Murder under duress and judicial decision-making in the House of Lords

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Introduction

While finding fault with House of Lords' decisions in the field of criminal law is by no means a new academic sport, the present decade is proving particularly fruitful for the critic. The precise ramifications of *Caldwell*[1] and *Lawrence*[2] are still being thrashed out.[3] *Seymour*,[4] on manslaughter, was unforgiveably ambiguous.[5] *Moloney*[6] and *Hancock and Shankland*[7] left the mental element in murder hopelessly opaque.[8] In impossible attempts *Anderton v Ryan*[9] revealed a degree of ineptitude which even the House of Lords had to recognise in overruling itself only a year later in *Shivpuri*.[10]

It is not simply a question of academics taking issue with the outcome of a particular decision. The further, and in some respects even more worrying, aspect of many of these decisions is the quality of the legal reasoning they embody.[11] Too often it falls well short of that to be expected from our highest appellate court, certain decisions being 'not even competent in technical respects'.[12]

The purpose of this article is to focus attention on the House's recent resolution of the central issue in *Howe*,[13] whether the plea of duress is available on a charge of murder.[14] It will be argued that the case is further

1. [1982] AC 341.
2. [1982] AC 510.
3. Eg, R.M. Lynn, '"Obvious" and "Serious" Difficulties' [1986] 37 NILQ 237.
4. [1983] 2 AC 493.
5. The difficulties of the decision are lucidly exposed by R. Card, *Cross and Jones: Introduction to Criminal Law* (10th edn, 1984) at pp 176–180. The subsequent opinion of the Privy Council in *Kong Cheuk Kwan v R* (1986) 82 Cr App R 18 did little to resolve the difficulties: see J.M. Brabyn, 'A Sequel to *Seymour*, Made in Hong Kong: the Privy Council decision of *Kong Cheuk Kwan v R*' [1987] Crim LR 84.
6. [1985] AC 905.
7. [1986] AC 455.
8. See J.R. Spencer (1986) 45 CLJ 161. (The House of Lords can take no credit for subsequent guidance given by the Court of Appeal in *Nedrick* [1986] 1 WLR 1025.)
9. [1985] AC 560, strongly criticised by Glanville Williams, 'The Lords and Impossible Attempts, or *Quis Custodiet Ipsos Custodes*?' (1986) 45 CLJ 33.
10. [1986] 2 WLR 988.
11. See Glanville Williams, *loc cit.*
12. J.R. Spencer (1984) 43 CLJ at 10 (referring to *Seymour* and *Morris* [1984] AC 320, a House of Lords decision on the meaning of 'appropriation' in theft).
13. [1987] 1 All ER 771.
14. The other two questions before the House concerned the test of duress and whether one who incites or procures by duress another to kill or to be a party to a killing can be convicted of murder if that other is acquitted by reason of duress.

potent evidence of the failure of the House of Lords to provide sound, well-reasoned decisions in the field of criminal law.

Howe – the arguments

The House was unanimous in its decision that the plea of duress is never available on a charge of murder, irrespective of the defendant's degree of participation in the crime. Briefly, four main strands of argument may be detected in the speeches. First, to hold duress available to the actual killer would be contrary to authority. Secondly, to reach any other conclusion would be to step outside the boundaries of proper judicial decision-making. Thirdly, morality and the principle of sanctity of life demanded the denial of the plea of duress on a charge of murder. Fourthly, any hardship that might arise in particular cases could be mitigated by administrative intervention. (The deference shown by Lords Bridge and Griffiths to Lord Lane CJ is best glossed over. 'Great weight' was to be attached to Lord Lane's opinion in the Court of Appeal decision in *Howe*[15] since he was in 'far closer touch with the practical application of the criminal law and better able to evaluate the consequence of a change in the law than those of us who sit in the House.'[16] Evidently the House of Lords has now ceded its authority to the Court of Appeal.)

It will be argued that the reasons advanced by the House were less than cogent. Neither precedent, principle, nor policy dictated the conclusion reached in *Howe* and the decision marks a retrograde step in the development of criminal jurisprudence. Underlying the decision is fundamental confusion centering on the roles of justification, excuse and mitigation in the criminal law. *Howe* represents a lost opportunity to delimit the defence on a coherent conceptual basis.

