Duress and steadfastness: in pursuit of the unintelligible

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Table of Contents

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Crim. L.R. 363 **Summary:** *In Graham Lord Lane articulated the objective requirement of reasonable steadfastness on the grounds of "public policy" to "limit the defence of duress". This article argues that the test is both logically and morally incoherent and superfluous, features which have been accentuated by the accelerating development of duress of circumstances.*

在為脅迫辯護的情況下，法院必須確信“一個具有合理堅定的清醒的人，具有被告的特徵”

1. Steadfastness and the nature of action performed under duress--the misalliance with provocation

According to Lord Lane, where duress is pleaded a court must be satisfied that "a sober person of reasonable firmness, sharing the characteristics of the defendant" [1] would have responded as the defendant did. Significantly, in adopting this view Lord Lane leaned heavily on the Law Commission's observations and proposals set out in its Report on Defences of General Application (considered below). [2] This was unsurprising bearing in mind the extreme paucity of authority alluding to a steadfastness standard. [3] Beyond such support, part of the explicit conceptual underpinning of Lord Lane's steadfastness test followed from his view that defendants who had suffered duress were in significant respects comparable to provoked defendants:

挑釁和脅迫是相似的。

Crim. L.R. 364 "Provocation and duress are analogous. In provocation the words or actions of one break the self-control of another. In duress the words or actions of one person *break the will of another.* The law requires a defendant to have the self

control reasonably to be expected of the ordinary citizen in his situation. It should likewise require him to have the steadfastness reasonably to be expected of the ordinary citizen in his situation". [4] (emphasis added)

How well founded was Lord Lane's analogous "break[ing] of the will" characterisation of the nature of duressed activity? What pre-*Graham* judicial or other support existed? Certainly the Irish Court of Criminal Appeal decision in *Attorney-General v. Whelan* took this line, as did a succession of later judges [5] including Lord Parker in *Hudson and Taylor* who asserted the need for threats "sufficient to destroy [the defendant's] will". [6] Similarly emphatic characterisations of duress appear in many post-*Graham* judgments. For example, in *Emery,* Lord Taylor put the issue in terms of whether the defendant had "had her will crushed". [7] More recently, in *Bowen,* [8] the Court of Appeal cited Lord Lane's judgment as the "classic statement" of the defence of duress. And in *Baker* the Court of Appeal observed that "the defence exists to accommodate human frailty when the mind of a defendant is so overpowered … that he cannot really be expected to act otherwise". [9]

However, turning to the House of Lords' treatment of this question, a rather different picture emerges. The most thorough-going analyses in *Lynch* strongly favour what might be termed a "choice" account of duress. [10] But hardly more than a decade later in *Howe,* only Lord Hailsham clearly held to the general stance taken ***Crim. L.R. 365*** in *Lynch*: duress was a "species of the genus necessity", differing only in relation to the nature of the threat involved; this was a "distinction without a relevant difference"; duress involved a "conscious decision (it may be coolly undertaken) [or] choice between the reality of the immediate threat and what [the defendant] may reasonably regard as the lesser of two evils." [11] Speaking for the majority, [12] Lord Mackay, in common with Lord Hailsham, appeared to take duress as a particular species of general necessity. [13] Yet in respect of the essential nature of the defendant's duressed action, he ventured no direct opinion. Rather, Lord Mackay generally endorsed an extensive part of Lord Lane's judgment in *Graham,* including an element where Lord Lane briefly spoke of the erosion of the "defendant's will to resist". [14]

Looking back across *Lynch* and *Howe,* speeches favouring a "choice" account of duress predominate and have a strong claim to represent the existing House of Lords' position on the nature of duressed actions. Subsequent Court of Appeal and Divisional Court affirmations of alternative conceptual accounts are clearly at odds with this predominant and prevailing House of Lords' analysis. [15]

In relation to duress and provocation, whilst Lord Hailsham [16] directly denied any analogous qualities between the two defences, Lord Mackay's [17] majority speech in *Howe* regarded Lord Lane's analogy as "entirely correct". This approach was explicitly endorsed in the subsequent authoritative Court of Appeal case of *Bowen.* [18] With the relationship between duress and provocation so drawn, it is a natural, though not inevitable, step to regulate duress's scope by employing a standard of "reasonable steadfastness" as a corresponding notion to self-control in provocation. Two broad questions are thrown up by the provocation analogy: first, just what sort of mental state is the defendant in when his "will is overborne"? and secondly, what personal characteristics are admissible in settling the standard of "reasonable steadfastness"? “合理的堅定”？

Turning to the first question, in duress, as with provocation, there is the major logical and psychological awkwardness of constructing an agent whose will or self-control has been neutralised for one purpose, yet is still sufficiently intact to exercise the "self-control reasonably to be expected of an ordinary citizen in his situation". ***Crim. L.R. 366*** Rather, as many commentators have argued, the reality of the defendant's state is more one of "moral" than of mental involuntariness. [19]

As for the second question, the refining process for determining what personal characteristics are admissible in settling reasonable behaviour in provocation has been mirrored in the development of duress. Problems of policy and practicability corresponding to those encountered in provocation have been wrestled with in a string of duress appeal cases. In *Graham,* Lord Lane spoke of an "ordinary citizen in [the defendant's] situation". Beyond expressly excluding the "voluntary consumption of drink or drugs", [20] no attempt was made to indicate what factors could be regarded as part of the defendant's "situation". Just how wide should the range of admissible personal characteristics be? Just how subjective might the factors be in determining what was the defendant's "situation"? Whatever the answer, one thing was certain: if *all* of the defendant's characteristics were admissible then the objective nature and function of the standard of reasonable firmness would be neutralised, for the defendant could claim that he was just acting in character.

