessity and duress were both successfully applied, and Her Honour could not find, beyond a reasonable doubt, any evidence that could offer a reasonable alternative. As such, Ducharme was acquitted of the charges held against him. See *R v Ducharme*, 2020 MBQB 177 [*Ducharme*]. It would also be prudent to note that this case was decided largely with the assistance of constant surveillance and video footage of the Stony Mountain Institute. With the assistance of this footage,

IV. IS THERE ANOTHER OPTION? THE USE OF DURESS AS MITIGATION IN SENTENCING

A. Duress as a Factor in Mitigation

With the uncertain nature of the development of the defence, and the difficulties of treating duress as a full defence, perhaps there is another option. A complete rejection of a defence which has been applied to cases for over a century may be too drastic. Although Stephen's interpretations on the subject are questionable, what he stated in his 1880 publication "The Criminal Code (1897)" in *The Nineteenth Century Journal* would apply in this situation;¹⁴⁴ history cannot be surgically removed from the laws it has created, but it must remain at its core in order to maintain a level of chronological consistency in order to uphold the law. By exploring a different route to address the issues relating to duress in Canadian law, this core could remain the same and the law could become more pliable and applicable to a modern, 21st-century court of law. Notwithstanding the historical understanding, when considering the defence of duress, many have argued that it should only be a matter for mitigation upon sentencing. There is evidence that "relates to an ancient era preceding the middle ages when justifications absolved, while excuses were merely a matter for mitigation of punishment."¹⁴⁵ Stephen was adamant about only using duress as a matter in sentencing rather than a full defence, stating it is:

[A]t the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary. It is, of course, a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands... No doubt the moral guilt of a person who commits a crime under compulsion is less than that of a person who commits it freely, but any effect which is thought proper may be given to this circumstance by a proportional mitigation of the offender's punishment. These reasons lead me to think that compulsion by threats ought in no case whatever to be admitted as an excuse for crime, though it

it was possible for the defence to build a case of duress with actual, physical evidence of the actions of the accused and other inmates. This should be kept in mind when analyzing and comparing other cases, where the actions relating to necessity and duress are not recorded and are not visible to assist in confirming the use of the defence.

¹⁴⁴ Stephen, "Criminal Code (1897)", *supra* note 108.

¹⁴⁵ Stuart, *supra* note 6 at 389.

may and ought to operate in mitigation of punishment in most though not in all cases.¹⁴⁶

The concept that duress should function only as an element of sentencing is not new. However, some researchers discussing the modern form of the defence felt that duress should not be used simply as a factor for mitigation. In *Lynch*, Lord Wilberforce stated that duress has been recognized from the 14th century as a full defence and not “as diminishing responsibility or as merely mitigating the punishment... Parliamentary action would be necessary if proof of duress were to operate upon the sentence.”¹⁴⁷ Yet, as Lord Edmund-Davies noted in *Lynch*, Stephen’s summary of the law of duress as left to mitigation “at least makes for neatness”¹⁴⁸ as all arguments of justifications and excuses are bypassed. Accepting Stephen’s assertion that duress should function only as mitigation would be a solution to ineffectual legislation and the “band-aid solution”¹⁴⁹ accomplished through the common law.¹⁵⁰ Examining this solution deserves another consideration in light of today’s sentencing practices. Using this solution, the court may consider the conduct of the accused rather than an artificial list of excluded offences. Those with serious threats would qualify for the defence of duress, while those that did not qualify as serious bodily harm would immediately be in a position to use duress in mitigation.

Many have suggested conceptualizing the defence for use in the sentencing phase in order to restrict the defence rather than find a further option for those who act under duress. Stephen starts with two basic assumptions when expounding the principle that duress should simply be a matter of mitigation, arguing that: (1) to give credence to threats of a rogue would be akin to opening the door for collusion of malefactors and (2)

¹⁴⁶ Stephen, *History*, *supra* note 36 at 107–08. Rosenthal, *supra* note 28 has noted that the “logical consequence of Stephen’s argument would be that the penalty should increase in proportion to the force of the compulsion!” at 211.

¹⁴⁷ *Lynch*, *supra* note 1 at 681.

¹⁴⁸ *Ibid* at 707.

¹⁴⁹ Stuart, *supra* note 6 at 401.

¹⁵⁰ UK, Law Commission, *Criminal Law: Report on Defences of General Application* (No 83) (London, UK: Her Majesty’s Stationary Office, 1977) at 8–9 [*Law Commission No. 83, 1977*] forwarded two propositions:

1. Certain very terrible threats should excuse from all crimes.
2. Less terrible threats should be a matter of mitigation only. If the crime is a minor one the mitigation may result in an absolute discharge, but that is at the discretion of the judge.

criminals would “confer impunity upon their agents by threatening them with death.”¹⁵¹

Some theorists have made extremist arguments about allowing duress as a defence. An example is the comment of Lord Salmon in *Abbott*, relying on the comments of Lord Simon of Glaisdale in *Lynch*, who argued that actions under duress cannot be regarded as excusable, as this would “prove to be a charter for terrorists, gang leaders and kidnapers.”¹⁵² This fear was properly criticized by the U.K. Law Commission in *Law Commission No. 83, 1977*, which states:

[W]e would point out that, over the many years that duress has been accepted as a defence, the few reported cases in which it has arisen for consideration, and the even fewer occasions when it has apparently been successfully relied upon, seem to indicate that the fears are without serious foundation. It is after all a defence of last resort, which entails acceptance of participation in the offence, and a degree of courage is required to advance the defence if the threats are really serious and convincing because of the possibility of reprisals against the defendant or those close to him.¹⁵³

As noted throughout, there has not been a flood of duress cases; it remains a difficult defence to assert only after the elements of the case have been made out. However, it is necessary to examine duress at sentencing because of the “power to grant an absolute discharge where appropriate. In addition, there are various administrative procedures which may be employed in suitable cases: the discretion not to prosecute, the exercise of the royal prerogative of pardon, the powers of review of the Parole Board.”¹⁵⁴ If duress was fundamentally relevant to mitigation “it would allow the court to pass one of a wide variety of sentences to match the diversity of cases that shelter under the umbrella of duress.”¹⁵⁵ There could be benefits to the accused under this scheme, as the court could pay attention to the circumstances of each individual. Although this may (or may not) result in sympathy, a court could adjust for morally blameless conduct and an appropriate sentence in the circumstances where a defence

¹⁵¹ Stephen, *History*, *supra* note 36 at 107.

