

The Paradox of Disallowing Dress as a Defence to Murder

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Abstract The common law has long recognised that what would otherwise constitute murder should be reduced to the lesser offence of voluntary manslaughter in instances where the accused was induced to kill because of provocative conduct on the part of the deceased that does not amount to lawful excuse or justification such as self-defence or defence of others. In what is often termed as a reasonable concession to human frailty, the law has opted to treat those who kill under such circumstances as less morally blameworthy than those who kill in the absence of such provocation or other mitigating circumstances such as a genuinely held, albeit objectively unreasonable belief, that the use of deadly force was necessary in self-defence or the defence of another person. In sharp contrast, the common law has steadfastly declined to allow the defence of duress to be interposed in like manner as a partial defence to the crime of murder. The discussion to follow will examine whether this disparate treatment is justifiable in light of the stated underpinnings of these defences. The discussion will conclude by exploring various proposals for reform and the extent to which they are likely to result in sanctions that are commensurate with the relative degrees of moral culpability of those who seek to interpose these defences as complete or partial defences to the crime of murder.

Keywords Provocation; Duress; Human frailty; Person of ordinary firmness

The common law defence of provocation can be traced back to the 17th century.¹ It was spawned out of a concession to human frailty or, if you will, a recognition that ordinary persons can, in response to sufficient provocation on the part of the deceased, resort to the use of deadly force and commit what would otherwise constitute murder were it not for the partial defence of provocation. The term 'partial defence' is used in this context because a successful interposition of the defence requires a jury to acquit on the charge of murder and instead convict on the lesser charge of voluntary manslaughter that, unlike murder, was not a capital offence in the 17th century.² The requirements of the defence were enunciated by King J in the following passage from R v The Queen:³

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1 For a judicial examination of the history of the defence, see *Parker v The Queen* (1963) 111 CLR 610 (Windeyer J). See also J. Horder, *Provocation and Responsibility* (Oxford University Press: Oxford, 1992).

2 *R v Hayward* (1836) 6 C&P 157 at 159 (Tindall J).

3 *R v The Queen* (1981) 28 SASR 321.

The killing of one person by another with intention to kill or do serious bodily harm is murder. Such a killing may, however, be reduced to manslaughter if the killing results from a sudden and temporary loss of self-control on the part of the killer which is brought by acts or words of the deceased amounting in law to provocation. To amount to provocation the acts or words must satisfy the following tests: (1) they must be done or said by the deceased to or in the presence of the killer; (2) they must have caused in the killer a sudden and temporary loss of self-control rendering the killer so subject to passion as to make him for the moment not the master of his mind; (3) they must be of such character as might cause an ordinary person to lose his self-control to such an extent as to act as the killer has acted.⁴

Readers should be aware that this formulation has undergone some important changes in more recent times.⁵

Suffice it to say that notwithstanding the recent common law and statutory modifications noted above,⁶ the foregoing exposition of the purpose, operation and constituent elements of the defence is more than adequate to draw attention to the profound distinction and resulting consequences that have long existed between it and the common law defences of duress and necessity in murder prosecutions. In particular, much of the balance of the discussion will focus on the hypocrisy and sheer folly of the judicial and legislative branches of government in 虛偽和純粹的愚蠢

4 Above n. 3 at 321–2. For a Privy Council decision in which the defence is thoroughly canvassed, see: *Parker v The Queen* (1964) 111 CLR 665. See also Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Hein: 1980) 63; H. A. Snelling, 'Manslaughter Upon Provocation' (1958) 31 *Australian Law Journal* 790 at 790–2. In the UK, the common law defence of provocation has been supplanted by the 'loss of control defence' by virtue of s. 54 of the Coroners and Justice Act 2009. This is also a partial defence that may reduce liability from murder to voluntary manslaughter. The 'loss of control defence' is, in reality, similar to the former provocation defence and designed to alleviate the criticisms of provocation; to wit: the requirement of suddenness has been removed (s. 54(2)) which enables victims of cumulative abuse to plead this defence; the introduction of qualifying triggers has narrowed the range of acts or events that may be relied upon (s. 55); and fear, rather than only a thing said or done, is one such qualifying trigger (s. 55(4)). It is noted that these elements under the 'loss of control defence' are remarkably similar to the modifications that have been made to the common law defence of provocation in Australia: see below n. 5.

