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THE DEFENCE OF NECESSITY IN NEW ZEALAND: THE CASE FOR REFORM

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The common law provides a defence in situations where the offender is morally blameless. The defences of necessity proper and duress of circumstances exculpate defendants who break the law to achieve a 'lesser evil' or to avoid imminent and serious harm. This paper explores the extent to which s 20 of the Crimes Act 1961 preserves these common law defences in New Zealand. The courts have declined to answer whether the defences are available, leaving the law uncertain. This paper argues that it is open for the courts to find both defences available in New Zealand. However, the narrow wording of ss 20 and 24 exclude duress of circumstances from applying where the threat arises from a person who is present when the offence is committed. As a result, New Zealand's law of necessity and compulsion draws an arbitrary distinction between threats arising from people and threats arising from other sources. This irrational 'legal gap' is out of step with the law in comparative jurisdictions who have functioning statutory and common law defences. Parliament should enact necessity proper and duress of circumstances into a statutory defence to remedy the defects in the Crimes Act and resolve the current uncertainty.

Key Words: criminal law, necessity, compulsion.

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I. Introduction

Everyone must follow the law. The rule of law would be undermined if people did not.[1] But, very rarely, situations arise where compliance with the criminal law would lead to irreparable and disproportionate harm. In these cases, must citizens rigidly comply with the law even when doing so will put them in grave danger? Should people be punished where they offend to avoid immediate physical harm? The intuitive answer to both questions is no. To prevent the law being applied unfairly and unforgivingly, the courts in other jurisdictions have developed a defence of necessity which justifies or excuses offending in certain situations. This defence upholds the simple and fundamental principle that criminal liability should not be imposed on those who are morally blameless. A similar defence should be recognised in all fair and rational justice systems.

For example, D is being chased on foot by a group of people intent on violently assaulting him. Unable to outrun his attackers, D gets in his car and drives a few blocks to safety where he calls the police. However, D is over the blood alcohol limit and cannot legally drive. Should D really have to follow the road rules and allow himself to be beaten or even killed? Is it fair that D, having survived the ordeal, be charged with drink driving? In England, a plea of common law necessity is available. In Australia, D could be excused by the statutory necessity defence. In Canada, a court would likely exculpate D because his act was 'involuntary'.

The problem is that if these facts occurred in New Zealand, it seems unlikely that D would have a defence. While s 24 of the Crimes Act provides a defence of compulsion it is narrowly framed and would not apply. D also could not rely on common law necessity because the courts have held that, if necessity is available in New Zealand, s 24 excludes it from applying where threats of imminent harm arise from people who are present when the offence is committed. Ironically, New Zealand's law is arbitrary and uncertain because of codification that took place in 1893, an exercise intended to achieve a clear and comprehensive criminal code. Parliament should mend the 'legal gap' and clarify the law by enacting a statutory defence of necessity.

[1] AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Thomson Reuters, New Zealand, 2012) at 13.3.3(1).

II. *Conceptualising Necessity: Why Do These Defences Exist?*

The common law has long recognised the need for a defence where people have no realistic choice but to break the law. Necessity is divided into two distinct arms: necessity proper and duress of circumstances.

Necessity proper applies where defendants are faced with a choice between two evils such that they cannot be blamed for choosing the lesser.[2] For instance, a woman runs a red light while rushing her dying husband to the hospital. While she could have chosen to obey the road rules, further endangering her husband's life, she opts to commit a minor evil to avoid the much worse alternative. The utilitarian "lesser-evils necessity" is usually conceptualised as a justificatory defence.[3] Actors are justified where they took the most appropriate course of action in the circumstances i.e. where they 'did the right thing'.[4] Denning LJ illustrates this by suggesting that the rescuer who breaks the traffic law to save a life should not be prosecuted but congratulated.[5] The rationale for the defence is simple: the criminal law should not punish good deeds.[6] In the sense that "laws are designed to maximize good and minimize evil, non-compliance with the letter of the law may turn out actually to be compliant with its spirit".[7] The law would be unfair and unreasonable if it was strictly enforced even in situations where compliance would result in an eviller outcome.

Duress of circumstances concerns the difficulty of complying with the law during emergencies.[8] It is an excusatory defence meaning that the act committed is criminal, but the defendant is excused from liability because they are not sufficiently responsible.[9] For example, a lost tramper breaks into a hut to prevent starving or freezing to death. While the act is unlawful, the defendant cannot be blamed because he has no realistic option but to break the law.[10] The tramper's will is

[2] *Tifaga v Department of Labour* [1980] 2 NZLR 235 (CA) at 243.
[3] See later discussion at Part III A. See also Dickson J in *R v Perka* [1984] 2 SCR 232 at 248-250.
[4] A.T.H. Smith "On Actus Reus and Mens Rea" in P.R Glazebrook (ed) Reshaping the Criminal Law: Essays in Honour of Glanville Williams (1978) at 99.
[5] *Buckoke v Greater London Council* [1971] 2 All ER 254 at 258.
[6] Simester and Brookbanks, above n 1, at 13.3.5.
[7] Law Reform Commission Canada *The General Part: Liability and Defences* (Working Paper 29, 1982) at 93-94.
[8] *Leason v Attorney-General* [2014] 2 NZLR 224 at [67].
[9] A.T.H Smith, above n 4, at 99.
[10] *R v Perka*, above n 3, at 249; Simester and Brookbanks, above n 1, at 13.1.

'overborne' by the emergency, making his action effectively involuntary.[11] Duress of circumstances is a humanitarian defence which recognises that ordinary people, when faced with immediate and serious threats to life or limb, cannot reasonably be expected to "comply with laws framed for normal situations devoid of peril".[12] Blackstone says that because the criminal law only punishes those who break it of their own free will, it is just that "a man should be excused for those acts, which are done through unavoidable force and compulsion".[13] Punishing people in such situations would be unfair and would not serve the purpose of the criminal law which, at its heart, seeks to prevent harm. Technically the distinction between justification and excuse has no legal consequences as both will fully acquit.[14] Nevertheless, the different terms provide a useful lens through which to conceptualise the defences.

