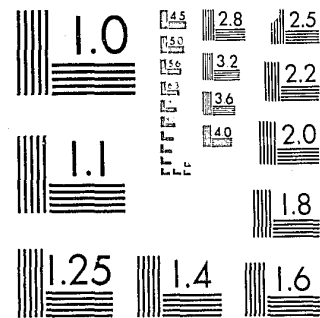


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Working Paper No. 5.

DURESS, COERCION AND NECESSITY

MELBOURNE
1978

LAW REFORM COMMISSIONER

Working Paper No. 5

NCJRS

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ACQUISITIONS

DURESS, COERCION AND NECESSITY

**MELBOURNE
1978**

Views expressed in this Working Paper are provisional only
and any recommendations or suggestions are tentative.

Comment and criticism are invited and it would be greatly
appreciated if these could be forwarded before
15th November, 1978.

Law Reform Commissioner,
155 Queen Street,
Melbourne, Vic. 3000.

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WORKING PAPER No. 5

DURESS, COERCION AND NECESSITY

SECTION 1. INTRODUCTION

1.01 By letter dated the 13th day of February 1978 the Honourable the Attorney-General acting pursuant to Section 8 (b) of the Law Reform Act 1973 referred to the Law Reform Commissioner the following reference —

“To investigate and report on the present scope of the law relating to the defences in criminal prosecutions of duress, coercion and necessity and on the desirability of reform in this area of the law.”

1.02 This Working Paper raises for consideration, comment and criticism a number of possible changes in the substantive law of Duress and Necessity. For reasons which will be briefly stated in Section 3 Coercion has received scant consideration. In a sentence it has already been adequately discussed in Report No. 3 — Criminal Liability of Married Persons.

SECTION 2. DURESS

Definitions

2.01 The terms “duress”, “coercion” and “necessity” when used in the criminal law are of uncertain meaning and have on occasions been used synonymously and interchangeably. Whilst they bear an underlying similarity in the sense that they encompass an excuse or justification arising from compulsion to perform a criminal act or omission brought about by some unbearable pressure, the distinction is usually made between compulsion applied by human agency which is called “duress” and that brought about by natural forces or inanimate circumstances which is called “necessity”. “Coercion” is distinguished from “duress” in that in law it refers to compulsion which arises in the context of the marriage relationship. (Necessity also has a much wider significance in that it goes beyond compulsion and embraces the idea of weighing competing harms or evils and choosing conduct resulting in the lesser despite its unlawful nature.) Because of the differences which exist it will be convenient and desirable to treat the defences of duress and necessity separately. Generally what will be said about duress applies equally to coercion although as will appear some separate consideration has to be given to the latter. This Working Paper will accordingly begin with a discussion of duress.

THE EXISTING LAW — A CONFUSING POSITION

Introductory

2.02 Sir Matthew Hale in his famous “History of the Pleas of the Crown” written in 1678 after drawing a distinction between the law applicable in times of peace and war wrote as to the former:

“Now as to times and places of peace.

If a man be menaced with death, unless he will commit an act of treason, murder or robbery, the fear of death does 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*.

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."¹

2.03 Sir William Blackstone, one of the greatest of writers on English law, writing in the latter part of the 18th century, had this to say:

"Another species of compulsion or necessity is what our law calls duress *per minas*; or threats and menaces which induce a fear of death or other bodily harm and which take away for that reason the guilt of many crimes and misdemeanours; at least before the human tribunal . . . This however seems only, or at least principally, to hold as to positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offences, so declared by the law of God, wherein human magistrates are only the executioners of divine punishment, and therefore, though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent. But in such a case he is permitted to kill the assailant."²

2.04 Most judicial statements of the law of duress pronounced over the past few decades seem still to incorporate one or other of the foregoing excerpts with approval. Nevertheless there is reason to doubt whether the law today is still as it was so expressed to be in the 17th and 18th centuries.

Victoria and Great Britain

2.05 In Victoria Mr. Justice Sholl adopted as an applicable expression of the law in a case³ where a man was charged with being a party to a serious wounding, the following passage from an earlier Irish case:

"Threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as a justification for acts which would otherwise be criminal. The application of the general rule must however be subject to certain limitations. 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 not be any justification. We have not to determine what class of crime other than murder should be placed in the same category . . . Where the excuse of duress is applicable it must further be already shown that the overpowering of the will was operative at the time the crime was actually committed, and, if there were reasonable opportunity for the will to re-assert itself, no justification can be found in antecedent threats."⁴

2.06 In the Irish case the accused who was charged with receiving stolen property was held entitled to rely on the defence of duress because he was threatened by a man with a revolver.

2.07 In 1966 Mr. Justice Barry directed a jury in the terms of the first two sentences quoted above and went on to expand their meaning in the following passage:

"if a man is compelled to do criminal acts because he is under the influence of a genuine fear aroused by the threat of imminent death or grave physical violence to himself or to his wife or to a woman with whom he is living as if she were his wife, he is entitled to claim that his actions were the result of duress and that accordingly his actions did not amount to a crime. In such a case the fear that governs his actions must be fear of the kind that will affect the will of a man of ordinary courage and fortitude, and it must be operative at the time when the criminal actions were done and there must have been no opportunity between the time of the threats and the time when the actions were done for him to free himself from the influence of the threats."⁵

The case was one in which two men were convicted of being accessories after the fact to the escape from gaol of two criminals. They had rendered considerable support and assistance to these men whilst they were at liberty. Each claimed that he was compelled by threats made both to his life and to that of other people including a woman who was the *de facto* wife of one appellant. Both men appealed to the Full Court of Victoria against their conviction. In the course of dismissing the appeal the then Chief Justice Sir Henry Winneke and Mr. Justice Pape expressed the view that "The whole body of law relating to duress is in a very vague and unsatisfactory state".⁶ However they expressly refrained from stating any views as to the correctness or otherwise of the law as laid down by the trial judge in the passage to which reference has been made and they went on to decide the case on grounds which need not be further analysed for the purposes of this Working Paper.

2.08 Mr. Justice Smith in the course of a dissenting judgment in the same case, set out a number of propositions with regard to the defence of duress as follows:—

"Where the accused has been required to do the act charged against him (i) under a threat that death or grievous bodily harm will be inflicted unlawfully upon a human being if the accused fails to do the act and (ii) the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did and (iii) the threat was present and continuing, imminent and impending, and (iv) the accused reasonably apprehended that the threat would be carried out and (v) he was induced thereby to commit the crime charged and (vi) that crime was not murder, nor any other crime so heinous as to be excepted from the doctrine and (vii) the accused did not, by fault on his part when free from the duress, expose himself to its application and (viii) he had no means, with safety to himself, of preventing the execution of the threat, then the accused, in such circumstances at least, has a defence of duress."⁷

His Honour was careful to point out that as to the law of duress there was much uncertainty and consequently he confined himself to stating such positive propositions as were necessary to cover the problems of the case before him and that he refrained as far as possible from setting limits to the doctrine of duress.

2.09 In September 1973 the Full Court in dealing with a defence that an appellant's possession of a large quantity of cannabis had been brought about by threats of the importer of the cannabis to kill him and destroy his family if he failed to assist the threatener by temporarily taking it into possession, had this to say:

"Leaving on one side the crime of murder or any other crime so heinous as possibly to be excepted, as to which we say nothing, we think the authorities cited supported the view that, in general, duress affords justification or excuse for acts which would otherwise be criminal."⁸

2.10 Duress was next considered at the end of 1974 when the Full Court after argument in October unanimously held⁹ in December that duress could not afford a defence to one who was charged with murder as an aider and abettor (sometimes spoken of as a principal in the second degree). In this case the appellant Harding had been convicted at his trial along with two others of the murder of a man named Shannon. Shannon was shot dead in the lounge of a South Melbourne hotel by another accused Taylor at the instigation, so it was said, of another man Longley (not charged) who had a grievance against Shannon. The allegation against Harding was that he had identified the deceased man to his co-accused (who did not know him) for the purpose of the shooting and that the carrying out of the incident had otherwise been assisted by Harding. Harding admitted assisting Taylor but claimed to be in mortal fear of Longley, the alleged instigator of the murder, and consequently that he should be excused on the ground of duress. The court repeated also what had been said in earlier cases both in Victoria and elsewhere in countries applying the common law that such a defence can never be allowed to one charged as an actual participant in the act of murder, that is, a principal in the first degree.

2.11 Harding appealed against the decision of the Full Court of Victoria to the High Court of Australia which heard his appeal in March of 1975 but unfortunately, at any rate for the elucidation of the law, Harding died on the 14th September 1975 before judgment was delivered.

2.12 In the meantime in November 1974 lengthy argument had been proceeding in the House of Lords in a case on appeal from Northern Ireland.¹⁰ The appellant Lynch drove a motor car containing a group of the Irish Republican Army on an expedition in which they shot and killed a police officer. On his trial for aiding and abetting the murder there was evidence that he was not a member of the I.R.A. and that he acted unwillingly and under the orders of the leader of the group, being convinced that if he disobeyed he would himself be shot. Neither the trial judge nor the Court of Criminal Appeal in Northern Ireland allowed the availability of the defence of duress in these circumstances. In March 1975 it was held in the House of Lords by a majority of three to two that on a charge of murder the defence of duress was open to a person accused as a principal in the second degree (aider and abettor) and a new trial was ordered.

2.13 The uncertainty and vagueness surrounding the concept of duress is perhaps best expressed in the words of Lord Simon of Glaisdale when he said in the course of his judgment in this case:—

"I take it for present purposes to denote such [well-grounded] fear, produced by threats of death or grievous bodily harm [or unjustified imprisonment] if a certain act is not done, as overbears the actor's wish not to perform the act, and is effective, at the time of the act, in constraining him to perform it. I am quite uncertain whether the words which I have put in square brackets should be included in any such definition. It is arguable that the test should be purely subjective and that it is contrary to principle to require the fear to be a reasonable one. Moreover, I have assumed on the basis of *R. v. Hudson* (1971 2 Q.B. 202) that threat of future injury may suffice, although Stephen's Digest of Criminal Law Art. 10 is to the contrary. Then the law leaves it also quite uncertain whether the fear induced by threats must be of death or grievous bodily harm, or whether threatened loss of liberty suffices; cases of duress in the laws of contract suggest that duress may extend to fear of unjustified imprisonment; but the criminal law returns no clear answer. It also leaves entirely unanswered whether to constitute a general criminal defence the threat must be of harm to the person required to perform the act, or extends to the immediate family of the actor (and how immediate?) or to any person."¹¹

2.14 In October 1975 Evans was tried on a charge of murder in the Supreme Court of Victoria before Mr. Justice Lush. In this case the evidence showed that the deceased man had been stabbed by a man named Gardiner, in some degree helped by Evans who claimed that he seized hold of the deceased because of a threat by Gardiner that he would "get" Evans if he did not grab the victim. The judge felt that in the circumstances then existing he should accept the law as laid down in Harding's case and that he should not apply Lynch's case in Victoria so as to allow a defence of duress to be advanced on the part of an accused person alleged to have been a participant in the final and fatal assault.¹²

2.15 A stage further had been reached with the advice given by a majority of Her Majesty's Privy Council¹³ in July 1976 that on a charge of murder the defence of duress was not available to a principal in the first degree who did the actual killing and that the trial judge was right in withdrawing the defence from the jury. The facts upon which this advice was given disclosed a particularly brutal murder in Trinidad. The appellant Abbott held the victim whilst others stabbed her and then along with those others buried her while she was still alive. His actions he claimed were forced upon him by a powerful character named Malik who wanted the deceased girl killed and who dictated to the appellant the part that he was to play and threatened that if he did anything to endanger the safety of other men involved or of Malik or of his children, the appellant and his mother would die on the very morning of the intended murder. Again in this case there was a three to two majority with two of the Law Lords who had formed part of the majority in Lynch's case registering a powerful dissent to the advice given by the majority and asserting for reasons which will be dealt with more fully later¹⁴ that even in such a case as this duress could provide a defence.