This *reductio* argument was effectively deployed in *Horne* where the Court of Appeal excluded as irrelevant evidence of "personal vulnerability or pliancy falling short of psychiatric illness". [21] But the difficulty of settling what was in principle relevant remained and was aggravated by the accelerating rate at which pleas of duress were being advanced by counsel. [22] It was a situation which "as a matter of public policy" the Court of Appeal sought to remedy in *Bowen,* where the court observed that "in most cases" probably only the defendant's "age and sex" [23] were characteristics relevant to the ability to resist threats. Beyond these two clear-cut "natural" characteristics, the court also conceded the relevance of "serious physical disability" but excluded characteristics which were due to "self-induced abuse such as alcohol, drugs or glue sniffing". As for the core difficulty in differentiating irrelevant character traits from relevant mental or psychiatric conditions, the court resorted to the criterion of medically "recognised" conditions.

Besides the considerable difficulty of determining whether a character trait merits the description "emotionally unstable", "a grossly elevated neurotic state", "pliant", "vulnerable" or "suggestible" rather than being classified as a "recognised" form of personality inadequacy, there lies the weighty question of the moral fairness of drawing such a distinction. Why should someone of such a disposition be denied a defence granted to one with a "recognised impairment"? For example, evidence that a defendant was more susceptible to intimidation because of the long-term emotional damage caused by parental or spouse abuse would be deemed irrelevant to the issue of reasonable firmness. [24] To be relevant not only must the defendant's condition be "recognised" but it must also make the defendant "more susceptible to pressure". Thus in *Emery,* where the defendant claimed that long-term abuse had resulted in post-traumatic stress disorder, the court was concerned to find that the ***Crim. L.R. 367*** level of abuse was sufficient to have produced a "condition of dependent help-lessness". [25] More generally, are a person's age and sex relevant because of expectations as to their physical ability or moral courage? The specifically identified relevance of "serious physical disability which may inhibit self-protection" appears to suggest the former. If this is true, an unqualified gender distinction makes no sense.

Although these and other associated problems are not completely intractable they well illustrate the awkward and forced nature of the "loss of will" characterisation of duress. But the difficulties of the current judicial model of duress are more extensive and run far deeper into the defence's conceptual foundations. This has become steadily more apparent over a decade of the development of duress of circumstances. These further, particular conceptual problems are now reviewed.

堅定不移和環境的脅迫

2. Steadfastness and duress of circumstances

As has already been noted, in broad terms the House of Lords in *Lynch* saw duress as a form of the "genus" necessity; the only difference between duress *per minas* and necessity was the "nature of force" threatened. "Choice" was an underlying characteristic of both defences. Again, as has been seen, although less expressly united on this issue, the House of Lords in *Howe* was at least agreed on regarding the necessity case of *Dudley and Stephens* as binding on them when considering duress in relation to murder. Such sentiments subsequently emboldened counsel to propose and courts to recognise an expanded version of duress--duress of circumstances. [26] In some respects this conceptual innovation was a substantial step towards recognising a general defence of necessity by linguistic sleight of hand. Duress of circumstances extended the defence of duress to situations where the endangering or threatening behaviour of others was not of a criminal nature. General recognition of a necessity defence where the threat is a non-human source has yet to arrive. The initial duress of circumstances cases adopted in unmodified form the objective requirements of Lord Lane's *Graham* formula even though it is bound up in the language of the overborne will. However, the nature of some more recent duress of circumstances cases has underscored the inappropriateness of characterising the defence in this fashion. Most particularly in ***Crim. L.R. 368*** *DPP v. Harris* [27] the Divisional Court's language was unavoidably that of necessity and choice:

"In determining the test for necessity, the court had to look at all the circumstances in deciding if the respondent had acted reasonably and proportionately to avoid a threat of death or serious injury … The potential evil of the suspected robbers escaping had to be balanced against evil of a serious collision …"

Also in *Pommell,* when faced with a plea of duress of circumstances as a defence to a charge of unlawful possession of a sub-machine gun, the Court of Appeal, rather than applying the *Graham* formula, expressed the qualifying test in the more general terms of "reasonable" behaviour in the circumstances.

"Must a person who has acquired a gun in circumstances in which he has the defence of duress of circumstances not only desist from committing the offence as soon as he reasonably can but, in the meanwhile, act in a reasonable manner with the gun?

The answer is that if he does not do so, it will be difficult for the court to accept that he desisted from committing the offence as soon as he reasonably could".

In such cases, as in many instances of duress of circumstances, the defendant's personal circumstances and "steadfastness" are not raised. In these situations the language of "overborne will" or even "irresistible pressure" is patently inappropriate.