Although the logic behind necessity proper and duress of circumstances is simple, the law has been slow to develop for several reasons. First, instances of true necessity are uncommon. There will typically be a legal alternative to criminal offending. Furthermore, where an accused is morally blameless, the Crown will often exercise its discretion not to prosecute. While some argue that prosecutorial discretion removes any need for a necessity defence, experience indicates that this view is unrealistic.[15] Finally, courts have generally been reluctant to acquit on the grounds of necessity because it allows citizens to choose which laws to obey.[16] In *Southwark LBC v Williams,* Edmund Davies LJ pointed out that necessity could "very easily become simply a mask for anarchy".[17] In that case, the Court of Appeal held that homeless people could not rely on necessity to trespass in empty accommodation. Denning LJ warned, "If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door which no man could shut".[18] Necessity must remain a narrow exception in extraordinary circumstances. The law would lose its integrity if people could break it when it suited them.[19]

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[11] *Leason*, above n 8, at [68].
[12] Law Reform Commission Canada, above n 7, at 94.
[13] William Blackstone *Commentaries on the Law* (Worcester, Massachusetts, 1790) Book 4, ch 2.
[14] A.T.H Smith, above n 4, at 99.
[15] Simester and Brookbanks, above n 1, at 13.3.3..
[16] Law Reform Commission Canada, above n 7, at 95-96.
[17] *Southwark London Borough Council v Williams* [1971] Ch 743 (CA) at 745-746.
[18] At 744.
[19] *Bayley v Police* [2007] SASC 411, (2007) 178 A Crim R 202 (SC) at [33].

III. Necessity at Common Law

As early as 1550, English courts recognised that a prima facie offence may sometimes be committed "to avoid greater inconveniences, or through necessity, or by compulsion".[20] In *Reniger v Fogassa,* the court said that some acts "may break the words of the law, and yet not break the law itself".[21] Sir William Blackstone reasoned that a defence of necessity could arise where a man faced with a choice between two evils chooses the 'least pernicious' option.[22] In 1818, Sir William Scott held "the law itself, and the administration of it, must yield to that to which everything must bend – to necessity."[23]

While the need for such a defence has been generally accepted, defining a test for necessity has proved difficult. Sir James Fitzjames Stephen, who was on a commission tasked with codifying the English criminal law, said the law of necessity was so vague that "judges would practically be able to lay down any rule which they considered expedient".[24] The challenge lies in expressing a defence broad enough to cover all situations of true necessity while also protecting the rule of law by excluding situations which do not meet the threshold. As Stephen points out, the codification exercise is complicated because it is impossible to foresee all possible scenarios in which a defence of necessity might arise.[25] A defence of necessity cannot prescribe factual requirements. Instead, necessity should be developed by applying established principles to specific facts on a case-by-case basis.

While preparing the draft criminal code, Stephen developed the following defence of necessity:[26]

> An act which would otherwise be a crime may be excused if the person accused can shew 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 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.

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[20] *Reniger v Fogassa* (1550) 1 Plowd 2, 75 ER 1.
[21] At 18.
[22] William Blackstone, above n 13.
[23] *The Generous* (1818) 2 Dods 322, 165 ER 1501 at 323.
[24] James F. Stephen *A History of the Criminal Law of England* (London, MacMillan, 1883) vol 2 at 108.
[25] At 109-110.
[26] James F. Stephen *A Digest of the Criminal Law (Crimes and Punishment)* (MacMillan, London, 1877) at 24.

However, the Stephen Commission decided not to include the untested defence in the draft code, saying:[27]

> "Casuists have for centuries amused themselves … by speculating as to the moral duty of two persons in the water struggling for the possession of a plank capable of supporting only one. If ever such a case were to come before a court of justice (which is improbable) it may be found that the particular circumstances render it easy of solution. We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case."

The following sections explore the development of necessity at common law.

A Necessity Proper

The 'lesser-evils' defence has been allowed in several cases such as the demolition of a house to prevent the spread of fire and transporting an infected child in public to seek medical aid.[28] Necessity proper has also justified administering medical treatment to patients that cannot give valid consent. In *Re F*, the House of Lords ordered the compulsory sterilisation of a mentally disabled woman who was sexually active for fear that would be unable to cope with pregnancy or raising a child.[29]

Although the defence was omitted from the English Draft Code, Stephen's necessity formulation remains the basis of common law necessity proper. In the English Court of Appeal case of *Re A (Children),* Brooke LJ restated Stephen's test as:[30]

1. The act is needed to avoid inevitable and irreparable evil;
2. No more should be done than is reasonably necessary for the purpose to be achieved; and
3. The evil inflicted must not be disproportionate to the evil avoided.

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[27] Criminal Code Bill Commission Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (George Edward Eyre and William Spottiswoode, London, 1879) at 10.
[28] *Cope v Sharpe (No 2)* [1912] 1 KB 496; *Surocco v. Geary* 3 Cal 69 (Cal 1853).
[29] *Re F (mental patient: sterilisation)* [1990] 2 AC 1. See also *R v Bournewood Community and Mental Health NHS Trust* [1999] 1 AC 458.
[30] *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 961 at 1052.

In *R v Perka*,[31] the Canadian Supreme Court outlined a similar test, holding that criminal acts would be excused in situations of urgent peril, where there is no reasonable legal alternative to criminality, and there is proportionality between the harm done and the harm avoided. While the test appears almost identical to that stated in *Re A*, the majority classifies necessity as an excuse, not a justification. The majority's language closely aligns necessity with the English formulation of duress of circumstances.[32] Firstly, the majority focuses on defendants not having a reasonable legal alternative which renders their actions 'involuntary'.[33] In contrast, the English courts do not view acts of necessity as involuntary but instead as a choice between two evils. Secondly, the majority discusses the proportionality requirement in terms of a reasonable person's firmness and ability to resist pressure.[34] In the English courts, the proportionality is between the evil inflicted and the evil avoided. Wilson J dissented, classifying necessity as a justification.[35]

1 Should necessity proper be a defence to murder?

> [I]f 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 ...
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> - Hale's Pleas of the Crown (1736) Vol 1, p. 51