5 For example, the requirement of suddenness has been construed to mean that the accused's intent to kill or cause grievous bodily harm must not have formed independently of the provocation offered by the deceased; rather, a significant causal nexus must be shown to have existed between the requisite *mens rea* for murder and the acts and/or words that are being relied upon by the accused as the foundation for the defence of provocation: *R v The Queen* (1981) 28 SASR 321 at 325. Suddenness is also viewed as relevant evidence that the accused killed at a time when he or she was still operating under a state of loss of self-control resulting from the deceased's provocative acts, words or both: *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 166–7 (Mason J). There have also been certain judicial modifications insofar as which, if any, of the personal attributes of the accused such as his or her age or gender, for example, are to be taken into account in deciding whether the so-called objective component of the provocation defence has been satisfied, see *Stingel v The Queen* (1990) 171 CLR 312 at 324, 327; *Masciantonio v The Queen* (1995) 129 ALR 575 at 581. For the English view on which of the accused's personal attributes were to be imputed in applying the objective component of the common law defence of provocation prior to the advent of s. 55 of the Coroners and Justice Act 2009, see *DPP v Camplin* [1978] AC 705, per Lord Diplock; *R v Morhall* [1996] AC 90; *Attorney-General for Jersey v Holley* [2005] UKPC 23.

6 See, e.g., *Stingel v The Queen* (1990) 171 CLR 312 at 324, 327; *Masciantonio v The Queen* (1995) 129 ALR 575 at 581. For an example of a statutory version of the defence that has arguably deviated to some extent from the common law version, see Crimes Act 1900 (NSW), s. 23(3)(b).

Australia and the UK for allowing provocation, but not duress or necessity, to be interposed as partial defences to the crime of murder.⁷ In addition, the article will conclude that aside from the fact that the justifications for such an anomaly cannot withstand careful analysis, there is a far more compelling argument to be made that one who commits what would otherwise be murder under duress or necessity is far less morally culpable than one who does so under provocation. At a minimum, therefore, these defences should similarly operate as partial defences to a charge of murder. Finally, attention will focus on two viable proposals for reform, including one that the writer favours on the basis that it is better suited to result in consequences that are commensurate with the relative blameworthiness of the accused's conduct.

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The purpose and scope of the defences of compulsion

The common law defences of duress⁸ and necessity⁹ are founded on the precept that one should not incur criminal liability for crimes committed due to factors beyond his or her control such as, for example, a threat from another that the accused or another person would be killed or grievously injured if he or she refused to commit a crime or crimes nominated by the person or persons making the threat.¹⁰ The defence of necessity is similar to duress in that the accused is likewise coerced into committing a crime due to mitigating circumstances beyond his or her control, but differs in that the latter, by definition, requires that the coercion consist of threats of human as opposed to non-human origin. For example, finding oneself dying of starvation and thirst after surviving a shipwreck and, as a consequence, having to confront a horrific choice; specifically, allow oneself to perish slowly or, alternatively, murder

⁷ After ignoring the recommendation of the Victorian Law Reform Commission in 1980 (and 1991), however, Victoria has now created statutory defences of duress and necessity and made them available as complete defences to the crime of murder: Victorian Law Reform Commission, *Duress, Necessity and Coercion*, Report No. 9 (1980) 7; Crimes Act 1958 (Vic), ss 9AG, 9AI. It is noteworthy that s. 9AI is referred to in the Act as '[s]udden or extraordinary emergency', although its requirements substantially follow the common law defence of necessity as set out in the Victorian and New South Wales cases of *R v Loughnan* [1981] VR 443 at 449 and *R v Rogers* (1996) 86 A Crim R 542 at 545 respectively.