2.16 At this point some explanation is needed concerning the relevance of the decisions of the House of Lords and of the Judicial Committee of the Privy Council to our situation in Victoria. The House of Lords in this context means those judges of the United Kingdom who by their eminence in the law have been appointed as Lords of Appeal in Ordinary and constitute under the Lord Chancellor the judicial arm of the House of Lords. This is the ultimate court of appeal in the United Kingdom. The Judicial Committee of the Privy Council consists of some or all of the Judicial Members of the House of Lords who have been appointed as Privy Councillors, joined from time to time by eminent judges from Commonwealth countries who have been so appointed. From those Commonwealth countries in which appeal to the Privy Council still lies, it is the ultimate Court of Appeal.

2.17 The decisions of these bodies are relevant in this way. With two minor exceptions which do not merit discussion, there is no law of the Victorian Parliament on the subject of duress as a defence to a criminal charge. Consequently the common law (if there is any applicable) is the law which governs. To ascertain the common law applicable we must look to the decisions of judges. When one asks what decisions of what judges, the answer is not easy and is apt to be confusing. The authority of judges to declare the law ranges through a hierarchy of judicial bodies. At the base are single judges of superior courts (in Victoria the Supreme Court) and at the apex the ultimate court of appeal. Before Federation what a Victorian Supreme Court judge declared to be the law was subject to appeal to the Full Court of Victoria and thence to the Judicial Committee of the Privy Council (for convenience referred to as the Privy Council). Since Federation the High Court of Australia, in addition to being in effect the supreme tribunal for the interpretation of the Commonwealth Constitution, has also been a court of general appellate jurisdiction from the Supreme Courts of the States. In non-constitutional matters originally appeal lay from the High Court to the Privy Council. So that body was in such matters the ultimate court of appeal and thus the final authoritative oracle of the common law for Victoria.

2.18 However a dramatic change has occurred with the abolition of appeals to the Privy Council from the High Court in mid-1975 (Privy Council (Appeals from the High Court) Act 1975) — a change presaged by earlier expressions of policy in the latter court that whilst paying the highest respect to their decisions it would not necessarily hold itself bound by any previous decision of either the House of Lords or the Privy Council. The dramatic nature of the change has been highlighted by a very recent appeal from the Court of Criminal Appeal in New South Wales to the High Court.¹⁵ The New South Wales Court purported to follow a decision of the Privy Council in relation to the defence of self-defence in preference to an earlier contrary decision of the High Court. The High Court in delivering judgment preferred its own earlier statement of the law to that of the Privy Council and allowed the appeal.

2.19 The position is now unclear and has been said by more than one judge of the High Court to be anomalous. An appeal is still open from the Full Court of Victoria to the Privy Council in which case the decision of that body is final. So also can appeal be taken from the Full Court to the High Court with that Court then having the final pronouncement of the law of this State.

2.20 No case on duress has been decided by the High Court and there are conflicting views expressed by the House of Lords and the Privy Council as to the extent of this defence. The courts were differently constituted and it would be unwise, perhaps indeed impossible to predict what view the House of Lords would take when a defence of duress to a charge of murder against a participant in the actual murder comes before it. Whether Abbott's case expresses the law of duress for Victoria it is impossible to say and could in some measure depend upon an accident of selection, i.e. the selection of an appellate court by some person convicted in the future.

2.21 The confusion as to how far the law of duress extends will now, it is hoped, be more apparent. In England, Scotland and Northern Ireland the decision of the House of Lords in Lynch's case is of course the final expression of the law as far as it goes. The decision of the Privy Council in Abbott's case is not necessarily the law in England and will not be until some judge so pronounces it.

2.22 The foregoing situation alone might seem to call for some reform in this area of the law, and at least for an understandable provision as to the definition and ambit of the defence of duress.

Other Common Law Jurisdictions in Australia

2.23 In the other common law jurisdictions of Australia duress has also been considered in recent times. In South Australia in 1967 Brown and Morley were jointly charged with the murder of a woman.¹⁶ It was proved that Morley stabbed and killed her and it was alleged that Brown was a principal in the second degree and had been a party in an arrangement with Morley whereby the woman should be murdered for the purpose of stealing any money that she might have. Brown pleaded that whatever he may have done in relation to the murder was done under the compulsion of threats by Morley. These were threats to kill his (Brown's) wife and his parents if he did not assist Morley by coughing to cover the latter's approach to the deceased victim. A majority of the Full Court of South Australia held that duress could not excuse a person who performs an act which he intends to be in furtherance of a proposed murder and Brown's act was such an act. Accordingly his sentence of death was upheld. On the question of duress the Chief Justice dissented and in a powerfully reasoned judgment concluded that in cases of murder except where duress is pleaded as a defence by one who actually kills or attempts to kill the victim, duress can be left to be considered by the jury as a defence. He regarded the trend of the later cases and general reasoning as preventing the acceptance of the simple proposition that no type of duress can ever afford a defence to any type of complicity in murder. He did not entirely rule out the availability of such a defence even where a person had actually killed or attempted to kill the victim. The reasoning of the Chief Justice was constantly referred to with approval in the cases of Lynch and Abbott to which reference has been earlier made.

2.24 The New South Wales Court of Appeal in 1972 held¹⁷ that a trial judge was wrong in not allowing a man accused of being an accessory after the fact to murder to put forward a defence of duress. This also was a particularly brutal case of murder and the murderer was said by the appellant to have forced him by threats of death to dispose of the body of the victim. For four

days after the murder the appellant was beset with constant threats which culminated in the murderer putting the body of the deceased victim in the boot of the appellant's car.

2.25 In 1974 Mr. Justice Glass conducting a trial¹⁸ in New South Wales in which there were six defendants arraigned on multiple charges of murder or associated charges and in which five sought to raise a defence of duress by the first, found that there was evidence capable of supporting a finding that whatever these five accused did in relation to the death of two of the victims was induced by a fear that the first accused would kill them if they did not do what he told them. He expressed his view of the law to be that duress producing a minor participation in a murder will operate as a complete defence. It was for the jury to determine whether any act proved is major or minor, provided it was not an act which involved the handling of the rifle with which the fatal shot was fired or other similar act. He also held it to be the law and so directed the jury that duress producing a major participation in a murder should, like provocation and excessive retaliation in self defence be treated as a qualified defence which will reduce murder to manslaughter. This last statement of the law did not find favour with the judges who decided Harding's case¹⁹ in Victoria in 1975.

2.26 In the light of these cases and of the fact that no case has come before either the High Court or the Full Court of Victoria since the powerful pronouncements by the highest courts in the home and fountain of the common law it still seems justifiable to say, particularly with regard to the crime of murder, that the law as to duress is in a "very vague and unsatisfactory state". However it seems a reasonable assumption that duress consisting of the threat of death or the infliction of or the threat to inflict serious personal harm can provide a defence to and so relieve from criminal responsibility for most crimes and misdemeanours in Victoria including some forms of treason, the infliction of grievous bodily harm and possibly attempts to murder. It is clear in such cases that where there is evidence of duress the onus is on the prosecution to negative its operation beyond reasonable doubt. It does not seem possible to assert with any confidence what the law is in relation to duress in the case of murder where a person is charged either as a principal in the first or second degree, or indeed as an accessory after the fact.

Duress Dealt With by Criminal Codes in Australia

2.27 Three of the Australian States (Queensland, Western Australia and Tasmania) have Criminal Codes, in each of which the defence of duress is provided. In Queensland and Western Australia²⁰ the law is expressed in identical terms and states that a person is not criminally responsible for an act or omission if he does or omits to do the act in order to save himself from immediate death or grievous bodily harm threatened to be inflicted upon him by some person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying of the threats into execution. But this protection does not extend to an act or omission which would constitute the crime of treason or wilful murder or murder, or certain crimes relating to piracy of a ship or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element, nor to a person who has by entering into an unlawful association or conspiracy rendered himself liable to have such threats made to him.

2.28 The Tasmanian Code²¹ 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 by a person subject to such threats and who believes that such threats will be executed and who is not a party to any association or conspiracy, the being a party to which rendered him subject to compulsion of any offence other than treason, murder, piracy, offences deemed to be piracy, attempting to murder, rape, forcible abduction, robbery with violence, causing grievous bodily harm and arson. Further a married woman is expressed to be in the same position as regards compulsion by her husband as if she were unmarried.

2.29 The New Zealand Crimes Act²² provides a defence of duress expressed in much the same way as in the Tasmanian Criminal Code.

The United States

2.30 In the United States of America the only text book on criminal law available²³ shows that the common law as recorded in that country does not recognise any compulsion, even the threat of instant death, as sufficient to excuse the intentional killing of an innocent person, and compulsion is not a defence to a prosecution for an assault with intent to murder. However the text writer regards it as clear that compulsion if sufficiently extreme, will excuse one not otherwise at fault for almost any harm not involving the intentional taking or attempting to take the life of an innocent person. And he points out that it is held to be an excuse in prosecutions for reckless driving, malicious mischief, larceny, embezzlement, receiving stolen goods, and also for such grave felonies as burglary, robbery and arson.²⁴ The sort of compulsion which will excuse has been said to be "present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or great bodily harm if the act is not done". There seems to be a tendency to hold that the threat of less than death or great bodily harm may be recognised as an excuse in some prosecutions, and it has been held in a case in which the defendant was charged with a relatively minor offence that the jury should be instructed that he had a defence if he had been compelled to commit the act under "such violence or threats as are calculated to operate on a person of ordinary firmness and inspire a just fear of great injury to person, reputation or property".²⁵

2.31 However a number of the States have legislation dealing with the defence of duress in a criminal case and of these, six States make no exception in terms of the crime involved by the availability of the defence.²⁶ The Penal Code of Texas, for example, states that a person forced by threats of actual violence to do an act is not liable to punishment therefor. Such threats however must be

(1) loss of life or personal injury;

(2) such as are calculated to intimidate a person of ordinary firmness.

The act must be done when the person threatening is actually present. The violence must be such actual force as restrains the person from escaping or ill-treatment of such a nature as to render him incapable of resistance.²⁷ Hawaii recognises duress if the actor is compelled by force which he cannot resist, but its statute states that no one shall "justify himself against a charge of his doing an injury to another by showing the threat or imminent danger

of an equal or less injury to himself"²⁸ Wisconsin provides that "coercion" is a defence to all claims except murder but in such a case if threats sufficient to establish the duress in other cases have been employed against the actor, murder is reduced to manslaughter.²⁹

Trends towards Reforms

1. Model Penal Code

2.32 The prestigious American Law Institute which was founded in 1923 as a permanent organisation devoted to clarification and improvement of the law in 1952 began the planning and drafting of a Model Penal Code. The word "penal" is somewhat misleading in that in America by "Penal Code" is meant a combined criminal code and a code for the organisation of correctional services. Intensive work was carried on by a body of "reporters" which included lawyers, and other experts including a psychiatrist, and a sociologist, and by an Advisory Committee which included some eminent Federal and State judges, district attorneys, forensic scientists, sociologists and academic lawyers. The Committee had as a consultant Dr. Glanville Williams, one of the most eminent writers in the field of criminal law in England, and at one time co-opted Dr. Norval Morris, well-known in Australia and now Dean of the Chicago Law School. The final draft of the Code was arrived at in 1962. It contains a section (2.09) dealing with duress, in Article 2 — General Principles of Liability — which reads as follows:—

"Duress as a Defense

- (1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.
- (2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.
- (3) It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under this Section. (The presumption that a woman, acting in the presence of her husband, is coerced is abolished.)
- (4) When the conduct of the actor would otherwise be justifiable under Section 3.02, this Section does not preclude such defense."

2.33 Section 3.02 referred to in sub-section (4) is a section embodying the defense of necessity which will be dealt with subsequently. The framers of the Model Code took the view that threats to property or even reputation cannot exercise sufficient power over men of "reasonable firmness" to warrant inclusion of such threats in the document. They regarded it as obvious that even homicide may sometimes be the product of coercion that is thoroughly irresistible and that for example danger to a loved one may have greater impact on a man of reasonable firmness than a danger to himself and they considered also that long and wasting pressure may well break down resistance more effectively than a threat of immediate destruction.