In 1884, the Court in *R v Dudley and Stephens* held that necessity is not available for murder.[36] Four survivors of a shipwreck were adrift in a lifeboat without food, water or immediate prospect of rescue.[37] The men discussed drawing lots to sacrifice one to feed the others, as was an established custom of the sea, though they could not reach an agreement. Two weeks into the ordeal, the cabin boy, Parker, became violently ill from drinking seawater and fell into a coma. Parker's condition did not improve and, after several more days without sighting a sail, Dudley and Stephens killed him. The three remaining men ate the cabin boy and were rescued four days

[31] *R v Perka*, above n 3, at 251-252.
[32] At 248.
[33] At 252.
[34] At 252-253.
[35] At 268.
[36] *R v Dudley and Stephens* (1884) 14 QBD 273 DC.
[37] AW Brian Simpson *Cannibalism and the Common Law* (The University of Chicago Press, Chicago, 1984) at 55.

later. The third survivor, Brooks, was not prosecuted. Despite strong public support for the sailors, Dudley and Stephen were charged with murder and found guilty.

The Court held that necessity cannot be a defence to murder. Lord Coleridge CJ, delivering the decision, provided two reasons for this. Firstly, allowing such a defence would completely divorce the law from morality.[38] Secondly, people should not be allowed to weigh the comparative value of others' lives. The Court says that in situations where one must take another's life to survive, one does not have a duty of self-preservation but rather a duty to die. Lord Coleridge says, "To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it".[39] The Court could not sanction this type of killing and the men were handed the statutory death penalty.[40] It was for the Sovereign's prerogative of mercy, not the judiciary, to pardon their actions.[41] However, after much deliberation, Dudley and Stephens' sentences were commuted to 6 months imprisonment, reflecting public opinion and the extreme circumstances in which they had offended.

Dudley and Stephens remains authority for the rule that necessity is not a defence to murder. However, following the decision in *Re A*, the issue is not so clear cut.[42]

In *Re A (children)*, the Court of Appeal held that conjoined twins could be surgically separated, even though the operation would kill the weaker twin.[43] While Jodie was a healthy child, Mary was underdeveloped and too weak to survive on her own. Mary was only kept alive because she shared an artery with her twin. However, Jodie's heart could not support them both and, without surgical separation, would eventually give out under the strain. The twins' parents opposed the operation on a religious basis. The hospital sought a declaration that the operation would be lawful. The Court held that, by performing the operation, the surgeon would kill Mary.

[38] At 287.
[39] Ibid.
[40] At 288.
[41] Ibid.
[42] See the discussion of *Re A (children)* below.
[43] *Re A (children)*, above n 30.

Nevertheless, the operation would be justified as the lesser evil.[44] The Court emphasised that these were exceptional facts and that the judgment should have no wider significance.[45]

The Court, agreeing with the decision in Dudley, also stressed that people cannot be the arbiters of life and death. Ward LJ says: [46]

> the policy of the law is to prevent A being judge in his own cause of the value of his life over B's life or his loved one C's life, and then being executioner as well.

He then quotes Blackstone who says that a man under duress "ought rather to die himself than escape by the murder of an innocent".[47] While Ward LJ affirms that "the sanctity of life and the inherent equality of all life prevails", he points out that this principle provides no assistance in the current case.[48] The doctors cannot preserve Jodie's rights without breaching Mary's, and vice versa. Instead he says, "the law must allow an escape through choosing the lesser of the two evils".[49] Brooke LJ distinguishes the facts from *Dudley* on the basis that Mary is "self-designated for a very early death".[50] As such, allowing the operation would not be an 'absolute divorce from morality' nor would the comparative values of the twins' lives have to be weighed.[51] Brooke LJ concludes by finding that Sir James Stephen's necessity test was satisfied; the operation was needed to avoid inevitable and irreparable evil, no more was done than was reasonably necessary to achieve the outcome, and the evil inflicted was not disproportionate to the evil avoided.[52] Therefore, necessity can be a defence to murder in some circumstances. The question is: when?

It appears that necessity proper can justify murder where the victim is somehow 'pre-destined' for death. In *Re A*, Mary's death was guaranteed. She could not survive without Jodie, yet her continued survival would quickly kill Jodie. There was no hope for Mary. The doctors did not have to compare the values of each twins' life. It was simply a matter of saving the only child

[44] At 1016.
[45] At 1018.
[46] At 1014.
[47] Ibid.
[48] Ibid.
[49] At 1016.
[50] At 1051.
[51] Ibid.
[52] At 1052.

who had a chance of survival. In contrast, Dudley and Stephens unilaterally decided to kill Parker, even though the death of any crewmember would have sufficed. The two men determined that their lives were more valuable than the cabin boy's, a discretion that the court refused to allow. Arguably, the survivors would have been acquitted had they drawn lots, as was customary.

The 'designated death' line intuitively makes sense. Killing someone whose death is imminent and unavoidable is not murder in the ordinary sense. Take the example of two climbers who are roped to one another.[53] One falls and is left dangling above a fatal drop. The other, who has grabbed a ledge, cannot pull her friend to safety. She can either hang on until exhaustion sends them both to their deaths, or she can cut her friend away and save herself. If she chooses the latter option, she is undoubtedly killing her friend. However, no one would call it murder because the friend's death is a foregone conclusion. The decision in *Re A* indicates that the law will justify this type of killing because it is socially desirable that at least one life be saved.

However, Professor Glanville Williams, a committed utilitarian, would extend the rule to include situations where there is no 'designated' victim. Necessity proper is a utilitarian defence, it aims to achieve the greatest amount of good for the greatest number of people. From this perspective, the optimal outcome is the maximum preservation of life. Society benefits much more from three survivors than from four corpses. Williams makes the compelling case of a captain in a ship wreck:[54]

> He can determine who are to enter the first lifeboat; he can forbid overcrowding; and it makes no difference that those who are not allowed to enter the lifeboat will inevitably perish with the ship. The captain, in choosing who are to live, is not guilty of killing those who remain. He would not be guilty even though he kept some of the passengers back from the boat at revolver-point, and he would not be guilty even though he had to fire the revolver."

[53] Glanville Williams *Textbook of Criminal Law* (Stevens & Sons, London, 1983) at 604; *Re A (Children)*, above n 30, at 1063.
[54] At 604.