¹⁵² *Abbott v The Queen*, [1976] UKPC 19 at 766, [1977] AC 755 [*Abbott*].

¹⁵³ *Law Commission No. 83, 1977*, *supra* note 150 at 8.

¹⁵⁴ Ian H Dennis, “Duress, Murder and Criminal Responsibility” (1980) 96 Law Q Rev 208 at 235–36. Note that the “royal prerogative” is purely a British construct in the case of murder.

¹⁵⁵ Martin Wasik, “Duress and Criminal Responsibility” (1977) Crim L Rev 453 at 457 [Wasik, “Duress”].

has failed, as “the court has the normal sentencing discretion and can give effect to shades of culpability and complicity.”¹⁵⁶

Using duress in sentencing would also placate those who criticize the exculpatory power of the defence, as it would punish those offenders most deserving of reprimand. Individual characteristics could again be considered in the particular case. Using the defence at the sentencing phase may also bring a solution for prior fault, which has plagued the defence of duress in Canada and abroad. There have been numerous situations where the accused brought the duress on themselves with involvement in, for example, a criminal organization.¹⁵⁷ One is left with the situation that “[t]o refuse to admit the defence in such a case may well be unjust, but its acceptance so as to exonerate the accused entirely could amount to a ‘terrorist’s’ charter.”¹⁵⁸ Clear sentencing aims could alleviate this issue.

Others have theorized that leaving duress to mitigation would also solve the problem of excluded offences, particularly murder. It has been said that “the best solution would be to allow the defence of duress to reduce murder to manslaughter, thus providing the judge with the desirable discretion on sentence.”¹⁵⁹ In *Abbott*, Lord Salmon stated that leaving duress to

¹⁵⁶ *Ibid.*

¹⁵⁷ In the 1987 publication of *The Cambridge Law Journal*, Conor Gearty wrote about issues relating directly to this topic through the use of the case *R v Sharp* [1987] 3 WRL 1. See Conor Gearty, “Duress—Members of Criminal Organisations and Gangs” (1987) 46:3 *Cambridge LJ* 379. He noted that the case involved three individuals who were accused of committing an act of robbery. Two of the three members were charged additionally with manslaughter and murder, respectively. The third member, Sharp, did not commit acts of manslaughter or murder and claimed that his participation in the robbery was due to duress which was imposed on him by one of the members. The Lord Chief Justice at the Court of Appeal noted that “where a person has voluntarily, and with knowledge of its nature joined a criminal organisation or gang which he knew might bring pressure on him to commit an offence and was an active member when he was put under such pressure, he cannot avail himself of the defence of duress” (*ibid* at 380). This exact act describes the nature by which one can bring duress upon themselves through the involvement of gang activities. The court in *R v Sharp* also noted that the case of *R v Hurley and Murray* [1967] VR 526, along with various criminal codes (including the Canadian *Criminal Code*), “together with the draft code of 1879 prepared by Mr. Justice Stephen, tended to confirm that... [the above noted] exclusory doctrine was already part of the common law” (*ibid*). Ultimately, Mr. Sharp’s defense of duress was rejected on these bases. The mention of Stephen in a case as recent as 1987, however, is both surprising and not. The words of Stephen from the draft code and the *Code* of 1892 still hold weight in modern courts of law.

¹⁵⁸ Wasik, “Duress”, *supra* note 155 at 458.

¹⁵⁹ *Ibid.*

sentencing, at least in the case of murder, would be feasible, claiming “[t]here is much to be said for the view that on a charge of murder, duress, like provocation, should not entitle the accused to a clean acquittal but should reduce murder to manslaughter and thus give the Court power to pass whatever sentence might be appropriate in all the circumstances of the case.”¹⁶⁰

One reason given for the use of duress at the sentencing phase is that duress would be “considered in a less formal, more flexible context, producing a speedier but no less just result.”¹⁶¹ This type of use for the defence was considered for provocation in New Zealand. A Law Reform Committee report noted that, at sentencing, the court would be able to determine the issue “untrammelled by artificial legal rules and definitions.”¹⁶² Perhaps sentencing may be the way to escape the numerous difficulties of duress and its troubled history.¹⁶³ Thus, there are benefits for both those who believe in the defence and want to see it used in a more reasoned way, and arguments for those, like Stephen, who saw duress as a dangerous tool and believed that sentencing would be a way to limit its applicability.¹⁶⁴

¹⁶⁰ *Abbott*, *supra* note 152 at 768. Lord Salmon also took the opportunity in *R v Sang*, [1979] UKHL 3, [1980] AC 402 [*Sang*] to again agree with Stephen that compulsion should not be an excuse but should be used to mitigate punishment. He noted that the “punishment would certainly vary according to the circumstances of the case; sometimes it might be minimal” at 12.

¹⁶¹ Martin Wasik, “Excuses at the Sentencing Stage” (1983) *Crim L Rev* 450 at 458 [Wasik, “Excuses”].

¹⁶² *Ibid*, n 58.

¹⁶³ ATH Smith, “On *Actus Reus* and *Mens Rea*” in PR Glazebrook, ed, *Reshaping the Criminal Law: Essays in honour of Glanville Williams* (London, UK: Stevens & Sons, 1978) 95 at 105–06 noted that:

Modern sentencing powers being what they are, the sentence can be extremely flexible, and justice might be satisfied by the granting of an absolute discharge. It seems to me that these latter are entirely proper policy considerations. It is probably also true that, as more defences become available, it is easier for the guilty to take advantage of the law’s greater complexity to fabricate defences. The costs in time and other resources that must be expended as a consequence of formally admitting a greater number of exculpatory pleas should also, perhaps, be taken into account. My point is simply that the arguments against a duress defence are lent no weight by an appeal to ‘theory’... It is an argument from definition, and that should not influence the policy issue at stake one way or the other.