2.34 Section 2.09 as will be noticed, leans in favour of an objective view. The drafting was based on the principle well expressed by a legal writer as follows:—

"Obligations of conduct fixed by a fair appraisal of the minimum requirements for the maintenance and fostering of community life, will, by hypothesis, be obligations which normal members of the community will be able to comply with, given the necessary awareness of the circumstances of fact calling for compliance."³⁰

The commentary drafted in explanation of the Model Code states that:—

"law is ineffective in the deepest sense, indeed that it is hypocritical if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such case is bound to be an ineffective threat; what is, however, more significant is that it is divorced from any moral base and is unjust. Where it would be both 'personally and socially debilitating' to accept the actor's cowardice as a defense, it would be equally debilitating to demand that heroism be the standard of legality. The proper treatment of the hero is not merely to withhold a social censure; it is to give him praise and just reward."³¹

The "person of reasonable firmness" is not wholly objective. The addition of the words "in his situation" is intended by the framers of the Code to be given a personal application. As they say 'stark tangible factors that differentiate the actor from another like his size or strength or age or health would be considered', although matters of temperament would not. (This is not unlike the concept of the ordinary man in the High Court and Victorian cases dealing with provocation.) The Code was intended as a model upon which legislatures could draw, but material is not presently available as to how far it has influenced the criminal law in the United States.

2. Draft U.S. Federal Code

2.35 In 1967 the Congress of the United States set up a National Commission for Reform of Federal Criminal Laws with an Advisory Committee presided over by the Honourable Tom Clark, retired Justice of the United States Supreme Court. Its charter was to formulate and recommend to the Congress legislation which would improve the Federal system of criminal justice and to make recommendations for revision and re-codification of the criminal laws of the United States. A large executive staff and an eminent law professor prepared working papers and by mid-1970 a Study Draft of a Federal Criminal Code was prepared. Chapter 6 of that Code entitled "Defenses Involving Justification and Excuse" dealt with duress in Section 611 which reads as follows:—

"Duress

- (1) Affirmative Defense. In a prosecution for any offense it is an affirmative defense that the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another. In a prosecution for an offense which does not constitute a felony, it is an affirmative defense that the actor engaged in the proscribed conduct because he was compelled to do so by force or threat of force. Compulsion within the meaning of this section exists only

if the force, threat or circumstances are such as would render a person of reasonable firmness incapable of resisting the pressure.

(2) Defense Precluded. The defense defined in this section is not available to a person who, by voluntarily entering into a criminal enterprise, or otherwise, willfully placed himself in a situation in which it was foreseeable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged."

The Draft provides that an "affirmative defence" must be proved by a preponderance of evidence. This Draft as the Commentary to the section notes, affords a broader protection than presently available under United States federal law. But two factors are mentioned which constrict the availability of what may seem to be a very liberal excuse; the burden of proof is imposed upon the defendant, and a jury finding that a person of reasonable firmness would not have been able to resist the pressure is required.

2.36 Consideration was given to providing that the defence should not be available in the case of certain exceptionally grave offences, e.g. murder, and that compulsion should reduce the grade of the offence rather than constitute a full defence. But the wider drafting was thought preferable. A final Report was delivered to Congress in early 1971. Professor Louis Schwarcz, the Commission Director, expressed the opinion then that the Code would become law within the next few years but feared that the problems of justification and excuse would be sidestepped. His fears were apparently justified. Early in 1978 the Criminal Code Bill was brought before the Senate and there passed as an Act by a large majority. It is currently with the House of Representatives. Chapter 6 of the Draft Code has been completely omitted and duress in the Code as being enacted is left to be determined by the courts according to the principles of the common law "as they may be interpreted in the light of reason and experience" (Section 501).

3. Australian Territories

2.37 Under the auspices of the Law Council of Australia a Draft Criminal Code for the Australian Territories³² was prepared and submitted to the then Attorney-General in February 1969. It provided for the defence of duress but as far as can be seen, no detailed consideration was given to the defence and the provision of the Queensland Code seems to have been adopted without critical discussion.

2.38 A Draft Crimes Ordinance³³ was prepared under the auspices of the Attorneys-General in the Whitlam Government and submitted in 1975. In it no special reference was made to duress, but it contained a section (Section 6) providing that the principles of the common law with respect to criminal liability should, subject to the Ordinance, apply in relation to offences punishable under the Ordinance. No clue is given (in the explanatory material) as to what was thought to be the common law in relation to duress in 1975.

4. The United Kingdom

2.39 The Law Commission of England published a Working Paper on Defences of General Application in 1974³⁴ and after receiving comments and further consideration, presented its Report to the Lord Chancellor which was

laid before Parliament in July 1977. The matters considered in that Report were duress, coercion, necessity and entrapment, and to its recommendations in relation to duress this Working Paper now turns.

2.40 The Commission had little difficulty in deciding to recommend that it would not be right for the criminal law to insist that in no circumstances should duress ever be a defence to criminal liability. In its view the law should provide that within certain defined limits, duress should exonerate from criminal liability and this provision should take statutory form. It had rather more difficulty in deciding upon the nature of the defence but concluded that duress should be available as a defence to all offences including murder, whether the defendant is charged as an accessory or as the actual perpetrator. It recommended that the basis of the defence should be that the defendant is induced by a threat of harm to himself or another to commit the offence with which he is charged. In its view the threats must be of a most serious nature and it recommended that the defendant must believe that the harm threatened is death or serious personal injury which it suggested should be defined to include mental as well as physical injury. This suggestion was made to cover a readily conceivable case where the threat is one to destroy a person's sanity or seriously damage his mind by the administration of drugs. Further it recommended that the defendant must believe that the threat will be carried out immediately or if not immediately, before he can have any real opportunity of seeking official protection, and that there is no other way of avoiding or preventing the harm threatened.

2.41 Its further recommendations were as follows:—

- (a) The threat must be such that the defendant could not reasonably be expected to resist it in all the circumstances of the case, including the nature of the offence, the defendant's belief as to the matters just referred to, and any other relevant circumstances personal to him. (The Commission thought that there should be an objective element in the requirements of the defence, so that in the final event it would be for the jury to determine whether the threat was one which the defendant in question could not reasonably have been expected to resist. It thought the personal characteristics of the defendant would need to be considered. A different view might be taken in the case of a weak, immature, or disabled person to that in the case of a normal healthy person. [See paragraph 2.34.])
- (b) "There should be an evidential burden on the defendant to ensure that there is sufficient evidence to raise duress as an issue, whereupon there should be a persuasive burden on the prosecution to negative the defence."
- (c) "In proceedings on indictment the defendant should give notice of his intention to rely on duress, subject to a discretion in the court to allow him to advance the defence where he has not given notice."
- (d) "The defence should be excluded where the defendant is voluntarily and without reasonable cause in a situation in which he knows he will or may be subjected to duress to induce him to commit such an offence as that with which he is charged."

Is a General Defence Necessary?

2.42 Because of the uncertainty which exists it is suggested that the law relating to duress as a defence against criminal liability is at least in need of

statutory formulation, and depending on what view is taken of what the existing law really is, of some measure of reform.

2.43 It can fairly be said that the defence of duress is available in most criminal cases, and the major doubt to be settled is as to whether it can be taken into account in deciding upon guilt in a charge of murder. If it can be available in such a charge then there can be no doubt as to its being available for all charges.

2.44 There was (and perhaps still is) a view held that duress should never be allowed as an excuse for crime but rather it should be considered in mitigation of punishment. This view was persuasively articulated by Sir James Stephen in his *History of the Criminal Law* in 1883, when he wrote the following:—

“Criminal law is itself a system of compulsion on the widest scale. It 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 someone else says, If you do not do it I will shoot you? Surely it is at 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. If impunity could be so secured a wide door would be opened to collusion, and encouragement would be given to associations of malefactors, secret or otherwise. 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 may and ought to operate in mitigation of punishment in most though not in all cases.”³⁵

Despite Stephen's forebodings duress has been pleaded (with mixed success) from time to time since he expressed his views and society does not seem to have suffered.

2.45 Moreover moral and social attitudes in relation to criminal liability have changed markedly over the past century, and it seems fair to say that in the content and administration of the criminal law there is now a greater tolerance and understanding of human behaviour than ever before. As far back as 1899 when the Queensland Code was drafted, Sir Samuel Griffith thought that some conduct brought about by natural human angry reaction to sudden provocation should not merit a criminal stigma. In the Queensland Criminal Code drafted in that year, there appears a provision exempting a person from criminal liability for an assault committed upon one who gives him provocation for the assault, and it is left for the community in the shape of the tribunal, to decide whether the provocative act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce him to assault the offeror of the act or insult. The common law has not as yet recognised such a defence in the case of an ordinary assault, but as well as

broadening the scope of the defence of provocation in murder cases and reducing offences from murder to manslaughter it has also in Australia made allowance in the case of homicide for a situation where a person uses undue force in the course of self-defence and causes death by providing for a reduction in appropriate cases of the crime from murder to manslaughter. Both of these attitudes show an increasing tendency to take account of human weakness in assessing criminal responsibility.

2.46 There can be little doubt that generally conduct, the result of genuine fear, is more excusable than that brought about by anger. Fear allied with the instinct for self-preservation can provide a motivating force which is irresistible to all but the strongest (or most insensitive) of human beings. The noted 17th century English philosopher Hobbes summed up the position neatly in this way:—

“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. And supposing such a law were obligatory yet a man would reason thus, If I do it not, I die presently; if I do it, I die afterwards; therefore by doing it, there is time of life gained; nature therefore compels him to the fact.”³⁶

2.47 Even if such an action could not be morally justified, punishment and consequently liability has by many been regarded as wrong because no argument could be advanced that punishment in such a case would or could act as a deterrent and thus a major reason for punishment would not exist.

2.48 Fear combined with love can provide perhaps a more worthy and no less strong or irresistible force. Little imagination is needed to understand (and excuse) the motives and acts of one who is driven to unlawful conduct to meet the demands of kidnappers or terrorists who are holding under threat of death an adult or child to whom he is bound by intense emotional ties.

2.49 In *Lynch's case* Lord Simon, who was one of the minority, thought there were three courses open to the House of Lords as the ultimate expositor and developer of the common law for the United Kingdom:—

- (1) To approve the various cases where duress has been allowed to be a defence negating the crime, and then extend the doctrine to the crime of murder as a principal;
- (2) To over-rule the cases where duress has been allowed to be a defence negating the crime, leaving it as a matter of mitigation of sentence in crimes other than homicide, and in homicide as a defence reducing murder to manslaughter; or
- (3) To affirm the cases where duress has been allowed to be a defence negating the crime but to refuse to extend it to murder as a principal.

2.50 The majority in that case in effect took the first course by deciding that the defence of duress should where the evidence allowed be open to a principal in the second degree (an aider or abettor) which was as far as their decision needed to and could go. Lord Simon and his fellow dissident Lord Kilbrandon in effect opted for the third course. Neither of their Lordships could offer any justification for differentiating between different degrees of murder and accordingly, could not agree with the majority, all of whom saw no

reason in justice, morality or law why the defence could not be availed of by a principal in the second degree on such a crime. Lord Morris thought it proper that any rational system of law should take fully into account the standards of honest and reasonable men. By those standards it is fair that actions and reactions be tested. If someone is really threatened with death or serious injury unless he does what he is told to do, the law should pay heed to his "miserable agonising plight".

"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 court room 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 well-disposed."³⁷

He left open the case of an actual participant in the murderous act.

2.51 In Abbott's case Lord Wilberforce who had been one of the majority in Lynch's case and who was in the minority in this case, similarly could see no justification for distinguishing between principals in a murder case and this was one of his reasons for holding that the decision in Lynch's case extended to the situation in Abbott's case where the accused man was an actual physical participant in the murder. Lord Edmund Davies reasoned similarly.

2.52 It seems that it is illogical and can be unjust to categorically deny the defence of duress to a principal in the first degree whose criminality and moral culpability may be according to circumstances considerably less than the actor whom the law categorises as a principal in the second degree. If the conduct springs from a genuine fear brought about by a threat which would be likely to overcome the will of an ordinary human being then it is suggested that it would be unwise and unjust to brand the conduct as criminal.