What such cases begin to show is the contrived and conceptually unconvincing distinctions sometimes drawn between duress and necessity. The recent history of this tendency is revealing. Until the late 1970s leading texts offered a view similar to that generally taken in *Lynch* and by Lord Hailsham in *Howe*: that duress and necessity were closely related, distinguished by the nature of the threat, and that "choice of evils" in a *broad* sense characterised each.[28] It was a position adopted in earlier[29] but not later Law Commission reviews of duress. Reflecting shifts in the views of some contemporary commentators, the Law Commission has in more recent times favoured "irresistible pressure" (a revamped "overborne will" notion) ***Crim. L.R. 369*** as the basis of duress,[30] thereby continuing to underwrite the credibility of a steadfastness test. Yet, as the Law Commission appears to concede, many imaginable instances of duress of circumstances could not be realistically characterised in this fashion.[31]

Arguably, in part driving the Law Commission's distinct conceptual characterisation of necessity and duress was the desire to categorise and distinguish the defences on an excuse/justification basis. But the problematic nature and limitations of such an analysis in relation to duress and necessity are plain[32] and well highlighted by the speeches in *Lynch* and *Howe.* In the former decision, duress was regarded as an "excuse", a "plea in confession and avoidance".[33] Yet, in more justificatory language, consequences or evils were to be "balanced" both in duress and necessity.[34] In *Howe,* Lord Hailsham employed the language of excuse and characterised duress as "a concession to human frailty", but also saw duress, like necessity, as based on a choice between "the lesser of two evils".[35] For the majority, Lord Mackay, whilst regarding duress as an "excuse", took the "necessity" case of *Dudley and Stephens* as binding authority on the question of duress and murder.

Whatever the value of an excuse/justification analysis of duress and necessity, duress is more appropriately regarded as particular crystallised form of a nascent general defence of necessity. Duress's particular appeal and consequent judicial recognition owes much to two features not present in necessity at large: self-preservation in the face of a threat of (criminal) harm is the most immediately understandable (and forgivable) of human responses[36]; and secondly, it is less socially threatening in that it relates to containable defence situations, unlike a more wide-ranging necessity defence. In the development of all defences, the judicial eye rarely strays for long from scrutiny of the risks of eroding the criminal justice system's central ability to deter proscribed behaviour and reinforce the social order. Striking this judicious balance between individual and social interests is frequently sought by posing the broad normative question: did the defendant behave reasonably in the circumstances? In the case of duress, two main possible courses of development were open in respect of the level of threat necessary to qualify for the defence: the law could have favoured proportionality and required that the harm or evil which the defendant aimed to avoid was at least as bad as that inflicted by the ***Crim. L.R. 370*** defendant[37]; or it could have set a common qualifying level of threat fixed for all offences. The appeal of the latter course in terms of the defence's certainty and containability is obvious, making its judicial adoption unsurprising. Adoption of the fixed standard of a threat of death or serious harm has important implications for duress's general structure and requirements. These are now considered.

3. Steadfastness and a fixed qualifying level of threat

By establishing a non-variable threshold at which a person might be granted a "concession to human frailty" the law fixes one aspect of the objective standard of a *reasonable* response. It determines that whatever the defendant's physical and mental disposition may be, nothing less than a (credible?) threat of serious harm merits exculpation. It is a pragmatic and practical approach to dealing with the issue of liability of those whose choice of action is severely compromised. It embodies a reasonable level of courage demanded of *all* citizens: to match the standard of a "person of ordinary fortitude", nothing less will qualify. But it is an approach which, in *this* respect, makes no concessions to those who are more "pliant" or susceptible to threats. So, for example, if V is an elderly infirm widow threatened by D with less than "serious harm" unless V facilitates burglary by revealing the means of access to a neighbour's house, V would have no defence to a charge of complicity in D's subsequent burglary.[38] It is within these initial objective boundaries that the current law's additional, separate requirement of reasonable steadfastness has to be considered. Just what is its function alongside a fixed minimum level of threat?

Judicial comments suggest it to be a particular manifestation of the ever-present concern over eroding the universal expectation, reinforced by the threat of sanctions, that the law is to be observed. Only exceptionally will the law compromise this expectation. In Lord Lane's frequently quoted words: it was a "matter of public policy … to limit the defence … by means of an objective criterion formulated in terms of reasonableness". [39] But does not the fixed qualifying standard of the threat of serious harm or death perform this role? Is it being maintained that, when faced with a belief in the threat of death or serious harm, the question is, *should* that defendant have capitulated bearing in mind their personal characteristics? In other words, does the reasonable steadfastness test envisage some defendants of strong emotional or physical disposition who will be denied a defence of duress and who must not choose self-preservation? Unless some curious, morally unsustainable variability exists in the standard of self-sacrifice or self-preservation expected of a defendant *in extremis,* no coherent function can be assigned to the steadfastness requirement.

