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THE DEFENCE OF COMPULSION
AN OVERVIEW

by

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INTRODUCTION

Compulsion together with its cognate duress has recently been described as an "extremely vague and elusive juristic concept."[1] While a critical analysis of the substantive law tends to support this conclusion, in that the defence appears to have developed on an insecure theoretical footing, it is also clear that imprecision in the use of definitions has further contributed to this elusiveness. In point of fact compulsion and duress are legally synonymous terms. Compulsion, however, 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.[2] It is also the expression preferred by Stephen[3] and presumably through his influence on the Draft Criminal Code of 1879, is the expression adopted in the Crimes Act 1961 and its antecedents.[4]

Duress[5] however, is the term preferred by Blackstone[6] 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."[7] This is aptly demonstrated when we add to our definitions, the term 'coercion'. Importing something less rigorous than threats of physical injury necessary to found the defence of compulsion, coercion is used to denote the special defence available to wives who commit what would otherwise be an offence under pressure from their husbands.[8]

It is regrettable, however, that such a richly connotative expression as coercion should now be relegated to the backwaters of juridical analysis, in favour of the vague and troublesome 'duress'.

1 *D.P.P. v. Lynch* [1975] A.C. 653, 686, per Lord Simon.
2 See Hale, Vol. I, *Pleas of the Crown,* 49: East, Vol. I, *Pleas of the Crown,* 70.
3 *History of the Criminal Law,* Vol. II, 106.
4 See Crimes Act 1961, s.24 of Crimes Act 1908, s.44.
5 Strictly *duress per minas.* Lit. compulsion exercised by threat of imprisonment, mayhem, or taking of life or limb. See Ballentine's Law Dict. (3rd edn), 1969. The phrase appears to have its origin in the notion of Constraint applied in the civil law of contract, having been subsequently adopted by criminal law theorists.
6 *Commentaries* (9th edn), 417.
7 *D.P.P. v. Lynch* [1975] A.C. 653, 688.
8 The common law presumption that a wife who commits an offence in her husband's presence does so under his coercion is now abolished in New Zealand, by s.24(3). It would appear from the Court of Appeal decision in *Annie Brown* (1896) 15 N.Z.L.R. 18 that the effect of this is to take away the wife's common law defence entirely.

But if duress is troublesome,[9] its difficulties pale into insignificance when compared to the doubly difficult concept of necessity—a concept widely misapplied and misunderstood in modern criminal law theory. It is noted, however, that necessity and compulsion are defences which at common law exist in a symbiotic relationship, each being dependent on the other for its existence.[10] I shall in fact argue that necessity is prior and that compulsion is a derivative defence.

The purpose of this paper, therefore, will be to analyse the development of the defence of compulsion[11] by suggesting its differentiation from necessity and examining its evolution in legal thought and practice, and in the light of recent case law developments suggesting the future parameters of the defence in New Zealand Criminal Law.

9 See, e.g. Edwards, *Compulsion, Coercion and Criminal Responsibility*, 14 M.L.R. 297. 'Duress' is here applied to a situation redolent of "causal necessity", another defence with a distinct theoretical basis. Yet no differentiation is attempted between the two concepts.

10 This fact is evident as a confusion amongst the commentators who
(1) use 'necessity' and 'compulsion' interchangeably (Blackstone)
(2) subsume 'necessity' under the genus 'compulsion' (Stephen)
(3) subsume 'compulsion' under the genus 'necessity'
(4) confuse necessity with self-defence, treating both as 'convertible' expressions (Foster, Hale, Blackstone). The illogical result of this analysis is that self-defence is conceptually indistinguishable from compulsion, which is clearly not the case.

11 For consistency this expression shall be used throughout this paper implying its cognate 'duress'.

I.

THE HISTORICAL AND CONCEPTUAL DEVELOPMENT OF COMPULSION

A. The Legal Philosophers

Aristotle[12] appears to be amongst the first of the early writers to have offered an analysis allowing for the later jurisprudential distinction between necessity and compulsion. Although writing from a non-legal background, Aristotle's analysis usefully distinguishes the various aspects of necessity and provides a valuable structural framework within which "compulsion" as a distinct defence can be identified.

According to Aristotle's analysis, compulsion is an aspect of 'hypothetical' or 'teleological' necessity,[13] the essence of which is that it comprises both voluntary and involuntary action. Though *essentially* involuntary, involuntary actions committed under compulsion are deemed voluntary because they are preferred to their alternatives.[14] On this basis we are able to differentiate other forms of conduct, such as might result from 'absolute'[15] necessity whereby harm results solely from the operation of external forces, and does not partake of any degree of voluntary and involuntary action.

Aristotle's analysis of mixed voluntary and involuntary action provides the theoretical framework for the view developed by Bentham,[16] that it is groundless to punish acts committed under compulsion. Bentham emphasises certain conduct as "necessary to the production of a benefit which was of greater value than the mischief,"[17] as in the case of something done as a means of averting some immediately threatened disaster.

If Aristotle appears ambivalent in assigning compulsion to voluntary or involuntary behaviour, Austin[18] is unambiguous in asserting that compulsion is not based on lack of consciousness or voluntariness, since: "the party is exempted in some cases in which the sanction might act on his

12 *Ethics* (Thompson ed.), at 77; see also Hall, *General Principles of Criminal Law* (2nd Ed.), 1961, 419-421.

13 See Hall, *supra*. The phrase denotes what is necessary on a hypothesis, but not necessarily determined by antecedents, or what is necessary to attain an end.

14 *Ibid.*, 421; *Ethics*, 79.

15 Hall substitutes the phrase *physical causation*, which we take to be synonymous with causal necessity. This, however, is still distinct from the Common Law defence of necessity in which voluntariness, rather than inexorability is implied, but is vitiated by the balancing of evils.

16 1 *Works*, 84.

17 *Ibid.*

18 I *Jurisprudence*, (4th edn), 498.

desires, but in which the fact does not depend on his desires''. He appears to endorse Bentham's theory of the non-utility of punishment in an example assimilated to the early treason cases, which purports to show that the urge to breach a duty is promoted ''by a motive more proximate and more imperious than any sanction which the law could hold out.''[19] A sanction applied in such circumstances would, in Austin's view, constitute ''a gratuitous cruelty''. Nevertheless, he appears to predicate the effectiveness of the defence upon the party ''having taken the earliest opportunity to . . . escape.''[20]

Later jurisprudential writers ground the 'non-utility' doctrine specifically in utilitarian philosophy.[21] The argument is that since there is no sufficient basis of legal liability, no punishment should be administered.[22] Salmond, who also regards compulsion as being grounded in the doctrine of jus necessitatis appears, in spite of utilitarian theory, to qualify its operation to the extend that he regards it as not providing a complete exculpation for all offences. In Salmond's view, where the basis for excuse is simply the futility of punishment, and not the preservation of a higher value (as in the case of homicide committed under compulsion) evidence of duress will go only to mitigation of penalty rather than to the existence of liability.[23] This view appears to run counter to the opinion advanced by Hobbes that: ''If a man by the terror of present death be compelled to do a fact against the law, *he is totally excused*; because no law can oblige a man to abandon his own preservation''.

However it is submitted that Hobbes' view[24] represents an extreme position and cannot be supported by the general weight of the various views expressed. I would submit that the following general propositions may be deduced from the jurisprudential writers on the issues of compulsion:

(1) Compulsion derives from the doctrine of necessity, but is distinguishable from other forms of necessity, which emphasise the inexorability of external forces.

(2) Although it is generally futile to punish acts committed under compulsion, futility of punishment is not an exclusive ground of exculpation, but must be related to the preservation of a higher value.

(3) Compulsion as a defence does not adhere upon a principle of lack of volition, but rather upon the imperious nature of threats upon human conduct.

(4) A person under compulsion must resist the coercer or seek escape from the coercive force at the earliest possible opportunity.

B. The Common Law Commentators

Hale[25] appears to be the first of the commentators to develop a

19 *Ibid.*, 499 ''The sanction is ineffectual as operating upon the desires in vain.''
20 *Ibid.*
21 See Salmond, *Jurisprudence,* (11th edn), 420.
22 *Ibid.*, 420.
23 *Ibid.*, 421.
24 *Leviathan,* ch.27: *Eng. Works,* III, 288.
25 I, *Pleas of the Crown,* Chap. VIII, 49.

systematic treatment of what he describes as "the civil incapacities by compulsion and fear" which he suggests may give a "privilege, exemption or mitigation" for capital offences. His exposition of the defence differentiates between acts committed in times of war and times of peace.

Accordingly, supplying rebels in times of war, if done pro timore mortis, though treasonable, may be excused provided the actor makes every effort to resist the rebels. Edwards[26] has suggested that in drawing this distinction Hale may have been influenced by the memory of the civil war and the statute of 1494 which provided that faithful service to the King de facto would not create liability to the penalties of treason, on the restoration of the King de jure.[27]

As to times of peace, however, Hale clearly excludes treason, murder and robbery from the purview of compulsion on the grounds first of the availability of the writ de securitate pacis and secondly, on the basis that a man "ought rather to die himself than kill an innocent."[28]

It is not clear from the context, however, to what extent the example given as founding the latter principle applies to compulsion, or whether it is directed primarily at self-defence. This, it is submitted is the natural interpretation of the context, which talks of "desperate assault"; "assailant's fury"; "actual force"—phrases which suggest the actual application of force, as opposed to the fear or threats of death which constitute compulsion.[29]

If this is so, then granted the demise of the ancient writ, the exclusion of murder from the defence may be an anachronism, there being no clear reason why the exclusion should be maintained.

