Matt Nesling Explain the relevance of the phrase *"A concession to human frailty"* when it comes to the defence of duress. Essay

Introduction –
The phrase 'concession to human frailty' refers to the allowance of the courts of individuals who break the law under threats of serious violence or death, as set out by Whelan 1934 and Valderamma-Vega 1998. It establishes under what circumstances the individual can 'crack' under the pressures and what offences can be committed. I shall look at the concession in relation to duress of circumstances and duress of threats, seeing what offences it can be accepted under, before concluding that the courts do allow a concession under certain situations, but it is removed for murder and attempted offences.

Duress of Circumstances and the 'Concession' –
The concession to human frailty is widely accepted under duress of circumstances due to the lack of severity of the offences committed under such duress. The first case of duress of circumstances was that of Willer 1986 where a man was convinced to drive down an alleyway by a local Citizen's Band radio station, and he was attacked by a gang of local youths. He drove away at speeds over a pavement, and upon reporting the incident was arrested for reckless driving. Upon appeal, the courts overturned the decision holding that the jury felt that D was under threat of death or serious injury, and complied with the four rules as set out in 'Stephens Digest of Criminal Law 1883', which are –

'The act was done in order to avoid consequences which could not have otherwise been avoided,
Those consequences, if they had happened, would have inflicted inevitable and irreparable evil,
That no more was done than was reasonably necessary for that purpose,
That the evil inflicted was not disproportionate to the evil avoided.[1]'
Also, to establish the defence, the Graham test needs to be set out and approved by both judge and jury. The test was set out in the case of Graham 1982 (see 'Duress of Threats, Murder and the 'Concession''), and takes both an objective and subjective view on behalf of the defendant.

This is the standard by which all cases relating to necessity, duress or duress of circumstances are set, and by which they all must comply with.

This case displays much sense as it lets a man who faced potential attack and serious injury commit what is necessary to escape, and what a minor offence it was. This case was the precedent by which the case of Conway 1988 followed.

In this case, two men approached a man and a passenger, who had been shot at recently. The man drove at high speeds to avoid the men, who were in fact plain clothed police officers. The man was convicted of reckless driving, but on appeal the decision was overturned on the basis of Willer, with the courts stating that 'the facts amounted to duress of circumstances; that duress was an example of necessity; and that whether duress of circumstances was called duress or necessity did not matter[2]'.

This case clearly accepts that a concession to human frailty is accepted within the courts and that they are sympathetic as to the pressures that the average man can withstand before being forced to commit an act against the state. However, these cases only relate to driving offences, known as regulatory offences due to the lack of severity of the offence itself.

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[1] A2 Criminal Law – Jacqueline Martin – Hodder Arnold 2006 – p195
[2] Pre-release material – Source 7 – p5

This was again the case succeeding this one, the case of Martin 1989 which relates to another driving offence, this time of a man driving with a disqualified license after his wife threatened to kill herself should he not drive their son to work, who was already late. Despite the hysterics of his wife, he did so and was convicted of driving whilst disqualified, although on appeal he was again successful and was acquitted of the charge.

This case has often been described as a perfect example of necessity, although as stated in the case of Conway, the title affecting the defence is irrelevant. This case also shows the courts willingness to offer a concession to human frailty as it applied the Graham test, which in my eyes it would have failed upon the objective account regarding the reactions of a 'reasonable man' to such a situation, and acquitted the individual of the charge.

The first case to extend the defence from that of regulatory driving offences was that of Pommell 1995, where a man apprehended a young man carrying a sub-machine gun and took it from him, returned upstairs to bed and slept with the gun in his bed. He was found in the morning by the police, sleeping next to the loaded, fully automatic weapon, and upon trial he stated his intention to return it to the local police station but as it was very late the station would have been closed and therefore he chose to leave it until morning. However, he was convicted of possession of an illegal firearm, although the Court of Appeal, upon appeal, again quashed the conviction holding that the defence was available to all defences except that of murder, attempted murder and treason.