The precedent argument

The House took the unanimous view that prior to *Lynch v DPP for Northern Ireland*[17] the weight of authority was against the availability of the defence of duress on a charge of murder. Accordingly, in answer to the certified question, they held that the plea was not available to the actual killer. Further, *Lynch* had to be overruled because there was no rational distinction between the actual killer and a secondary party and because it was a decision that the House had not been empowered to make given the weight of authority prevailing at the time.[18]

15. [1986] QB 626 at 641.
16. *Per* Lord Griffiths at 789, Lord Bridge emphasising his concurrence at 784.
17. [1975] AC 653.
18. Lord Hailsham at 778, 782, Lords Bridge and Brandon at 784, Lord Griffiths at 789, 790, Lord Mackay at 798. (Lord Hailsham, at 777, 778, would have been prepared to distinguish the actual killer from a secondary party, *cf* Lord Morris in *Lynch* at 671, 672.) The decision thus rids the law of the wholly unprincipled distinction arising from *Lynch* and *Abbott v R* [1977] AC 755 (see Smith [1976] Crim LR 563 at 564–565 and *Graham* [1982] 1 All ER 801 at 804), but substitutes equally anomalous distinctions (see Smith [1976] Crim LR 480 at 483). Lord Brandon, at 784, alone expressed dissatisfaction at the outcome.

However, examination of the 'heavy preponderance of authority'[19] against the availability of the defence on a charge of murder prior to *Lynch* reveals mainly a stream of opinions of commentators with Hale[20] as its source. The views of great writers of the past should not be compelling in a modern decision.[21] Judicial authority pre-*Lynch* consisted principally of *obiter dicta* in favour of its exclusion in *A-G v Whelan*,[22] *Steane*[23] and *Bourne*[24] but, as Lord Morris observed in *Lynch*,[25] these could similarly be traced back to Hale. The only judicial decision that might be taken to establish that duress was no defence to a charge of murder is *Tyler and Price*,[26] but the precedent value of that decision is not strong.[27]

In *Howe* reliance was also placed on *Dudley and Stephens*[28] where the defence of necessity failed on a charge of murder. Lord Hailsham claimed that the conclusion in that case had met with 'very wide acceptance'.[29] (In fact, the decision has generated controversy since its inception.[30]) Lord Mackay[31] pointed out that since the dilemma in that case was essentially the same as in duress, to hold duress available on a murder charge would involve a departure from *Dudley and Stephens*. Whether the House should have been so heavily persuaded by the authority of that famous case is highly questionable. Admittedly, the emphasis on the decision is understandable given the almost total lack of direct judicial authority. Less understandable is the failure to subject the decision to any critical analysis and the attempt to pass off the decision as watertight authority against the defence of necessity on a murder charge.

Given the weight placed on *Dudley and Stephens* in *Howe* it is worth pausing to emphasise the weakness of its authority in an attempt to relegate it to its proper position as an historically interesting legal response to a specific problem and not a major landmark in the development of criminal jurisprudence. The ambiguities and the feebleness of the reasoning in *Dudley and Stephens* have been ruthlessly exposed by Glanville Williams and Glazebrook[32] so as to convince even the most

19. *Per* Lord Hailsham at 776.
20. '[A man] ought rather to die himself than kill an innocent', *Pleas of the Crown*, Vol 1, 51.
21. *Cf* the minority approach in *Abbott* at 771, 'Great stress has been laid by the majority of their Lordships upon the apparent unanimity with which great writers of the past have rejected duress as a defence, but, on any view, they have to be read with circumspection in these days, for the criminal courts have long accepted duress as an available defence to a large number of crimes from which those same writers withheld it.'
22. [1934] IR 518 at 526.
23. [1947] KB 997 at 1006.
24. (1952) 36 Cr App R 125 at 128.
25. At 672.
26. (1838) 5 C & P 616, cited as authority by Lord Griffiths in *Howe* at 785.
27. See Glanville Williams, *Criminal Law, The General Part* (2nd edn, 1961) at pp 759, 760.
28. (1884) 14 QBD 273.
29. At 778.
30. Eg, Stephen, *Digest*, Art 11, n 2, declaring that he could find no principle in it; Glazebrook, 'The Necessity Plea in English Criminal Law' (1972) A CLJ 87 at 112–115; Glanville Williams, 'A Commentary on *R v Dudley and Stephens*' (1978) 9 Cambrian Law Review 94.
31. At 796. *Cf* Lord Griffiths at 785.
32. *Supra*, n 30.

sceptical that the case cannot confidently be taken as authority for anything very much at all. The House of Lord's unquestioning acceptance in *Howe* of the less than compelling decision of an inferior court, delivered 100 years ago, is surprising.