Blackstone,[30] like Hale, treats compulsion as a matter of excuse. His advance upon Hale's analysis, however, is his effort to categorise compulsion under four separate heads, in which he distinguishes *duress per minas* (compulsion through threats) from *choice of evils'* whereby an actor "being obliged to choose one . . . chooses the least pernicious of the two. . . ."[31]

There appear to be two major difficulties with Blackstone's analysis.

First, there is a confusion in terminology. Blackstone appears to use the term compulsion and necessity interchangeably, and apparently following Hale, seems to confuse compulsion with self-defence. Thus in describing *duress per minas* which he defines as "threats or menaces, which induce

26 *Compulsion, Coercion and Criminal Responsibility*, 14, M.L.R., 297 at 298.

27 Hale's theoretical distinction between times of war and times of peace was subsequently approved in *McGrowther's Case* 18 St. Tr. 391; Fost. 13, where the Court, while rejecting compulsion on the facts, indicated the validity of the defence to treason in times of public rebellion.

28 *Op.cit.*, 51.

29 *Loc.cit.*

30 *Commentaries,* (9th edn), 417.

31 *Ibid.* Blackstone's remaining categories are *civil subjection* and *marital coercion.* Unlike Stephen, however, Blackstone appears to admit compulsion as a general defence stating that it is "highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion." *Commentaries on the Laws of England* (1862), Vol. 4, p. 23.

fear of death or other bodily harm", he concludes, "Therefore, if a man be violently assaulted, and has no other means of escaping death, he is permitted to kill the assailant, for here the law of nature and self-defence its primary canon, make him his own protector."[32]

Secondly, the above categorisation, which distinguished *duress per minas* from *choice of evils,* it is submitted, creates an artificial distinction in which two constituent elements within the defence of compulsion are elevated to separate *types* of the defence.

This critique of Blackstone agrees with Stephen's analysis[33] for whom "choice of evils" is an essential concept upon which the defence as a whole adheres. His rationalisation for the defence is the fact that a man under compulsion is subjected to motives "at once terrible and exceedingly powerful" in the circumstances of which "the majority of people would act in the same way." This suggests, perhaps, that it is the unitary nature of the human reaction to fear which provides the primary rationale for the defence.

However, Stephen appears unwilling, finally, to allow the logical extension of the doctrine beyond the limits narrowly prescribed by Hale, concluding that the defence is an excuse only in cases "in which the compulsion is applied by a body of rebels or rioters and in which the offender takes a subordinate part."[34]

Ironically like Hale whom he criticised, Stephen's unwillingness to allow the extension of the defence, is based more on public policy grounds than logical reflection, his express concern being the danger to society if criminals could confer impunity on their agents by threatening them with death or violence.[35] He concludes that compulsion by threats should never be an excuse for a crime, although he concedes that it may operate in mitigation of punishment in most cases.

With Stephen, therefore, the defence can hardly be said to have been given a firm grounding. The result is that by the beginning of the twentieth century the law on compulsion was still confused and vague, with no proper separation from the allied defence of necessity having been effected, and without a conclusive description of the actual boundaries of the defence having been attempted.[36]

If it is possible to draw any general conclusions from the common-law commentators on compulsion, I would offer the following tentative propositions:

(1) Murder and treason are excluded from the general operation of the defence.

32 *Op.cit., supra,* note 19 at 417.

33 II, *History of the Criminal Law,* 102.

34 *Ibid.,* 106.

35 *Ibid.* Yet the fallacy inherent in Stephen's concern is as palpable as the weakness in Hale's reasoning concerning *de securitate pacis*, which he unhesitatingly exposes. Threats *per se* are no more capable of conferring impunity than approbation is capable of creating legal liability. Threats may, nevertheless, produce desperation which on Stephen's reasoning, may be excusable.

36 It is to be observed that by 1883 the case law on compulsion was, in Stephen's words, 'meagre and unsatisfactory', a situation which has pertained until relatively recently.

(2) Where the defence operates the exculpatory base is excuse, rather than justification.
(3) Choice of evils is a constitutive aspect of the defence not a separate type of the defence.
(4) Where evidence of threats is insufficient to raise the defence, it may go to mitigation of penalty.

C. Development of Early Case Law

Hale[37] cites cases of 1320, 1347, and 1419 as authority for his view that commands of an invading enemy or rebels backed by threats of force may constitute compulsion and render otherwise treasonable acts, not criminal.

However, in *Axtell's Case*[38] the defendant, one of the regicides who commanded the guards at the trial of Charles I, justified that all he did was as a soldier under command of his superior officer "whom he must obey or die." This was held to be no defence, on the basis that since the superior was a traitor, obedience to commands issuing from such a one is also traitorous.

Oldcastle's Case (1419)[39] had earlier established in respect of accomplices in rebellion that where their acts were done pro timore mortis, they were acquitted. Nevertheless it seems that accepting a command in a rebel army may have raised a presumption of willingness and vitiated the defence.[40]

It was clearly established by *McGrowther's* case[41] that fear of destruction of property was no excuse for continuing or joining with rebels. The case firmly establishes the rule that "the only force that excuses is a force upon the person and present fear of death", and endorses the principle that it is for the accused to show that he quitted the affair as soon as he could.

In the same year as *McGrowther's* case was the case of *Sir John Wedderburn*[42] who had been appointed collector of excise by the son of the pretender, and actually collected revenue for the use of the rebel army. Although the case supports the view that submitting to rebels is excusable when resistance would be dangerous, East[43] observes that if what is lacking is *will* rather than *power* to deny assistance, the pretence of fear or compulsion will not excuse the conduct.

In *Stratton's Case* (1779)[44] the term "natural necessity" was used apparently to designate fear of great physical evil; treason committed under such constraint, provided it amounted to force such that "human

37 I, P.C. 43-52.
38 (1660) Kel. 13; 84 E.R. 1060.
39 I, East P.C. 70; I, Hale P.C. 50.
40 *Ibid.*, 71.
41 Fost 13; 168 E.R. 8; 18 St. Tr. 891. Cited in I, East P.C. 71. East observes that the issue of force is a question of fact to be determined by the jury "on the whole evidence".
42 I, East P.C. 72.
43 I, East P.C. 72.
44 21 St. Tr. 1222.

nature could not be expected to resist'', was excusable. The case appears to allow the extension of compulsion to forms of treason other than those committed in times of war.[45]

The earliest non-treason case in which compulsion was admitted as a defence is *Crutchley* (1831).[46] The charge involved a prosecution for malicious damage arising out of the threshing machine riots. The defendant had been compelled to join a mob and to give a blow at each machine that was broken. He gave evidence that he ran away at the earliest opportunity, and compulsion was admitted as a defence. Unfortunately, the report of the case does not include the direction to the jury so it is impossible to know the nature of the compulsion.

By 1831, although compulsion had been judicially extended to include malicious damage, neither judicial prouncement nor legislative enactment had purported to make compulsion a defence of general application. Neither can the general pronouncements of the law-writers, confused as they appear to be with the concept of self-defence, be treated as a general endorsement of the defence.

Furthermore, although some Commonwealth codes have clearly extended compulsion as a general defence, following the Draft Criminal Code of the English Criminal Law Commission of 1879,[47] the draft code cannot be said to have accurately represented the law on compulsion as it then stood. Neither its general extension as a defence, nor the listed (excluded) offences, represent a logical development from the case law. The fact that the draft code was not finally adopted in England suggests at least that the English legislature was unconvinced by the apparently arbitrary formulations of the Commissioners.

45 *Ibid.*, 1223.
46 5 C. & P. 133; 172 E.R. 909.
47 (1879) C. 2nd series 2346. See *D.P.P. v. Lynch* [1975] A.C. 653, 685 per Lord Wilberforce.

II.
COMPULSION AND MURDER

A. Introduction

The relationship of the defence of compulsion to murder is a vexed one which has still to be fully resolved. The traditional approach of the common law has been to unequivocally exclude murder in all its forms from the operation of the defence. No early authority suggests that an alternative approach to this dualism was desirable or even possible, without invoking the controversy concerning necessity and self-defence.[48] In general terms there appears to have been almost universal endorsement of Lord Hale's celebrated dictum that a man "ought rather to die himself, than kill an innocent."[49]

Furthermore, until comparatively recently this was the position generally reflected in the case-law and it could be argued that the modern debate between the 'legal pragmatists' and the 'ethicists' on the question of murder, is an historical anomaly. In any event the complex nature of this debate, raising as it does important questions of public policy, suggests that it is incapable of resolution on the grounds of logical judicial analysis.[50] It is submitted, therefore, that compulsion and murder must eventually become the subject of special legislative intervention.