2.53 Mr. Justice Smith in Hurley's case and the Chief Justice of South Australia in the case of Brown and Morley both thought that the heinousness of the crime of murder in the first degree was so great that the law would not allow any defence of duress. Neither was expressing a view of what the law should be and in the circumstances of each case neither was authoritatively expressing a view of what the law actually is. Both in Lynch's case and in Abbott's case several of their Lordships made approving reference to a decision in South Africa in 1972 (where the criminal law is a mixture of English and Roman-Dutch law). A passage in the reasons for judgment delivered by Mr. Justice Rumpff contains what is suggested to be a compelling and psychologically persuasive statement of principle. It reads:—

"When the opinion is expressed that our law recognised compulsion as a defence in all cases except murder, and that opinion is based on the acceptance that acquittal follows because the threatened party is deprived of his freedom of choice, then it seems to me to be irrational, in the light of developments which have come about since the days of the old Dutch and English writers, to exclude compulsion as a complete defence to murder if the threatened party was under such a strong duress that a reasonable person would not have acted otherwise under the same duress. The only ground for such an exclusion would then be that, notwithstanding the fact that the threatened person is deprived of his freedom of volition, the act is still imputed to him because of his failure to comply

with what has been described as the highest ethical ideal. In the application of our criminal law, in the cases where the acts of an accused are judged by objective standards, the principle applies that one can never demand more from an accused than that which is reasonable, and reasonable in this context means, that which can be expected of the ordinary, average person in the particular circumstances. It is generally accepted also by the ethicists, that for the ordinary person in general his life is more valuable than that of another. Only they who possess the quality of heroism will intentionally offer their lives for another. Should the criminal law then state that compulsion could never be a defence to a charge of murder, it would demand that a person who killed another under duress, whatever the circumstances, would have to comply with a higher standard than that demanded of the average person. I do not think that such an exception to the general rule which applies in criminal law, is justified."³⁸

2.54 An example could well be imagined in these days of terror and violence and bank robberies. Suppose a group of bank robbers entered a bank, one of them armed with a knife thinking (rightly) that the teller whom he approached would have a pistol in his drawer, pressed his knife against the throat of that teller, and ordered him to hand over his pistol saying at the same time "I am going to fix that . . . down there", (pointing to another bank officer). "He spoilt our last job here." The teller hands over the gun, his assailant takes it and shoots and kills the other officer. Can it be said that that teller should be found guilty of murder, he being an active participant in the act?

2.55 The reasons most often advanced against duress, however terrifying, being available as a defence to murder are firstly, that already referred to and best expressed as the duty to sacrifice one's own life rather than take another's. To this it has been answered that the criminal law should not be applied as if it were a blueprint for saintliness but rather in a manner in which it can be obeyed by the reasonable man, and further that the duress may well extend to and threaten the lives and safety of others and in such a case the path of heroism has been said to be obscure.

2.56 Secondly, public policy is relied upon — expressed in different ways. The views expressed by Sir James Stephen have already been noted (see paragraph 2.44). Again it has been said that murder is so grave a crime that no facilities should be afforded to the murderer to escape conviction and punishment, that duress is a plea easy to raise, and that (the onus to destroy it being upon the prosecution) it may prove impossible to rebut. As to the latter reasoning it is suggested that a properly directed jury can always be trusted to give such effect to the defence as it deserves. It is worthy of note that in cases already dealt with in this Working Paper that despite Mr. Justice Barry's favourable view of the law as he expounded it to the jury in Hurley's case both accused were convicted and the plea of duress did not succeed.³⁹ Again in Williamson's case in New South Wales upon a new trial with a direction that the defence of duress was open the jury convicted the accused and Lynch on his retrial in Northern Ireland, after his defence of duress was put to the jury, was also again convicted. As to the former it can be argued that justice and humanity demand that a man should not be held criminally liable when in a situation not of his own making he is subjected to pressures to perform a criminal act which no ordinary human being could resist.

2.57 It is provisionally recommended that there should be a general defence of duress and that it should be available in respect of any offence including murder. How far it should be available to exculpate a person charged with murder and the nature of the compulsion used to produce criminal acts has now to be discussed.

Ambit of the Defence

2.58 As well as the recommendation of the English Commission two further courses merit serious consideration. One where death is caused intentionally would allow only a reduction of the crime of murder to that of manslaughter, the other would allow in every case of murder a complete defence of duress or an intermediate defence of reduction to manslaughter where the accused genuinely gave way to the compulsion of threats but in circumstances where the ordinary man could have been expected to resist the pressure put upon him.

2.59 By the intentional causing of death is meant that death is either the objective aimed at or the expected result of the act or acts leading to the murder. This is to be distinguished from the other situations in which the person causing death will be guilty of murder, namely

- (a) Where he intentionally causes really serious bodily injury (commonly referred to as grievous bodily harm) and death results from that injury
- (b) Where he causes death by an act of violence done in the course of, or in furtherance of, a felony involving violence
- (c) Where he causes death by an act of violence done to a person whom he knows to be an officer of justice acting in the execution of his duty or a person assisting him, and done with the object of preventing lawful arrest or detention (or done to a person known to be acting to suppress an affray or apprehend a felon).⁴⁰

2.60 In support of the stricter course it can be argued that considerations similar to those which support the rule that provocation is not a complete defence to a charge of murder by intentional killing, but merely reduces the offence to manslaughter, would appear to support the enactment of a corresponding rule for cases in which an intentional killing is induced by duress. The relevant considerations may be thought to include the following:—

- (a) Among the primary objectives of the criminal law are the prevention of intentional killing and, to that end, the fostering of community acceptance of the sanctity of human life.
- (b) Even when the threat constituting duress takes a most convincing form there can be no certainty that, upon a refusal to submit, the threat will be carried out—nor can there be certainty that compliance will procure immunity. Hence one who kills under duress is inflicting death upon an innocent person with the object of ending, or reducing, what is strictly speaking only a risk—though sometimes a very high one—of death or injury to himself or another.
- (c) If it were to be enacted that duress removes all criminal guilt from intentional killing, then very many ordinary citizens would be aware of the new rule. They would therefore be disposed to believe, if they found themselves subjected to any substantial pressure to kill a person, that they could give in to the pressure and be held guiltless by the law; and this

could be expected to reduce their ability to resist such pressures. Fewer people, therefore, would be found resisting strong pressures, and more people yielding to lesser pressures.

- (d) Public knowledge of killings committed by persons yielding to pressures and public knowledge of the complete acquittal by the courts of persons who kill intentionally but alleged that they acted under duress, could be expected to result in a reduction in community respect for the sanctity of human life. And this tendency would be increased if all that the accused was required to do in order to be found guiltless in respect of the killing was to raise a reasonable doubt as to whether his act was induced by duress.
- (e) Juries, in applying the test of whether a person of ordinary fortitude could have been expected to resist the pressure, or the test of what could reasonably have been expected of the particular accused, would rightly judge the case in accordance with the lowered standards of resistance to pressure that had become current in the community.
- (f) On a conviction for manslaughter the penalty may be nominal or severe, so as to match the degree of blame attaching to the accused's conduct.

2.61 It can be argued also that the reasoning that is relied upon to support the conclusion that a person who kills intentionally, but under duress, is guilty of no offence would seem to require, equally, that a person who kills intentionally but under such provocation as would have been likely to cause an ordinary man to act as the accused did, should not be held guilty of manslaughter but should be found guiltless. And like reasoning would seem, also, to justify, if not require, the abolition of much of the law of involuntary manslaughter.

2.62 On the other hand it can be argued that where crimes against human life and limb are in issue community standards are not easily or lightly lowered. The ordinary man and woman, as embodied in the criminal jury, is not likely to show a diminished respect for the sanctity of human life. But he or she can be expected to show understanding of the "breaking point" of the ordinary man and compassion for the frailty of the less than ordinary man who succumbs more easily to pressure. For the former in the rare case where that point is reached and compulsion and pressure brings about the act of intentional killing, acquittal is the proper course. For the latter—the person of less than ordinary fortitude, the weaker-willed, the more easily terrified—an analogy may be drawn with the use of excessive force in self-defence and a verdict of manslaughter made permissible.

2.63 The precise formulation of such a defence is difficult and would require a jury to draw difficult distinctions between subjective and objective appraisals of the circumstances of the case. Nevertheless it would not seem that the jury's task would be any more difficult than in its consideration of the defence of self-defence.⁴¹ With an increasing readiness of courts to convict in accordance with the moral culpability of the act committed such a type of defence would not only be logically consistent with that of self-defence but could well be said to be the truest road to the achievement of justice.

2.64 If the special case of murder by intentional killing is to be separately dealt with then for all other crimes involving injury to the person (including all the three forms of constructive murder referred to in paragraph 2.59) the

definition of duress should be wide enough to include threats of torture, rape, buggery, imprisonment and abduction.

2.65 Most of the cases which have come before the courts involve threats of serious physical harm but as Professor Howard points out in his book on criminal law⁴² the existence of the crime of extortion shows the effectiveness of non-violent threats. He suggests, properly it is thought, that if a man steals to find the money to pay off a blackmailer in a position utterly to ruin him, duress could well be applicable and he goes on to make the general suggestion that the law should be that the character of the threat itself is no more decisive of the issue than any other single factor, but should be afforded its due weight in the light of the other facts given in evidence.

2.66 It is reasonably clear that the present law requires that the threats to establish duress must be of death or of grievous bodily harm. The English Law Commission⁴³ considered that if the defence were to be extended to murder then a threat of such nature would still be required although it recommended a modification in that the expression used should be "serious personal injury" and it would include in that concept not only physical but also mental injury. It had in mind a situation where the threat is to destroy a person's sanity or seriously to damage his mind by the administration of drugs. The Model Penal Code in one respect leaves the matter more at large in that it says that the use of or the threat to use unlawful force against the person of the accused or of another which a person of reasonable firmness in his situation would have been unable to resist is the guiding factor. The Law Commission thought that this expressed the defence a little too loosely and thought it better to qualify the expression "person of reasonable firmness in his situation" in the way set out in paragraph 2.41 (supra). The Crimes (Married Persons' Liability) Act 1977 when dealing with coercion defines coercion to mean pressure whether in the form of threats or any other form sufficient to cause a woman of ordinary good character and normal firmness of mind placed in the circumstances in which the woman was placed to conduct herself in the manner charged. However the Act excludes treason, murder, and certain related offences from its operation.

2.67 It is not proposed to suggest in this Working Paper a definitive draft but it is suggested that the recommendations of the English Law Commission with regard to duress should form the basis of legislative enactment (see paragraphs 2.40 and 2.41). However it is further suggested that those recommendations be qualified and that a significant alternative be added. The qualifications are as follows:

- (a) A provision could be included that duress can provide a defence only where the threat is of an evil equal to or greater than the evil effected by the offence charged. This would give effect to the requirement of "proportion" which has been held to be a necessary element where self-defence or prevention of felony is thought to be relied upon by an accused person.
- (b) The recommendation of the Law Commission that the defendant must believe that the threat will be carried out before he has had any real opportunity of seeking official protection may be regarded as unduly restrictive and it is suggested that it be provided as an alternative that he must believe that to seek official protection would not give any real protection from the harm threatened.

2.68 The alternative suggested is that where duress could be concluded to have been genuinely responsible for an unlawful killing but where the accused's resistance to the compulsion exercised was less than that of an ordinary man the crime of murder should be reduced to that of manslaughter.

2.69 Finally it is suggested that in addition to the foregoing legislation should provide that where the offence charged is not one involving injury to the person then threats of harm to property or reputation inducing criminal conduct could provide the basis for a defence of duress. In such cases the question to be asked could be simply whether or not in all the circumstances the threat was of such a nature as to overbear ordinary human resistance.

SECTION 3 COERCION

3.01 In paragraph 2.01 it is pointed out that "coercion" is the term used in referring to compulsion to criminal acts by a husband of his wife. This subject has received detailed attention in the Law Reform Commissioner's Report No. 3 — Criminal Liability of Married Persons (Special Rules) — Part I. The recommendations for reform in this area were:—

- (a) That there be no presumption of coercion of a wife by her husband if she commits an offence in his presence.
- (b) That a wife should be entitled to a defence of coercion to a charge of any offence except treason or murder, conspiracy and incitement to murder and attempted murder if she is able to point to evidence in support of such a defence and that in such a case the onus should be on the prosecution to satisfy a jury or court that the action or inaction charged was not due to coercion by her husband.
- (c) That "coercion" in this connection means such a degree of pressure by the husband, whether by threats or otherwise howsoever, as could have caused a wife of ordinary good character and normal firmness of mind, placed in the circumstances in which she was placed, to conduct herself in the manner charged and further that those circumstances should include the degree to which she was in fact dependent economically or otherwise upon her husband.