In assessing the modern precedent value of *Dudley and Stephens*, a further consideration might be added. The language of the judgment is almost exclusively that of justification. 'Excuse' makes the occasional appearance but is not used in a sense distinct from justification: '. . . unless the killing can be *justified* by some well-recognised *excuse* . . .'[33] The court's conclusion that 'the facts as stated in the verdict are not legal justification of the homicide . . .',[34] together with the repeated use of 'justify', 'justifiable' and 'justification',[35] bear witness to the court's failure to explore any possible excusatory rationale underlying the defence.

The omission is hardly surprising. At the time of *Dudley and Stephens* the practical consequences of the distinction between justifiable and excusable homicide had disappeared. Only recently has the importance of the distinction between the theoretical bases of excusatory and justificatory defences been advanced.[36] Only still more recently has the view that necessity may operate on an excusatory as well as a justificatory basis gained wide currency.'[37]

In contrast, the House of Lords in *Howe is* at fault in failing to take account of developments since *Dudley and Stephens*. To hold that decision applicable because there is no supportable distinction between killing under necessity and killing under duress ignores the very different questions raised in the two cases. Whereas the central question in *Dudley and Stephens* was whether the killing might be justifiable, the central question in *Howe* was whether the killing might be excusable.

To conclude this section, it is submitted that the weight of authority binding the House in *Howe* was flimsy and unconvincing and in no way would have barred the court from reaching an opposite conclusion. The truth is that the House of Lords was being 'called upon for the first time to make an unfettered decision on a point of pure common law in accordance with basic common law principles.'[38] However, perhaps the greater truth is that, as a matter of principle, the House did not *want* to reach an opposite conclusion.

33. At 286, 287.
34. At 288.
35. *Passim.*
36. See further *infra* under sub-heading 'Continuing confusion between justification and excuse'.
37. Eg, P.H.J. Huxley, 'Proposals and Counter Proposals on the Defence of Necessity' [1978] Crim LR 141 at 144; Glanville Williams, Textbook of Criminal Law (2nd edn, 1983) at pp 634, 635; Celia Wells, *'Necessity and the Common Law'* (1985) Ox J Leg Stud 471. The Law Commission (Law Com No 83), *Criminal Law Report on defences of General Application* (1977) failed to consider the possibility. *Cf* Law Reform Commissioner for Victoria, Report No 9, *Duress, Coercion and Necessity* (1980) esp paras 1.07, 3.47, 4.19.
38. *Per* Lord Edmund-Davies at 713 in *Lynch.*

The 'best left to parliament' argument

'The rules of which [the common law] is the source cannot be unchanging . . . They must reflect contemporary views of what is just, what is moral, what is humane.'[39]

In *Howe*, the House of Lords took a rather narrower view of its functions, arguing that any change in the law of murder under duress should be brought about by legislation and not judicial decision.[40] Lord Hailsham[41] adverted to the 'must move with the times' argument but expressly rejected it as 'based on the false assumption that violence to innocent victims is now less prevalent than in the days of Hale or Blackstone', citing a catalogue of appalling crimes including the holocaust of the Jews, the Moors murders and the attempted explosion of an aircraft in mid-air by the Arab terrorist Hindawi. All are strongly emotive examples, but nothing in his Lordship's argument serves rationally to explain precisely how withholding the defence of duress from one charged with murder might discourage such crimes. Further, the principle that duress is not available to one who has voluntarily exposed himself to the risk of duress would deny the defence in many instances which might otherwise give rise to concern, as Lord Hailsham himself later conceded.[42]