The purpose in this section will be to review the cases dealing with compulsion and murder critically, an analysis which, I submit, will support an argument in favour of limiting the general extension of the defence in the case of murder.

B. The Cases

The case of *R v. Tyler,*[51] concerning an indictment for the murder of a policeman, is the first reported decision to address the question of compulsion and murder as a substantive issue. Although the decision has been criticised[52] and appears on the face of it to run counter to the earlier decisions on compulsion, the principle laid down in the dictum of Lord Denman, cannot on the facts of the case be treated as being of universal application. Lord Denman said, "No man from fear of consequences to

48 For a full discussion on this related problem see *R. v. Dudley and Stephens,* 14 Q.B.D. 273; [1881-5]. All E.R. Rep 617 per Lord Coleridge, C.J.

49 I, Hale P.C. 51.

50 This, in effect, is the nett conclusion to be drawn from the recent decisions in *D.P.P. v. Lynch* [1975] A.C. 653 (H.L.) and *Abbott v. R.* [1977] A.C. 755 (P.C.).

51 (1838) 8 C. & P. 616; 173 E.R. 643.

52 See, e.g. *D.P.P. v. Lynch* [1975] A.C. 653 at 672 (per Lord Morris), also *R. v. Brown* [1968] S.A.S.R. 469 at 494 per Bray, C.J.

himself, has a right to make himself a party to committing mischief on mankind.''[53] It would appear that the reason why the defence of compulsion did not avail the accused was because of his failure to take the opportunity of escape. Furthermore, it is doubtful whether the threats were sufficient to rouse the mortal fear constitutive on the defence of compulsion and there is no evidence from the judgment that the danger to the defendants was real and imminent.

The case did not go so far as saying that there is no fear which could ever excuse an act which is illegal although it did emphasise that mere ''apprehension of personal danger'' would not excuse an illegal act.

Between 1894 and 1904 a number of American cases[54] had to decide whether compulsion was a defence to murder and in each instance it was held that compulsion was not a defence. But as Hall[55] observes, ''Even opinions which emphatically avow the rule excepting murder stress some other element in the situation to support the conviction.''[56] He concludes that although judges support the exception, they also indicate that the doctrine of compulsion is not actually relevant.

Curiously *Tyler's Case* makes no reference to the Common law authorities on murder, and it is not until 1934 in an obiter judgment, that the matter is discussed judicially and with regard to the authorities. Sitting in the Irish Court of Criminal Appeal in *A. G. v. Whelan*[57] Murnaghan J. stated:

> ''the commission of murder is a crime so heinous, that murder should not be committed even for the price of life, and in such a case the strongest duress would be no justification.''

This decision is important in the development of the defence generally. The following points should be noted.

First, it appears to be the first attempt in a compulsion case to articulate the 'ethical' argument, and prescribe natural limits to the operation of the defence.

Secondly, in extending the defence to a charge of receiving stolen goods on the ground of ''general principle''[58] the case unwittingly allows the extension of the defence to the general range of offences.

Lord Goddard, C. J. appears to endorse the common law limitation with regard to murder in two post-war cases[59] dealing respectively with an offence in the nature of treason and buggery. However, it is submitted that

53 *R. v. Tyler* (1838) 8 C. & P. 616; 173 E.R. 643 at 654.

54 See *Paris v. State,* 35 Tex. Cr. R.82, 31 S.W.855 (1895); *Jones v. State,* 207 Ga.379, 62 S.E. 3d 187 (1950); *Rainey v. Commonwealth* 101 Ky, 258, 40 S.W. (1897); *Arp v. State* 97 Ala 5, 12 s.301 (1895); *State v. Nargashian,* 26 R.I. 299, 301, 58A.953 (1904). See also *R. v. Farduto* (1912) 10 D.L.R. 699 55, *General Principles of Criminal Law,* (2nd edn), New York, 1960.

55 *Op Cit, supra,* note 12.

56 *Ibid.,* 440.

57 [1934] Ir. R. 518.

58 *Ibid.,* 526. It is submitted that Murnaghan J. was forced to adopt this construct in order to circumvent the silence of the case-law.

59 *R. v. Steane* (1947) 1 K.B. 997; *R. v. Bourne* [1952] Cr. App R.125.

the general comments of Lord Goddard pertaining to the defence of compulsion are misconceived and in other respects quite inaccurate. For example it cannot be assumed, as he supposes, that Hale and Stephen are authority for the proposition that "while compulsion does not apply to treason, murder and some other felonies, *it does apply to misdemeanours*".[60] Furthermore his supposition that compulsion is a mens rea defence,[61] the onus of proving which is on the accused,[62] cannot now be supported in criminal law theory.

The difficulties inherent in Lord Goddard's exposition of compulsion were discussed by Sholl J. in the Victoria case of *R. v. Smyth,*[63] a prosecution for, inter alia, malicious wounding. There the court reused to accept the generality of Lord Goddard's dictum in *Steane's* case, which it suggested was not intended to be a "complete or wholly inaccurate description of . . . duress."[64] Rather it chose to follow *Whelan's* case, endorsing the exclusion of murder, while allowing the defence for malicious wounding.

The issue of murder was again considered in the South Australian case of *R. v. Brown and Morley.*[65] Here the accused had been charged as a principal in the second degree to murder in that he had been party to an arrangement to kill a woman for the purpose of theft. In considering whether in the circumstances the accused could rely on compulsion, the court was divided. The majority held that the defence was not open and was impressed on the basis of earlier authority that "it has never been expressly decided that duress can excuse murder."[66]

In reaching its decision the majority considered two earlier Privy Council cases[67] both of which were concerned with murder and in which compulsion was in issue. However, the reports on *Sephakela* are brief to the point of being quite unsatisfactory and contain little authoritative commentary on compulsion. This fact is implicitly acknowledged by the majority in *Brown's* case, who conclude that the case could not be regarded as authority for the proposition that "duress was a defence to a charge of ritual murder."[68]

In considering *Rossides* case, the majority in *Brown* found similarly that the decision, on facts which did not even produce evidence of compulsion could not be treated as authority for admitting murder to the defence.

In dissent, Bray C. J. differed from the majority on the legal effect of

60 *R. v. Steane* [1947] 1 K.B. 997 at 1005.
61 See *R. v. Bourne* [1952] Cr. App. R.125 at 129.
62 See *R. v. Steane, op.cit., supra,* note 60 at 1005.
63 [1963] V.R. 737.
64 *Ibid.*, 738.
65 [1968] S.A.S.R. 467.
66 *Ibid.*, 467.
67 *Sephakela v. R* [1954] Crim. L.R. 723; The Times, 14 July 1954; *Rossides v. R,* The Times, 3 October 1957.
68 The judgment criticised the interpretation of Glanville Williams (see his *Criminal Law—The General Part,* (1961) at 753) arguing that he had drawn the false assumption from the reports of *Sephakela* that the Privy Council assumed duress to be a defence. This criticism is well founded.

compulsion as a defence to a charge of minor participation in murder. In a closely reasoned argument containing a full review of the authorities, Bray, C. J. sought to establish *Sephakela* and *Rossides* as support for the proposition that "some types of duress may excuse some types of complicity in murder." However, it is submitted that his use of the earlier authorities in support of the proposition cited is at best an argument from silence, and in respect of the two Privy Council decisions does not adhere on the basis of any verbal endorsement by the members of the Board.

I would argue, therefore, that the majority of *Brown's Case* are on firmer ground, and that although the differentiation of Bray C. J. between minor complicity in murder and perpetration of the act sounds plausible, it was at the time unsupportable on existing authority. Furthermore, this analysis would appear to derive some support from *D. P. P. v. Lynch*[69] where Lord Edmund-Davies criticises Bray C. J.'s reliance on *Sephakela* as "misplaced".[70]

Two later decisions cited by the majority in *Lynch* as supporting the proposition that compulsion may constitute a complete defence to a change of murder, must be regarded as being of dubious value; one being a decision in Roman-Dutch law,[71] the other an unreported trial in Northern Ireland.[72]

However, of more interest is the decision of the English Court of Appeal in *R v. Kray.*[73] The court, hearing charges that implicated the defendant in a double murder, held that compulsion was a defence to a person charged with being an accessory before the fact of murder. But since the judgment of Widgery C. J. contains no evaluation of the case-law, it is difficult to see how he was able to conclude that "a viable defence existed",[74] thereby effectively extending the defence to complicity in murder.

Accordingly, the statement of Lord Morris that "there was in that case (*R. v. Kray*) no occasion to have sustained legal argument or analysis"[75] seems all the more surprising in view of the singular importance of the issue before the court in *Kray*. A fortiori when it is considered that *R v. Kray*[76] is the first reported English decision since *R. v. Tyler* to deal directly with compulsion and complicity in murder.