3.02 Statutory formulation was given to these recommendations by the enactment of the Crimes (Married Persons' Liability) Act 1977 Sec. 2 (b), which inserted a new Section 336 embodying them into the Crimes Act 1958.

3.02 Nothing said elsewhere in this Working Paper seeks to impinge upon the reforms effected. What has been done by the Act is complementary to what is suggested. The 1977 Act recognises the special position of a wife in certain circumstances but would not preclude her from relying upon the wider defences of duress and necessity proposed.

3.03 Accordingly no recommendation is made with regard to coercion.

SECTION 4. NECESSITY

Introductory

4.01 The concept of necessity providing a justification or excuse for conduct not otherwise lawful has been with mankind from early times. In the Old Testament Jonah speaks of jettisoning cargo to avoid a shipwreck.⁴⁴ In Rome in the immediate pre-Christian era Cicero was writing of shipwreck survivors fighting for possession of a plank on which one alone could survive the doom of the sea — a perennial problem argued throughout the centuries until today by theorists in the field of criminal law. The laws of Alfred talk of a homicide “of necessity”. Bracton in the 13th century said that what is not otherwise lawful necessity makes lawful.

4.02 Throughout early reports of cases there is many a reference to pulling down a house to prevent the spread of fire. In 1499 it was judicially stated that jurors may lawfully depart without leave of the judge for a good cause, as where an affray breaks out and they are in peril of death, or if the court room falls down. And it seems clear that at this time the law recognised that no penalty could be exacted from a person who escaped from a burning gaol although there was a statute making a prison breach a felony without any excusatory qualification; as was pithily said: “for he is not to be hanged because he would not stay to be burned”.

4.03 In the 16th century the maxim “Necessity knows no law” seems to have been well-known.⁴⁵ And early in the next century Mr. Justice Hobart said:

“All laws admit certain cases of just excuse, when they are offended in letter and where the offender is under necessity either of compulsion or inconvenience.”⁴⁶

The action recorded in Jonah was approved early in that century when it was held that any passenger may, to lighten a barge in a storm and for the safety of passengers, jettison the cargo.⁴⁷

4.04 The 19th century saw necessity being urged in defence in some American cases and in particular in two dramatic and much debated cases, one in America and the other in England. There appears to have been increasing resort to a legal plea of necessity in the present century. In this State in 1977 the Court of Criminal Appeal has recently recognized the existence of the defence although on the facts of the case before it the Court found it unnecessary to consider whether the circumstances constituted such a necessity as to excuse an escape from prison.⁴⁸

Definitions

4.05 “Necessity” is a word of wide import and when used in the area of criminal law has not been the subject of close analysis in the courts nor until recent times by academic writers in this field. In this Working Paper it will be used broadly to delineate two complementary lines or bases of defence to a criminal charge. Detailed analysis would show that these bases may often be overlapping but this is not the place for such analysis. The first basis may be described as the choice of evils doctrine. Harmful conduct proscribed by the criminal law may be justified if its performance averts a demonstrably and significantly greater harm either to the actor, to others or to property. The second may be described as the basis of compulsion. Conduct brought about

by pressure of circumstances of such magnitude that no ordinary human being could reasonably be expected to resist that pressure may be excused. It will be later suggested that there is a need to have both these lines of defence given statutory formulation as part of the law of Victoria.

Problems of Today

4.06 In Victoria today it is not difficult to find examples in daily life of action taken under the stress of necessity. A passer-by to extinguish a grass fire which threatens a house seizes (and in the course of acting destroys) a carpet airing on a line; a farmer commandeers a boat to save stock in a flood; a crop or grass is burned to prevent the spread of fire on to other land. A pedestrian disobeys a traffic signal to render assistance to another lying apparently injured on the roadway; a fire engine goes through a red light on its way to a fire to rescue someone in danger of incineration; an ambulance follows the same course; a lost and starving hiker breaks into a house in a remote area and takes food for sustenance.

4.07 Necessitous situations suggested elsewhere are breaking into an unoccupied rural house for the purpose of making a telephone call vital to a person's life; assaulting a person who has a virulent contagious disease in order to prevent him from going out and starting an epidemic, and burning the real property of another for the purpose of preventing a raging forest fire from spreading into a densely populated community. Dr. Glanville Williams, an eminent teacher and writer in the law, describes an incident which he personally witnessed in the following terms:— X was cutting down a heavy branch over a road; D was stationed to warn the public of the impending fall; P, a cyclist, saw that D was trying to stop him but did not appreciate the reason and being in a hurry tried to pass. To prevent P riding into the danger area D seized P's bicycle and caused him to stop. D was clearly justified in what he did; yet P was conscious and did not consent to the interference. D's justification rested upon necessity.⁴⁹

4.08 To return to Victoria a couple of perhaps more complex and difficult problems could be envisaged. A unionist in a “closed shop” industry in the course of an industrial dispute trespasses on land and inflicts some minor damage in real and genuine fear of expulsion from his union and thus, in a situation of high unemployment, from his livelihood if he refuses to join his fellow-unionists in such prohibited conduct.

4.09 Nor is it beyond possibility for a situation to arise in which a hijacked aircraft is on the tarmac at Tullamarine with a full complement of passengers including five or six desperate terrorists. A decision has to be and is taken to “shoot it out” in the almost certain realisation that to save the aircraft being blown up one or more of the innocent passengers will be killed in the course of the shooting.

Statutory Recognition of Necessity as a Defence

4.10 To comb the statutes and regulations for every sanctification of action taken under the stress of necessity is both daunting and unnecessary. A few examples will illustrate the rather piecemeal and diverse statutory approach to the provision of specific excuses.

4.11 The Country Fire Authority Act 1958 for the purposes of extinguishing or restricting the spread of any fire or of protecting life and property in case of fire confers on the Chief Fire Officer or the captain of any urban or rural brigade and certain other officers power to enter upon any land or building, to force open doors, and to take any measures which in the circumstances are reasonable and which appear to be necessary or expedient, and in particular power to cause any house or building to be pulled down, destroyed or removed, and fences likewise, and any undergrowth, trees or grass to be burnt or destroyed.⁵⁰ The Metropolitan Fire Brigades Act 1958 gives the like sort of powers to the Chief Fire Officer and other fire officers.⁵¹

4.12 The Road Traffic Regulations provide that notwithstanding anything to the contrary in the regulations the driver of an emergency vehicle may when it is expedient and safe to do so in certain circumstances proceed past a traffic control signal, disobey a red or amber circle or pass a stop sign without stopping, stop, leave standing or park the vehicle at any place at any time, or exceed the prescribed speed limits. An emergency vehicle is defined as a motor vehicle conveying members of the police force on urgent police duty, the fire brigade travelling to or on duty to any place in consequence of an alarm of fire, or an ambulance answering an urgent call, and so on.

4.13 But no specific provision exists to exculpate an off-duty policeman or fireman or ambulance driver or any other member of the public when taking any of the urgently needed actions above described.

4.14 There are other statutes and regulations which seem or have been held to contain within themselves justification or excuse for their breach based on necessity. The Crimes Act 1958⁵² in defining "theft" says that a person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving that other of it. There are cases of necessity which would negate the "dishonest" appropriation, as for example the taking of the carpet to beat out the grassfire and the taking of food from the house referred to earlier.

4.15 Again many statutes preface the description of a prohibited act with the word "unlawfully". Conduct compelled by necessity has in several cases been held not to be unlawful and so not criminal. An outstanding example of this approach is to be seen in a case in Victoria dealing with abortion. It is provided in the Crimes Act 1958 that whoever with intent to procure the miscarriage of a woman unlawfully administers to her any poison or any noxious thing or unlawfully uses any instrument or other means with the like intention shall be guilty of felony.⁵³

4.16 Mr. Justice Menhennitt held⁵⁴ that to establish that the use of an instrument with intent to procure a miscarriage was unlawful, the Crown must establish either (a) that the accused did not honestly believe on reasonable grounds that the act done by him was necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; or (b) that the accused did not honestly believe on reasonable grounds that the act done by him was in the circumstances proportionate to the need to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail.

Necessity at Common Law

4.17 Apart from cases in which a court has decided that the proper interpretation of legislation required the necessity of a situation to excuse or justify the conduct of a defendant there are very few cases reported in England or Australia dealing with the defence of necessity. In situations where no physical injury or harm is involved and the harm avoided by the prohibited conduct is so evident that the necessity can generally be seen to be too clear for argument, prosecutions would in all likelihood never be instituted. It is hard to imagine criminal proceedings being brought against any of the persons referred to in paragraph 4.06 — except where it seemed necessary to have a judicial determination whether a situation of necessity really existed or whether private motivation brought about the harmful conduct.

4.18 The case establishing the legality of jettisoning cargo in necessitous circumstances has stood for centuries.⁵⁵ In modern times provisions for fire-fighting are such that it is difficult to envisage the necessity for the destruction of houses to prevent the spread of fire and in any event as has been noted, statutory provisions exist. Yet in 1912 it was held justified to burn a strip of heather to prevent a fire from spreading.⁵⁶ In America where the offence charged is not one of particular gravity the courts have not hesitated to recognize necessity as an excuse where the danger or apparent danger to be avoided was more serious in its nature.

4.19 Two recent cases in England whilst in effect admitting that there is a defence of necessity seem to go far to limit its availability. The first arose out of an attempt by two families in a situation of dire housing shortage to remain in occupation of decrepit empty houses owned by Southwark London Borough Council.⁵⁷ They resisted ejectment *inter alia* on the ground of necessity. The defence was rejected by the Court of Appeal. Lord Denning spoke of there being authority for saying that in cases of great and imminent danger in order to preserve life the law would permit of an encroachment on private property, and he also referred to the law's approval of the pulling down of a house in time of fire to stop it spreading. However he and the other judges in the case felt that the doctrine of necessity must be carefully circumscribed. Killing, he thought, was not justified by necessity nor the entering of a house by a starving man to take food. If hunger were once allowed to be an excuse for stealing, he said, it would open a way through which all kinds of disorder and lawlessness would pass. And he went on to say:

"So, here. If homelessness were once admitted as a defence to trespass no one's house would be safe. Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine that they were in need, or would invent a need, so as to gain entry. Each man would say his need was greater than the next man's. The plea would be an excuse for all sorts of wrongdoing. So the courts must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless; and trust that their distress will be relieved by the charitable and the good."⁵⁸

4.20 In the second case which was concerned with the duty of firemen to obey traffic signs and in particular road traffic lights an illustration was given in the following terms:—

"A driver of a fire engine with ladders approaches the traffic lights. He sees 200 yards down the road a blazing house with a man at an upstairs window in extreme peril. The road is clear in all directions. At that moment the lights turn red. Is the driver to wait for 60 seconds, or more, for the lights to turn green? If the driver waits for that time, the man's life will be lost."⁵⁹

4.21 Lord Denning expressed the view that the defence of necessity could not be allowed in such a case and that the only use of the circumstances was in mitigation. The particular situation cannot arise in Victoria because of the existence of the Road Traffic Regulations already referred to. But the same sort of construction may be adopted in a Victorian court and prevent a defence of necessity being allowed for other helpers at a fire or other tragedy who have in the urgency of the moment transgressed the letter of the law.

Necessity and Prison Escapes

4.22 In recent times there has been a good deal of discussion in America arising out of a number of cases which have come before the courts of escape from prison brought about, so it has been alleged by the escapers, because of serious homosexual assaults and threats of such assaults. The attitude of the courts has not been uniform either as between the States or even in some cases in the same State. In the latest case which has come to notice, two women (one of whom was mentally defective and under the protection of the other) escaped from a Californian gaol because of serious homosexual harm already endured and still feared at the hands of a group of lesbian inmates of the same prison. The threats were not only of bodily indignity and harm, but also threats to life. The Californian Court of Appeal held necessity to be a viable defence to an escape charge in such circumstances.⁶⁰

4.23 The rule laid down by that court for the application of the defence requires first that the escaper be faced with a specific threat of death, forcible sexual attack, or substantial bodily injury in the immediate future, second that there be no time for a complaint to the authorities or a history of futile complaints which made any benefit from such complaints illusory, third that there must be no time or opportunity to resort to the courts; fourth, that there be no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and fifth, that the prisoner report immediately to the proper authorities upon attaining a position of safety from the immediate threat.