Lord Mackay, in theory at least, was prepared to take a broader view of the House's powers, seeking guidance from Lord Reid's view in the hearsay case of *Myers v DPP*[43] that 'the common law must be developed to meet changing economic conditions and habits of thought'. Nevertheless, Lord Mackay ultimately concluded[44] that this was one of those areas, as in *Myers* itself, where judicial change would 'introduce uncertainty over a field of considerable importance' and the area was 'not susceptible of what Lord Reid described as a solution by a policy of make do and mend'. However, judicial development of the defence of duress is very different from judicial reform of the rule against hearsay. It is easy to see why Lord Reid refrained from tinkering with the incoherent body of cases which make up the latter. Change in one area might inevitably lead to unpredicted changes in another. Duress, in contrast, is a relatively self-contained area. Any difficulties and uncertainties relate generally to the shadowy boundaries of the defence of duress and already prevail over the wide range of offences in respect of which duress *is* available. It might be thought that those boundaries could be clarified by judicial decision.

However, in the context of discussion of the Law Commission's proposal that duress should be available on a charge of murder,[45] Lord Bridge[46] put the view that precise definition of the scope of duress could be achieved '. . . by legislation alone, as opposed to judicial development . . .' Surely

39. *Per* Lord Diplock in *Hyam v DPP* [1975] AC 55 at 89.
40. See Lords Bridge and Brandon at 784.
41. At 781.
42. At 782. See also *infra*, n 52, n 69 and associated text.
43. [1965] AC 1001 at 1021, quoted by Lord Mackay at 793.
44. At 796, 797.
45. Law Com No 83, para 2.44.
46. At 784.

precision is vital whatever the nature of the offence in respect of which the defence is available, and arguably it is the House's duty clearly to define the boundaries of a common law defence.[47]

Proceeding on lines similar to Lord Bridge, Lords Griffiths and Mackay argued[48] that the Law Commission's recommendations embodied a definition of duress which their Lordship's believed to be 'considerably narrower' than that thought to apply at present. Lord Griffiths further asserted that the Law Commission's definition of duress introduces 'conditions which clearly go beyond the bounds of judicial creativity and would require legislation.' His Lordship quoted in support of clauses 1 and 2 of the Law Commission's Criminal Liability (Duress) Bill.[49]

However, the principal provisions reveal nothing approaching a considerable narrowing of the present law. For example, the test of duress in the proviso to clause 1(3) is actually less restrictive than that laid down by Lord Lane CJ in *Graham*[50] and endorsed by the House of Lords in *Howe*.[51] Lord Lane's test embodies two essentially objective requirements not present in the Draft Bill: the defendant is assumed to be a person of reasonable firmness and any misreading of the situation has to be reasonable before it can be taken into account. As to 'judicial creativity', the Court of Appeal[52] clearly felt it was keeping within its acceptable bounds when it recently recognised the *Fitzpatrick*[53] principle as part of English law. It thereby incorporated into the concept of duress a requirement similar to that in clause 1(5) of the Draft Bill, under which the defence is not available to one who has voluntarily exposed himself to the risk of duress. The only provisions which may properly be regarded as significantly narrowing the present availability of the defence relate to the denial of the defence where there was a real opportunity for the defendant to seek official protection regardless of whether that protection would have been effective.[54]

It has been argued that the House of Lords chose to take a much too restrictive view of its proper functions, preferring to toss the hot potato of murder under duress into parliamentary hands. For good measure, Lords Bridge[55] and Griffiths[56] inferred that parliament and the public did not in fact want to extend duress to murder. This inference was

47. *Cf* Lord Wilberforce in *Lynch* at 684, '[The House] would not discharge its judicial duty if it failed to define the law's attitude to this particular defence in particular circumstances.' See also n 52 *infra* and associated text.
48. At 787, 796 respectively.
49. Law Com No 83, Appendix 1.
50. [1982] 1 All ER 801 at 806.
51. At 800. See also 715, 782, 784, 790.
52. *Sharp* [1987] 3 WLR 1 and see discussion by Smith [1987] Crim LR 566 at 567. *Cf Shepherd* (1987) Times, 16 May, CA.
53. [1977] NI 20.
54. Clauses 1(3)(c), 1(4), 1(6). English authority lends support to the view that the defence is available where the protection would be ineffective, see *Hudson and Taylor* [1971] 2 QB 202 and *R v K* (1984) 78 Cr App Rep 82, discussed by Smith [1983] Crim LR 736.
55. At 784.
56. At 788.

drawn from the sole consideration that, in the ten years following the Law Commission report, parliament had taken no action, but parliamentary intention is notoriously difficult to divine even in respect of actions rather than omissions. Equally it could be inferred that parliament was well pleased with the decision in *Lynch* because it had taken no action to correct it. Further, parliament can be slow to enact even the most uncontroversial measures. Latterly, it might have been thought inappropriate for parliament to intervene while the matter was being further considered by the Criminal Code Team.[57] In short, the inference drawn by Lords Bridge and Griffiths is unwarranted.