In suggesting this, a fundamental and vital distinction must be drawn between the emotional impact of a threat of at least serious harm on the defendant (how personally disturbing or intimidating it was), and what the defendant might have done in the circumstances to avoid or neutralise the threat, or how much credibility the threat should have been given. It is with respect to these two latter factors, where ***Crim. L.R. 371** reasonableness of response is demanded by the law, that the defendant's personal characteristics could plausibly be drawn into the wider question of whether the defendant has behaved reasonably. However, undoubtedly, this was not Lord Lane's intended role for "steadfastness". Moreover, most [40] subsequent judicial wrangles over just what personal characteristics may legitimately be admitted in determining "reasonable steadfastness" were clearly concerned with the issue of the emotional impact on the defendant's ability to resist threats as distinct from the reasonableness of a belief in the threat's existence or ways of avoiding it. Thus, these cases would seem to accept that even where the threat of serious harm is credible and where there is no reasonable prospect of escape open to the defendant, the jury must still consider, in effect, whether the defendant's choice of self-preservation was morally acceptable bearing in mind his personal characteristics; in other words, in the jury's view did the defendant deserve to be excused? [41]

This is certainly true of the Law Commission's interpretation of the steadfastness test. As set out in the Draft Bill appended to its 1977 Report, the objective requirement of reasonable resistance in the Law Commission version of duress was to be judged bearing in mind the defendant's personal characteristics and in the light of the defendant's own belief "(b) that the threat [of death or serious personal injury] would be carried out immediately…or…before [the defendant] could have any real opportunity of seeking official protection; and that there was no other way of avoiding or preventing the harm threatened". [42] Just how normative the Law Commission's test of steadfastness could be was later revealed in the 1985 Criminal Code Team's Report and the 1989 Law Commission Criminal Code Report.

In both Reports, when illustrating the intended effect of the Code provisions on the standard of reasonable resistance, the jury was seen as legitimately taking into account "(a) the nature of the offences; (b) the part played by D; (c) D's age and any other personal characteristics affecting the gravity of the threat [of death or serious injury]; (d) current attitudes to what may properly be expected of citizens facing threats [by such criminals]." [43] The reference to "current attitudes" makes explicit in the clearest possible fashion the accepted loose and variable nature of the steadfastness test; in making a moral judgment on the defendant's excusability it is permissible to draw in not only the defendant's particular circumstances and actions, but also the wider sweep of current social and political realities as perceived by the jury. To take the Law Commission's own example of participation in a terrorist attack, if at the time of trial there is a high incidence of terrorist activity the jury "must have regard" to this and, presumably, demand a greater level of self-sacrifice from duressed defendants than during times when terrorist activity is at a ***Crim. L.R. 372** lower level. And, of course, similar reasoning would hold for *any* form of criminality.

Turning to the Law Commission's suggested relevance of the "nature of the offences", just what is intended here? Is this an oblique reference to Lord Wilberforce's *dicta* in *Lynch,* possibly implying that the believed threat of death or serious harm needs to be measured or *balanced* against the evil or harm caused or carried out by the defendant? If not, what does it mean? The claimed relevance of "the part played by D" is no clearer. Is this another manifestation of a distinction drawn between principal and secondary actors in duress so comprehensively discredited in relation to murder? [44] If it is, then a jury would, for example, be invited to regard the supply of a gun as more excusable than pulling the trigger and, more generally, be obliged to make moral judgments on the infinite range of possible behaviour between the two extremes of participation. When these features of steadfastness are combined with the deemed relevance of "current" public opinion on "what may be properly expected of citizens" subjected to threats by criminals of the type involved, the impossibility of the task facing a jury is as patent as is the unpredictability of its judgment.

The Law Commission's endorsement of the *Graham* test of steadfastness was qualified, in that rather than incorporating Lord Lane's reference to a "sober person of reasonable firmness sharing the characteristics of the defendant" the Law Commission favoured the more subjective "threat…which in all the circumstances (including any of his personal circumstances that affect its gravity) he cannot reasonably be expected to resist". [45] The reasoning rested on scepticism over the feasibility and wisdom of separating personal characteristics from "circumstances", because a defendant's "firmness' is a characteristic that might affect a threat's gravity. [46] The effect of the Law Commission's proposal would be both to improve and worsen the situation. It would seemingly improve it in so far as the emotionally feeble would not suffer the arguable injustice of being found legally wanting because of their precipitate capitulation to a threat. Instead, the "reasonableness" of their action would be assessed taking into account their relative lack of moral resilience. However, the position would be worsened (become more incoherent) because of the *reductio* effect: if the defendant's feeble or suggestible character was the reason for capitulation *and* would be relevant in determining if the actions were reasonable, then, necessarily, the defendant could not be expected to have acted in any other way--a form of moral determinism.

The Law Commission affirms (on the utilitarian ground of the defendant's non-deterrability and the normative one of expecting only reasonable behaviour from the defendant) that the defence of duress should not be "withheld from the "objectively weak"'. [47] The meaning of "objectively weak" is unclear. Does it mean just physically weak, or does the expression also extend to moral or emotional weakness? Earlier comments by the Law Commission support the latter interpretation. But does this mean that those who are "objectively weak" are excusable even though they ignored reasonable opportunities to seek official protection or some other way of thwarting the threat? For example, what if D, who is physically powerful but an emotional ***Crim. L.R. 373*** marshmallow, passed up an easy chance to escape his threatener? It is difficult to see why D should be denied a defence of duress once those "objectively weak" are seen as meriting excuse, for a timid disposition governs the defendant's responses to every feature of his extreme situation. Those whose mental characteristics are such that they morally crumple in the face of a threat of serious harm (an "overborne will") could in this sense do no other. Failure to avail themselves of an objectively easy escape would not, for them, be unreasonable; nothing would in this deterministic sense. The prosecution could only show that the defendant behaved unreasonably by somehow demonstrating that the defendant had the moral fibre to have behaved otherwise but failed to do so. Under the Law Commission's proposals, defendants are excused when they act reasonably in *their* mental and physical circumstances. This makes sense only in relation to seeking official protection or the opportunity to escape; going beyond this and drawing in other speculative factors relating to the impact of the threat, response and social context is both unnecessary and unacceptably imprecise.