It is arguable that in situations like this, where everyone will die but some can be saved, necessity proper may justify killing even though there is no person 'designated' for death. Such a case can be distinguished from *Dudley* because the imminent peril requires that the choice of who should live must be made urgently. In other words, there is no time to draw straws.

B Duress of Circumstances

Duress of circumstances was first implicitly recognised by the English Court of Appeal in *R v Willer*.[55] Willer was driving when his car was mobbed by a gang of 20 to 30 youths. One of the youths yelled, "I'll kill you Willer". Another got into the backseat and began fighting with a passenger. Willer escaped by mounting the pavement and driving through a small alley at about 10 mph. He was charged with reckless driving. Tasker Watkins LJ overturned the trial judge's ruling that the defence of necessity was unavailable, holding that the defence of duress should have been left to the jury.[56] However, this was not the recognised duress by threats defence which requires that the defendant break the law in response to a specific conditional threat (compulsion in New Zealand).[57] The youths were not yelling, "mount that curb or we will kill you". The court was extending duress to include threats arising from external circumstances.

The term 'duress of circumstances' was coined in *R v Conway,* another reckless driving case.[58] Conway was driving with a passenger who had recently survived a targeted shotgun attack. When two plain clothes police officers approached the car, Conway sped away recklessly at the urging of his passenger, fearing the assassins had returned. The Court of Appeal held:[59]

> necessity can only be a defence to a charge of reckless driving where the facts establish 'duress of circumstances,' as in R v Willer… ie where the defendant was constrained by circumstances to drive as he did to avoid death or serious bodily harm to himself or some other person.

[55] *R v Willer* (1986) 83 Cr App R 225.
[56] At 25.
[57] Simester and Brookbanks, above n 1, at 13.2.
[58] *R v Conway* [1989] QB 290; [1988] 3 All ER 1025 (CA).
[59] At 1029.

While the Court expressed doubt that a jury would have found the defence to be made out, it nevertheless held that the defence should have been left to the jury.[60] The conviction was quashed. The Court expressly rejected that the defence should be based upon a subjective belief of an immediate threat, favouring an objective test.[61]

R v Martin is the leading English case on duress of circumstances.[62] The Court of Appeal confirmed that English law recognises the defence in extreme situations where the accused or others are placed under threats of serious harm from objective dangers.[63] The Court said that duress of circumstances should lead to an acquittal where:[64]

1. The accused acted to avoid a threat of death or serious bodily injury to the accused or another;
2. The response to the threat was objectively reasonable and proportionate;
3. The belief in threat of death or serious injury was reasonably held; and
4. A sober person of reasonable firmness, sharing the accused's characteristics, would have acted in the same way.

In *R v Abdul-Hussain*, the Court of Appeal added that the threat must be 'imminent'.[65] Simester and Brookbanks explain that "the evolution of duress of circumstances is a simple matter of analogy" from duress by threats (compulsion).[66] Compulsion excuses defendants from liability where they could not reasonably have been expected to withstand the threat. Logically, the same rationale applies to threats that arise from other circumstances. As Lord Hailsham reasons in *R v Howe*:[67]

> I cannot see that there is any way in which a person of ordinary fortitude can be excused from the one type of pressure on his will rather than the other.

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[60] At 1030.
[61] At 1027.
[62] *R. v Martin (Colin)* [1989] 1 All ER 652.
[63] At 345-346.
[64] At 346.
[65] *R v Abdul-Hussain* [1999] Crim LR 570.
[66] Simester and Brookbanks, above n 1, at 13.2.
[67] *R v Howe* [1987] AC 417 at 429.

IV. Necessity in New Zealand

The law in New Zealand in uncertain. The courts have been reluctant to answer whether necessity proper and duress of circumstances are available.[68] This uncertainty arises through the relationship between ss 20 and 24 of the Crimes Act 1961. The only authoritative judicial guidance is that, if the defences are available in New Zealand, s 24 excludes duress of circumstances from applying where threats arise from people present. This section analyses the judicial treatment of ss 20 and 24 and concludes that it is open to the courts to find both necessity proper and duress of circumstances available in New Zealand, subject to certain limitations.

A Legislative History of the Crimes Act

The origins of the Crimes Act 1961 can be traced back to renowned jurist Sir James Stephen's Criminal Code Bill 1879 (Stephen Code).[69] Stephen and his fellow Criminal Code Commissioners were given the enormous task of codifying England's haphazard criminal law into a clear, accessible and comprehensive criminal code. The object of the code was to:[70]

> produce a collection of lucid and intelligible definitions, derived both from the common law and the statutes, of the ordinary crimes punishable on indictment, and to arrange, collect, and amend the rules of practice and procedure in such cases.

Stephen's Code was never enacted, failing in the House of Commons in 1879 and 1880. English attempts at comprehensive codification were dropped in 1883 when several other bills were also unsuccessful.[71]

Looking to emulate the 'Mother Country', the New Zealand government instructed the Statutes Revision Commission in 1879 to examine the Stephen Code and adapt it for enactment.[72] Surprisingly, the government remained determine to codify even when it became clear that

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[68] Contrast *Police v Kawiti* [2000] 1 NZLR 117 (HC) at 122. Salmon J's obiter comment that duress of circumstances exists in New Zealand has been ignored by subsequent appellate decisions.
[69] Criminal Code Bill 1879.
[70] Jeremy Finn "Codification of the Criminal Law: the Australasian parliamentary experience" (paper presented at the Comparative Histories of Crime conference, Christchurch, September 2003).
[71] Stephen White "The Making of the New Zealand Criminal Code Act of 1893: A Sketch" (1986) 16 VUWLR 353 at 358.
[72] At 360; Statutes Act 1879, s 4(7).