At common law, duress is not a defence to the crime of attempted murder: *R v Gotts* [1992] 1 All ER 832. Insofar as the Crimes Act 1958 (Vic), ss 9AG and 9AI are concerned, attempted murder is not a 'relevant offence' as defined in s 9AB of the Act. Thus, it appears that neither of these sections is available as a defence to attempted murder. There is nothing in logic or principle, however, that would justify this dichotomy, and one can only hope that the Victorian Court of Appeal or Parliament will take appropriate remedial measures. As to whether provocation is available to reduce attempted murder to attempted voluntary manslaughter, there is a split of authority: K. J. Arenson, 'The Pitfalls in the Law of Attempt: A New Perspective' [2005] 69 JCL 146 at 153–4. In the writer's view, if the intention to kill was induced by sufficient provocation to reduce the offence to voluntary manslaughter if the victim had died, it would be appropriate to either 'charge the accused with attempted voluntary manslaughter or, if the charge is attempted murder, to direct the jury that it can convict on the lesser charge of attempted voluntary manslaughter': *ibid.* at 154.

⁸ *R v Dawson* [1978] VR 536; *Nguyen v The Queen* (2008) 181 A Crim R 72; *R v Abusafiah* (1991) 24 NSWLR 531.

⁹ *R v Loughnan* [1981] VR 443 at 444; *R v Rogers* (1996) 86 A Crim R 542 at 542.
¹⁰ *R v Dawson* [1978] VR 536 at 543.

another survivor whose death is imminent in the hope that it may result in a longer period of survival during which another ship might fortuitously effect a life-sustaining rescue.¹¹

Duress and necessity, though separate and distinct defences that consist of different elements (see below), are similar in many ways and are capable of overlapping in instances that involve crimes committed under threats of human origin made against the accused or another if the accused refused to commit the nominated offence or offences. For both illustrative and convenience purposes, however, our attention will henceforth be limited to an overview of the elements of the common law defence of duress and why the House of Lords and the overwhelming majority of Australian courts have, in sharp contrast to the defence of provocation, rejected it as a partial defence to murder.¹² The central question is whether that distinction can survive careful analysis and, if not, what remedial action the judiciaries and legislatures in Australia and the UK should take in order to rectify or at least ameliorate the untenable consequences that are certain to continue in the absence of some form of remedial legislation or exercise of the courts' inherent power to develop the common law incrementally.

The constituent elements and core justification of duress at common law

In *R v Hurley and Murray*,¹³ Smith J enumerated the constituent elements of duress at common law:

[T]he accused has been required to do the act charged against him (i) under a threat that death or grievous bodily harm will be inflicted unlawfully upon a human being if the accused fails to do the act and (ii) the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did and (iii) the threat was present and continuing, imminent and impending ... (iv) the accused reasonably apprehended that the threat would be carried out and (v) he was induced thereby to commit the crime charged and (vi) that the crime was not murder, nor any other crime so heinous as to be excepted from the doctrine and (vii) the accused did not, by fault on his part when he was free from the duress, expose himself to its

¹¹ *R v Dudley and Stephens* (1884) 14 QBD 273. This was a case in which two shipwreck survivors were confronted with exactly that choice and opted to murder another survivor who was much closer to death. A fourth survivor refused to take part in the murder or the consumption of the deceased's body parts. After the three surviving crew members were subsequently rescued by a passing British vessel, the two survivors who partook in the murder admitted to having committed it as their sole means of having any chance of survival. The two were later convicted of murder with Lord Coleridge opining that even if the common law were to recognise a defence of necessity generally, it could never be interposed as a defence to murder for want of any workable standards as to which life or lives should be spared in preference to others. His Lordship further opined that society is better served by holding all people to an idealistic and unrealistic standard whereby a higher premium is placed on preserving the life of another unoffending and innocent person rather than one's own life: *ibid.* at 287.

¹² *Western Australia v Auckram* [2013] WASC 69; *R v McConnell* [1977] 1 NSWLR 714. See also D. W. Elliot, 'Necessity, Duress and Self-Defence' [1989] Crim LR 611.