¹⁶⁴ In Clayton C Ruby et al, *Sentencing*, 6th ed (Markham, ON: LexisNexis Canada Inc, 2004), the authors note the discrepancy in that “[e]xcessive delay which does not amount to a breach of section 11(b) of the Charter can be taken into account in mitigation of sentence, because it causes prolonged uncertainty for the appellant. It is utterly anomalous that a Charter violation cannot mitigate sentence, but a course of

B. Mitigating Excuses

There is also an argument for what has been called a separate class of “mitigating excuses.” Mitigation has been conceptualized as something that may add up to a “negative tariff” of mitigating factors that would entitle an offender to a lesser sentence if deterrent or incapacitation are not the overriding principles.¹⁶⁵ However, some have noted that there are a small group of factors that have an “excusatory effect.”¹⁶⁶ Martin Wasik developed this concept from the work of Hyman Gross, a theorist on punishment. Gross examined mitigation and concluded that “[t]he punishment *deserved* for the crime is no less when these things are taken into consideration, but since what is deserved is not all that matters in deciding what sentence is right, there is good reason for a lighter sentence in spite of that.”¹⁶⁷ This leaves space for duress as a mitigating excuse on sentencing.

Wasik builds on this theory claiming that a sentencer should first consider mitigating excuses because “they form part of the determination of proportionality itself.”¹⁶⁸ He states that once culpability is established, one may take into account other mitigating factors which may reduce the sentence to “a level below what would be regarded as proportionate, because of reasons of policy or humanity. This suggests that... allowance for mitigation should be regarded as an entitlement of the offender.”¹⁶⁹ If a mitigating excuse was considered before the other typical mitigating factors, it would be granted more weight because we ascribe these types of excuses more value. Perhaps if the sentencer ascribed some increased meaning to the mitigating excuse, culpability could be applied by the sentencing judge who heard the evidence and may balance blameworthiness and the needs of the offender.¹⁷⁰ These factors may not reach the level of full excuse but could allow more focus on the individual punishment appropriate for the offender.

conduct, which does not amount to a violation of the Charter, can do so” (*ibid* at 264, citing Allan Manson, “Charter Violations in Mitigation of Sentence” (1995) 41 CR (4th) 318).

¹⁶⁵ Wasik, “Excuses”, *supra* note 161 at 462–63.

¹⁶⁶ *Ibid* at 463 [emphasis in original].

¹⁶⁷ Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979) at 449 [emphasis in original]. Wasik notes that Gross is operating from a “just deserts” model. Wasik, “Excuses”, *supra* note 161 at 463.

¹⁶⁸ Wasik, “Excuses”, *supra* note 160 at 463.

¹⁶⁹ *Ibid* [emphasis in original].

¹⁷⁰ DA Thomas, “Sentencing Implications” (1980) *Crim L Rev* 565 at 565–68.

Legal theorist Allan Manson says that a veritable “menu”¹⁷¹ of mitigating factors have been accepted in Canadian law.¹⁷² Traditionally, duress has been accepted as one of these factors, and Manson notes that these offences have a reduction in moral blameworthiness in offences that may have been excluded by s. 17. Although there may be no full defence, the crime remains less blameworthy and may “mitigate a sentence. The common case is a drug courier who argues that a threat was made to encourage his or her participation. If there is no defence of duress, there may still be facts that support its use for sentencing purposes.”¹⁷³ Even though the state of s. 17 is in question, it is likely that the common law will be in place, and there will be offenders who do not fit within the defence and could benefit from effective sentencing.

C. Duress as a Partial Defence on the Duress Continuum

Alternatively, theorists have recently proposed that duress should act as a “partial defence.”¹⁷⁴ This is the purely traditional response that duress should take its place among other mitigating factors. Douglas Husak argues that this theory explains the use of mitigation in duress, since “threats of bodily harm can excuse completely when they are sufficiently extreme, then they can excuse partially when they are less so.”¹⁷⁵ He goes on to say that the defendant who acted under duress had “‘no choice’ but to commit the crime. Of course, this claim cannot be taken literally; defendants who plead duress decide to acquiesce to the threat. But threats are among the most familiar reasons to deny that a choice is fully voluntary. If a severe threat greatly reduces the voluntariness of an act, a less severe threat slightly reduces its voluntariness.”¹⁷⁶ Like a mitigating excuse, the partial excuse of duress may also be used in mitigation. It has been said that many theorists have a distinction between “excusing conditions and mitigating excuses... The basis for this assumption is rarely articulated, and when it is, it seems unconvincing. Those writers who urge or assume a sharp distinction between excusing conditions and mitigating excuses are faced with

¹⁷¹ Allan Manson, Patrick Healy & Gary Trotter, *Sentencing and Penal Policy in Canada: Cases, Materials, and Commentary* (Toronto: Emond Montgomery, 2000) at 132. “Menu” is the term used by the authors.

¹⁷² Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001).

¹⁷³ *Ibid* at 140.

¹⁷⁴ Douglas N Husak, “Partial Defenses” (1998) 11:1 Can JL & Jur 167.

¹⁷⁵ *Ibid* at 184.

¹⁷⁶ *Ibid*.

something of a problem by the existence of ‘partial excuses’ in the criminal law.”¹⁷⁷ However, Wasik makes it clear that rather than an either/or dichotomy, the more useful distinction would involve a “‘scale of excuse,’ running downwards from excusing conditions, through partial excuses to mitigating excuses.”¹⁷⁸ Many benefits can be seen as flowing through this type of model. As Baker has noted:

This change would greatly increase the ability of the criminal law to respond flexibly, realistically, and fairly to the enormous diversity of actual fact situations involving duress that do arise. All of the facts bearing on the accused’s responsibility and culpability could be placed before the body entitled to determine guilt and recommend sentence. The criminal law would gain in justness, in that it could better apportion its verdicts and penalties to the merits of each individual case. I expect the perception of its fairness would also increase.¹⁷⁹

Further, there is value in a continuum of duress because “it would be possible to combine a general relaxation of the excusing power of duress with specific provisions marking an upper boundary on the seriousness of offences for which duress could acquit, and above which duress could only mitigate by reducing the sentence.”¹⁸⁰ This continuum theory of duress offers an appealing alternative to the model currently employed.