England's attempts would fail.[73] As a result, the Criminal Code Act 1893 very closely resembled the Stephen Code, a resemblance which has been preserved in the current Crimes Act 1961. Sections 20 and 24 of the Crimes Act, the provisions responsible for New Zealand's complicated law of necessity proper and duress of circumstances, were copied almost exactly from Stephen's Code.[74]

It is worth noting the two main objections levelled at codification in New Zealand since they foreshadowed, quite uncannily, the issues that have arisen today. Firstly, the code did more than merely consolidate the law – it introduced principles of the criminal law that were still unsettled in England. Lord Cockburn CJ, alongside other critics, was concerned that enacting an incomplete code would result in ambiguities and unforeseen complications.[75] Secondly, New Zealand had always been closely aligned with English law. When Stephen's Code failed in 1880, it was apparent that England would not achieve codification and that English law would continue to be developed in the courts.[76] Codification would de-couple the systems and many were wary of the consequences that divergence might bring.

B Section 20: Preservation of Common Law Defences

The starting point for examining necessity proper and duress of circumstances in New Zealand is s 20 of the Crimes Act 1961. Section 20 is a 'portal' provision which takes common law defences and makes them available in New Zealand alongside statutory defences. Section 20 states:

> All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment.

[73] Ibid.
[74] Criminal Code Bill 1879.
[75] Stephen White, above n 71, at 355-356.
[76] At 359-360.

Section 20 does not encompass all common law defences. The provision places two important limitations on what defences are imported. Firstly, the words "shall *remain* in force" suggest that s 20 only includes common law defences that were recognised in 1893 when the first Crimes Act was passed. Secondly, the words "except so far as they are altered by or are inconsistent with this Act or any other enactment" limit common law defences which Parliament has expressly provided for in legislation. The following sections explore whether necessity proper and duress of circumstances overcome these 'hurdles'.

C Are s 20 Defences 'Frozen In Time'?

The question is not whether common law necessity was 'in force' in 1893. The concept of a 'choice between two evils' defence had long been recognised at common law, even though its scope was uncertain. Therefore, the principle of necessity proper became part of New Zealand law in 1893. The question is whether the duress of circumstances defence is available through s 20, even though it was not recognised until 1986 in *R v Willer*. The issue turns on the meaning of the words "shall remain in force" in s 20. Can common law defences that were recognised in 1893 evolve in the courts or must they be regarded as 'frozen in time'?

While the Court of Appeal in *R v Hutchinson* declined to resolve the issue, counsel for the appellant argued compellingly that common law defences recognised by s 20 "should not be regarded as frozen in time". [77] He argued that it would be consistent with the Interpretation Act principle that the law is always speaking to develop the defences with regard to changes in other common law jurisdictions.[78] If the law of necessity in New Zealand has developed alongside the common law, duress of circumstances must be available under s 20. This view is consistent with the Canadian approach. Section 8(3) of the Canadian Criminal Code is materially identical to s 20 of the Crimes Act.[79] It preserves common law defences in force immediately before April 11955 to the extent that they are not altered or affected by legislation.[80] The Canadian Supreme Court has confirmed that s 8(3) preserves duress of circumstances.[81]

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[77] *R v Hutchinson* [2004] NZAR 303 at [44].
[78] Ibid.
[79] Criminal Code RSC 1985 c C-46, s 8(2) and (3).
[80] Ibid.
[81] *Paquette v R* [1977] 2 SCR 189, *R v Ruzic* [2001] SCC 24.

The Court was hesitant to accept this argument, noting that Canada's Code preserves common law offences as well as defences.[82] The Court suggested that because Canada placed less emphasis on codification than New Zealand, Canadian courts have more freedom to enlarge the common law and should construe s 8(3) as not freezing defences in time.[83] The Court questioned whether this approach is appropriate considering New Zealand's more complete codification scheme.[84] However, the Court failed to reference s 9 of the Canadian Code which states "Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730 of an offence at common law".[85] The Court's assertion that the "codification envisaged in Canada falls short of that contemplated in New Zealand" is therefore questionable.[86]

The very purpose of s 20 is to allow common law defences to be developed by the courts. This is clear from s 19 of the Stephen Code, the origin of s 20. Contrary to their objective of creating a comprehensive criminal code, Stephen and his fellow Commissioners preserved common law defences using s 19. If the Commissioners had wanted to freeze the common law defences in time as at 1893 they would have codified them. Section 19 was intended to allow vague and unsettled defences to be developed and improved by the courts. One example is necessity. The Commissioners opted not to include necessity in the code, instead preferring that it be developed in the courts "by applying the principles of law to the circumstances of the particular case".[87] When read in light of its purpose, s 20 clearly cannot be construed as freezing common law defences in time. Accordingly, it is open for the courts to find that duress of circumstances is available in New Zealand.

[82] *R v Hutchinson*, above n 77, at [46].
[83] At [46]-[47].
[84] At [47].
[85] Criminal Code RSC 1985 c C-46.
[86] At [46].
[87] Criminal Code Bill Commission, above n 27, at 44.

D Is Duress of Circumstances Altered by or Inconsistent with Legislation?

The courts have held that the scope of duress of circumstances in New Zealand is limited by s 24 Crimes Act, compulsion. Section 24 states:

> Subject to the provisions of this section, a person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is protected from criminal responsibility if he or she believes that the threats will be carried out and if he or she is not a party to any association or conspiracy whereby he or she is subject to compulsion.

Section 24(2) provides a long list of offences to which compulsion cannot be a defence.[88]

The issue was first addressed in *Kapi v Ministry of Transport*.[89] The Court of Appeal reasoned that Parliament probably considered the scope of necessity and s 24 reflects the extent to which it was adopted in New Zealand.[90] The Court held that because s 24 provides a defence where the criminal act is done under threat of death or grievous bodily harm from a person who is present when the offence is committed, s 20 cannot preserve "a common law defence of duress by threat or fear of death or grievous bodily harm from a person not present."[91]

It is well-settled that duress of circumstances, if available in New Zealand, is excluded where the threats of harm are sourced in other persons and do not involve a demand to break the law.[92] The Supreme Court in *Akulue v R* held that this "is a reasonably obvious interpretation of s 20".[93] The Court said the Stephen Commission clearly viewed compulsion as a subset of necessity and "sought to codify exclusively the circumstances in which compulsion by threats of harm from another person provides a defence, leaving only other circumstances of necessity to the common law".[94]