C. The Conflict in Abbott and Lynch

The decisions in *D. P. P. for Northern Ireland v. Lynch*[77] and *Abbott v.*

69 [1975] A.C. 653.
70 *Ibid.*, 715.
71 *State v. Goliath,* (1972) 3 S.A. 1.
72 *R v. Fegan,* (1974) Unrep.
73 [1969] 3 All E.R. 941; [1970] 1 Q.B. 125: 53 Cr.App. Rep 569.
74 [1969] 53 Cr. App. Rep at 578.
75 *D.P.P. v. Lynch,* [1975] A.C. at 674.
76 [1970] 1 Q.B. 125. But quaere whether *Kray* could be followed by a New Zealand Court. S.24(1) Crimes Act limits the operation of compulsion to "persons who commit an offence." See *Paquette v. R.* [1977] 70 D.L.R. (3rd) 129 at 132. Also *R. v. Teichelmann* [1981] 2 N.Z.L.R. 64, 66, C.A.
77 [1975] A.C. 653.

R.[78] represent a watershed in the development of the defence of compulsion. Both cases deal directly with the issue of murder.

In *Lynch* the House of Lords by a majority held that the defence of compulsion was open to someone otherwise guilty of murder when it was not his physical act which caused death. In that case E, a ruthless gunman ordered D to drive both him and his associates to a place where a policeman was subsequently shot and killed. Although at the trial Lynch was convicted on a direction that compulsion could not be a defence to murder, the House of Lords, recognising that some threats might be so grave as to cause even an honest and reasonable man to participate in murder, ordered a new trial.

However, at the appeal the question as to whether compulsion could ever be a defence when the defendant's physical act caused death (i.e. a principal in the first degree) was left open. Lord Morris, one of the majority, held compulsion could not be a defence to a principal in the first degree while Lords Simon and Kilbrandon, in the minority, held the defence was not available on a charge of murder at all. They completely eschewed the distinction between principals in the second degree and others.

It should be noted that drawing a distinction between principals in the first and second degree is a novel development, unknown in the common law, which has traditionally held that those who commit and those who help others to commit crimes are equally liable to the same penalty.[79]

Both Lords Wilberforce and Edmund-Davies, however, appear to have held that the defence was theoretically possible for someone otherwise guilty of murder in the first degree. Indeed Lord Edmund-Davies suggested that such a position is quite logical, since an accessory in some cases might morally be more guilty than a principal in the first degree in others.[80]

In *Abbott v. R*[81] an appeal from Trinidad and Tobago arising out of the murder of a woman in a Trinidad commune in 1972, the complex difficulties manifest in *Lynch* were even further exacerbated, by what has been described as judicial compromise and "side-stepping".[82] The reason for this strongly worded rebuke was the decision of the majority in *Abbott,* that on a charge of murder, notwithstanding the availability of compulsion as a defence to a defendant charged as a principal in the second degree, the defence was not available to a principal in the first degree. The decision has been criticised as illustrating "the difficulty, if not the absurdity of allowing substantial consequences to flow from such a tenuous distinction as that between a principal in the first and a principal in the second

78 [1977] A.C. 755.

79 It seems that common law drew distinctions of substance between accessories and principals which did not apply between principals in the first and second degree (see Hale 1 P.C. 437; Hawkins 2 P.C. 312). It was recognised that the offence of the abettor (principal in the second degree) might be greater in law than that of the principal in the first degree.

80 See *D.P.P. v. Lynch* [1975] A.C. 653 at 709.

81 [1977] A.C. 755.

82 See *Abbott* [1977] A.C. at 774 per Lords Wilberforce and Edmund-Davies dissenting.

degree."[83]

According to the facts of *Abbott,* the defendant had held the victim while she was stabbed and helped others to bury her while she was still alive. The stabbing and the burying were both causes of death. The Board was unanimous that the defendant was a principal in the first degree, although it was not clear whether this was on the ground of his involvement in the stabbing or in the burying or in both.

It has been observed that whereas the classical writers are clear authority for the fact that "all, that are present, aiding and assisting, are equally principal with him that gave the stroke, whereof the party died,"[84] *Abbott* appears to decide that where compulsion is in issue, it is no longer the stroke of all.[85]

However, it is arguable whether this anomalous situation is the result of perversity on the part of the majority in *Abbott,* who, it has been suggested were "less favourably disposed to the defence than the majority in *Lynch.*"[86] Certainly the present complexities might have been avoided had they acted decisively by simply refusing to follow *Lynch.*[87]

On the other hand it may also be argued that it was an inaccurate exposition of the authorities on the part of the majority in *Lynch,* making possible the drawing of false and unsupportable distinctions, which really gave rise to the anomaly.

It has been suggested that in fact, both decisions are "text-book examples of judges enunciating as 'the Common Law' their own conclusions on the perplexing and controversial ethical problem."[88]

At all events, the situation that now pertains has properly been described as "a remarkable state of the law."[89] It is submitted that in the future judges ought to tread warily before determining to extend compulsion to all degrees of murder. As Lord Simon cautioned in *Lynch v. D. P. P.,*[90] such a radical extension of the common law principle, being "closely bound up with matters of policy relating to public safety, . . . is far more fitly weighed in Parliament on the advice of the executive than developed in the courts of law". It may seem regrettable in retrospect that it was precisely this course which the majority in *Lynch's* case declined to adopt.

Cases decided since *Abbott* are not notable for any tendency to further extend the defence of compulsion, and suggest no willingness to go beyond the notional boundaries implied in *Lynch* and firmly established in *Abbott* itself. Thus in *R. v. McConnell,*[91] a case involving a particularly

83 See "Commentary on Abbott" in [1976] Criminal L.R. 564 and for a full discussion of the implications of Abbott see Dennis, *Duress Murder and Criminal Responsibility* 96 L.Q.R. (April 1980) 208 at 209.

84 See, e.g. Hale, I P.C. 437.

85 Smith & Hogan, *Criminal Law* (4th edn), 201.

86 See Williams, *Textbook of Criminal Law, London,* 1978, at 581.

87 For a full discussion of the reasons why the majority in *Abbott* found it necessary to distinguish *Lynch,* see Dennis, *op.cit., supra,* at 211-219.

88 Glazebrook, *Committing Murder Under Duress-Again,* (1976), 35 C.L.J. 206.

89 See Dennis, *op.cit., supra,* note 83 at 208.

90 [1975] A.C. 653.

91 [1977] 1 N.S.W.L.R. 714.

brutal murder, the New South Wales Court of Criminal Appeal held that compulsion was not available to a principal in the first degree to murder. In so ruling, the Court overruled the suggestion to the contrary made by Glass J. in *R v. McCafferty,*[92] apparently in reliance on the dissenting judgment of Bray C. J. in *R. v. Brown & Morley.*[93]

In *R. v. Paquette*[94] a judgment of the Canadian Supreme Court on appeal from the Ontario Court of Appeal, the court, following *Lynch,* held that compulsion was available to a person charged as an accessory to murder. However, the more important concern in that case was the conclusion that compulsion, as well as constituting a general defence to criminal charges, also operated to negative the common intention to carry out an unlawful purpose.

In arriving at this conclusion the Supreme Court distinguished its earlier decision in *Dunbar v. R.*[95] On that occasion the court had held that on a charge of murder, compulsion did not negative the intention of the accused to carry out an unlawful purpose, but instead related to his motive for joining in the common purpose.

Martland J, giving the judgment of the court in *Paquette,* simply stated that he did not agree with the view expressed in *Dunbar's Case* and rested his disinclination to be bound by that decision on the following proposition.

> "A person whose actions have been dictated by fear of death or of grievous bodily injury cannot be said to have formed a genuine common intention to carry out an unlawful purpose with the person who has threatened him with those consequences if he fails to co-operate."[96]

Although *Paquette* does not purport to move beyond *Lynch* in defining the scope of compulsion, it does, like *Lynch* have important implications for the development of the defence in New Zealand. It is noted that s.17 of the Criminal Code of Canada is almost identical to our s.24. The actual differences in the two provisions have no legal consequences, except that the Canadian provision does not contain as many exclusions as its New Zealand counterpart.[97]

As a result of *Paquette* an important qualification to the exclusion of murder from the operation of the defence is admitted, by allowing the defence to a person "sought to be made a party to the offence by virtue of s.21(2)," the equivalent of s.66(2) of the Crimes Act 1961.

Whereas previously, the defence was available only to a person who has himself committed an offence,[98] the effect of *Paquette* would seem to be to extend the defence to accessories. To this extent it would appear to

92 [1974] 1 N.S.W.L.R. 89.
93 [1968] S.A.S.R. 469.
94 (1977) 70 D.L.R. (3rd) 129.
95 (1936) 67 C.C.C. 20, (1936), 4 D.L.R. 737. For a full discussion of these cases, see Dennis, *op.cit., supra,* note 83.
96 (1977) 70 D.L.R. (3rd) 129 at 135.
97 Exclusions not contained in the Canadian provision include sabotage, piratical acts, wounding with intent, kidnapping.
98 See s.24(1) Crimes Act 1971; s.17 Criminal Code of Canada.

endorse the decision in *R. v. Kray*[99] even though *Kray* was not discussed in the judgment.

With regard to compulsion and murder generally, it remains only to be said that while the defence has been judicially extended to embrace most forms of complicity in murder, the question of perpetrators in the first degree remains unresolved. They should, it is submitted, become the special subject of legislative investigation.