4.24 In several of the earlier cases there were allegations of gross homosexual assaults and of futile complaints to prison authorities. It has been said both that such assaults are widespread in American prisons, and that some prison administrators look upon these assaults with a complacent eye. One observer goes so far as to say that the discharge of aggression through homosexuality is thought to keep the general peace of the institutions through relaxing tensions in aggressive inmates. Despite what appears to be convincing evidence of assaults, cases denying the defence have been based largely on considerations of public policy expressed in a fear that intervention by the judiciary would subvert prison discipline.⁶¹

4.25 In the recent Victorian case mentioned in paragraph 4.04 the Court beyond a somewhat cursory reference to the text writers had little to say about

the law as the judges came to the clear conclusion that the paranoic fears of a prisoner allied to his failure to show any continuing compulsion or lack of any remedy other than escape made any further consideration of the defence unnecessary.⁶²

Homicide

4.26 Very few of the cases throughout the history of the law deal with cases of the infliction of bodily harm for the avoidance of what may seem to be a greater harm or evil. However those in which the greatest of such harms has been caused — homicide — have been of such a dramatic character and elicited such emotional response that it is difficult to satisfactorily extract a principle from them and impossible to guess what would be a modern court's attitude.

4.27 There is a somewhat unsatisfactory report of a series of events in the seventeenth century from which it appears that a number of men were driven out to sea from St. Kitt's in the Caribbean Sea by the stress of weather and that after 11 days they drew lots and killed one of their number and ate him for survival. On their eventual arrival the survivors were pardoned without any trial presumably by the Governor of the then infant English colony.⁶³

4.28 Two cases have produced spasmodic debate amongst legal writers and passing reference by judges but without authoritatively laying down the law — it would seem either for America, England or Victoria. The first was heard in America in 1842 and arose out of a shipwreck after collision with an iceberg in the Atlantic Ocean. A seaman named Holmes, acting under orders, took part in throwing male passengers overboard from a grossly overloaded long-boat. In this craft were the first mate, 8 seamen and 32 passengers. It seems clear that the circumstances were such that if this action had not been taken, all on board would have perished. In the result the boat with its remaining passengers and crew members kept afloat and they were rescued. A grand jury (the precursor of our committing magistrates) refused to indict Holmes for murder but presented him to a jury on a charge of manslaughter.

4.29 The trial judge in summing up to the jury laid down the following propositions:—⁶⁴

- (1) Provided all ordinary means of self-preservation have been exhausted, there are cases of necessity which the penal laws pass over in silence. "For example," he said, "suppose that two persons who owe no duty to one another that is not mutual should, by accident not attributable by either, be placed in a situation where both cannot survive. Neither is bound to save the other's life by sacrificing his own, nor would he commit a crime in saving his own life in a struggle for the only means of safety."
- (2) There are, however, situations, such as those involving a member of the crew and a passenger, in which one person is under a pre-existing duty to make his safety subordinate to that of the other and the duty continues to exist notwithstanding the imminent peril. "While we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that if a passenger is on the plank even the law of necessity justifies not the sailor who takes it from him."
- (3) "Where there is time, the different parties should consult and endeavour to fix some mode of selection 'by which those in equal relations may have equal chance for their life'. There is no rule of general application.

'There is, however, one condition of extremity to which all writers have prescribed the same rule. When the ship is in no danger of sinking, but all sustenance is exhausted and the sacrifice of one person is necessary to appease the hunger of others the selection is by lot. This mode is resorted to as the fairest mode and in some sort an appeal to God for the selection of the victim'."

4.30 As far as can be ascertained no similar situation has come before an American court and no case has been discovered in that country in which disapproval has been expressed of the statement of the law expressed by the judge in that case. However Mr. Justice Cardozo, a very distinguished American jurist, writing in 1931 said:

"I think there is little if any doubt that he" (Holmes) "acted in good faith believing that all would be lost unless there was a sacrifice of some. His good faith did not purge him of crime although it called for mercy in the sentence. Where two or more are overtaken by a common disaster there is no right on the part of one to save the lives of some by the killing of another . . . Who shall choose in such an hour between the victims and the saved? Who shall know when masts and sails of rescue may emerge out of the fog?"⁶⁵

4.31 The struggle for the plank referred to in the judge's summing up to the jury has been much debated by philosophers and legal theorists through the ages. Lord Bacon in his *Maxims* written in the 17th century positing a situation where the newcomer dislodges the first occupier of the plank regards the newcomer as free from criminal responsibility. Many other subsequent legal writers have accepted Bacon's view, including Sir James Fitzjames Stephen. He argued that it is impossible to suppose in such a case that the survivor would be subjected to legal punishment.⁶⁶ It is hardly surprising that such a case has never come before the courts, the survivors of all such incidents which no doubt have happened from time to time remaining understandably silent.

4.32 The other case concerned a macabre sequel to another shipwreck — this time a yacht in 1884. The survivors, three seamen and a youth of seventeen, were case adrift in an open boat 1600 miles from the Cape of Good Hope. Their food was all consumed in 12 days and they had been for eight days without food and six days without water when two of the men (Dudley and Stephens) killed the youth, who by this time was lying at the bottom of the boat unable to make any resistance. The question of his killing had been previously discussed; he naturally did not assent to it and neither did the third man, he at that time taking the view that they should all die together. After the boy was killed the third man joined the other two in feeding on his body and drinking his blood. After four days the surviving three were picked up by a passing vessel.

4.33 At the trial of Dudley and Stephens in England a jury found that if they had not fed upon the body of the boy the probability was that they would not have survived to have been picked up, and rescued, but within the four days would have died of famine. The boy, because of his weak condition, was likely to have died before them. The jury also found that at the time of the killing there was no sail in sight, nor any reasonable prospect of relief. There was no appreciable chance of saving life except by killing someone for the

others to eat. They also found that, assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men. A special panel of judges, on considering the jury's findings, held that the facts constituted no justification for the killing of the boy, and that the prisoners were guilty of wilful murder.⁶⁷

4.34 Holmes, upon conviction of manslaughter was sentenced to six months imprisonment, and Dudley and Stephens, in the English case, having been convicted of murder, had their sentence of death commuted to imprisonment — also for six months.

Codes and Necessity

4.35 Many countries and states have codified their criminal law. In England in the nineteenth century strenuous but unsuccessful attempts at such codification were made. However the work of Lord Macaulay, Sir James Fitzjames Stephen, and the Criminal Law Commissioners, formed the basis for *inter alia* the Criminal Code of India and the codification in Queensland in 1899 and Western Australia in 1902 of which Sir Samuel Griffith, the first Chief Justice of Australia, was the principal architect.

4.36 In this century codification has spread to jurisdictions where the criminal law was to be found in the common law and a morass of statutes. In England codification is again spoken of as the objective. In all of the Codes, both in Europe and common law countries, necessity is dealt with and in some form or another thought essential as an available defence to a criminal charge.

4.37 Because of the widespread view that the criminal law should embody a principle or doctrine of necessity, examples of the statutory expression or implementation of this view are included in this Working Paper and set out hereunder.

India

4.38 The Indian Penal Code introduced in 1860 deals with necessity in the following way:—

Section 81 Act likely to cause harm; but done without criminal intent, and to prevent other harm

Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Explanation — It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

Illustrations (summarised)

- (a) A, a ship's captain, without fault, finds that, before he can stop the ship, he must inevitably collide with vessel B containing 20 people, unless he changes course; but by so doing he must risk colliding with vessel C containing two people, although he may clear it. If A so alters his course to avoid danger to B he is not guilty of an offence, although he may collide with C.

- (b) A, in a great fire, pulls down houses to prevent it spreading, in order to save human life or property. If it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of an offence.

England

4.39 Sir James Stephen, when he drafted a Criminal Code Bill, for introduction in the House of Commons in 1878, included a section under the title "Necessity" as follows:—

"No act is an offence which is done only in order to avoid consequences which could not otherwise be avoided, and which if they had followed would have inflicted upon the person doing the act, or upon others whom he was bound to protect, inevitable and irreparable evil, and if no more is done than is reasonably necessary for that purpose, and if the evil intended to be inflicted by such act is neither intended nor likely to be disproportionate to the evil intended to be avoided.

No act which causes harm to the person of another is an offence if the person doing it was, without any fault on his part, so situated at the time that he could not avoid doing the act which caused such harm, without doing some other act which was equally likely to cause harm to some other person (not being himself), and if he did the one act only in order to avoid doing the other."⁶⁸

4.40 The Criminal Code Bill Commissioners failed to include this section in the Draft Code prepared by them in the following year because they were, so they said, not prepared to suggest that necessity should in every case be a justification. They were equally unprepared to suggest that necessity in no case should be a defence. In their view such questions were better left to be dealt with when, if ever, they should arise in practice by applying the principles of law to the circumstances of the particular case. What those principles were they did not elucidate.

Cyprus

4.41 The British Code for Cyprus (1928) set out a general principle which was put forward as the whole law of justification. Article 18 read as follows:—

"An act or omission which would otherwise be an offence may be excused if the person accused can show that it was done or omitted to be done only in order to avoid consequences which could not otherwise be avoided, and which if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted was not disproportionate to the evil avoided . . ."

Queensland

4.42 In the Queensland Criminal Code of 1899, Sir Samuel Griffith included a section (Sec. 25), which under the heading of "Extraordinary Emergencies" reads as follows:—

"Subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circum-

stances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise."

4.43 Sir Samuel noted that this section gives effect to the principle that no man is expected (for the purposes of the criminal law at all events) to be wiser or better than all mankind. He thought the rule enacted in the section to be a rule of the common law, as undoubtedly it is, he says, "a rule upon which any jury would desire to act". Indeed he went further and thought that it could be said that the section sums up nearly all the common law rules as to excuses for an act which is *prima facie* criminal. So far as can be discovered there have been no cases under this section which have been thought worthy of report as elucidating the law. A similar section is found in the Western Australian Criminal Code (Sec. 25).

Model Penal Code (U.S.A.)

4.44 The Model Penal Code (which has been referred to earlier in the section on Duress) under the heading **General Principles of Justification** contains a section (3.02) **Justification Generally: Choice of Evils**; which reads as follows:—

- (1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
 - (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
 - (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
 - (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
- (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

4.45 In the view of the framers of the Code a principle of necessity affording a general justification for conduct which otherwise would constitute an offence is essential to the rationality and justice of all penal prohibitions. The principle is regarded as being of general validity and consequently extends to homicide. The framers of the Code recognised that the sanctity of life has a supreme place in the hierarchy of values but felt that conduct which results in taking life may promote the very value sought to be protected by the law of homicide. They quoted a much repeated illustration of making a breach in a dyke knowing that this will inundate a farm but that it is the only course available to save a whole town. They accept the life of every individual as being of equal value and numerical preponderance in the lives saved compared to those sacrificed, so they argue, establishes an ethical and legal justification for the act.

Draft Federal Criminal Code (U.S.A.)

4.46 The Study Draft of the Federal Criminal Code contains a Section (Section 6.08) dealing with conduct which avoids greater harm. It reads:

"6.08. Conduct Which Avoids Greater Harm. Conduct is justified if it is necessary and appropriate to avoid harm clearly greater than the harm which might result from such conduct and the situation developed through no fault of the actor. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the penal statute defining the offense, either in its general application or with respect to its application to a particular class of cases arising thereunder."

The second sentence of the Section is intended by its framers to make clear that it is the legislature's judgment of the harm that controls and not the subjective evaluation made by the offender.

4.47 However the final Draft which has early in 1978 been passed as an Act in the Senate of the United States and is at the time of writing before the House of Representatives, has omitted the chapter dealing with Justification and instead contains a section (Section 501) leaving the defence of duress or of acts performed in the protection of persons or of property to be determined by the courts according to the principles of the common law "as they may be interpreted in the light of reason and experience".