Duress is difficult for theorists to conceptualize fully. Could it be that duress naturally flows through different categories all the way from an

¹⁷⁷ Martin Wasik, “Partial Excuses in the Criminal Law” (1982) 45:5 Mod L Rev 516 at 516 [Wasik, “Partial”] [emphasis in original]. See Marcia Baron, “Justifications and Excuses” (2005) 2:2 Ohio St J Crim L 387 at 388–89, n 4, where she notes that Hart distinguishes three types of defenses: excuse, justification, and mitigation. I find this a peculiar grouping, blurring two separate issues. One issue is whether the defence is complete or only partial, complete defences being those that result in acquittal, whereas partial defences merely reduce the crime to a lesser one (usually murder to manslaughter). What Hart calls ‘mitigation’ can be either formal or informal. Formal mitigation is the same thing as a partial defence, and informal mitigation is simply the handing out of a lighter sentence than one would otherwise mete out. The second issue is whether the defence is a justification or an excuse. These strike me as distinct issues, and although we should leave open the possibility that a justification has to be complete to be a justification (and likewise for excuses), I see no reason to take that as a starting point and to shape our classification of defenses accordingly.

¹⁷⁸ Wasik, “Partial”, *supra* note 177 at 524–25.

¹⁷⁹ Baker, *supra* note 43 at 610.

¹⁸⁰ *Ibid.* Baker goes further to extend the example to murder. In the proposed mitigation approach, Baker suggests that “the law would be able to acknowledge, through reduction in sentence, the moral difference between taking a life as a result of an agonized choice between that evil and great personal loss, and the more usual cases of killing that the law prohibits.”

excusing condition, to a partial defence, to perhaps even a mitigating excuse? It appears very rational that “[a]t a given stage in the history of criminal law, policy claims against admitting a particular excuse as an excusing condition will be seen as more or less compelling.”¹⁸¹ This is why *Lynch* and *Abbott* opened up the defence when it was needed. Perhaps this is why *Ruzic* was decided as it was because the particular facts of these cases made duress traverse the duress continuum.¹⁸² The answer is just as difficult as some will argue that:

[C]riminal law excuses are so morally and legally significant that they *must* be considered prior to the verdict. These are the excuses towards the higher end of the ‘scale of excuse’ where maximum exculpatory power outweighs considerations of policy and expedience for not admitting the excuse as an excusing condition. To transfer these issues to the sentencing stage, as some would have us do, would sacrifice individual culpability to social policy. On the other hand some excuses, towards the lower end of the scale, may properly be dealt with just by the sentencer, and it will be pointed out that sentencers are now developing more rigorous procedures after conviction for assessing the weight to be attached to mitigating excuses.¹⁸³

Taking all of the theory on mitigating factors, mitigating excuses, and all of the surrounding information, the best summary of the theory is provided by Zoe Sinel through a revised retributivist theory with the addition of judicial mercy, as discussed above. Sinel argues that:

[T]he retributivist’s concern for the inherent dignity and freedom of human beings is emphasized and serves as a justification for legislative and/or judicial sensitivity to particular situations of partial agency. Thus, the harshness of the retributivist regime, it is argued, can and ought to be mitigated by a sensitivity to human agency and its limitations in exigent circumstances that affect its functioning. It behooves us to be sensitive to this situation of partial agency. An accused who commits an act under partial agency should not be held as responsible for his act as one who commits an act under full agency. If we are not sensitive to this difference, the argument runs, then the unmitigated punishment of the accused acting under duress is disproportionate. Therefore, far from undercutting the retributivist doctrine’s duty to punish the wrongdoer, excuses can serve to mitigate the

¹⁸¹ Wasik, “Partial”, *supra* note 177 at 525.

¹⁸² *Ibid* at 529. Determining exactly how to calculate a discount using duress has proven problematic, and it is not conducive to allocating specific numbers for a specific offence. As noted by Wasik, the job of the sentencing judge will be more art than science.

¹⁸³ *Ibid* at 531–32 [emphasis in original].

harshness of this doctrine by paying close attention to the *ad hoc* circumstances that inhere in a situation that would make it disproportionate to punish.¹⁸⁴

This is the same argument given in Wilson's dissent in *Perka* where she noted that where "a defence by way of excuse is premised on compassion for the accused or on a perceived failure to achieve a desired instrumental end of punishment, the judicial response must be to fashion an appropriate sentence but to reject the defence as such."¹⁸⁵ There is much support for a theory that, under whatever title, recognizes the unmitigated punishment of an offender who acts under duress is unsustainable. There is an appropriate place for judicial mercy in sentencing. The debate on this alternative theory of duress will continue, but looking at duress in the full range of possibilities will only help illuminate the best path for the future of this defence.¹⁸⁶

D. Criticism of Duress in Sentencing

Glanville Williams succinctly summarizes the common criticisms of allowing duress to function as a factor in mitigation. He stated that:

1. Allowing a specific defence means that the evidence is brought out fully before the jury. It is a criticism of our trial system that when evidence is admissible only in mitigation, so that it is no concern of the jury, it is not

¹⁸⁴ Zoe Sinel, "The Duress Dilemma: Potential Solutions in the Theory of Right" (2005) 10 Appeal 56 at 65-66.

¹⁸⁵ *Perka*, *supra* note 48 at 234.

¹⁸⁶ Douglas Husak, "On the Supposed Priority of Justification to Excuse" (2005) 24:6 Law & Phil 557 at 582 [Husak, "Priority"]. Husak discusses partial justifications and excuses. He analyzes partial excuses as grounds for his rejection of what he calls the "priority" of justifications over excuses. Husak claims that "[i]f we suppose that a defendant should prefer a full justification to a complete excuse, should she also prefer a partial justification to a complete excuse? Does this preference remain even though the complete excuse, unlike the partial justification, allows her to be acquitted?" Although Husak is "noncommittal" about whether what he calls "hybrid defences" exist, he makes the point that we should perhaps conceptualize a defence like duress as a "borderline case" in which it is not possible to categorize the act as an excuse or a justification. There has been some criticism of this hypothesis, including Marcia Baron, "Is Justification (Somehow) Prior to Excuse? A Reply to Douglas Husak" (2005) 24:6 Law & Phil 595. Baron notes that she is not certain that justifications are prior to excuses. In fact, she claims "I'm not sure that I think it is." See Fletcher, "The Right", *supra* note 23 at 955. However, I adopt Baron's acceptance of Fletcher's statement in "The Right" that an analysis of justification precedes that of excuse. This discussion, again, ties into the discussion of the philosophy of the defence in Chapter 2. See Husak, "Priority", *supra* note 185 at 583-84. Husak concludes that the priority thesis should be rejected as excuses are only noncommittal about justifications, and this does not mean that justifications have priority over excuses.

considered and probed with the same thoroughness as evidence going to liability.