99 [1970] 1 Q.B. 125.

III.
SOME CONCEPTUAL DIFFICULTIES

A. The Exculpatory Basis — Justification or Excuse?

The terms 'justification' and 'excuse' tend to be extremely elusive as concepts implying exculpation from criminal liability and may be positively misleading when applied as notions of substantive penal theory.[100] This is nowhere better demonstrated than in the attempt to differentiate the two concepts in their relation to the defence of compulsion.

Traditionally, 'justification' was taken as applying to cases where the aim of the law was not frustrated, where what is done is regarded as something "which the law does not condemn, or even welcomes."[101] On the other hand 'excuse' tended to apply to cases where it was not thought proper to punish.[102] In such cases, even though what is done may be deplored, the psychological state of the actor at the time was such that public condemnation and punishment are deemed inappropriate.[103]

Curiously, however, at early common law compulsion, although generally deemed an excusing condition, was often treated for practical purposes as though it were a matter of justification. Indeed, it would seem that prior to the middle ages unless an act was 'justifiable' in the strict sense, there was no defence at all. Williams[104] observes that matters of excuse generally were not necessarily defences although they may have been the occasion for a royal pardon.

However, by the end of the middle ages, excuses were recognised by the courts, which fact may have led to Stephen's observation that the distinction between excuse and justification "involves no legal consequences" in the common law.[105] Certainly the distinction between the two concepts is often difficult to grasp and in relation to compulsion often notoriously difficult to maintain.[106] For example, if compulsion were a form of justification, the usual mode of analysis would suggest that the coercer should not be liable, yet he is. Conversely, if compulsion is assigned to excuse, emphasising the involuntariness of the deed not its rectitude, there would be no reason to reject compulsion in cases of homicide as

100 Hall, *op.cit., supra,* note 12 at 233.
101 H. L. A. Hart, *Punishment and Responsibility,* Oxford, 1968 at 13.
102 Williams, *Textbook of Criminal Law,* London, 1978 at 39.
103 Hart, *op.cit., supra,* note 2 at 14.
104 *Op.cit., supra,* note 3 at 39.
105 3 Stephen H.C.L. IJ (1883); Cited by Hall, *op.cit., supra,* note 12 at 232. This view appears to be shared by Williams, see *supra,* note 3, at 39.
106 Hart argues that compulsion may, depending on the particular fact situation be viewed variously as justification, excuse or mitigation (see *supra*, note 2, at 16).

perpetrator. Yet this differentiation is still made.

Nevertheless, the general weight of recent judicial authority endorses the 'excusatory' theory of compulsion. Implicit is the recognition that exculpation cannot simply be founded upon the rational choice of the lesser of two evils, but must also take account of the circumstances in which an accused person came to commit a crime.[107]

The Law Commission sees compulsion as being primarily 'excusatory' in character and consistently with this view, would extend the defence to all offences.[108]

However, the Law Commission's reasoning in this regard has been criticised on two counts. First, in defining compulsion as an excuse insofar as it is "a concession to human infirmity in situations of extreme peril,"[109] the Commission has effectively abandoned the justificatory model without discussing more generally the role of excuses in the legal system.[110] Secondly, the Commission is criticised for its description of compulsion as a concession to human weakness. The argument is that 'infirmity' is a pejorative term, whereas, as a matter of logic, retributive and deterrent theories of punishment require that the defence be recognised and given effect without any depreciation. Punishment cannot be justified where compulsion exists.[111]

However, for the purposes of New Zealand criminal law, compulsion is defined by statute as a matter of excuse.[112] Nevertheless, the anomaly remains, in terms of a fully consistent theory of criminal responsibility, that certain offences continue to be statute barred from the operation of the defence.

B. Defence or Mitigation

In the attempt to define the place of compulsion within criminal law theory, it has periodically been suggested that since an accused person has done a wrong act, and is to some extent morally guilty, compulsion should go to mitigation only. On this analysis the effect of compulsion on moral guilt can be reflected in sentencing, courts already possessing wide discretionary powers in dealing with offenders.[113] This view had been vigorously argued by Stephen who stated that "it is at the moment when temptation to crime is strongest that the law should speak most clearly and

107 See Dennis, *Duress, Murder and Criminal Responsibility* (1980) 96 L.Q.R. 208 at 232.

108 Criminal Law: Report on Defences of General Application (Law Com. No. 83) Pt II, para. 2.46(2).

109 *Ibid.*, para. 2.42.

110 See A.T.M. Smith, 1978 Crim. L.R. 123.

111 Dennis, *op.cit., supra,* note 8 at 235.

112 See s.24(1) Crimes Act 1961. The phrase "protected from criminal responsibility" is used in contra-distinction to "justified". S.2 defines "justified" as meaning not guilty of an offence and not liable to any civil proceedings. "Protected from criminal Responsibility" however, means not liable to any proceedings except a civil proceeding. c.f. s.44 Crimes Act 1908 (NZ) and s.17 Criminal Code (Canada) both of which employ 'excuse'. Also *R v. Teichelman* [1981] N.Z.L.R. 64, 66 ("The legislation provides a narrow release from criminal responsibility where its strict requirements are met").

113 See Glazebrook, *op.cit., supra,* note 88 at 208.

emphatically to the contrary."[114] It has recently been advocated in the House of Lords in the dissenting judgments in *Lynch's* case[115] but cannot be said to command a wide support.

Furthermore, in most common law jurisdictions, the theory of compulsion as an excuse for the *commission* of a criminal act, has been fully recognised and extended judicially and legislatively to cover an increasingly wide range of criminal offences.

However, this "historical trend"[116] notwithstanding the question of murder as we have seen, continues to pose a grave difficulty in the development of the defence. Yet if, as a true construction of the defence would seem to imply, the issue were exclusively "the involuntariness of the deed, and not its rectitude,"[117] it would be indefensible to reject compulsion in cases of homicide. *Abbott,* however, decides otherwise.

In addition is the difficulty posed by the anomalous exclusions currently maintained in the criminal codes of a number of Commonwealth jurisdictions.[118] If, as has already been suggested, the primary rationale for compulsion, is not the rectitude of conduct, but the imperiousness of the human motive of fear, it is difficult to see how the generality of offences excluded from the defence, can be justified.

In fact it is arguable that the exclusions are themselves the result of an historical anomaly, insofar as they are based, as we have indicated, on the draft code of the English Criminal Law Commissioners of 1879. Applying a test of heinousness, the Commissioners recommended the exclusion of certain offences from the operation of compulsion, justifying these exclusions on the basis that they expressed the "existing law" or "what ought to be the law".[119] The inaccuracy of this surmise has, I hope, been demonstrated in the review of the case law, and one is bound to conclude that the exclusions are in fact based upon a misconstruction of the law. They certainly cannot be defended in the light of the manner in which the defence has developed subsequently.

But how far can the defence reasonably be extended? Any attempt to admit further offences to the purview of compulsion must necessarily be guided by the limitations imposed by the decisions in *Lynch* and *Abbott,* which purport to exclude murder as a perpetrator and some (largely undefined) forms of treason.

If, however, these are accepted as constituting the outer parameter of the defence, then it is feasible to suggest the application of an objective standard whereby each fact situation can be examined and the availability of the defence determined. On this basis, one could submit that an appopriate standard is that advocated by Salmond;[120] namely, that

114 II *History of the Criminal Law,* 107.
115 [1975] A.C., per Lord Simon at p. 687 and Lord Kilbrandon at p. 703.
116 Dennis, *op.cit., supra,* note 8 at 238.
117 Fletcher, *The Individualization of Excusing Conditions* (1974) S.Calif. L.R. 1269 at 1289.
118 See the Criminal Codes of Canada (s.17); Tasmania (s.20(1); Queensland (art.31(4)).
119 *Lynch v. D.P.P.* [1975] A.C. at 684 per Lord Wilberforce.
120 See *supra,* note 21 at 420-421.

compulsion will excuse where the act committed preserves a higher value. Such a test, it is submitted, would also embrace accomplices and accessories to murder since it can be argued that the preservation of the life of an accomplice is still a higher value than the inchoate possibility of the death of the putative victim, at the time the threats are applied. The situation vis a vis the perpetrator, however, is qualitatively different since the value destroyed and the value preserved are equal. Here, the futility of punishment argument of itself cannot provide a complete exculpation, since there is no inevitability attaching to human conduct under compulsion.[121]

Upon such a sliding scale, the nature of threats, the degree and quality of fear, the age and immaturity of the actor, could all be properly evaluated so that all conduct (except in extreme cases) if not actually excusable, could be mitigated, in a manner which is not strictly possible under existing law. Reason requires that the immorality of the compulsion should also be considered together with other values implicit in any fact situation so that the defence is not automatically excluded simply by virtue of an arbitrary determination of what is heinous.