4. Duress and Self-Defence

The more appropriate features of a duress defence are usefully thrown into relief when comparisons are drawn with self-defence and intervention to prevent a crime under section 3 of the Criminal Law Act 1967. In some situations duress and self-defence offer two alternative exculpatory routes. For instance, D threatens V with immediate serious harm unless V beats up Y. If V complies he may have a defence of duress; if he resists and defends himself against D he may have one of self-defence. Both defences require V to be in some sort of extremis and both defences are best regarded as involving a pressurised choice by V. The test of reasonableness runs through both defences. For self-defence V needs to show that his actions were necessary and reasonable in the circumstances that he believed to exist. [48] However, just what characteristics of the defendant are germane to the question of reasonableness of action is without clear authority. Reflections in leading authorities such as *Palmer* [49] and *Attorney-General's Reference for Northern Ireland (No. 1 of 1975)* [50] on the defendant's "circumstances" fail to reveal the extent to which objective reasonableness is modified by the defendant's subjective characteristics.

More recently in *Scarlett* [51] the Court of Appeal appeared to apply a purely subjective standard of response in respect of both the necessity of force *and* the level of force required in self-defence. This seemed to concede that all of the defendant's personal characteristics may be given due allowance in calculating reasonableness. However, the subsequent decision in *Owino* [52] marks a retreat from this position, re-establishing an objective standard of reasonably proportionate force. Yet even with an objective standard it does not follow that *none* of the defendant's personal characteristics can legitimately be drawn into the assessment of reasonable proportionality of response. For example, would not a defendant's use of some weapon ***Crim. L.R. 374*** to resist an assault be *more* likely to be regarded as reasonable if the defendant were physically feeble, aged or infirm? With one key distinction, this is again the problem of distinguishing what should be relevant and irrelevant personal characteristics encountered by the courts in duress. But the essential distinguishing feature between duress and self-defence is that the issue of proportionality does not (and cannot coherently) arise in a duress defence incorporating a fixed rather than a variable qualifying

threshold of threat. Were a balancing of harms or evils approach adopted (as in a general necessity defence) the analogy with self-defence would be closer, for *balance* and *proportionality* are kindred if not identical concepts: both seek to strike the appropriate balance between the harm entailed in the defendant's response and the harm threatened. Analytically, they share a broadly justificatory nature [53] whereas the fixed level threat test in duress contributes to the defence's largely excusatory character.

A further comparison in respect of the non-aggressive avoidance of a threat can be made between duress (*per minas*) and self-defence. For duress, not only must the threat be "immediate", but also the defendant must "know or believe that the threat is one which will be carried out before [he] can obtain official protection". [54] Quite how objective this requirement is remains unclear. What if the defendant is unreasonably unaware of the availability of protection? What level of imagination or courage is required? According to the earlier case of *Hudson,* "in deciding whether such an opportunity was reasonably open to the accused the jury should have regard to his age and circumstances and to any risk to him which may be involved." [55] This is generally in line with the view of "relevant characteristics" articulated in *Bowen.* For self-defence the defendant's action must be "necessary", and therefore failure to use a reasonable opportunity to "retreat" open to the defendant may render his force unnecessary. [56] Presumably, at least the defendant's physical characteristics would be a relevant factor. Thus, for example, it might be reasonable to expect a normally mobile defendant to avoid (say) threatened blows with a club by retreating rather than by using another weapon, whereas the option of fleeing would not be open to an immobile defendant. [57]

Steadfastness is an unnecessary and overly complicated test in the defense of duress. The defense already requires the threat to be of at least serious harm or death, which is a clear and sufficient standard to determine whether the defendant acted under coercion. This fixed threshold alone is enough to excuse someone's actions, as it acknowledges that people may naturally give in to extreme threats due to human weakness or self-preservation. Adding the steadfastness test does not add value and only makes the defense more confusing and harder to apply.

5. Conclusions

Despite strong contrary House of Lords' opinion, duress's modern conceptualisation has been one predominantly based on the incoherent notion of an "overborne will". This has led courts into misallying the defence of duress with provocation, an analogy which has gone some way in promoting the duress requirement of reasonable steadfastness. As in provocation, not only is such a requirement problematic because of the difficulty in settling what characteristics ***Crim. L.R. 375*** appropriately make up a reasonably steadfast person, but in duress its scope and function have never been judicially clarified beyond the broad intention of limiting the defence's availability on the grounds of "public policy".

Arguably, steadfastness is a superfluous objective test, pointlessly adding to the complexity of the defence. Steadfastness is superfluous when set alongside duress's fixed minimum standard of the threat of at least serious harm. Subject to other distinct requirements, this threat condition marks the threshold of qualifying coercion, submission to which is deemed to be the fitting basis for excusing a defendant because it constitutes acceptable "human frailty" or self-preference. Moreover, it can hardly be accidental that the Model Penal Code's duress provisions, whilst incorporating a "reasonable firmness' condition, do not specify a fixed universal minimum level of threat. To this extent, the Model Penal Code formulation of duress implicitly requires juries to balance the level of threat against the offence committed--a proportionality requirement. [58] Secondly, the presence of a steadfastness test deflects attention away from legitimate defence conditions relating to the neutralization or avoidance of threats. Contrary to an implicit view persisting in an extensive body of case law from *Graham* onwards (and explicit Law Commission opinion), the steadfastness requirement cannot coherently relate to anything other than the distinct conditions that defendants take all reasonable opportunities to escape from or neutralise an aggressor's threat. This is true both for duress *per minas* and duress of circumstances. It is in satisfying these objective conditions of the reasonableness of the defendant's capitulation to threats that reference may plausibly be made to the defendant's characteristics and capacities.