2. There is a special argument for murder. If duress were not allowed as a defence the judge would have to pass a life sentence.
3. A last argument is perhaps the most decisive. In the case of overwhelming duress, no punishment can in justice be imposed on the unhappy victim of the duress. The moral rigorist may assert that there must nevertheless be a conviction, to maintain the supremacy of the higher morality. But, as Rupert Cross remarked, ‘an absolute discharge or an instant release under the prerogative of mercy are strange methods of enforcing absolute moral prohibitions.’¹⁸⁷

Critics of this rather simplistic model point out that it is not “sufficient in the true case of duress for account to be taken of the duress by the exercise of some discretionary power” and that the proper place for the consideration of the defence is before a jury.¹⁸⁸

Although all of the factors would be before the trial judge, they may not be available to other authorities using the defence of duress and, as Lord Edmund-Davies again points out in *Lynch*, “there can be no assurance that even a completely convincing plea of duress will lead to an absolute discharge. And even the exercise of the Royal prerogative involves the notion that there must have been a degree of wrongdoing, for were it otherwise no ‘pardon’ would be called for.”¹⁸⁹ Lord Morris of Borth-y-Gest also surveys whether duress could serve as a function of mitigation. He ponders the justness of such an approach but concluded that fairness could be ensured after conviction, as a “judge could ensure that after a conviction full opportunity would be given to adduce all material evidence” and if the actions were compelled by “the compulsion of a threat of death or of serious bodily injury it would not in my view be just that the stigma of a conviction should be cast on him.”¹⁹⁰ The example becomes all the more sound when Lord Edmund-Davies looks at the case of *Crutchley*, where an individual was

¹⁸⁷ Glanville Williams, *Textbook of Criminal Law*, 2nd ed (London, UK: Stevens & Sons, 1983) at 626.

¹⁸⁸ *Law Commission No. 83, 1977*, *supra* note 150 at 7. Some theorists, such as Doré, *supra* note 40, note that duress, especially for the battered offender, is “especially suited for resolution by the jury. That is, because duress requires a judgment about what a person of reasonable firmness would do under similar circumstances, the question of coercion, in all but extreme cases, arguably should go to the jury as representatives of the relevant standard-setting community” at 762.

¹⁸⁹ *Lynch*, *supra* note 1 at 707.

¹⁹⁰ *Ibid* at 671.

compelled to do damage to machinery by a mob.¹⁹¹ Lord Edmund-Davies quotes Glanville Williams, who claims “*Crutchley* was a case where justice demanded not merely a mitigation of punishment but no punishment at all; nor would there have been any sound reason for registering even a technical conviction.”¹⁹² This argument is persuasive, as the stigma should not attach to the innocent.

Is leaving the defence to the use of the sentencing judge placing the “stigma of conviction” on the innocent?¹⁹³ Lord Simon also recognized these limitations and said:

It is true that the Home Secretary can advise exercise of the royal prerogative of mercy, and that the Parole Board can mitigate the rigour of the penal code; but these are executive not forensic processes, and can only operate after the awful verdict with its dire sentence has been pronounced. Is a sane and humane law incapable of encompassing this situation? I do not believe so.¹⁹⁴

There may be another factor to consider with the insistence of the judges in *Lynch* and *Abbott* that duress be a defence and not left to the sentencing judge, which leads to the discussion of mandatory minimums.¹⁹⁵

Others have noted that the deterrent effect will be lost if mitigation is permitted under duress. However, it is aptly noted that “[s]urely if the prime object of the law were to deter, it would treat duress as an aggravating circumstance.”¹⁹⁶ Yet, despite the difficulties with sentencing, mitigation in the case of duress is promising. The criticisms are succinctly enunciated by Sinel who says that:

A mitigation in sentence includes a verdict of moral culpability – we still consider the accused to have committed a wrong. In addition, sentencing discretion is manipulatable. Whom should this power of acquittal go to? A judge, a jury, an elected body? Furthermore, what considerations ought such a body take into account when mitigating sentences? It seems obvious to say that we would prefer not to leave something as significant and nuanced as a defense of duress solely to the discretion of judges. Moreover, the situation of duress is conceptually different from most mitigating situations. If a person acting under duress refuses to succumb to the will of his/her duressor, then we do not simply consider his/her actions to be morally right, but morally saintly. We consider him/her to have acted

¹⁹¹ *R v Crutchley*, (1831) 172 ER 909, 5 Car & P 133 [*Crutchley*].

¹⁹² See Glanville Williams, *Criminal Law: The General Part*, 2nd ed (London, UK: Stevens & Sons Ltd, 1961) at 755, cited in *Lynch*, *supra* note 1 at 707.

¹⁹³ *Law Commission No. 83*, 1977, *supra* note 150 at 7.

¹⁹⁴ *Lynch*, *supra* note 1 at 696.

¹⁹⁵ A full discussion of mandatory minimums is beyond the scope of this paper.

¹⁹⁶ André Gombay, “Necessitate Without Inclining” (1985) 24:4 *Dialogue* 579 at 587.

superogatorily. It seems odd that if the accused succumbs to the threat, we hold him/her guilty, but withhold punishment; and if the accused does not succumb, we write him/her into our hagiography.¹⁹⁷

Thus, although there are many criticisms of using duress post-conviction, there are also some very compelling reasons to consider this comprehensive approach.