C. Relevance of Mens Rea

The question whether an offence committed under compulsion lacks mens rea, in the sense that mens rea is somehow vitiated as an essential component of the offence, has been the regular subject of academic and judicial discussion. On one view, it is argued that as a result of his will being overborne by threats of violence, the actor never forms the criminal intent necessary to constitute the offence, and is completely exculpated.[122]

An alternative view, however, argues that

> "True duress is not inconsistent with act and will as a matter of legal definition, the maxim being *coactus volui.* Fear of violence does not differ in kind from fear of economic ills, fear of displeasing others or any other determinant of choice; it would be inconvenient to regard a particular type of motive as negativing will."[123]

The former view would argue that the drive to self-preservation is irresistible, conduct in such situations being inexorably fixed for all human beings.[124] But it is arguable that such a deterministic view of human conduct is untenable and does not conform with the principles of responsibility enshrined in the criminal law.

121 Hall, *op.cit., supra,* note 12 at 447. Hall disputes the dogma that man will always choose to live even though they must kill unoffending persons to preserve themselves. He argues that sound policy should reflect a consensus at the extremes, but not exculpating the most serious crimes committed under compulsion, but exculpating in cases of imminent death or the commission of a minor harm. This would appear to coincide with the view of Hart, *op.cit., supra,* note 2, at 16.

122 See, e.g. *R. v. Bourne* (1952) 36 Cr.App.R. 125 at 128 per Lord Goddard, C.J.

123 Williams, *Criminal Law—The General Part* (2nd end, 1961) 751.

124 See Hall, *op.cit., supra,* note 12 at 446.

By analogy, with the law relating to manslaughter, for example, a killing in a passionate fight, or upon discovery of adultery, the proscribed behaviour is never regarded as mechanical and uniform. A fortiori in the case of compulsion.

On the latter view, however, compulsion can be understood as an additional element superimposed on the other ingredients (i.e. mens rea and actus reus) which standing alone would have constituted the offence. The will is not destroyed but merely deflected.[125] A true construction of the paradigm coactus volui, a concept having its origin in the law of contract, suggests that by analogy with contract law compulsion should not negative criminal responsibility, but go to mitigation of penalty only.[126]

Yet as a matter of practice, it seems courts generally deem it appropriate to acquit rather than allow a conviction to be entered, on the basis that 'not every morally exculpatory circumstance has a necessary bearing on either actus reus or mens rea'.[127]

It is noted, however, that exculpation in cases of compulsion, cannot, strictly speaking, be defended on the basis of the principles of criminal responsibility. At best coactus volui is a construct imported into criminal law to mitigate the harshness of the Canons of Criminal law theory. It is not, however, without its own difficulties.[128]

D. Relationships between Compulsion and Necessity

The relationship between the defence of compulsion and necessity has traditionally been a confused one. I have attempted to show that compulsion is a derivative defence, being, in essence "a particular application of the doctrine of necessity."[129]

In conceptual terms compulsion and necessity are almost identical, the only difference being the source of the fear which promotes the prescribed conduct. As stated by Lord Simon:[130]

> ". . . in compulsion the force constraining the choice is a human threat, whereas in necessity it can be any circumstance constituting a threat to life (or perhaps limb). . . . In both circumstances, there is actus reus and mens rea . . . power of choice between two alternatives. . . . In both the consequence of the act is intended."

Yet in spite of the obvious similarities between the two defences, the

125 *D.P.P. v. Lynch* [1975] A.C. at 695 per Lord Simon.

126 *Ibid.*, 694. cf Hart, *op.cit., supra,* note 2 who appears to endorse this construction, while allowing for the possibility of complete exculpation where the crime committed is petty in relation to the seriousness of the harm threatened.

127 Turpin, 1972 C.L.J. 205, cited in *Lynch* [1975] A.C. at 710 per Lord Edmund-Davies.

128 For example *coactus volui* is unhelpful where the mental element consists of a defined mental attitude to certain consequences described by reference to a defendant's 'intent' or 'purpose'. In such cases compulsion may be inconsistent with the required mental attitude. See further *R v. Paquette* (1977) 70 D.L.R. (3rd) 129 and discussion in Dennis, *op.cit., supra,* note 83 at 223-228.

129 Per Lord Simon in *Lynch v. D.P.P.* [1975] A.C. at 692.

130 *Ibid.*, 692. Also *Tifaga v. Department of Labour* [1980] 2 N.Z.L.R. 235, 243 per Richardson J (the choice between two evils).

status of necessity as a general defence in English law remains doubtful.[131] One of the reasons for this dubiety is the fact that the defence of necessity exists in the law under a number of disguises,[132] and has often been confused with self-defence. In failing to differentiate conceptually between the two defences, courts have confusedly identified them as 'convertible' terms,[133] investing 'necessity' with a narrow and restrictive meaning. This has lead, as Williams suggests,[134] to a general down-grading of the concept of necessity to the extent that rather than promoting an acquittal it may act as a reason for convicting![135]

However, there may well be cases where an obviously lesser value is sacrificed to preserve life-situations that are not directly analogous to compulsion, but which may provide powerful illustrations of the validity of the doctrine of necessity. Hall cites as an example the Biblical story of Jonah, where goods cast overboard in the face of an overwhelming tempest constituted a privileged act.[136] Yet in terms of the development of the common law, the judgment of Lord Denning in *Buckoke v. Greater London Council*[137] appears to signal the death knell of necessity as a substantive defence, if as it seems, even a situation of extreme peril is not regarded as excusing a breach of technical traffic rules.

In order apparently to resolve the current confusion concerning the status of necessity as a defence, the Law Commission has recommended that it be abolished altogether while proposing to enact the defence of 'duress'.[138]

Such an approach, I submit, is inconsistent and illogical if, as suggested, compulsion is a "species of the genus necessity".[139] One should endorse the dictum of Lord Kilbrandon that "the difference between . . . compulsion, which comes from coercion by the act of man, and . . . necessity, which comes from coercion by the forces of nature, is narrow and unreal."[140] Any distinction based on the source of the threat must surely be irrelevant since it can have no bearing on the actor's moral culpability.[141]

For these reasons I would argue, as a matter of law reform, that urgent consideration be given to enacting a defence of necessity in New Zealand. This, it is submitted, would be instrumental in resolving a major lacuna in our substantive criminal law.[142] I would note in conclusion that the learned

131 See Law Commission Report, *op.cit., supra,* note 9 at para 4.1.
132 See Williams, *Defences of General Application* [1978] Crim. L.R. at 131.
133 See *R v. Dudley & Stephens* [1881-5] All E.R. Rep 61 at 65G.
134 *Op.cit., supra,* note 33 at 131.
135 *Ibid.*, see *Johnson v. Phillips* [1976] 1 W.L.R. 65.
136 Hall, *op.cit., supra,* note 12 at 425. Cf. *Tifaga v. Department of Labour* [1980] 2 N.Z.L.R. 235, C.A., recognising a narrower defence of impossibility.
137 [1971] Ch. 655.
138 See Williams, *Defences of General Application, op.cit., supra,* note 33 at 132.
139 See Dennis, *op.cit., supra,* note 83 at 228.
140 [1975] A.C. 653 at 701.
141 See Smith, *Defences of General Application, op.cit., supra,* note 11 at 123.
142 Williams advocates for similar reasons the creation of a new defence of 'compulsion of circumstances'. See *op.cit., supra,* note 3 at 563. Richardson J. expresses doubts as to a general defence in *Tifaga* (*supra,* n.37), at 243-245.

authors of Archbold are of the opinion that the defence of necessity is arguably available under similar circumstances as is compulsion, on the basis of Lords Simon's and Kilbrandon's inability, as expressed by *Lynch*, to see any 'logical' distinction between the two defences.

IV.
THE ELEMENTS OF COMPULSION

A. Nature of the Harm Threatened

Compulsion as defined by s.24 is primarily concerned with moral force, threats as distinguished from direct physical compulsion.[143] Furthermore, it would seem that it is only "threats of immediate death or grievous bodily harm from a person . . . present when the offence is committed" that will be admitted as evidence of compulsion under the New Zealand provision. In using the phrase "threats of immediate death or grievous bodily harm", s.24 is following Article 23 of the Draft Code of 1879, and is substantially the same as the phrase used by Stephen in his Digest.[144] However, it is noted that whereas s.24 includes only threats the earlier formulations of the rule include the actual application of force. Actual force would also appear to be constitutive in the draft of the Model Penal Code.[145]

It is not clear why actual force has been excluded from the statutory definition of compulsion in New Zealand. One might venture to suggest, however, that the early confusion in the relationship of compulsion and self-defence may have contributed to this omission—it being assumed that the application of direct force in an unprovoked situation, was adequately dealt with in the substantive rules relating to self-defence. If this is the case, then it is clearly a mistaken view, the basis of moral culpability in compulsion and self-defence being clearly different in each case.

There would, therefore, appear to be no good reason why actual force should be excluded from the definition of compulsion and I would advocate its inclusion in any future reformulation of the statutory provisions.