The Penal Law of New York

4.48 In 1965 the Penal Law of New York was revised and re-enacted. Article 35 of that Law provides a defence of justification. Justification generally is defined in Section 35.05 as follows:—

"Unless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force, conduct which would otherwise constitute an offence is justifiable and not criminal when:

1. Such conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties or functions; or
2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense."

Subdivision 1 is substantially adopted from the Model Penal Code (Section 3.03) and Subdivision 2 is derived from the Model Penal Code (Section 3.02).

It contains the choice of evils doctrine and would extend to homicide but as with the Model Penal Code, not to the situation of the swimmers fighting for the lifesaving plank.

4.49 The phraseology of the provision is designed to limit closely its application. The prohibition against violation of a statute because of the doubts about "morality" or "advisability" seems intended to render the provision unavailable to the mercy killer, the crusader who considers a penal statute unsalutary because it tends to obstruct his cause, and the like. The enactment of this article does not seem to have caused any great legal difficulties. Apparently there have been only two cases worth reporting since 1965. The first was one in which prisoners held prison guards as hostages and threatened to seriously assault and kill them unless corrective action were taken in prison conditions. A defence of justification under Section 35.05 on the basis of the compulsion to action by the harsh and inhumane prison conditions was rejected out of hand and it would seem rightly so. However in another case a man who contended that he was approached by a stranger carrying a gun, and in an attempt to flee committed traffic violations including running through two red lights, was held entitled to have the defence of necessity put before a jury.⁶⁹

The German Penal Code

4.50 The German Penal Code of 1871 seems to be based on considerations of the likelihood of human beings succumbing to the compulsion of the overpowering pressure of events. It provided in Section 54 that there was no criminal act whenever, apart from cases of self-defence (for which separate provision was made) the act was done out of necessity to overcome an imminent risk to the life or bodily security of the actor or one of his dependants, provided that the actor was not responsible for the necessity and there was no other way of overcoming it. There was no reference to choice of evils or harms in this section, but in 1923 the German Supreme Court held that implicit in the criminal law was an extra-statutory justification based on necessity and that this justification applied to render a lifesaving abortion legal and proper. It appears that since that date courts proceeded on the assumption that the Penal Code regulated necessity as an excuse for criminal conduct but that it was supplemented by the extra statutory defence of necessity which goes further than excuse and justifies otherwise criminal conduct where a greater social good was promoted by such conduct.

4.51 After many years of consideration of the criminal law both of civil and common law countries, the German Penal Code was revised and re-enacted in 1969 although not proclaimed to come into operation until January 1975. It made provision for two types of necessity, that which justifies and that which excuses. These are set out in the two sections which follow:—

"Section 34. Emergency which Justifies"

1. A person who commits an act to avert from himself or another person a present danger to life, freedom, honour, property or any other legally recognised interest which cannot otherwise be averted, does not act illegally if a weighing of the opposing interests, in particular the affected rights and the degree of the threatening danger to them, shows that the protected interest significantly outweighs the interest which he harms (by his act).

* The translation of the German "notstand" as "emergency" is regarded by Dr. Peter Sack of the Research School of Social Sciences, Australian National University as more accurate conceptually than "necessity".

2. This however only applies insofar as the act is an appropriate means for averting the danger.

Section 35. Emergency which Excuses*

- I. 1. A person committing an unlawful act to avert from himself, a relative or another person close to him, a present danger to life, limb or freedom which cannot otherwise be averted acts without guilt.
2. This does not apply if the person could be expected under the circumstances, in particular because he has himself caused the danger or because he has special legal obligations to suffer the danger.** However in this case the punishment can be (mitigated in accordance with other provisions of the Code).
- II. If a person erroneously assumes the existence of circumstances which would have exculpated him in accordance with sub-section I he can only be punished if he could have avoided his error. (In such a case punishment is to be mitigated according to other provisions of the Code.)"

A Comparison of the Codes

4.52 Two illustrative situations may assist the reader in comprehending the sometimes subtle differences between these codes.

- (1) A, a volunteer, burns B's crop (or B's house killing B, an invalid unable to escape) to prevent the spread of a raging bushfire threatening a country estate. No other measures could have been taken to save the estate, used as a retirement village by 30 persons. (This illustration reflects the choice of evils doctrine.) (Para. 4.05)
- (2) X and Y charter a plane which is forced to land in Central Australia. They have no food or water. After 10 days X kills Y to survive and does so for a further 15 days by feeding from Y's body until the search party arrives. Undisputed evidence shows that X and Y would not have survived for more than 20 days without food and water. (This illustration reflects the irresistible pressure doctrine.)

4.53 In suggesting whether or not necessity would be available as a defence, the broadest possible interpretation of the codes has been adopted to show the underlying rationale. It is appreciated that in most instances a narrow interpretation of the code by a court could restrict the availability of the defence.

- (a) **India**
The defence would be available to A but not to X.
- (b) **England** (Stephen's Draft Code)
The defence would not be available to A but could arguably be available to X.
- (c) **Cyprus**
The defence would be available to X but not to A.
- (d) **Queensland and Western Australia**
Depending on the view taken by the court of the behaviour of the ordinary man, the defence may be available to both A and X.

** This is aimed particularly at policemen, fire officers, etc., whose profession requires them to expose themselves to certain dangers.

- (e) **Model Penal Code (U.S.A.)**
The defence would be available to A but not to X.
- (f) **Draft Federal Criminal Code (U.S.A.)**
The defence would be available to A but not to X.
- (g) **Penal Law of New York**
The defence would be available to A but not to X.
- (h) **German Penal Code**
The defence would be available to both A and X.

Is there a General Defence of Necessity?

4.54 This is a question to which it seems impossible to give a clear and satisfactory answer. By a general defence is meant one that covers the whole range of criminal offences in the same way as for example, do the defences of insanity and infancy. Judges in the courts in England, America and Australia have from time to time spoken of the defence of necessity without considering its generality or its precise limits.

4.55 In the abortion case referred to earlier (paragraph 4.16) the judgment was founded upon what was said to be the principle of necessity, the statement of which by Stephen in his *Digest of the Criminal Law* was referred to with approval. The statement is as follows:

"An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided. The extent of this principle is unascertained."⁷⁰

Then followed an illustration in these terms:

"A and B swimming in the sea after a shipwreck get hold of a plank not large enough to support both; A pushes off B who is drowned. This is no crime."

The judgment of the court took care to point out that necessity is not a justification for every act which would otherwise be criminal, but allowed that the concept finds its place in various branches of the criminal law and examples were given — the prevention of a felony and the apprehension of a felon and the element of necessity in self-defence. Mr. Justice Menhennitt took the view that the principle as stated was the appropriate one to apply to determine whether a therapeutic abortion is lawful or unlawful within the meaning of Section 65 of the Crimes Act.

4.56 It would seem to be equally applicable to the swimmer in dire straits seeking possession of a life-saving plank.

4.57 As a result of what was said in the case of *Dudley and Stephens* (paragraphs 4.32-4.34) Stephen in a later edition of his *Digest* in 1887 added to Article 32 the words "The extent of this principle is unascertained" and further "It does not extend to the case of shipwrecked sailors who kill a boy, one of their number, in order to eat his body". In a footnote to the article he referred to the two men on a plank and he gave further examples.

- (a) The case of several men roped together on the Alps who slip and the weight of the whole party is thrown on to one who cuts the rope in order to save himself.

In each of the foregoing he placed the emphasis on living and states the question as being not whether some shall die but whether some shall live. He goes on

- (b) to refer to the choice of evils as for example the surgeon killing a child in the act of birth, as the only way to save the mother, and a boat being too full of passengers to float and so some are thrown overboard. In the same footnote he roundly asserts that he can discover no principle in the judgment in the case of *Dudley and Stephens*.

4.58 In the *Southwark Council Case* (paragraph 4.19)⁷¹ Lord Denning recognises the existence of authority for saying that in case of great and imminent danger in order to preserve life the law will permit of an encroachment on private property. But beyond carefully circumscribing that authority he offers no further assistance to the solution of the question.

4.59 In a paper presented to the Medico-Legal Society in 1959 an eminent Victorian judge, the late Sir Norman O'Bryan, considered the case of a surgeon's operating on an unconscious patient who was unable to give consent to the operation. He concluded that the principle to be applied is the same whether the unconsciousness is induced by an anaesthetic and a new and unforeseen emergency arises in the course of an operation to which the patient has consented or whether the necessity to operate first arises when the patient is already unconscious (as is so often the case as the result of a motor accident). He asserted that the principle should be and indeed is that where a certain course is necessary in the sense that it is the only reasonable course to take for the preservation of the patient's life or to avoid a grave impairment of his health and comfort should he survive, and the surgeon acts in good faith and without negligence and in the interests of his patient, he would be regarded in the law as protected by the necessity of the occasion from any action based upon absence of the patient's consent to the particular operation.

4.60 In *Buckoke's case* (paragraph 4.20) Lord Denning himself raised the question of the driver of the fire engine having the defence of necessity and without argument accepted the proposition that the fireman had no defence in law; despite his view that such a man should be congratulated and not prosecuted.

4.61 In 1955 the Court of Criminal Appeal in England refused to upset a conviction for drunken driving in the following circumstances. The defendant who undoubtedly was under the influence of alcohol and who had been in the course of being driven by his brother-in-law and had dozed off, awoke to find himself alone in the car on a sloping road and with the handbrake failing to hold the car. He manoeuvred himself into the driver's seat, steered the car on to a grass verge and brought it to a halt, thus avoiding potential danger both to himself and other users of the road. Neither counsel in the case nor the three judges of the court appeared to have even thought of the necessity of the situation and discussion seems to have been confined to the meaning of the word "driving".⁷²

4.62 In the State of Texas in 1958 an appellant convicted of a similar offence sought to raise the defence that the sole purpose of his driving was to get to

hospital in order to obtain treatment for a serious head injury which he had suffered at his place of residence. The Texan Court of Criminal Appeal, by a majority would not allow the defence although a dissenting judge was of the view that the law does recognise a defence of necessity and that the facts if proved would have come within a recognised principle.⁷³

4.63 There is no unanimity amongst the text-writers in the field of criminal law. Dr. Glanville Williams holds the view that there is a general defence of necessity although it seems he would confine it to a choice of evils situation. He pleads for the formulation of a general rule allowing necessity as a defence to homicide where the minority are killed to preserve the majority.⁷⁴

4.64 P. R. Glazebrook in a persuasive article in the *Cambridge Law Journal*⁷⁵ takes issue with Dr. Glanville Williams as to their being a general defence but does not deny the need for such. In his view probably the most persistent English attitude to the problem raised by the necessity plea is that hard cases are best dealt with by the prerogative of mercy in which he would apparently include the exercise of the discretion not to prosecute at all.

4.65 One of the outstanding American writers, Professor Jerome Hall,⁷⁶ charges the courts with failure to discuss the doctrine of necessity and coercion in relation to the relevant principles. He argues the essential conditions of the doctrine of necessity as being:

- (1) The harm to be justified must have been committed under pressure of physical forces.
- (2) It must have made possible the preservation of at least an equal value, and
- (3) the commission of the harm must have been the only means of conserving this value.

He points out that some of the confusion in this field of law arises from a failure to properly analyse two distinguishable bases upon which the defence rests.

4.66 Professor Howard, the present Dean of Law at Melbourne University, in his book on the *Criminal Law*,⁷⁷ makes this point strongly, and would go further than those who advocate the availability of the defence where a question of avoiding the greater evil or choosing the greater good arises. He would allow for the human frailty of those who in the pressure of circumstances allow the instinct of self-preservation to over-ride the dictates of what Professor Cross calls the theory of the maintenance of standards.

4.67 Volume II of the Fourth Edition of *Halsbury's Laws of England* which states the law as of 1st January 1976 may perhaps be allowed the last (but still unsatisfactory) word in answer to the question posed in this section.

"Although there are cases in which it is not criminal for a person to cause harm to the person or property of another, there is no general rule giving rise to a defence of necessity, and it seems that, outside the specified cases mentioned, it is no defence to a crime to show that its commission was necessary in order to avoid a greater evil to the defendant or to others."