E. The Benefits of a Reasoned Use of Duress in Sentencing – Comparison to the United States

It has been said in Canadian jurisprudence that “it must not be forgotten that, even where compulsion or coercion is not available as a defence, it will generally be a mitigating factor in considering the question of punishment.”¹⁹⁸ However, Canada has never seen fit to put down a firm rule with respect to the role of duress in sentencing to ensure that it is taken into account in the proper proportion in sentencing. American authorities, however, have seen that a policy statement was inserted into the Federal Sentencing laws to solidify the place of duress. Policy statement 5K2.12 states that:

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant’s actions, on the proportionality of the defendant’s actions to the seriousness of coercion, blackmail, or duress involved, and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency.¹⁹⁹

Reducing the sentence below guidelines is a serious consideration. This model could be followed in Canadian sentencing. With some statutory

¹⁹⁷ Sinel, *supra* note 184 at 66, 67. Sinel also takes up the argument of Professor Alan Brudner who claims that many of the problems of duress could be solved by making duress a “justificatory defense.”

¹⁹⁸ Edwards, *supra* note 5 at 313.

¹⁹⁹ *Federal Sentencing Law and Practice*, § 5K2.12 (2005 ed). This policy statement took effect November 1, 1987, and has been amended only once. Note that a statement to depart from sentence is necessary in a system where sentencing can be very formulaic as it is in the United States. Nonetheless, this is an important statement showing the United States court’s belief in the need for mitigation for duress.

changes, modifications could be made to mandatory minimums, allowing an exception in the case of duress.

In the United States the “sentencing court may take into account the subjective mental state and personal characteristics of an offender in determining whether she was susceptible to coercion or duress in the commission of an offense.”²⁰⁰ American caselaw has found that a departure from the sentencing guidelines can be appropriate whether or not a jury has considered and rejected the mitigating circumstances as a complete defence for what was called “imperfect duress.”²⁰¹ In addition, it has been noted that the subjective factors otherwise irrelevant to guilt may be taken into account in sentencing, where a court can consider the offender on an individual basis. Thus, a battered offender’s subjective perception of danger, her individual evaluation of the opportunity to escape, her psychological makeup, and her particular susceptibility to “patterns of dependence, domination and victimization,” while arguably irrelevant to her culpability, may be utilized in determining her sentence.²⁰² However, the difficulty in the United States, as in Canada, is that even when departures are made from the guidelines because of duress, “courts may find themselves further hamstrung by legislative mandatory minimum sentences.”²⁰³ The result is that even if the court views “battered offenders as less deserving of punishment, and less in need of deterrence or incapacitation, [they] might be precluded from translating those sentiments into practice.”²⁰⁴ On the

²⁰⁰ Mary-Christine Sungaila, “Taking the Gendered Realities of Female Offenders into Account: Downward Departures for Coercion and Duress” (1995) 8:3 Federal Sent’g Rep 169 at 170. Sungaila notes at 171 that:

While the guidelines make no express accommodation for women offenders, they do allow sentencing courts to take into account mitigating circumstances disproportionately experienced by women offenders because of their sex. They enable courts to consider the significant impact on female offenders of experiences largely felt by women, such as abuse and male domination, and thereby equitably dispense justice in sentencing. It is incumbent upon defense counsel to make courts aware of the possibility of such downward departures, and thereby ensure that their female clients are appropriately sentenced under the guidelines.

²⁰¹ *United States v Lopez-Garcia*, 316 F (3d) 967 at 973 (9th Cir 2003).

²⁰² Doré, *supra* note 40 at 734 [footnotes omitted].

²⁰³ *Ibid* at 735. This sentiment has also been echoed in Isabel Grant, Dorothy Chunn & Christine Boyle, *The Law of Homicide* (Toronto: Carswell, 1999) (loose-leaf updated 1999, release 1), at 6–68, where they noted that “[i]t should be remembered, however, that life imprisonment is mandatory for murder, thus limiting judicial flexibility with respect to the appropriate stage for taking coercion into account.”

²⁰⁴ Doré, *supra* note 40 at 736, 764–65 [footnotes omitted]. Doré has noted that:

other end of the spectrum are those who believe that sentencing is not an effective way to deal with duress because “[i]n terms of principle, many would regard leaving matters to sentencing discretion as a poor substitute since in ever more cases that discretion is curtailed by legislation, and, more importantly, the defendant is denied the opportunity for the jury to consider the question of culpability.”²⁰⁵ Again, this reinforces the view that stigma would attach to the undeserving.

F. Cases Involving Duress as a Mitigating Factor

When examining the purposes and principles of sentencing, the quandary is that none, or very few, of the legislative aims seem to squarely apply to someone acting under duress.²⁰⁶ As discussed above, punishing someone who felt that they had no real control of their actions does not meet the traditional aims of deterrence because this individual is not likely to allow themselves to be put in this situation again, nor are others likely to be stopped through general deterrence. Incapacitation is largely ineffective because these offenders do not normally pose a threat to the safety of others after the threat of duress has resolved, and rehabilitation is futile because the offender felt that they had no other choice and cannot be rehabilitated from thinking they did the right thing. Reparations are unproductive, again, because the offender feels that there are not culpable for their actions. The only aim that is applicable is denunciation, and the Supreme Court has

It is tempting to compensate for this sentencing inadequacy by throwing up one's hands in frustration and urging that if the battered woman defense cannot be fully accounted for at sentencing, a court has no alternative but to permit the jury to consider it in assessing guilt. While emotionally appealing, this argument remains theoretically disquieting. I question the wisdom of attempting to correct a faulty sentencing scheme with an injudicious expansion of the substantive excuse itself – an expansion that requires a fundamental modification in excusing and that applies to a much broader class of psychologically ‘coerced’ offenders” [footnotes omitted].

²⁰⁵ David Ormerod, ed, “Duress” (2006) *Crim L Rev* 142 at 145, citing Andrew Ashworth, *Principles of Criminal Law*, 4th ed (Oxford: Oxford University Press, 2003) at 228.

²⁰⁶ *Criminal Code*, *supra* note 11, s 718, which states:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to the victims and to the community.

made it clear that “exemplary sentences (i.e. the imposition of a harsher sanction on an individual offender so that he or she may be made an example to the community) are unjustified” simply on the grounds that the sentence can be used as a “resource to deter potential offenders.”²⁰⁷ The individual culpability of the offender should be the most important goal.²⁰⁸ Theorists have argued that marginalized populations are most at risk when we tout deterrence (as has been a goal in drug mule cases), as there are many women who have been “tricked, or entrapped and persuaded, to carry out these offences.”²⁰⁹ Examining some recent Canadian drug mule cases will focus these principles.