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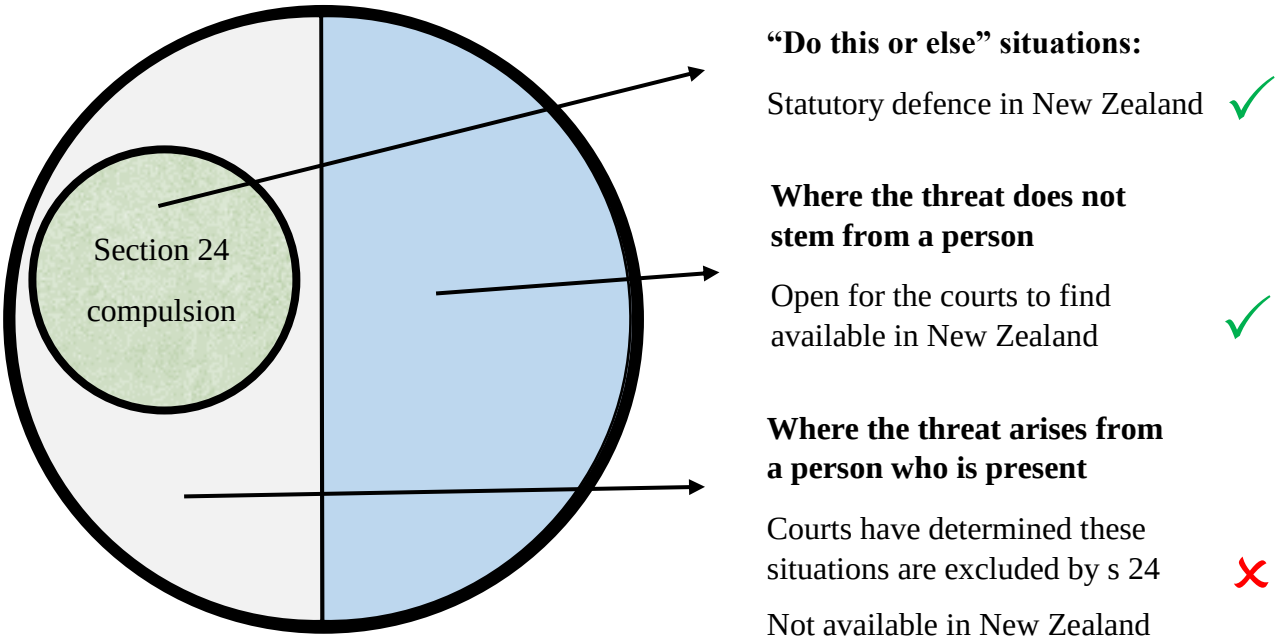
[88] Crimes Act 1961.
[89] *Kapi v Ministry of Transport* (1991) 8 CRNZ 49.
[90] At 54.
[91] At 54-55.
[92] *Akulue v R* [2013] NZSC 88, [2014] 1 NZLR 17 at [25].
[93] Ibid.
[94] At [29].

This is illustrated by the diagram below. The diagram represents all situations in which there is an imminent threat of death or serious bodily injury.[95] Of the situations where the threat arises from a person who is present (left-hand semi-circle), Parliament exclusively provided a defence in situations where the threat is accompanied by a demand to break the law. The Supreme Court held that it would be inconsistent with the narrow wording of s 24 to recognise a wider common law defence in respect of threats which do not meet the statutory criteria.[96] Therefore, duress of circumstances is potentially available in New Zealand where the threat is not from a person (right-hand semi-circle).

Figure 1: The extent to which common law duress of circumstances may be preserved in New Zealand



[95] Note: the diagram omits self-defence (s 48).
[96] *Akulue v R*, above n 92, at [30].

1 The arbitrary distinction

The distinction between threats arising from people present and threats arising from objective dangers is arbitrary and unfair. The fundamental rationale behind duress of circumstances is that defendants who must break the law to avoid death or serious injury are not morally blameworthy. Duress of circumstances excuses defendants because it would be unreasonable to expect ordinary people to comply with the law when faced with grave danger to life and limb.[97] Therefore, the source of the threat should be irrelevant because "it is the threat, not its source, that does the exculpatory work".[98] Smith and Hogan illustrate this by saying that it would not matter whether Willer broke the law to escape from "the youths, or a herd of charging bulls, a runaway lorry, or a flood".[99] He would be excused provided the act was necessary to escape serious and imminent harm. However, if the events of *Willer* had occurred in New Zealand, there would be no defence. Compulsion would be barred as there was no specific demand to break the law and duress of circumstances would be unavailable because the threats arose from people who were present at the time of the offending.

The District Court decision in *Police v Matsubara* illustrates the inadequacy in the current law.[100] Mr Matsubara was sleeping in his car. He was heavily intoxicated and in no state to drive. A group of youths surrounded the car and assaulted Matsubara. They also took his wallet and his glasses and uttered 'crude racial slurs'. Fearing further violence to himself and his vehicle, Matsubara drove approximately 100m around a corner and parked the car. He was charged with driving a motor vehicle while over the legal blood alcohol limit. Judge Hubble held that the defence of compulsion was made out. In arriving at this conclusion, he unduly stretched the words of s 24. Parliament clearly intended s 24 to provide a narrow defence in 'standover' situations where the threatener says, "do this or else".[101] There must be a particular threat associated with a particular demand.[102] However, the youths did not demand that Matsubara break the law. They simply assaulted and abused him, and he feared that they might do so again.

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[97] Simester and Brookbanks, above n 1, at 13.1.
[98] At 13.2.
[99] David Ormerod *Smith and Hogan's Criminal Law* (13th ed, Oxford University Press, Oxford 2011) at 362.
[100] *Police v Matsubara* [2004] DCR 385.
[101] *R v Raroa* [1987] 2 NZLR 486 at 491.
[102] At 492-493.

The Judge appears creatively to construct a demand, implying that the threat posed by the youths amounted to a demand to, "drive your car while drunk or we will beat you up". This interpretation of s 24 is artificial and contrary to accepted case law. The Judge may have delivered a fair outcome, but he erred in law. *Matsubara* is a classic duress of circumstances case. However, the defence was unavailable because the threat arose from people present and the Judge was required to manipulate compulsion to reach a just result.