4.68 The specific cases mentioned are self-defence, defence of property, force used in the prevention of crime, duress and marital coercion. It is noted also that traditionally it has been held lawful to pull down a house in order to

prevent the spread of fire and that it is apparently permissible to jettison cargo to lighten a ship in a storm, or to carry an infected child through the streets to seek medical aid.

Should there be a General Defence of Necessity?

4.69 The tentative recommendation of this Working Paper will be that there should be such a defence. But before proceeding to justify this recommendation it will be as well to say something of the consideration recently given to this subject in England.

The Law Commission Report (England)

4.70 There, a prestigious Working Party formed to assist the Law Commission in its consideration of Defences of General Application in the Criminal Law published a Working Paper in 1974.⁷⁸ In this paper it considered at some length the defence of necessity using the term to connote those situations in which "D is able to choose between two courses, one of which involves breaking the criminal law and the other, some evil to himself or others of such magnitude that it may be thought to justify the infraction of the criminal law". Then the Working Party made a series of provisional proposals as set out hereunder:

- (i) There should be a general defence of necessity.
- (ii) It should be available where the defendant himself believes that his conduct is necessary to avoid some greater harm than that which he faces.
- (iii) The harm to be avoided must, judged objectively, be found to be out of all proportion to that actually caused by the defendant's conduct.
- (iv) The harm to be avoided need not be directed against the defendant: it may, provided always that the test in (iii) is satisfied, be directed against himself or his property or against the person or property of another.
- (v) The defence should not apply where the defendant has put himself into a position where he must commit one offence in order to avoid another.
- (vi) The defence should be available to a charge of any offence, however serious.
- (vii) The defence should not be available where the greater harm, which the defendant alleges he was seeking to avoid by committing the offence with which he is charged, consists of the doing by some other person of an act which that person was legally entitled to do.
- (viii) As in the case of duress, the burden should be on the defendant to give sufficient evidence to raise an issue as to necessity.

4.71 The Working Party took the view that it is unjust in principle to convict when action has been dictated by necessity and the situation of the fireman driving his appliance through a red light and meriting conviction rather than the congratulation that he deserved as Lord Denning suggested in *Buckoke's* case was cited as a prime example of injustice. The Working Party also took account of the silence of courts in applying a general defence even where necessity was present.

4.72 The Working Party was concerned too that unless there were a general defence special provisions could lead to uncertainty. In Victorian law, for example, the fact that certain officials on duty are exempt from traffic regulations when driving emergency vehicles could well lead to a judicial view that people not specifically mentioned but on the same errand of mercy could seek no exemption from prosecution and conviction, no matter how necessary and otherwise blameless was their conduct.

4.73 The Working Paper was widely circulated and after considering the large number of comments which it provoked the Law Commission itself came to the conclusion⁷⁹ that there should be no defence of necessity in the projected English Criminal Code. The Commission was left with an overall impression of unease as to whether such a defence was practicable and was concerned with the qualifications and exclusions which it saw as likely to be required and which would make the formulation of a defence too complex. The Commission took the view that for minor offences generally where the absurdity of punishing for breach of statutes and regulations is apparent the remedy lies, in what must in a majority of instances happen, in the exercise of an administrative discretion not to prosecute. It is of interest to note that in England in the case of firemen, where in each year over the six years 1965-70 there were about 150,000 fire calls, the yearly number of convictions of fire appliance drivers for traffic light offences varied between two and six.

4.74 The Commission was greatly concerned also as to the applicability of such a defence to homicide within the highly controversial area of euthanasia. Other ethical problems it foresaw also can easily arise in cases of offences against the person. For example, what would be the situation if an immediate blood transfusion is essential to save an injured person and the only one who has the same blood type refuses to give blood? Can he be overpowered and the blood taken from him? And the Commission pointed out that in an era in which the donation of rare blood groups and bone marrows and the making of organ transplants is increasingly common, the probable necessity of excluding forcible action taken in such cases provided a further reason for concluding that a general defence is not the right approach in the field of offences against the person.

4.75 In the result the Commission thought that the difficulties attaching to a general defence extending to minor offences would outweigh its advantages. And in contrast with duress the difficulties arising in any defence of necessity in relation to providing for exceptional and difficult cases it saw as overwhelming. It thought it probable that situations where necessity may be in issue are so diverse as not to be readily classifiable and was very doubtful whether a defence operating with the degree of uncertainty which it thought inevitable ought to find a place in the Code.

4.76 In effect the Working Party proceeded on the same basis as did the framers of the Model Penal Code and the other American Codes cited, i.e. on the basis of the choice of evils with stress being laid on the proposition that for the defence of necessity to be available the harm to be avoided must be out of all proportion to the harm created by performance of the prohibited act. Even in its tentative proposals there seems to be no room for the exercise of compassion where the individual (defendant) succumbs to the overwhelming pressure of events, as for example the successful struggler for the plank in

whom the instinct of self-preservation has overcome any standards of decency or morality he may have had.

Argument for a General Defence

4.77 To return to a justification of the tentative recommendation it is necessary to consider first a basis or rationale for the defence and then wherein would lie its feasibility and advantage over whatever may be the present situation.

4.78 As to rationale Professor Hall's criticism of the inability of English law-lawyers to distinguish the two bases upon which the defence may be said to rest, merits attention. The first basis is that of justification of the performance of a legally prohibited act. Broadly speaking, if that act is performed in the exercise of the choice between two courses of action, one of which can be said to promote the greater social good or to avoid the greater harm, and this can be seen to be clearly the case, then the act is said to be justified as being necessary. If it is so justified it loses any taint of criminality and can properly be regarded as a lawful act. It is this kind of what may be called the choice of evils doctrine which underlies Section 3.02 of the Model Penal Code, Section 35.05 of the New York Penal Law, and the proposals of the Working Party set out above.

4.79 The second basis is that of excuse. This is the basis for the defence of duress earlier considered. A compassionate application of the criminal law would pay regard to the dire straits in which individuals sometimes find themselves through no fault of their own. It would forgive conduct which although in its nature criminal should, on a fair appraisal of the circumstances and the fortitude and decency which the ordinary individual could be expected to show be held to be not blameworthy. It would forgive conduct performed by an individual about which and whom the ordinary man would say: "You couldn't blame him for that", "He couldn't help it" or "He had to do it".

4.80 The promotion of a greater social good is generally not to the point in cases where the conduct of the actor is sought to be excused rather than justified. The swimmer ferociously struggling for possession of the plank cannot urge a choice of the lesser social evil in beating off the other contender. He would seek to be excused because in the desperate circumstances in which he finds himself the instinct of self-preservation prevailed and the law could hardly blame him for succumbing to that instinct. As Stephen said in his Digest: "This is no crime". Heroism is not the norm which rules in society.

4.81 It may be difficult to justify an escape from prison on the basis of justification but if conditions brought about by fellow-prisoners can be seen to be intolerable and without redress except by escape there seems no reason why that escape should not be excused on the ground of necessity.

4.82 Stephen's Draft Code and the Queensland and Western Australian Codes all would seem to allow for the individual to be excused rather than his conduct generally justified and so create a new legal rule. German penal theory began with the idea of forgiving individual conduct which could be excused rather than justifying it on the ground of its social benefit. Now it does both.

4.83 Despite the amount of writing and argument that has been devoted to the eating of defenceless boys and the struggles for planks in the sea, the incidence of cases of this sort has been and could be expected to be rare indeed. Necessity to breach legal rules generally arises in much more mundane circumstances. More often than not it would appear to be an issue in cases generally dealt with in courts of summary jurisdiction. To allow a defence such as is outlined in the Model Penal Code (paragraph 4.44) or Section 34 of the German Penal Code (paragraph 4.50-4.51) it is thought would be a proper conferring of jurisdiction on such courts. To allow a defence which involves a judgment on the part of a judicial tribunal as to the social utility and therefore justification of an act is a task which surely can be confided to magistrates. Whilst many of the issues which would confront them could be seen to be of considerable public importance, if a comparison of community values is involved they are persons whom the community has trained for and entrusted with a judgment on those values. Further they are always subject to the control of the superior courts. It is unlikely, indeed well nigh impossible, that potentially explosive issues such as euthanasia, organ transplants and assaults for the purpose of obtaining blood would be left to their ultimate decision.

4.84 It can be perhaps even more strongly argued that magistrates should be permitted to consider the type of defence embodied in Section 35 of the German Penal Code (paragraph 4.51) for they are accustomed to consider daily the stresses placed upon human beings and the limits of tolerance to stress in human behaviour.

4.85 Where homicide is in issue and necessity is called upon to justify a killing (as some would say it was in the case of Davidson [paragraph 4.16]) as it can undoubtedly be in the prevention of a felony and in self-defence, it can certainly be argued, and it is suggested in this Working Paper, that the choice of evils doctrine should be written into the law. In what form it should be so written is not easy to suggest. The Model Penal Code has been said to be too vague in that it lays down no scale of values and in that it needs amplification by the inclusion of subsidiary criteria, the selection of which can be affected by many ethical, religious and utilitarian judgments. The doctrine may be thought better expressed in the Penal Law of New York and the test required be that the injury to be avoided be of such gravity that according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding that injury must clearly outweigh the desirability of avoiding the injury sought to be prevented by the existing law.

4.86 In whatever way the doctrine is expressed it is suggested that the jury is a proper arbiter and custodian of community values and that no multiplicity of criteria would be necessary. To the jury in cases of manslaughter by negligence is entrusted the task of deciding whether the negligence is of such seriousness as to deserve criminal punishment. That a defence of necessity should in proper circumstances be available to the surgeon operating without the consent of his patient in an emergency situation and eventually facing a charge of manslaughter arising out of death during the operation can hardly be doubted. Whether a person charged with "mercy killing" (which of course could be none other than intentional) and pleading that the continuous pain and distress suffered by his victim was of such gravity that its termination by his act clearly outweighed the desirability of the preservation of that human life, whether such a person should be found guilty of murder or of some lesser

crime or of no crime at all can, it can be argued, be safely left to the decision of a jury. This proposition assumes that there would be evidence upon which in the opinion of a judge, a jury could reasonably find. Undoubtedly controversial issues such as euthanasia raise most difficult problems. But if a particular jury in such a problem area should fail to reflect the majority community view then it would seem that Parliament would not be slow to act.

4.87 There seems to be a strong and longstanding judicial reluctance to allow the defence, based upon a fear of opening the door to a proliferation of attempts to plead necessity, and perhaps more importantly, to an increase in lawlessness. Lord Coleridge in the judicial climate of 1884 thought that to allow the defence in such a case as that of the starving seamen would lead to anarchy and an increase in lawlessness. Reference has already been made to Lord Denning's fears expressed in the squatter's case⁸⁰ and to the fear of the impact on prison discipline of allowing a necessity defence to justify escape from prison. However it seems that this reluctance overlooks the fact that it is one thing to take the defence, but another to raise sufficient doubt in a jury's mind both so as to justify the necessity and to lead them to think that the defendant may reasonably be thought to be telling the truth. As has been noted earlier in dealing with duress, at any rate in the more serious cases, juries do not lack scepticism of the defendants' bona fides.

4.88 For the same reasons as it has been suggested that the defence of duress should extend to murder in all degrees, it is also suggested that where pressure of circumstances is so great as to be beyond human endurance, the defence of necessity should be available. Here again it can be argued that the defence should be limited to one reducing the crime from murder to manslaughter or one in which the three alternatives of guilty of murder or manslaughter, or acquittal, should be available and the considerations set out in paragraphs 2.58 to 2.63 are to be borne in mind.

4.89 In summary it is provisionally suggested that if the legislature has not (as it may and sometimes does) carefully and with particularity circumscribed the defences open in the case of particular offences a general defence of necessity based both on justification and excuse should be provided by statutory enactment.

4.90 To leave the decision as to the exculpatory effect of necessity to the executive or administrative agencies where generally no public scrutiny is possible seems wrong and seemingly could be capricious. It is the theme of this Working Paper that in all unlegislated-for cases of necessity there should be a residual power in the court to consider and adjudicate upon them.

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