This once more shows the courts willingness to allow a concession to human frailty as it allowed a man to act heroically and prevent a worse evil from being committed. Lord Justice Kennedy stated in his judgement of the case 'where someone commendably infringes a regulation in order to prevent another person from committing what everyone would accept as being a greater evil with a gun. In that situation it cannot be satisfactory to leave it to the prosecuting authority not to prosecute.

The defence of duress of circumstances is very willing in terms of providing a concession to human frailty, with no major case to remove the concession. This shows a clear relevance toward the concession and the defence, as it clearly outlines the defence and the willingness of the concession to exist.

Duress of Threats, Murder and the 'Concession' –
Under the defence of duress of threats, or duress, the concession to human frailty is accepted under the same circumstances to that of duress of circumstances, i.e. that it is not accepted for murder and attempted murder charges, as per the case of Howe 1988 which removed all links to between murder, attempted murder and treason and the defence of duress. This was after a man was found to have taken part in the torture and murder of one, as a secondary offender, and been a principal offender in the murder of another man. The courts refused him the defence of duress, following the words of the Abettors and Accessories Act 1861, which states that 'Whosoever shall aid, abet, counsel, or procure the commission of [any indictable offence], whether the same be [an offence] at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.[3]'

This case overruled the previous decision in the case of Lynch 1975, which allowed secondary offenders to murder to use the defence of duress. This case involved a

[3] http://www.statutelaw.gov.uk/content.aspx?&ActiveTextDocId=1044166 - Section 8

taxi driver being placed under duress to act as a 'getaway' driver for a man, and told to drive to a train station and away after shooting and killing a policeman. This went against the Abettors and Accessories Act 1861 and gave way to the defence being permitted for murder. This case offered a clear and distinct concession to human frailty, highlighting a relevant link to the between the defence and the phrase, although this link was eradicated later by Howe.

This principles of Lynch were followed again in Graham 1982, where a man lived in a 'bizarre minarge-trois' with his wife and his homosexual lover, K, who was often violent and aggressive towards him. K then threatened the man to hold one side of a flex around his wife's neck until she was dead, else he would kill him. The man did so, and was convicted of murder, with Lord Lane stating 'the law requires a defendant to have the self-control reasonably to be expected of the ordinary citizen in his situation. It should likewise expect him to have the steadfastness reasonably to be expected of the ordinary citizen in his situation[4]'. Although this case did not allow the defence, it allowed the principles of Lynch to be expressed, and would have allowed it should D in the case of Graham have passed both the objective and subjective elements of the test for duress [established within the case of Graham and subsequently called the Graham test].

However, since the case of Howe 1988, the concession to human frailty has all but been removed from murder, attempted murder and treason in relation to the defence of duress. This has been reaffirmed in the case of Gotts 1992, where a 16 year old boy was convicted of attempted murder against his mother, after he stabbed her due to threats received from his father telling him to do so. Lord Jauncey stated in his judgement of the case 'I can therefore see no justification in logic, morality or law in affording to an attempted murderer the defence which is witheld from a murderer[5]'.

This therefore removes the concession to human frailty entirely from the defence of duress relating to murder, but the defence and the concession still coincide under other such offences, such as those of theft, due to the lack of severity surrounding the offence.

Duress of Threats and the 'Concession' –
With regards to the other offences besides murder and attempted murder, duress still applies and allows a concession to human frailty. This was evident in the case of Shepherd 1987 as a man joined a group of shoplifters, but upon trying to leave was placed under threats of violence, in keeping with the standards as set out in Whelan 1934 and Valderamma-Vega 1998, and therefore kept doing so. As he did not know of the gangs violent history, as it did not exist, he was given the defence of duress due to this lack of knowledge. This case clearly gives an existing concession to human frailty under the defence of duress, with the presiding judge stating 'if trouble materialises unexpectedly and puts the defendant into a dilemma in which a reasonableman might have chosen to act as he did [inkeeping with the Graham test], the concession to human frailty is available to the defendant[6].'