¹³ *R v Hurley and Murray* [1967] VR 526.

application and (viii) he had no means, with safety to himself, of preventing the execution of the threat.¹⁴

At first glance it appears that there are eight elements upon which the accused must satisfy the evidential burden, following which the Crown will be required to satisfy the legal burden of negating one or more of these elements beyond reasonable doubt in order to render the defence nugatory.¹⁵ This is assuming, of course, that the Crown has been successful in satisfying its own evidential burden as to both the elements of the crime(s) charged as well as the accused's complicity therein.¹⁶ In fact, however, it was subsequently held that Smith J's comment from the above-quoted passage that 'the accused has been required to do the act charged against him'¹⁷ adds a ninth element; namely, that the crime or crimes with which the accused stands charged must be an offence or offences nominated by the person or persons making the threats.¹⁸ Insofar

14 Above n. 13 at 543. Although there is no universally accepted statement of which elements comprise the common law defence of necessity, it has been defined at the appellate level in two of the three Australian common law jurisdictions. In *R v Loughnan* [1981] VR 443, the Victorian Court of Appeal held that three components must be satisfied in order to succeed in this defence: first, the crime or crimes must have been committed only for the purpose of protecting the accused or someone that he or she was obligated to protect; secondly, that the accused must have believed on reasonable grounds that he or she or the person or persons they were obliged to protect had been placed in a position of impending danger; and lastly, that the crime or crimes allegedly committed by the accused must not have exceeded what a reasonable person in like circumstances would have deemed necessary to avert the danger. In *R v Rogers* (1996) 86 A Crim R 542, and on facts quite similar to those in *Loughnan*, the New South Wales Court of Criminal Appeal adopted a formulation of the necessity defence that is arguably identical *in substance* to the one adopted in *Loughnan*; specifically, whether the accused believed on reasonable grounds that it was necessary to act in the manner that he or she did.

15 P. Gillies, *Criminal Law*, 4th edn (LBC Information Services: 1997) 356.

16 Ibid. at 341.

17 *R v Hurley and Murray* [1967] VR 526, 543.

18 *R v Dawson* [1978] VR 536 at 538 (Anderson J), 543 (Harris J). In *Dawson*, the accused was serving a long prison term for various robbery convictions. He had received threats from unknown sources within the prison that he would be murdered. Having been stabbed on at least three prior occasions by other inmates, he opted to escape as a means of averting the threat. After he was later apprehended and charged with the crime of escape, his attempt to raise a defence of duress at trial was rejected on the basis that because the crime of escape was not an offence nominated by the person or persons making the threat against his life, he had failed to meet the evidential burden on what *Dawson* effectively held to be the ninth element of duress at common law. On appeal, Anderson and Harris JJ upheld the decision of the trial judge and dismissed the appeal.

Although the Full Supreme Court of Victoria made it abundantly clear in *Dawson*, that the crime or crimes with which the accused stands charged must be an offence of offences nominated by the person or persons making the threats, it did not address the important question of whether this is true of offences that are closely related to or, stated differently, incidental to those specifically nominated by the person or persons making the threat. If, e.g., one is forced to commit armed robbery of a bank under a threat of death or grievous bodily harm to the accused or another person, can the accused also raise the defence of duress if he or she commits an assault by pointing a gun at a patron who attempts to foil the robbery? The writer believes that in order to avoid unduly harsh results, the defence should also extend to any crimes that are closely related to or incidental to the ones nominated by the person or persons making the threats. By the same token, if the accused commits a gratuitous offence that is properly characterised as a personal frolic that is in no way incidental to the planned criminal enterprise, there appears to be no justification for allowing duress to be interposed as a defence. This would occur, e.g., if the person threatened into committing

as the other eight elements are concerned, only one requires explanation for purposes of this article. In particular, element (ii) mandates that ‘the circumstances were such that a person of *ordinary firmness*¹⁹ would have been likely to yield to the threat in the way the accused did’ (emphasis added).²⁰ In writing for the majority in *R v Howe*,²¹ Lord Hailsham explained that this requirement constitutes the core justification for the defence of duress at common law.