Just what characteristics *ought* to be admissible remains problematic, even when steadfastness is employed in this defensible fashion. As pointed out, the question is very much akin to that arising in self-defence (and prevention of crime) and as yet lacks authoritative resolution. For both defences the question is what characteristics, beyond those of physical attributes, ought to be regarded as relevant to the defendant's ability to make a reasonable effort to avoid or neutralise a threat of harm. In both duress and self-defence the outstanding question may be reduced to whether, besides physical limitations, evidence of anything less than medically recognised mental impairment affecting the defendant's competence to cope with a threat should admissible in determining whether the defendant acted reasonably. [59] For the reasons previously outlined, the inherent difficulty entailed in a jury weighing up a defendant's moral resilience alone argues against admitting such evidence. But beyond such practical problems, deeper conceptual objections exist. Allowing evidence of character to influence the ascription of criminal responsibility would be a unique departure from orthodox principles of liability. Drawing into the calculation of reasonableness the defendant's character traits would be to reduce the issue to something approaching whether the defendant could have acted otherwise. Moreover, imbuing the "reasonable" defendant with his own character traits would ***Crim. L.R. 376*** lead back to

the *reductio* position. Yet, true as this might be, it is also uncomfortably true that the distinction the law draws between physical and mental limitations is hardly underpinned by the clearest of moral divides. [60]

On several occasions the Court of Appeal has suggested that the qualifying conditions of duress require legislative review. [61] Whether revision can only be accomplished by legislative intervention is to be doubted, especially when set against a background of the extensive judicial creativity exhibited in establishing duress of circumstances. Jettisoning the steadfastness standard, except in relation to matters of escape from or avoidance of a threat, would be a worthwhile simplification.

Footnotes

1 [1982] 1 All E.R. 801 at 806.

2 *ibid.* at 805-6: "We think that there should be an objective element in the requirements of the defence so that in the final event it will be for the jury to determine whether the threat was one which the defendant in question could not reasonably have been expected to resist. This will allow the jury to take into account the nature of the offence committed, its relationship to the threats which the defendant believed to exist, the threats themselves and the circumstances in which they were made, and the personal characteristics of the defendant. The last consideration is, we feel, a most important one. Threats directed against a weak, immature or disabled person may well be much more compelling than the same threats directed against a normal healthy person". (Law Com. No. 83, HMSO, 1977, para 2.28). The Law Commission's advocacy of a steadfastness element in duress is not to be found in its Working Party Paper No. 55 (1974). Glanville Williams was a member of the Working Party and his *General Part* treatment of duress is prominent in much of the Paper. Neither edition of the *General Part* includes or proposes a steadfastness test. Williams later noted that in Report 83 the Law Commission had "slipped in" a steadfastness provision. *Textbook of Criminal Law* (1978) at p. 578.

3 The only clear previous authority was *Attorney-General v. Whelan* [1934] Ir.R. 518 at 526, where the Irish Court of Criminal Appeal observed that "threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance, should be accepted as a justification for acts which would otherwise be criminal". Before this see Lord Mansfield's equivocal comments in *Stratton* (1779) 21 St. Tr. 1222. No 19th century code proposal or digest formulation incorporated a steadfastness requirement. See generally, K. J. M. Smith, *Lawyers, Legislators and Theorists* (1998), Chap. 7.

4 [1982] 1 All E.R. 801 at 806.

5 Henn-Collins J. the trial judge in *Steane,* referred to "circumstances sufficient to overbear a man's will [so that] it is not an act of his will at all": [1947] 1 K.B. 997 at 1001. For the Court of Criminal Appeal, Lord Goddard saw the defence of duress as concerned with "negating the intent" (at 1007). Lord Goddard took a similar view in *Bourne* (1952) 36 Cr.App.R. 125 at 129, noting that there was "no mens rea because her will was overborne by threats". This also appears to have been the approach of Lawton J. in the unreported case of *Shiartos* (1961). In *Kray* (1969) 63 Cr.App.R. 569 at 578, Widgery L.J. described a duressed defendant as one who has "ceased to be an independent actor".

6 [1971] 2 Q.B. 203 at 207.

7 (1993) 14 Cr.App.R. (S.) 395 at 398. Elsewhere Lord Taylor referred in less absolute terms to whether the duress had "undermined her autonomy and independence of action" (at 395 and 396) or created the "condition of dependent helplessness" (at 400).

8 [1996] 2 Cr.App.R. 157 at 161, quoting the central passage of Lord Lane's judgment, including his reference to "break[ing] the will of another".