The case of Sharp 1987 also arguably offers the concession to human frailty, as in similar circumstances the defendant of this case also took part in robbing post offices, and was again placed under threat to continue. However, D knew of the gangs violent history, and was not allowed the defence, with Lord Lane CJ stating 'where a person has voluntarily, and with knowledge of its nature, joined a criminal

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[4] Pre-release material – Source 1 – p2
[5] Pre-release material – Source 4 – p3
[6] Pre-release material – Source 6 – p5

organisation or gang which he knew might bring pressure on him to commit an offence and was an active member when he put under such pressure, he cannot avail himself of the defence of duress[7].' In this case, the concession to human frailty was accepted for the offence, but merely denied on the grounds that D placed himself under self-induced duress, although arguably it could be stated that the concession has been removed due to the circumstances under which D was placed under the threats. This point was also followed within the case of Hasan (Formerly Z) 2005 with the same principles being applied.

Also, the courts have accepted that perjury is another crime that they will allow a concession to human frailty to. This was decided in the case of Hudson and Taylor 1971 where two girls, aged 17 and 19, were threatened with severe violence into lying under oath in the courts. They were convinced that official protection from the police would be ineffective and therefore chose to commit the offence, despite other options being available to them. They were convicted, following the precedent of Gill 1963 relating to a safe avenue of escape, but the Court of Appeal quashed the conviction. The judge presiding over the case of Howe 1988, Lord Griffiths, reaffirmed some of the decisions in this case, by stating 'if duress is introduced as a merciful concession to human frailty it seems hard to deny it to a man who knows full well that any official protection he may seek will not be effective[8].' This case therefore highlights a strong and relevant link between duress and the concession to human frailty, allowing those who know official protection would be ineffective to be allowed the defence of duress. However, it has often been stated by legal academics that a case such as this would be unlikely to be successful again.

Should the defence of duress exist? –
On several occasions, judges have expressed the view that the defence of duress should be removed and that the concession to human frailty be taken into account and act as a mitigating factor to offences committed. These views were echoed further by Lord Jauncey in the case of Gotts 1992, where he stated 'I share the views of Lord Griffiths [Howe 1988] that it would have been better had the development of the defence of duress not taken place and that duress had been regarded as a factor to be taen into account in mitigation[9].'

I share these views, as I believe it wrong for someone to be fully acquitted of a crime they chose to commit, regardless of if they would not have done it prior to the threats. However, I do not believe it fair that someone should be issued with a life sentence for committing murder under duress, i.e. should a pregnant mother of two be asked to shoot a peadophile over having her children killed. This in my eyes is not justice, despite the law being in place to protect the civil liberties of the people, as the woman has merely done what is asked of her [as per Cole 1994{Source 5, Page 4, Pre-release material}] and done what the reasonable man would have done in that position [as per the Graham test]. The issues of justice whilst using the defence of duress were again taken into account within the judgement of Gotts 1992 by Lord Jauncey, as he stated obiter that 'withholding the defence in any circumstances will create some anomalies but I would agree with Lord Griffiths [Howe 1988] that nothing should be done to undermine in any way the highest duty of the law to protect the freedom and lives of those who live under it[10].' I think that this statement should also be taken into account for the offenders as well as the victims, as the offenders are also victims of threats made against them and those close to them.

[7] Pre-release material – Source 6 – p4
[8] Pre-release material – Source 5 – p4
[9] Pre-release material – Source 4 – p3
[10] Pre-release material – Source 4 – p3

However, in relation to my example, it would have also been possible should the courts have distinguished from the case Lynch as opposed to overruling it when deciding over the case of Howe 1988. This would have avoided the potential injustices, such as Gotts 1992, as I believe it is unfair to sentence a 16 year old boy merely trying to protect himself at the expense of his mother, with a mandatory life sentence, although a sentence is definitely required in such a circumstance.

Conclusion –
I believe that the concession to human frailty to exist under the defence of duress, with the exceptions of murder, Howe 1988, and attempted murder, Gotts 1992, and that this is both fair and just due to the protection of civil liberties, the purpose of the law being created. Although unfair to the victims, I do believe it to be fair to also protect the rights of the offenders also, as they are the victims within the situations also. However, I also believe that the defence of duress should be eradicated and that duress should be taken as a mitigating factor as opposed to a full acquital. I think this would resolve certain issues of justice and fairness within the sanctity of the law.