To sum up, the House took an unduly narrow view of its functions, raised illusory difficulties on precisely defining the defence, and misread parliamentary intent. Again, it is difficult to escape the conclusion that the House of Lords, as a matter of policy, simply did not *want* to find that it had the power to hold the defence available on a charge of murder.

The sanctity of life/morality argument

At the root of the decision lie two interrelated policy considerations: that the law cannot be seen to be countenancing the immoral act of killing an innocent to save one's own skin and that the principle of sanctity of life must not be eroded.[58] Given the highly emotive nature of the general question posed and the horrific circumstances of the particular killings in *Howe*, it is clear that the issue ultimately had to turn on these fundamental principles. However, it will be argued below that the House of Lords was less than rigorous in its analysis of the role of morality in the criminal law, paid insufficient regard to the function of excuses in determining criminal responsibility, and was too highly influenced by emotional considerations.

The underlying assumption was that it is necessarily immoral to kill an innocent third party to avert the threat of death; but perceptions of morality are notoriously variable.[59] Moreover, even if moral etiquette demands the sacrifice of one's own life before killing an innocent, what if the coercer threatens lives of others as well as one's own[60] or, indeed, only the lives of others and not one's own? Further, whatever the correct moral position, there is no necessary correspondence between ethical theory and legal guilt.[61] The importation of a moral principle into the criminal law should be justified on grounds other than that of simple morality.

The justification in *Howe* could be said to rest on the weakening of respect for the principle of sanctity of life that would follow from extend-

57. Law Com No 143, *supra* n 37.

58. See esp Lord Hailsham at 778, 781, Lord Griffiths at 785, 789, 790, Lord Mackay at 798.

59. As Hogan observes, '. . . whose morality? Is there some book on the library shelves which provides us all with an agreed guide?' ('Forced to commit murder', *The Law Magazine*, May 1987 32 at 33.)

60. *Cf* Wechsler and Michael, 'A Rationale of the Law of Homicide' (1937) 37 Col LR 738, '. . . when a third person's life is also at stake even the path of heroism is obscure.'

61. See Hart, *Concept of Law* (1961) Ch VIII.

ing the defence of duress to one charged with murder. This consideration weighed heavily with Lords Hailsham, Mackay and Griffiths, the latter asserting, 'I would do nothing to undermine [the sanctity of human life], be it ever so slight,'[62] but as a society we do not in practice embrace sanctity of life as an absolute ideal.[63] Sometimes it has to be qualified by other competing considerations, social, moral and economic. As far as the criminal law is concerned the concept is arguably already diluted, even where the victim is innocent, as in self-defence where the privilege may be exercised against an 'innocent' attacker who lacks criminal responsibility because he is, say, under age or insane,[64] and in the partial defence of provocation where the provocative conduct does not now have to stem from the victim.[65]

Further, it is difficult to see precisely how extending the defence of duress to one charged with murder would weaken the ideal. Lord Griffiths[66] endorsed Lord Lane's fears that bogus defences might succeed because 'the defence of duress is so easy to raise and may be so difficult for the prosecution to disprove beyond reasonable doubt,' but the same charge can be levelled at *any* excusing condition.[67] All excuses present the unscrupulous with an opportunity to deceive courts and juries. In any event, it is unlikely that a successful plea of duress would be readily secured on a murder charge. As the minority asserted in *Abbott*,[68] 'The realistic view is that the more dreadful the circumstances of the killing, the heavier the evidential burden of an accused advancing such a plea, and the stronger and more irresistible the duress before it could be regarded as affording any defence.' Further, the defence is already restrictively defined by the common law. In particular, the *Fitzpatrick* principle would deny the defence to terrorists, gang members, etc[69] and Lord Lane's test of duress, endorsed in *Howe*, has a strong objective element, leaving it to the jury to determine whether a person of reasonable firmness would have resisted the threat.[70] Additionally, of course, the threat should be one of death or serious personal injury and, as a species of necessity, there must be no other available means of escape. Even Lord Hailsham concluded that it was doubtful whether properly instructed juries would have acquitted in *Abbott* and *Howe*.