In rejecting the appellant’s assertion that duress could be invoked as a partial defence to murder,²² Lord Hailsham opined (the first reason) that the defence emanated out of a recognition that a ‘reasonable man of average courage’,²³ when confronted with a threat of death or grievous bodily harm against oneself or another, could reasonably conclude that the commission of the crime represents the lesser of the two evils.²⁴ When the subject offence is murder, however, his Lordship was of the view that as a matter of law, no reasonable man could ever conclude that the taking of an innocent life represents the lesser of the two evils.²⁵ In support of this view, his Lordship wrote:

In such a case a reasonable man might reflect that one innocent human life is at least as valuable as his own or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils. Instead, he is embracing the cognate but morally disreputable principle that the end justifies the means.²⁶

In addition, Lord Hailsham flouted the appellant’s assertion that because duress and provocation are analogous in that both are viewed as concessions to human frailty,²⁷ duress should similarly operate as a mitigating circumstance that reduces what would otherwise constitute murder to the lesser offence of voluntary manslaughter.²⁸ In spurning this suggestion, his Lordship stressed (the second reason) that to allow duress to function in this manner would offend the longstanding common law precept that duress, when successfully invoked, results in an outright acquittal that is unadulterated by the opprobrium engendered by most convictions.²⁹

the bank robbery decided to abduct and rape one of the female patrons while affecting an escape following the robbery. Here, public policy demands that the law create a disincentive rather than an incentive for the accused to extricate himself or herself from further criminal activity at the first reasonable opportunity.

19 *R v Hurley and Murray* [1967] VR 526 at 543. Readers will note that as with provocation, element (ii) of the *Hurley and Murray* formulation is based on an ‘ordinary’ as opposed to a ‘reasonable’ man standard: *ibid*. In *R v Howe* [1987] AC 417 at 421 the House of Lords spoke in terms of the reasonable man rather than a person of ordinary firmness as did Smith J in *Hurley and Murray*.

20 *R v Hurley and Murray* [1967] VR 526, 543.

21 *R v Howe* [1987] AC 417.

22 *Ibid.* at 423–38.

23 *Ibid.* at 432.

24 *Ibid.* at 433.

25 *Ibid.*

26 *Ibid.*

27 *Ibid.* at 435.

28 *Ibid.*

29 *Ibid.*

In further addressing this issue, Lord Hailsham opined (the third reason) that the suggestion advanced by the appellant is inimical to basic principle.³⁰ In amplifying this point, **Lord Hailsham** wrote that

[p]rovocation ... is a concession to human frailty due to the extent that even a reasonable man may, under sufficient provocation temporarily lose his self control [sic] towards the person who has **provoked him** enough. **Duress ... is a concession to human frailty in 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.**³¹

Although maladroitly expressed, the above-quoted passage suggests that although both defences are steeped in the notion of concessions to human frailty,³² it is only in the case of the latter that a reasonable person could justifiably conclude that the commission of a crime represents the lesser of two evils.³³ When the crime is murder, however, the House of Lords held that a reasonable person could never justifiably conclude that the taking of an innocent life represents the lesser of the two evils.³⁴ This stands in sharp contrast to the defence of provocation which is grounded on the tenet that ordinary³⁵ persons may, when subjected to sufficient provocative conduct on the part of the deceased, lose self-control to such an extent as to resort to the use of deadly force that is neither justifiable nor excusable in the eyes of the criminal law.³⁶ Thus, Lord Hailsham's majority opinion in *Howe* rejected the appellant's argument that as a concession to human frailty, the common law defence of duress should also operate as a partial defence to murder.³⁷

30 Above n. 21.

31 Ibid.

32 Ibid.

33 Ibid.

34 Ibid. at 433.

35 *Stingel v The Queen* (1990) 171 CLR 312, 326–31 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron, McHugh JJ). In *Stingel*, the High Court held that in applying the defence of provocation, the 'ordinary' person as opposed to 'reasonable' person is the correct standard to be applied to the so-called objective element of the defence which now requires that the deceased's provocative conduct be of such a character as might have caused an *ordinary* person to lose self-control to such an extent as to act as the accused did. The court explained that this was preferable to a 'reasonable' person standard because a reasonable person would not kill without lawful justification or excuse. This further underscores the point that provocation, when successfully invoked, does not result in an outright acquittal, but merely reduces what would otherwise constitute murder to the lesser offence of voluntary manslaughter.

36 *Stingel v The Queen* (1990) 171 CLR 312 at 329.