In the case of *Valentini*, there were four defendants: Valentini, Paquin, Bonin, and Tepsa.²¹⁰ For the purpose of this analysis, the focus will be on Tepsa as the court found that she had the least knowledge about the circumstances. This case involved individuals who had conspired to import cocaine from Aruba. Tepsa’s then-boyfriend, Bonin, agreed to bring back cocaine from their vacation. Tepsa did not know the plan until several days later but was told that she had to comply because they were being watched, and she believed Bonin when he said that others had threatened to kill them if they did not import the narcotics. Tepsa arrived in Toronto with 3.5 kg of cocaine and was arrested. The jury found that Tepsa was not under duress and rejected her defence. The trial judge did not believe that duress “should ever be considered, even under another name, for sentencing purposes, once it has been rejected by the jury.”²¹¹ The trial judge summarized that Tepsa had no criminal record, she was five months pregnant at the time of sentencing, she was vulnerable at the time of the offence, she had a favourable pre-sentence report, and there was no evidence that she knew they were being paid for the importation. However, it was found that there were aggravating factors, including the value of the cocaine, her knowledge, and no real sense of remorse, which led to a sentence of 7 years incarceration and a weapons prohibition for 10 years.²¹² The use of the

²⁰⁷ *R v CAM*, [1996] 1 SCR 500 at para 78 [CAM].

²⁰⁸ Taking into consideration that s. 718.1 states that “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” *Criminal Code*, *supra* note 11, s 718.1.

²⁰⁹ Alured Darlington, “The mule’s defence” (1999) 149 New LJ 402 at 402.

²¹⁰ Tepsa’s maiden name is used to distinguish her from her husband’s name of Bonin.

²¹¹ *R v Valentini*, [1995] OJ No 3933 at 11, 29 WCB (2d) 342 [Valentini, Trial].

²¹² *Ibid* at 23. This sentence was reduced to 18 months imprisonment on appeal. *R v Valentini*, [1999] OJ No 251 at paras 114, 132 CCC (3d) 262 [Valentini, Appeal]. The

“failed” defence of duress on sentencing is a critical mitigation tool when appropriately used.

Even more troubling is a case out of the Northwest Territories Supreme Court in *R v RFS*.²¹³ In this case, Shelly Marie Elanik was found guilty of manslaughter of a hotel employee during the commission of a robbery. Her defence was that she was under duress from her boyfriend, Ronald Frank Sayers. Elanik was found to have done “some thing or things that aided or abetted Mr. Sayers.”²¹⁴ On the night of the robbery, Elanik testified that Sayers had sexually assaulted her with a bat, brought a knife into the bathroom and told her that he had killed their baby, and spoke of killing her and himself. However, the court found that Elanik refused to do what her boyfriend said at the time of the robbery and she testified that if she did not comply, he would take her outside and “beat her until she was almost dead.”²¹⁵ Justice Schuler found that, since she still refused to assist in the robbery, she clearly was able “to exercise some choices as to what she would or would not do.”²¹⁶

Elanik also refused to assault the victim when told to do so and again was threatened with another beating. In fact, she only admitted to searching for money at the location of the crime. Justice Schuler refused to accept the evidence of the defence expert witness who testified that she acted under duress and Battered Woman’s Syndrome (BWS) and would not take this evidence into account on sentencing. Even though there was evidence that Elanik was beaten by Sayers in the past (and, indeed, Sayers was convicted for assaulting Elanik only two years prior), Justice Schuler said that he did not “accept that the battered women’s syndrome explains Ms. Elanik’s actions that night or provides any mitigation in this case. I find the proposition that it would [sic] particularly hard to accept when the violence was directed to an innocent third party.”²¹⁷ Thus, it seems that duress (and, by extension, evidence of battered women’s syndrome) as a factor in sentencing is being used inconsistently across the country. Even with the

fact that the amount of cocaine was greater than in the other cases may explain some of the disparity, but this is very different than the cases described above.

²¹³ 2003 NWTSC 69 [RSF].

²¹⁴ *Ibid* at 14.

²¹⁵ *Ibid* at 16.

²¹⁶ *Ibid* at 19.

²¹⁷ *Ibid* at 19. It was also found that Elanik had a reasonable avenue of escape.

acknowledgment that Elanik was the subject of an abusive relationship, there was no allowance for a mitigation of sentence.²¹⁸

It is a concern that in some cases the accused has to decide whether to gamble and to adduce evidence in the hopes of a full acquittal on the excuse. The risk is that, if the defence is unsuccessful, some sentencing judges do not take the evidence of duress as a source of mitigation. On the other hand, if the accused decides to immediately plead guilty and ask for the mercy of the court by presenting evidence of duress that does not have to pass the difficult standards of the defence, the judges seem far more likely to take the evidence into account. A new look at duress is needed to ensure that the use of the defence at the sentencing stage is being justly employed. The aim of denunciation is being met, but the court must also be consistent with s. 718.1 of the *Criminal Code* because the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

As seen above, having an undefined use of duress in sentencing is not resulting in fair outcomes for all offenders. Having a defence like duress based on compassion is laudable, but its use is very inconsistent. Fletcher noted the difficulties of leaving compassion to the courts, stating that hoping for judicial mercy to determine whether the conduct is “blameworthy can hardly depend on whether the judge feels like blaming the defendant. The judge’s proper response is not to ask whether she feels like blaming the defendant, but whether the defendant deserves blame.”²¹⁹ One can see that this is the case with compassion for offenders who raise duress on sentencing, as they are left at the whim of the judge who can choose to include or exclude the factors. A principled approach to sentencing in the case of duress is required, perhaps to the level of a mitigating excuse.

²¹⁸ *Ibid* at 24–25. Elanik received a sentence of five years because of the mitigating factors that she was 18 years old at the time of her offence, had no criminal record, had a grade nine education and, as the court commented, she had “very little work history, which is probably not surprising, considering that she was a mother at the age of 18.” Elanik had the support of her family and had adhered to her bail conditions. At para 81, the court also notes that Elanik was an Aboriginal offender, but Justice Schuler saw “no basis to treat Ms. Elanik any differently because of her Aboriginal status.”