Nevertheless, it might be argued that denial of the plea of duress on a murder charge serves a useful deterrent purpose. The view has been put that the knowledge that a finding of guilt will follow from his actions will have a deterrent effect on an individual under duress.[71] It was an argu-

62. At 789.
63. See Jonathan Glover, *Causing Death and Saving Lives* (1977).
64. See Smith and Hogan, *Criminal Law* (5th edn, 1983) at p 328.
65. Homicide Act 1957, s 3.
66. At 789.
67. See Packer, *The Limits of the Criminal Sanction* (1969) pp 64, 65 and *Cf* Hart, *Punishment and Responsibility* (1968) Ch II.
68. At 773.
69. *Supra*, n 52 and associated text.
70. *Supra*, n 50 and associated text.
71. See discussion by Hall, *General Principles of the Criminal Law* (2nd edn, 1960) at 444–8.

ment strenuously advanced by Stephen,[72] 'Surely it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary,' but it is questionable whether the law can have any deterrent effect on the individual under duress. The instinct of self-preservation in the face of an immediate threat will nearly always take precedence over the threat of legal punishment at some future time – unless, of course, the individual possesses heroic qualities in which case the deterrent effect of the criminal law is superfluous.

What effect would extending the plea to a charge of murder have upon the wider public? It was argued above that, if duress were available on a murder charge, acquittals would be rare. Would such cases undermine the principle of sanctity of life? Would the mere availability of the plea weaken respect for the principle? The straight answer is No – duress is an excuse and not a justification and a successful plea in no way signifies condonation of the killing: the act remains wrongful, it is only the actor's culpability which is in issue. A potential difficulty with that view is that the public may perceive an acquittal in a quasi-justificatory light. 'The fact is that the public will always interpret an acquittal as a vindication of the deed.'[73] However, given the nature of the defence the practical repercussions of such perceptions might be thought to be slight. Duress is concerned with emergencies – 'one off' cases where someone is suddenly placed in a dilemma – it does not arise where someone engages in a certain activity and has the opportunity to order his conduct in response to misguided perceptions of what the law is saying.

The mitigation argument

The House was not wholly unsympathetic to one who kills under duress, but argued that in the 'most agonising cases'[74] hardship could be avoided by what might be termed an essentially mitigatory approach to the defence. The mandatory penalty barred mitigation in the ordinary sense, but their Lordships investigated other ways in which account could be taken of the defendant's dilemma. Broadly two avenues presented themselves. (One might pause to observe that the least complicated approach would have been to extend the plea of duress to murder. As argued above,[75] inevitably the jury is only going to acquit in these 'agonising' cases.)

First, Lords Hailsham, Griffiths and Mackay considered the possibility that duress, like provocation and diminished resposibility, might reduce murder to manslaughter. Lord Hailsham[76] rejected the suggestion on the ground that duress is different from provocation and diminished responsibility. Of course it is, but he fails to provide any clear analysis of why the difference is compelling here. If a 'concession to

72. *A History of the Criminal Law of England* (1883) Vol I at 107.
73. Fletcher, *Rethinking Criminal Law* (1978) at 825, discussed by Simon Gardner, 'Instrumentalism and Necessity' [1986] 6 Ox J Leg Stud 431.
74. *Per* Lord Hailsham at 780.
75. *Supra*, notes 68, 69, 70 and associated text.
76. At 782.

human frailty', to quote Lord Hailsham,[77] is acknowledged in provocation, why is it not in duress?

A further extraordinarily quixotic ground of rejection advanced by Lord Hailsham[78] also found favour with Lords Griffiths[79] and Mackay,[80] and presumably also with Lord Brandon (who agreed with Lord Mackay's speech) and Lord Bridge (who agreed with Lords Griffiths and Mackay). Their Lordships observed that case law and the Law Commission[81] supported the view that where duress is available and made out the defendant is entitled to a complete acquittal without the stigma of a conviction. Accordingly, they argued, it would be inconsistent and unjust to hold that duress might reduce murder to manslaughter. Yes, but surely less stigmatic than a conviction for murder which was the alternative their Lordships had on offer.