The attempt in *R v. Steane*[146] to extend compulsion to embrace "fear of violence or imprisonment" is redolent of the confusion created by the introduction of the civil law concept of *duress per minas* and does not represent the present law.[147]

The Law Commission, supporting the formulation requiring threats of death or grievous bodily harm alone, advocates the adoption of the term "serious personal injury" in place of "grievous bodily harm".[148] This change, it argues, would embrace the possibility of threats of mental injury, where the threats are to destroy a person's sanity or damage his

143 Adams, *Criminal Law and Practice in New Zealand* at para. 476.
144 9th edn Art.10 p. 8.
145 Am.Law Inst. (proposed Official Draft) s.2.09.
146 [1947] 1 K.B. 997 at 1005.
147 See Edwards, *Compulsion, Coercion and Criminal Responsibility* 14 M.L.R. 297 at 302.
148 Report on Defences of General Application, para. 2.25.

mind, by administering drugs.

Unfortunately s.24 is silent on the question of whether compulsion should include criminal acts done by an accused under threats directed against his wife, children or other kin. However, recent authorities suggest that evidence of threats directed against another person or persons, may be admitted as evidence of compulsion.[149]

Generally, however, the threats must be "so great as to overbear the ordinary powers of human resistance",[150] or "of such gravity that they might well have caused a reasonable man placed in the same situation to act as he did."[151] In practice, the courts tend to apply a 'variable' test which seeks to relate the gravity of the threat to the gravity of the offence. But the New Zealand provision, in common with other Commonwealth codes, lacks any objective criteria and chooses instead to simply (and it is submitted arbitrarily) exclude certain offences from the operations of the defence.

Conversely, the model Penal Code does not purport to exclude any offences from compulsion, but stipulates an objective test requiring that the threats be such "that a person of reasonable firmness in the defendant's situation would have been unable to resist."[152] The advantage of such an objective test is that it would overcome the arbitrariness of the present statutory exclusions by focusing on the actor himself and the actual effect upon him of imperious threats, rather than simply focusing on the prescribed conduct.

B. Immediacy of the Harm Threatened

Before the decision in *R. v. Hudson & Taylor,*[153] it was thought that the defence was not available if the defendant could seek police protection, irrespective of whether or not the police could give adequate protection, and irrespective of the immediacy of the threatened harm. Earlier, in *R. v. Gill,*[154] doubt was expressed as to whether the defence was open where, after the threats were made, the accused had had an opportunity to raise an alarm on being allowed to enter his employers yard.

Now, therefore, following the decision in *Hudson* the Common Law would appear to be that even threats of future harm, provided they could have been effective and operative on the defendant at the time of committing the offence, will be admitted as evidence of compulsion. But it is doubtful whether this decision could be followed by a New Zealand court on this point, in view of the wording of s.24(1) which requires that threats be "of immediate death or grievous bodily harm".

149 See *R. v. Hurley & Murray* [1968] V.R. 526, where threats of harm were directed at the defendant's wife who was held hostage. See also *R. v. Taonis* [1974] Crim. L.R. 322 where compulsion was allowed on a charge of importing drugs, on evidence of beatings and threats of torture directed against the accused and his de facto wife.

150 Smith & Hogan, *Criminal Law* (3rd edn, 1973), 164.

151 Archbold, *Criminal Pleading Evidence and Practice* (39th edn 1976) para. 1449e.

152 See *supra,* note 46, at s.2.09.

153 [1971] 2 Q.B. 202.

154 [1963] 2 All E.R. 688, 670.

"It is not the threat but the death or grievous bodily harm that must be immediate."[155]

That matter appears to have been conclusively decided, in terms of New Zealand law, by the Court of Appeal, in *R. v. Joyce.*[156] There the accused, who had been charged with assault with intent to rob under s.237 of the Crimes Act gave evidence that at the time the robbery was attempted he had been compelled by threats to keep watch in the street, but was not physically proximate to the perpetrator of the offence. Citing as authority the Canadian decision of *R. v. Carker (no. 2),*[157] the court held that the evidence did not disclose threats of 'immediate' death or grievous bodily harm from a person present when the appellant did the acts which constituted him a party to the offence, and held that compulsion had properly been withdrawn from the jury by the trial judge.

The decision in *Hudson*[158] has been criticised on the grounds that the defendants had the opportunity and obligation to seek police protection, and should never have been indulged with the defence.[159] In any event Williams[160] suggests that the proposal of the Law Commission[161] to refuse the defence if the defendant had the opportunity to seek official protection, if implemented, would overrule *Hudson* and restore the status quo.

C. Criminal Conspiracies

Some of the ways in which statutory law seeks to limit the operation of compulsion have already been mentioned. A further restriction is the provision in s.24 that the defence will be available only if an accused person "is not a party to any association or conspiracy whereby he is subject to compulsion."

What the phrase "whereby he is subject to compulsion" actually means, does not appear to have been judicially considered in New Zealand. It was, however, fleetingly adverted to by the Court of Appeal in *R. v. Joyce*[162] where the court merely expressed doubt as to whether the legislature intended to widen the exception by substituting 'whereby' for the "more precise language of the earlier section."[163]

At least it would seem to be reasonably settled that before the defence can be denied an accused would have to be shown to have acted with some degree of culpability in placing himself in a situation in which he was exposed to compulsion. However, what degree of culpability is required to

155 Adams, *op.cit.*, para. 484/1.
156 [1968] N.Z.L.R. 1070. The *Joyce* approach is confirmed by the Court of Appeal in *R v. Teichelman* [1968] 2 N.Z.L.R. 64, 66, limiting the defence to continuing "standover situations", and not extending to vague threats of danger.
157 [1968] 2 C.R.N.S. 16.
158 [1971] 2 Q.B. 202.
159 See Williams, *op.cit., supra,* note 3 at p. 584-5.
160 *Ibid.*, 585.
161 Report on Defences of General Application, *op.cit.*, para. 2.46(4)(b).
162 [1968] N.Z.L.R. 1070, 1077.
163 *Ibid.* S.44 of the 1908 had used the phrase "the being a party to which rendered him subject to compulsion", which would seem to be a less ambiguous expression.

vitiate the defence, is not clear from the wording of the section. Adams suggests, citing *Joyce's* case, that the association "must be such that the accused should have forseen the possibility that it might subject him to compulsion"[164] implying that proof of recklessness is required.

Although s.24 does not require that the group be unlawful, the fault required to prevent compulsion being raised, would probably be established if an accused were shown to "have voluntarily joined a criminal organisation knowing of its purpose," and were later subject to compulsion.[165]

This principle was approved by *R. v. Hurley & Murray*[166] where the accused had been charged with being an accessory after the fact to the felony of escape.

The question of the effect of illegal association has recently been considered by the Court of Criminal Appeal for Northern Ireland in *R. v. Fitzpatrick.*[167] In that case compulsion was held to be no defence to a charge of robbery which was committed as a result of threats by the I.R.A. because D had voluntarily joined that organisation. In reaching its decision, the court was influenced by the common law codes. In rejecting the defence that D had attempted to leave and was prevented from doing so by threats, the Court stated:

> ". . . the better organised the conspiracy and the more brutal in its internal discipline, the surer would be the defence of duress for its members. It can hardly be supposed that the common law tolerates such an absurdity."[168]

Fitzpatrick is now regarded as an authoritative statement of the law on illegal association, and its reasoning likely to be followed in England.[169] It is submitted, however, that the decision goes somewhat further than s.24 presently allows, by requiring evidence that a person has *voluntarily* exposed himself to illegal compulsion by *voluntarily* joining an organisation *which to his knowledge* might compel him to commit criminal acts. An amendment to the present statutory provision incorporating these elements, would be instrumental in eliminating the ambiguities adverted to, and would bring our code into line with development in the common law.

D. Superior Orders

There appears to be no recent authority on this question, which at common law appears to be a separate defence analogous to compulsion. As a general principle, however it is no defence for D to show that the act was

164 *Op.cit.*, para. 484/2.
165 Williams, *Criminal Law (The General Part)*, 2nd ed. (1961) cited by O'Regan in *Duress and Criminal Conspiracies* 1971 Crim. L.R. 35 at 36.
166 [1967] V.R. 526.
167 [1977] N.I. 20.
168 Cited by Smith & Hogan *Criminal Law* (4th edn), at 206.
169 See Archbold, *op.cit.*, at para. 1449d. The House of Lords refused leave to appeal in *Fitzpatrick.*

done by him in obedience to the orders of a superior, military or civil.[170] Adams observes[171] that the order of a private employer may sometimes be relevant to a question of mens rea on the part of a servant. However, it will not excuse the commission by the servant of an offence committed with the requisite mens rea on his part. But the fact that D was acting under orders, may negative mens rea by showing, e.g. that D acted under a mistake of fact or by claim of right.[172]

A further limited exception to the general rule may be the case of members of the armed forces. The question is whether orders are a defence where they do not negative mens rea or negligence, but give rise to a reasonable mistake of law.[173] However, the Manual of Military Law appears to put the matter at rest by stating that a serviceman has no defence to a criminal charge if he acts in response to an unlawful order.[174] This position has been criticised on the grounds *inter alia* that "the dead hand of Nuremburg lies on a British Soldier, but not on the German or Israeli".[175]

An alternative view suggests that a serviceman may have a defence if, although the order was unlawful in fact, he reasonably believed it to be lawful.[176]

But there is little English authority on this question and although it is theoretically open to the House of Lords to extend the law to provide a defence of Superior Orders, Williams suggests that "the chances of judicial reform are not good."[177]

Adams notes that in New Zealand s.47 of the Crimes Act 1961 may provide some relief in providing that any member of the New Zealand forces is justified in obeying any command of his superior officer for the suppression of a riot "unless the command is manifestly unlawful."