²¹⁹ Fletcher, “The Right”, *supra* note 23 at 970. Fletcher notes that the right to be excused applies only against the court as it would be difficult to decide that, at the time of the act, the shipwrecked individuals in *Dudley & Stephenson* had a right to kill and eat the boy, and that the boy had a duty to submit to his killing. Of course, Fletcher has written on many more issues around duress. For additional analysis see Chapman, *supra* note 23.

V. CONCLUSION

As described throughout this article, the defence of duress has a rather troubled history. Little thought was given to the defence at the time of the inception of the *Criminal Code* because there were relatively few cases using the defence. Stephen's original statutory conception of the defence was dismissive, but the codified version allowed some leeway but excluded a host of offences for no particular reason. The impact of Stephen's theory on the defence is, at best, a type of unstated compromise succinctly summarized by Shaffer in that:

Stephens' views did not, however, carry the day and the duress provision that the Commission ultimately proposed reflected a compromise between refusing to recognize the defence at all and allowing duress to serve as a defence to all offences. Section 17 thus reflects the ambivalence that has always characterized the duress defence, namely whether coercion should ever excuse the commission of a criminal offence.²²⁰

Add to this Stephen's shortcomings in his attempts at digesting the criminal law as he had an "unrealistic optimism that such a vast subject might be adequately dealt with in the compass of even 1,500 pages or so."²²¹ This, coupled with Stephen's "tendency to dwell on his own interests... resulted in an occasional lack of proportion in the treatment of certain topics."²²² His disdain for duress created an artificial and disproportionate suppression of the defence.

Despite the wishes of the earliest framers that there be flexibility, the case law does not reflect this. This restriction was not reviewed upon the revision to the *Criminal Code* in 1955, as the lawmakers felt that if the section was in need of reform, the caselaw would have provided evidence of what was required, losing another opportunity for reflection. Dressler rightly points out that there is little perfection in the criminal law, only minimum standards of conduct that do not function "as the moral police, requiring us, upon threat of death or loss of liberty and resulting stigma, to act virtuously... In some cases, it is proper for the law to excuse me, although I do not excuse myself."²²³

²²⁰ Martha Shaffer, "Coerced into Crime: Battered Women and the Defence of Duress" (1999) 4 Can Crim L Rev 271 at 278.

²²¹ Smith, *Stephen*, *supra* note 60 at 53.

²²² *Ibid.*

²²³ Dressler, *supra* note 7 at 1369.

Duress is certainly not perfectly set out either statutorily or through the common law. However, as a society, we should determine how we want to treat people who are in impossible situations. If duress is really supposed to be a concession to human infirmity in the face of an overwhelming evil, then the defence cannot be so artificially limited without a reasoned explanation. Of course, public policy reasons could inform the excluded offences, but it seems that no such discussion has really been engaged throughout the history of this defence.

Since an attempt to make the law less piecemeal and more just has largely failed over the last 100 years,²²⁴ then perhaps the pragmatic way in which the defence must change is with the increased individualization which “complements rather than detracts from the rule of law” and is required so that unique offenders are not immediately denied a defence before the discussion even begins.²²⁵ As the Court of Appeal in *Ryan* said, “[i]n turn, it also highlights the need for this defence to be sufficiently flexible to, when appropriate, accommodate the dark reality of spousal abuse. At the same time, it will oblige the courts to ensure that reliance upon such a defence will be ‘strictly controlled and scrupulously limited.’”²²⁶ Why are we making this defence so restrictive? Without the unreasoned blanket exclusions of offences, the defence of duress could finally achieve a level of coherence. It is a fundamental principle that “[m]oral culpability may only attach to an individual who has the rational capacity to appreciate the difference between a right choice and a wrong one, and who was in circumstances that provided for a meaningful exercise of that choice.”²²⁷ There is no meaningful exercise of choice in the current legislative scheme that includes a blanket exclusion of offences. If there is the judicial and/or legislative will to eliminate the excluded offences, then we may be able to help offenders facing an impossible “choice,” particularly when faced with the unimaginable circumstances a battered spouse may experience.

Should the avenue of eliminating excluded offences not prove feasible, a means of accessing duress principles is still necessary. Although faced with debate over whether mitigation is a necessary factor in sentencing cases of duress, it is nonetheless a general component of the parameters of criminal

²²⁴ See MacLean et al, *supra* note 16 at 80–81.

²²⁵ Fletcher, “Individualization”, *supra* note 23 at 1309.

²²⁶ *R v Ryan*, 2011 NSCA 30 at para 91 [*Ryan*, CA].

²²⁷ Sujung Lee, “Re-Evaluating Moral Culpability in the Wake of Gladue” (2020) 78:2 UT Fac L Rev 109 at 114.

law. Stephen himself repeatedly noted, around the time of his *Draft Code*, that “specific areas of the criminal law were in need of simplification, clarification, and rationalization.”²²⁸ Why not apply this aim to the stagnant laws of duress? Should the wording of the law itself never change, clarification and rationalization as to how the law of duress and mitigation coexist is a necessity. Marc DeGirolami asks the question, in relation to the ideals behind Stephen’s punishment, “[i]f judicial discretion in sentencing is not to be controlled by principle, then is it not unrestrained and arbitrary in all of the ways that make indeterminate sentencing unattractive?”²²⁹ A sentencing judge should act on their own accord, by a standard of good faith, and with the offender and the public’s best interest in mind. Sentencing aims (including deterrence) cannot be upheld for one who truly acts under duress and who cannot be held accountable for their actions. Using duress as an individualistic mitigating factor is necessary as a principled use of duress on sentencing.

Choosing to continue to shove a round peg into a square hole of an unworkable section is no longer a possibility; change needs to occur. The pragmatic way in which the defence will change is with the increase in sentencing individualization which “complements rather than detracts from the rule of law” and is required so that offenders are not left at the whim of those making the decisions.²³⁰ With these changes, the defence of duress may achieve a level of coherence for the first time in its long history. Mitigation is a real solution and perhaps the future of a defence which should remain relevant and accessible.

²²⁸ Marc O DeGirolami, “Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen” (2012) 9:2 Ohio St J Crim L 699 at 724.

²²⁹ *Ibid.*

²³⁰ Fletcher, “Individualization”, *supra* note 23 at 1309.