The first avenue having been rejected, a second essentially mitigatory approach was advanced by Lords Hailsham[82] and Griffiths.[83] This approach maintains that at several stages in the criminal process sufficient effect can be given to a plea of duress other than by way of a general defence.[84] First, when a discretion to prosecute is exercised;[85] secondly, when sentence is imposed following conviction;[86] thirdly, a Royal Pardon may be granted; fourthly, there is the role of the Parole Board. However, all these possibilities are unsatisfactory.[87] All involve the exercise of a discretion, the outcome of which is necessarily uncertain, in contrast to the automatic acquittal where the plea is available and made out. Further, apart from the second possibility, the person or body exercising the discretion will be taking into account factors much wider than the self-contained legal issues before a court. Such factors may include considerations of policy and expediency which may have no bearing on the individual's culpability. Additionally the grounds of duress might not be so fully investigated at the trial if they were not the subject of complete defence. Above all, as Lord Edmund Davies emphasised in *Lynch*[88] '. . . even the exercise of the Royal Prerogative involves the notion that there must have been a degree of wrongdoing, for were it otherwise no "pardon" would be called for'.

In short, the arguments advanced for rejecting the suggestion that

77. *Ibid.*
78. *Ibid.*
79. At 790.
80. At 788.
81. Law Com No 83.
82. At 780, 781.
83. At 785, 790.
84. See Wasik, 'Duress and Criminal Responsibility' [1977] Crim LR 453.
85. Although the examples cited by Lord Griffiths, at 790, envisage this being exercised in the coercee's favour only when his role in the killing was minimal.
86. Technically, of course, there is no formal scope for this approach in respect of murder because of the mandatory penalty, but Lord Hailsham, at 781, points out that the trial judge may decide to make no minimum recommendation and will always report to the Home Secretary.
87. See *Lynch*, Lord Wilberforce, at 685 and Lord Edmund-Davies at 707; Law Com No 83, paras 2.16–2.18.
88. At 707.

duress might reduce murder to manslaughter fall well short of rational exposition. Further, the notion that hardship might be mitigated through essentially uncertain discretionary channels ignores the disparate roles of excuse and mitigation as determinants of criminal responsibility.

Continuing confusion between justification and excuse

Thus far the decision in *Howe* has been criticised for the less than convincing arguments advanced by the House of Lords in support of its decision. Of further concern, is the underlying ignorance of the features of an excusatory defence.

In recent years writers have proselytised the jurisprudential distinctions between the roles of justification, excuse and mitigation in the criminal law.[89] Proper account of their distinct functions is thought to pave the way for the coherent development of defences.[90] While there is some disagreement on the precise characteristics of each[91], their basic perimeters are relatively well settled. Briefly, mitigation necessarily entails holding the defendant criminally responsible for what he did. Even where no punishment is imposed, conviction has a stigmatic effect. In contrast, both justificatory and excusatory defences absolve the defendant from criminal responsibility. Nevertheless, justification and excuse are themselves distinct species. An act is justifiable if it consists of conduct which the law seeks to promote or at least does not seek to discourage. In excuse the emphasis is on the actor rather than the act, with the law deploring the conduct but finding it inappropriate to attribute criminal responsibility for that conduct because the circumstances were such that the defendant could not reasonably have been expected to have acted otherwise.

Superficially at least, the distinctions between justification, excuse and mitigation have filtered through to the judiciary in *Howe* with none of the judges using the terms interchangeably. This represents a welcome advance from Lord Goddard's extraordinary confusion between excuse and mitigation in *Bourne*,[92] Murnaghan J's alternation between justification and excuse in *A-G v Whelan*[93] and Lord Wilberforce's synonymous use of 'justify' and 'excuse' in the same paragraph of his speech in *Lynch*.[94]

Although none of the judges in *Howe* falls into the jurisprudential trap of describing duress as a justification there is nonetheless clear evidence that not all of them have fully grasped what lies behind the label 'excuse'.