9 [1997] Crim.L.R. 497 at 498. Quoted and followed in *DPP v. Rogers* [1998] Crim.L.R. 202 at 207 along with *Graham* and *Whelan.*

10 For Lord Morris, a defendant "decides whether he will or will not submit to a threat. There may consciously or subconsciously be a hurried process of balancing the consequences of disobedience against the gravity or weakness of the action that is required. The result will be that what is done be done most unwillingly but yet intentionally" ([1975] 1 All E.R. 913 at 918). Lord Wilberforce conceptualised duress as not involving matters of "will"; "duress does not destroy the will" (at 926). For Lord Simon duress "overbears the actor's wish not

to perform the act" (at 931-2). In both "duress" and "necessity" there was "a power of choice between two alternatives" (at 931-2). Similarly, Lord Kilbrandon regarded any claimed fundamental distinction between duress and necessity as "narrow and unreal". In the case of duress the defendant "had decided to do a wrong thing, having balanced in his mind…the consequences…[C]onstancy is overborne so that he yields to the threat…a calculated decision to do what he knows to be wrong…" (at 944-5). And for Lord Edmund-Davies, duress was a "particular type of motive [not] negating will" (at 951), involving a "conscious choice, although that choice was made unwillingly" (at 951).

11 [1987] 1 All E.R. 771 at 777 and 782.

12 Lords Bridge, Brandon and Griffiths.

13 Like Lord Hailsham, he regarded *Dudley and Stephens* as a binding authority against a plea of duress in respect of murder (at 796).

14 [1987] 1 All E.R. 771 at 800.

15 It is arguable whether in *Lynch* and *Howe* the conceptualisation of duressed action was a necessary foundation for determining the particular issue before the court. Even if not part of the ratio of each case, the relatively clear and consistent views of their Lordships in *Lynch* on such a fundamental feature of the defence give them particular significance.

16 [1987] 1 All E.R. 771 at 782.

17 *ibid.* at 800.

18 [1996] 2 Cr.App.R. 157 at 165-166. And similarly, for example, by the Court of Appeal in *Hurst* [1995] 1 Cr.App.R. 82 at 90, and in *Hegarty* [1994] Crim.L.R. 353 at 354. No such analogy with provocation was drawn in *Whelan.*

19 G. Fletcher, *Rethinking Criminal Law* (1978), p. 803.

20 [1982] 1 All E.R. at 806.

21 [1994] Crim.L.R. 584 at 585-6. Also *Hurst* [1995] 1 Cr.App.R. 82 at 90-91.

22 See comments in *Hurst, ibid.*

23 Though on the matter of gender, the Court of Appeal seemed to be facing both ways when noting that "many women would doubtless consider they had as much moral courage to resist pressure as men." [1996] 2 Cr.App.R. 157 at 166-7.

24 See *Hurst.*

25 (1993) 14 Cr.App.R. (S.) 394 at 400. Furthermore, in an attempt to staunch the now steady flow of defending counsel's ingenuity, the Court of Appeal met a claim of duress in defence of prison breaking charges with an additional requirement that the causative feature must be "extraneous to the offender". Here, it was claimed that depression had produced mental instability which threatened to bring about the prisoner's suicide. An easier response might have been that the condition generating the threatened harm was the consequence of their own criminal behaviour, *i.e.* self-induced. See *Roger and Rose* [1998] 1 Cr.App. R. 143.

26 See also its view of the Law Commission's Criminal Code team on duress of circumstances (Law Com. No. 143, 1985, paras 13.25-13.29), affirmed in cl. 46 of the Draft Criminal Code (Law Com. No. 177, 1989). The early cases are *Willer* (1986), *Denton* (1987), *Conway* (1988) and *Martin* (1989). Lord Hailsham's conceptualisation of duress and necessity in *Howe* was expressly adopted by Woolf L.J. in *Conway* [1988] 3 All E.R. 1025 at 1029. According to *Pommell* duress of circumstances covers the same range of offences as duress *per minas* [1995] 2 Cr.App.R. 607 at 615.

27 [1995] 1 Cr.App.R. 170. Harris, a policeman was charged with driving without due care and attention. At the time he was following a vehicle "containing persons believed to be planning an armed robbery. Paramount in his mind had been the possibility that, if he lost contact, an armed robbery might occur with the risk of death or serious injury being caused to other persons".

28 See Glanville Williams, *Criminal Law: The General Part* (2nd ed., 1961), Chapters 17 and 18 and *Textbook of Criminal Law* (1st ed., 1978), Chapter 25; J. C. Smith & B. Hogan *Criminal Law,* (1st ed., 1965) pp. 120-129. *cf.* (5th ed., 1983) 209.

29 In Working Paper No. 55 the main difference between duress and necessity was seen as being that in duress "the harm sought to be avoided…always proceeds from another person's wrongdoing." Moreover, it was noted that there was no "adequate juristic basis for permitting one defence to be raised but denying the other" (para. 30). The Law Commission in Report No. 83 disagreed on the issue of the practicability of a necessity defence rather than in relation to its "juristic basis" (paras 4.28-4.33). See also the Code team's observations in Law Com. No. 143 (1985) paras 13.25-13.27; and Law Com. No. 177 (1989) paras 12.20-12.21.

30 Law Com. C.P. No. 122 (1992) para.19.4; but see n. 276. See also Law Com. No. 218 (1993) paras 35.4-35.6.

31 Law Com. C.P. No. 122, n. 276.

32 For example, see Alldridge, "The Coherence of Defences" [1983] Crim.L.R. 665; Greenawalt, "The Perplexing Borders of Justification and Excuse" (1984) 84 Col.L.R. 1897; Gardner, "Instrumentalism and Necessity" (1986) 6 O.J.L.S. 431.