As alluded to earlier, the arbitrary distinction between threats from people and threats from other sources can be attributed to the Stephen Code – a document drafted 140 years ago. The Code carved out a narrow statutory defence of compulsion at a time when the law of necessity was still highly uncertain. New Zealand adopted the Code while England remained a common law system. Problems arose when the English courts developed duress of circumstances, a defence that Stephen may not have contemplated. The common law defence is strangely limited by ss 20 and 24 of the New Zealand's Crimes Act. In *Kapi*, Gault J suggested duress of circumstances cases like *Willer*, *Conway* and *Martin* fall outside the scope of s 24 because of "deliberate legislative intent to restrict the scope of the defence of duress or compulsion." But the unsatisfactory position of the current law is in no way the result of parliamentary intention. The law is flawed because the drafters of the Crimes Act failed to foresee that ss 20 and 24 might restrict a common law defence that barely existed at the time. Only Parliament can rectify the problem.

Simester and Brookbanks summarise the scope of duress of circumstances in New Zealand as the following:[103]

1. The perceived threat must be one of imminent death or serious injury
2. The defendant's perception of the threat must be correct or reasonably based
3. The defendant's action must be in response to that perceived threat
4. The defendant's response to the threat must be proportionate, in the sense that a sober person of reasonable firmness, sharing certain characteristics of the defendant, would have responded in like manner.

[103] Above n 1, at 13.2.4.

5. The defence is not available for murder or attempted murder.
6. The defence is not available whenever the source of the threat is another person
7. The defence is not available where there was a realistic, legal alternative available.

However, it is likely that the scope of duress of circumstances is even narrower. The Court in *Hutchinson* suggests that duress of circumstances might require "immediacy" rather than 'imminence'.[104] As s 24 requires an immediate threat, it would be inconsistent to recognise a wider common law defence. Likewise, duress of circumstances arguably should not apply to offences that compulsion would be unavailable for under s 24(2).[105] Otherwise, defendants could use a common law defence in situations where a statutory defence was expressly prohibited.

2 Canada

It is worth commenting on the Canadian position as Canada's criminal code is very similar to New Zealand's, having also been modelled on the Stephen Code. At first glance, it appears that the Canadian common law must be likewise restricted as the code contains provisions almost identical to ss 20 and 24 of the Crimes Act.[106] However, the Canadian courts can declare unconstitutional legislation that is inconsistent with the Charter of Rights and Freedoms. In *R v Ruzic*, the Supreme Court held that the strict 'immediacy' and 'presence' requirements of compulsion were unconstitutional because they breached the fundamental principle that criminal liability requires moral voluntariness.[107] While the codes are similar, the Canadian courts can use the Charter to circumvent issues posed by the narrow compulsion defence in a way that New Zealand courts cannot.

[104] *Hutchinson,* above n 77, at [54]. See also *Akulue v R*, above n 92, at [26].
[105] *Akulue v R*, above n 92, at [26].
[106] Criminal Code RSC 1985 c C-46, s 8(2) and (3).
[107] *R v Ruzic*, above n 81.

E Is Necessity Proper Altered by or Inconsistent with Legislation?

Leaving aside duress of circumstances, the scope of necessity proper in New Zealand is uncertain as the courts have not directly discussed whether it is limited by legislation.

Arguably, it would be consistent with the courts' generally conservative and restrictive approach to hold that necessity proper is also limited by s 24. The Court in *Hutchinson* displayed reluctance toward allowing necessity in New Zealand. The Court noted that the English Court of Appeal's in-depth analysis of necessity proper in *Re A* must "be read with s 20(1) of the [Crimes] Act firmly in mind."[108] In other words, the full scope of necessity proper at English common law may not be available in New Zealand due to limiting legislation. If necessity proper is limited by s 24, it will be subject to the same incoherency as duress of circumstances.

However, the better approach is to view necessity proper as not being inconsistent with s 24. This is because the objectives and rationales of necessity proper are fundamentally different to those of compulsion. In situations of necessity proper, the defendant is not responding to a threat of immediate harm. Rather, they are seeking to achieve the lesser of two evil outcomes. Accordingly, necessity proper is not altered by or inconsistent with s 24 and New Zealand inherits the defence as it exists at common law. This view is consistent with the approach of the Canadian courts which have long held that necessity is available in Canada.[109]

[108] At [36].
[109] See *R v Perka*, above n 3; *R v Latimer* [2001] 1 SCR 3; *R v Kerr* [2004] 2 SCR 371.

V. Reform

The law evidently requires reform. Developments in common law necessity have left New Zealand's law in an uncertain and unsatisfactory position. The courts have unhelpfully declined to confirm whether necessity proper and duress of circumstances exist in New Zealand. Analysis of s 20 suggests that while both defences should be available, duress of circumstances will be arbitrarily restricted by s 24. This is not a problem that the courts can solve. The Supreme Court in *Akulue v R* refused to extend the common law to circumvent the strict requirements of compulsion, holding that this would be an "obvious usurpation of legislative function".[110] The only viable solution is parliamentary reform. This view is supported by Simester and Brookbanks who argue that the common law doctrine of necessity "should be clearly expressed in statutory form and should be available in New Zealand as a general defence".[111]

There are two options. Firstly, s 24 could be amended so that it expressly does not limit the defences of necessity proper and duress of circumstances which appear via s 20. This approach would allow the defences to develop at common law consistently with other jurisdictions. The second, and preferable, option is to codify the defences into statute. Making necessity a statutory defence would be consistent with New Zealand's codification scheme and would give courts the clear parliamentary guidance that they have been seeking.

The unsuccessful Crimes Bill 1989 sought to enact the following defence of necessity:[112]

> A person is not criminally responsible for any act done or omitted to be done under such circumstances of sudden or extraordinary emergency that a person of ordinary common sense and prudence could not reasonably be expected to act otherwise.

This provision was inspired by s 25 of Sir Samuel Griffith's Queensland Criminal Code 1899.[113] Griffith intended that the 'sudden or extraordinary emergency' provision be a residual defence which protects the morally innocent where other defences did not apply.[114] Victoria, Western

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[110] Above n 92, at [26].
[111] Above n 1, at 13.3.3.
[112] Crimes Bill 1989, s 30.
[113] Criminal Code Act 1899 (Qld), s 25.
[114] Robin O'Regan *New Essays on the Australian Criminal Codes* (Law Book Co, Sydney, 1988) at ch 4.