89. Eg, Hart, *Punishment and Responsibility* at 13–17; Fletcher 'The Individualisation of Excusing Conditions' (1974) 47 S Cal Law Rev 1269 and *Rethinking Criminal Law*, esp Ch ten; Glanville Williams, 'The Theory of Excuses' [1982] Crim LR 732.
90. Eg, Peter Alldridge, 'The Coherence of Defences' [1983] Crim LR 665.
91. Eg, Dressler, 'New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking' (1984) 32 UCLA Law Rev 61.
92. At 128, 129.
93. At 526.
94. At 680, 681.

For example, Lord Bridge[95] referred to the defence's 'lack of any underlying principle', claiming that it is 'difficult to rationalise by reference to any coherent principle of jurisprudence'. His specific analysis of this lack of principle went only so far as to observe that it is fallacious to suppose that the coercee is deprived of volition.[96] Admittedly, the courts may have failed in the past in a coherent development of the defence. However, the jurisprudential foundation of the defence is well established. It is essentially 'a concession to human infirmity in the face of an overwhelming evil threatened by another.'[97] It is a recognition that criminal responsibility should not be imposed on any individual who could not reasonably have been expected to have acted otherwise. Nor is this pure jurisprudential theorising – the latter principle has been judicially written into the test of duress by Lord Lane and endorsed by the House of Lords in *Howe*.[98]

Further misunderstanding of the nature of an excusatory defence may be detected in Lord Hailsham's speech. Recognising that duress is a concession to human frailty, he observed[99] that it allows 'a reasonable man to make a conscious choice between the reality of the immediate threat and what he may reasonably regard as the lesser of two evils.' However, while the balance between the relevant harms may be the central feature of a justificatory defence, there is no *requirement* in an excusatory defence that the value represented by the harm averted should outweigh the value injured by the harm done. In excuse, as Fletcher observes,[100] 'The comparison of interests is but the vehicle for determining what we may rationally and fairly expect of the actor under the circumstances.'

Confusion, or at least imprecision, is also seen in Lord Mackay's speech[101] when he spoke of it seeming repugnant that the law should 'recognise in any individual in any circumstances, however extreme, the *right* to choose that one innocent person should be killed rather than another,' but 'rights' (or privileges) are, in any event, not in point in the context of an excusatory defence.

In conclusion, it is submitted that the House of Lords never really addressed the question whether an excusatory defence should be available on a charge of murder. It may have been *speaking* in terms of excuse but none of the speeches discloses any genuine understanding of how and why excusatory defences operate. Further support for this view lies in its unquestioning acceptance of the authority of *Dudley and Stephens*, failing to observe that, whatever the proper interpretation of that case

95. At 783.
96. Citing Lord Edmund-Davies in *Lynch* at 709–711. (A closer reading of Lord Edmund-Davies' excellent speech might have provided Lord Bridge with a clearer understanding of the defence's excusatory rationale.)
97. Law Com Working Paper No 55, *Defences of General Application* (1974) para 3.
98. *Supra*, notes 50, 51.
99. At 782.
100. (1974) 47 S Cal Law Rev at 1277.
101. At 798.

might be, it is certainly no authority on whether killing under threat of death is *excusable*.[102]

Judicial lack of realism

Finally, the lack of realism displayed in Lord Hailsham's speech cannot pass without comment. His Lordship made no bones about the fact that the criminal law *can* reasonably expect qualities of heroism from the ordinary man. In his experience, ordinary people were capable of acts of heroism and he could not regard as just or humane a law which protected 'the coward and the poltroon.'[103]

The passage demonstrates a breathtaking gulf between judicial expectations and ordinary human nature. Who can say what they might not do in the face of a gun held at their child's head?[104] Further, to assert that some people are capable of heroism is one thing, it is quite another for the criminal law to oblige the individual to meet such a standard. Moreover, even Lord Hailsham recognises that 'Doubtless in practice many will succumb to temptation.'[105]

Conclusion

If there are good grounds for withholding the defence of duress on a charge of murder, then the decision in *Howe* fails to reveal them. Instead, at its core lies a half-articulated gut reaction to the central question before the House, coloured by the repellent facts which gave rise to the particular cases in the appeals. The criminal law deserves better from our final appellate court.

102. *Supra* n 28 and ensuing discussion.
103. At 779, 780.
104. *Cf* Hogan, *loc cit.*
105. At 780.