The issue has not been addressed in any recent New Zealand case.

170 See Stephen, *Digest* (9th edn) Art. 308, Adams, *op.cit.*, para. 486.

171 *Ibid.*

172 Smith & Hogan, *op.cit.*, 209.

173 *Ibid.*, cf Williams, *op.cit., supra,* note 3 at 408. "A soldier, sailor or airman is bound by law to obey military commands without question; but he may not find it easy to decide on the spur of the moment whether a particular command is lawful or not."

174 Manual of Military Law (1956) Part 1, 117.

175 Nichols, *Untying the Soldier by Refurbishing the Common Law* 1976 Crim. L.R. 181—an allusion to the fact that both German and Israeli law expressly recognise the defence of superior orders.

176 Smith (1900) 17 S.C.R. 561; 17 G.C.H. 561.

177 *Op.cit., supra,* note 3 at 309. But of the Model Penal Code which enacts a defence of Military Orders where an actor "does no more than execute an order of his superior . . . which he does not know to be unlawful." See Proposed Official Draft, 1962, s.2.10.

V.
PROCEDURAL ASPECTS

A. Burden of Proof

Where a defendant relies on the defence of compulsion the burden is in practice upon him to adduce sufficient evidence to raise compulsion to a "live issue". In a trial, on indictment, once compulsion becomes a "live issue" the burden is on the prosecution to negative the defence beyond reasonable doubt.[178]

In *R. v. Bone*[179] the English Court of Appeal in considering the question of burden of proof in compulsion cases stated:

> "Duress, like self defence and like drunkenness, is something which must at the first instance be raised by the defence, but at the end of the day it is always for the prosecution to prove their case, which involves negativing the defence which has been set up . . . to ensure that the jury are not confused it is not in general sufficient to give the general direction at the beginning in regard to the burden and standard of proof, but the jury should be told specifically that it is for the prosecution to negative the defence."

The court allowed an appeal against conviction on a charge of burglary on the basis that the jury had not been properly directed by the trial judge in respect of the corroboration of an accomplice's evidence.[180] The case illustrates the importance of ensuring that a jury is properly directed in respect of the nature and effect of compulsion particularly as regards the shifting burden of proof.

B. Advance Notice

The Law Commission has recommended that in trials on indictment, the defendant be required to give at least 7 days notice of his intention to rely on the defence of compulsion.[181] The reason for this restriction is given as "ensur(ing) that the defence . . . is not raised frivolously." It is now recommended, however, that advance notice be required in respect of summary proceedings on the ground that there is no rule of procedure obliging the prosecution to give a defendant prior notice of the evidence upon which the case against him is based.

This recommendation is criticised by Smith[182] who argues that such a

178 *R. v. Gill* [1963] 1 W.L.R. 841; [1963] 2 All E.R. 688, CCA.
179 [1968] 1 W.L.R. 983.
180 *Ibid.*, per Lord Parker C.J. at 985.
181 *Defences of General Application, op.cit., supra,* note 9 at para. 2.33.
182 *Op.cit., supra,* note 11, at 127.

change in criminal procedure, aimed at eliminating the element of surprise in criminal trials would require "far more consideration and justification"; if such change is required. Secondly, he observes that the new procedure could well prejudice the wider interests of an accused person by requiring him to give information to the police concerning persons "from whom he already has most to fear."[183]

Accordingly, such a change seems unnecessary, particularly if the nett result is simply to further test the courage of the accused. Merely to raise the defence would be a test of the fortitude and resolve of most defendants, eloquent testimony to which lies in the fact that the defence has so seldom been raised in New Zealand criminal law.

CONCLUSIONS AND RECOMMENDATIONS

The defence of compulsion has developed in a confused and disparate manner in English law. Although deriving conceptually from the notion of necessity, a proper differentiation between the defence of compulsion and its progenitor, necessity, has seldom been attempted in the case-law, the terms often being used interchangeably. Furthermore, failure to allow for any categorisation within the genus necessity, has resulted in a general questioning and denigration of necessity as a defence, which in turn has reflected on the acceptability of compulsion as a defence.

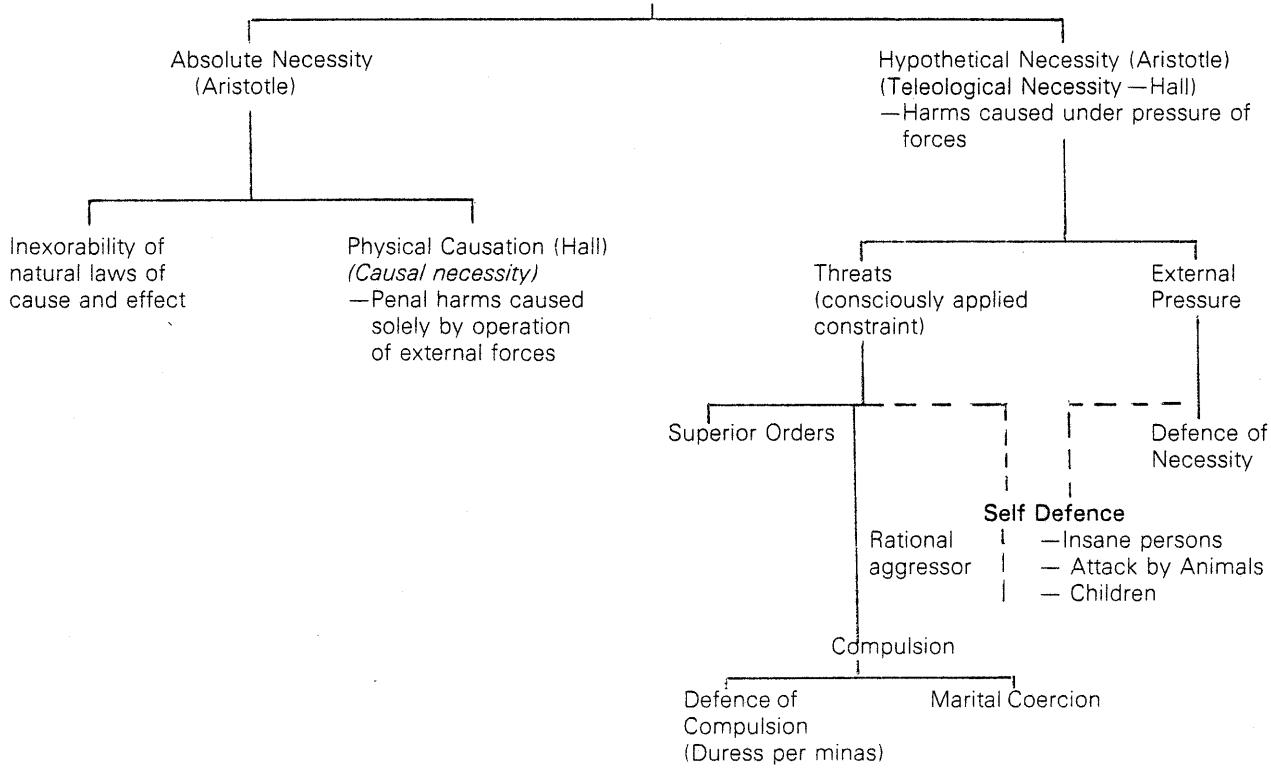
Thus, although in many Commonwealth jurisdictions the defence has been extended by statute to cover a wide range of defences, its development has been anachronistic and independent of any proper theoretical or jurisprudential analysis. This situation, it is submitted, has led directly to the anomalies which at present surround the defence in most common law jurisdictions.

I would recommend that the existing statutory provision be amended to allow for compulsion to be extended to all offences. This is consistent with the conclusion that the proper exculpatory basis of compulsion is excuse and not justification. However, a qualification to this general recommendation lies in the fact that judicial authority has traditionally excluded both murder (in all its categories) and treason from the operation of the defence. If it is now thought proper to include these within the scope of compulsion then, granted the grave matters of social policy involved, no law-making initiative should be undertaken until the matter has been thoroughly investigated by the Criminal Law Reform Committee. This, it is submitted, should involve a thorough review of the case law, particularly the controversial decisions in *Lynch v. D.P.P.* and *Abbott v. R.* which for the meantime, have arbitrarily determined the scope of the defence in English common law.

183 *Ibid.*

APPENDIX A

Notional Constraint



APPENDIX B

Alternative Draft Provision

(1) A person who commits an offence under compulsion, whether through the application of unlawful force, or by threats of immediate death or serious personal injury directed to himself or members of his immediate family, and which in all the circumstances of the case a person of reasonable fortitude could not be expected to resist, is excused from criminal liability.

(2) The defence provided by this section is unavailable, if on the occasion in question, the defendant was voluntarily and without reasonable cause, in a situation in which it was forseeable that he might be subjected to compulsion and required to commit the offence with which he is charged, or an offence of the same or similar character.