Australia and Northern Territory have all since adopted similar defences.[115] The remaining territories are governed by common law necessity.[116] The Commonwealth Criminal Code 1995, which is slightly more nuanced that Griffith's 1899 defence, provides:[117]

> **10.3 Sudden or extraordinary emergency**
>
> (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.
>
> (2) This section applies if and only if the person carrying out the conduct reasonably believes that:
>
> (a) circumstances of sudden or extraordinary emergency exist; and
> (b) committing the offence is the only reasonable way to deal with the emergency; and
> (c) the conduct is a reasonable response to the emergency.

Adopting a similar defence into the New Zealand Crimes Act would resolve the shortcomings in duress of circumstances by providing a defence in situations where an imminent threat arises from people who are present. The defence would extinguish the current uncertainty surrounding necessity by providing clear guidance to the courts.

The "sudden or extraordinary emergency" formulation is attractive because these words appear sufficiently wide to encompass both necessity proper and duress of circumstances. The word 'sudden' captures situations like *Willer* where action is required to avoid imminent danger, whereas 'extraordinary' covers peculiar scenarios like *Re A* which involve a choice between two evils.

Importantly, the defence is broadly drawn allowing it to be applied flexibly to any situation that might arise. As Stephen pointed out, cases of necessity cannot be determined beforehand.[118] The open wording of the defence means it can be used in any case of true necessity, regardless of

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[115] Criminal Code Act 1983 (NT). s 33; Crimes Act 1958 (Vic), s 322R; Criminal Code Compilation Act 1913 (WA), s 25(3).
[116] PA Fairall and M Barrett *Criminal Defences in Australia* (5th ed, LexisNexis Butterworths, Chatswood, NSW, 2016) at [6.1].
[117] Criminal Code Act 1995 (Cth), s 10.3.
[118] Stephen *A History of the Criminal Law of England*, above n 26, at 109-110.

how bizarre the facts may be. The defence is available for all offences, even murder and attempted murder.[119] This stands in contrast to compulsion which is limited by a long and arbitrary list of offences in s 24(2).[120] Compulsion's 'hard-and fast' checklist has been described as a crude mechanism for "ensuring the harm done by the defendant is not disproportionate to the threatened harm".[121] The 'sudden or extraordinary emergency' defence does not need to proscribe offences because the overarching reasonableness requirement provides a safeguard. For example, necessity will rarely be a defence to murder because killing will only be reasonable in the most extreme circumstances. The corollary is that lesser crimes like property damage may be reasonable in less urgent situations. The provision is likely flexible enough to include Glanville William's ship captain who must choose who enters the lifeboats and who must go down with the ship.[122]

The defence could also cover situations like *Police v Kawiti* where the immediate threat has ceased but there is still an emergency.[123] Ms Kawiti was assaulted by her drunk partner at an unfamiliar marae. Her partner went to sleep in the car. Kawiti was in excruciating pain from a dislocated shoulder but could not call an ambulance as she did not have access to a phone and was afraid that she would be attacked again if she returned to the marae. She drove to the hospital and was charged with driving while drunk and disqualified. Duress of circumstances was unavailable because Kawiti, although in excruciating pain, was not under a threat of imminent death or serious injury. There is a strong argument that Kawiti's act was the only reasonable response to her emergency and that she would therefore have a defence under the proposed provision.

While the provision is worded widely, it does not lower the threshold for necessity. Although the defence omits some common law requirements such as proportionality of response and no legal alternative

[119] Fairall and Barrett, above n 116, at [6.11].
[120] Crimes Act, s 24(2).
[121] *Akulue v R*, above n 92, at [12].
[122] See discussion of Glanville Williams above at 12.
[123] *Police v Kawiti*, above n 68.

available to them or if they inflicted a greater evil than the one they sought to avoid. The Australian experience provides the best insight into how the defence operates in practice. Fairall and Barrett write that the provision is "rarely invoked" and has encountered "limited success".[124] The Australian courts have interpreted the defence narrowly, drawing on common law developments. The case law suggests that the following elements are required:[125]

(1) a serious threat of imminent danger to the life or health of the defendant or his or her family, or property;
(2) no way of avoiding the threat other than by breaking the law;
(3) proportionality between the violation of the law and the threat;
(4) the accused knows of the circumstances of necessity; and
(5) the circumstances must be such that a person of ordinary fortitude in the position of the accused would have responded in the manner of the accused.

The New Zealand courts have shown a similar disinclination toward expanding necessity. Judges have frequently referenced Edmund Davies LJ's warning that necessity could easily become a "mask for anarchy".[126] The Court in *Hutchinson* counselled that the nature of the defence must not be diluted, stressing that the word 'necessity' "is a useful reminder of the high threshold required to justify the defence being put to a jury."[127] It is well established that the defence must point to sufficient evidence to justify a defence being put to the jury.[128] Overall, there is little danger that enacting the defence will 'open the floodgates' of litigation or jeopardise the rule of law. The defence would be strictly applied and only allowed in truly exceptional situations of absolute necessity.

[124] At [6.10].
[125] At [6.12].
[126] *Southwark London Borough Council v Williams*, above n 17, at 745-746.
[127] *Hutchinson*, above n 77, at [33].
[128] At [56].

VI. Conclusion

The common law has developed a defence of necessity to exculpate defendants who are morally blameless. The drafters of New Zealand's criminal code enacted a provision (s 20) to preserve common law defences like necessity within the statutory scheme. However, when the English courts developed necessity into the distinct defences or necessity proper and duress of circumstances, the wording of ss 20 and 24 of the Crimes Act had the unforeseen effect of arbitrarily limiting the scope of duress of circumstances. The courts have been unwilling to confirm whether necessity proper and duress of circumstances are available in New Zealand, making the law both unfair and uncertain. Parliament should resolve the doubt and shortcomings in the law by enacting necessity proper and duress of circumstances into a clear statutory defence.

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