33 Lord Edmund-Davies in *Lynch* at 951.

34 See the speeches of Lords Morris, Simon and Edmund-Davies.

35 *Howe* at 782. Both choice and reactive self-preference can be seen operating in varying combinations across the range of situations from duress *per minas* to necessity cases. At one extreme, in paradigm duress *per minas* examples (where a party is threatened with serious harm unless a specified offence is committed) the reactive quality of compliance will be the dominant characteristic. "Pure" necessity cases (such as therapeutic abortion) occupy the opposite end of this continuum, where choice largely excludes any reactive characterisation of action. Duress of circumstances cases will often represent a median point, where both reaction and choice may be seen operating in combination, with neither characterisation being obviously more appropriate than the other.

36 See Lord Morris in *Lynch* at 918.

37 Indeed, this approach was briefly considered in Law Com. W.P. No. 55, para. 16. Certain elements in some speeches in *Lynch* hint at this variability. See for example Lord Morris at 922, Lord Wilberforce at 927 and (with Lord Edmund-Davies) in *Abbott* [1976] 3 All E.R. 140 at 152.

38 It might, of course, influence the level of sanction imposed.

39 *Graham* [1982] 1 All E.R. 801 at 806.

40 Including *Bowen* [1996] 2 Cr.App.R. 157.

41 At least two cases appear not to apply the *Graham* steadfastness test. In *Pommell* [1995] 2 Cr.App.R. 607, the Court of Appeal formulated the test for duress of circumstances as "in deciding whether a defendant acted reasonably, regard would be had to the circumstances in which he finds himself", and that the defendant "must desist from committing the offence as soon as he reasonably can…" (at 616). In the police pursuit case of *Harris* [1995] Cr.App.R. 170, the Divisional Court expressed the question in terms of whether the defendant "in all the circumstances [had] acted reasonably and proportionately to avoid a threat of death or serious injury".

42 Report No. 83, Draft Bill, cl. 1(3).

43 Criminal Law: Codification of the Criminal Law. A Report to the Law Commission (1985), Law Com. No. 143, Sch. 1, Illustration 45(I); Criminal Law: A Criminal Code for England and Wales (1989) Law Com. No. 177, Vol. 1, Appendix B, Example 42(i).

44 See, for example, Sir John Smith, "A Note on Duress" [1974] Crim.L.R. 349.

45 Law Com. No. 177 cl. 42(3)(b); Law Com. No. 218 (1993) Draft Bill cl. 24(2).

46 Law Com. No. 177, para. 12.16; Law Com. No. 218, para. 29.12. See also Law Com. C.P. No. 122 (1992) paras 18.10-18.12.

47 Law Com. No. 218 para. 29.14.

48 See J. C. Smith and B. Hogan, *Criminal Law,* (8th ed., 1996) pp. 259-268 and A. Ashworth, *Principles of Criminal Law* (2nd ed., 1995) pp. 132-143.

49 [1971] A.C. 814.

50 [1977] A.C. 105.

51 (1994) 98 Cr.App.R. 290.

52 [1996] 2 Cr.App.R. 128. See similarly, Law Com. No. 218 (1993) Draft Bill, cl. 27(1).

53 Yet even self-defence does not merit an unqualified justificatory characterisation for there need not be an *actual* threat or risk to the defendant, it is sufficient that the defendant believes there is. *Beckford* [1988] A.C. 130. For a discussion of the relationship between duress and self-defence see Elliott, "Necessity, Duress and Self-Defence" [1989] Crim.L.R. 611.

54 See *Hurst* [1995] 1 Cr.App.R. 82 at 93.

55 [1971] 2 Q.B. 203 at 207. In *Whelan* the court saw the defence as unavailable if there had been a "reasonable opportunity for the will to reassert itself". [1934] I.R. 518 at 526. And see *Pommell* [1995] 2 Cr.App.R. 607 at 615-6.

56 See *Julien* [1969] 1 W.L.R. 839 and *Bird* [1985] 2 All E.R. 513.

57 On the use of alternative pleas of duress and self-defence see *Symonds* [1998] Crim.L.R. 280.

58 Section 2.09. "(1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist". And *cf.* section 3.02 on necessity. See also *Model Penal Code and Commentaries (Official Draft and Revised Comments),* Part 1 (1985) 375-380, and "Proceedings of the A.L.I., 39th Annual Meeting" (1960) 120-130.

59 Resolution is not obviously affected by the general categorising of duress as an excuse and self-defence as a justification.

60 Lurking here are the fundamental challenges posed by the spectre of moral determinism. For an illuminating exploration see Horder, "Criminal Law: Between Determinism, Liberalism and Criminal Justice" (1996) 49 CLP 159, 160-172.

61 See the recent Court of Appeal call for legislation on the defence in *Abdul-Hussain and others* [1999] 2 *Archbold News.* See also *DPP v. Rogers* [1998] Crim.L.R. 202, *Baker and Williams* [1997] Crim.L.R. 497, *Hurst* [1995] 1 Cr.App.R. 82, *Cole* [1994] Crim.L.R. 582, and Lord Bridge in *Howe* [1987] A.C. 417. And, more generally, Lord Bingham; see extract of his speech July 22, 1998, published [1998] Crim.L.R. 694.