37 *R v Howe* [1987] AC 417 at 435. Before *Howe*, the defence of duress was allowed for an accessory to murder: *R v Kray* (1969) 53 Cr App R 569; *DPP (Northern Ireland) v Lynch* [1975] AC 653. *Obiter dicta* from *Howe* was followed by the Court of Appeal in *Gotts*, holding that the defence of duress was not available as a defence to attempted murder: *R v Gotts* [1992] 2 AC 412. The position in South Australia is identical to that espoused in *Howe* and later reaffirmed by the House of Lords in *R v Hasan* [2005] UKHL 22. In *R v Brown and Morley* [1968] SASR 467, the Supreme Court of South Australia held that duress is not available as a defence to murder, and this is true irrespective of whether one is charged as a principal offender or an accomplice. In New South Wales, the current position is that duress is unavailable as a defence to one who is charged with murder as a principal offender, but is available to one who is charged as an accessory to murder, meaning as a principal in the second degree or an accessory before the fact: *McConnell v The Queen* [1977] 1 NSWLR 714. In *McConnell*, the original decision of Nagle J, that duress was available as a defence to a principal in the second degree, was upheld. Many jurisdictions such as the UK and South Australia have recognised that an

Examining the justifications offered by the House of Lords for rejecting duress as a partial defence to murder

In examining each of the reasons put forth by Lord Hailsham for rejecting the appellant's argument, the first and third are not only closely related and overlapping, but strike at the very core of the longstanding resistance of nearly all judiciaries and legislatures³⁸ to allowing duress to operate as a partial defence to murder. As both are premised on the notion that no ordinary person could reasonably conclude that the taking of an innocent life represents the lesser of the two evils, a question arises as to whether this notion can withstand careful analysis.

Suppose, for example, that a mother and her six-year-old daughter are kidnapped at gunpoint and taken to a shack in a desolate wooded area. Much to the mother's surprise, another six-year-old girl is also being held there against her will. The kidnapper, a 30-year-old man, loads a handgun within eyesight of the mother, points the gun at her daughter, and then places a butcher knife on the floor. The kidnapper then demands that the mother pick up the knife and stab the other six-year-old girl to death. He then adds that if she refuses, he will shoot and kill her daughter. While it is impossible to know what percentage of mothers of six-year-old daughters would elect to sacrifice their own daughter's life rather than that of another innocent child, the writer believes that the overwhelming majority of mothers would opt to save their own child even if it meant killing someone else's child in order to do so.³⁹ In this dreadful scenario, the fact is that whichever option the mother chooses, an innocent human being is going to have his or her life taken.

Given these unpleasant realities, how much credence should be accorded to Lord Hailsham's pronouncement that duress can never be a



accomplice who plans a criminal scheme can be more blameworthy than a principal offender. A good example of this would be the Nazi hierarchy of Hitler, Heydrich, Himler, Goring and others who planned the mass genocide of the Jews and others as compared with those who carried out the genocide in the knowledge that they would be summarily executed if they refused. For the position in Victoria, see the Crimes Act 1958 (Vic), s. 9AG (read together with s. 9AB(1)) that creates a statutory form of duress that is available as a complete defence to murder. In the UK, duress is not available as a defence to murder despite the recommendations of the Law Commission: Law Commission, *Partial Defences to Murder—Final Report* (2004) 69; Law Commission, *Offences Against the Person and General Principles*, Law Com. Consultation Paper No. 218 (1993) 48–64, 104–7. Lord Hailsham's reasoning in *Howe* was more recently reaffirmed in *R v Wilson* [2007] All ER (D) 228.

38 In Victoria, as noted earlier, the Crimes Act 1958 (Vic), ss 9AG and 9AI represent statutory versions of the common law defences of duress and necessity respectively. These sections do not represent mere codifications of the common law defences, but do mirror them to a significant degree, the most important difference being that contrary to the common law position, both are available as complete defences to murder, whether as a principal offender or an accomplice, provided the statutory criteria are satisfied. It should be re-emphasised that although s. 9AI is termed '[s]udden or extraordinary emergency', there is no question that it was intended to function as a statutory version of the common law defence of necessity enunciated in *R v Loughnan* [1981] VR 443 and *R v Rogers* (1996) 86 A Crim R 542.

39 In the writer's 19 years of teaching criminal law in Australia, and having put this question to nearly 2,000 students, not a single one indicated that he or she would opt to sacrifice his or her own child in favour of someone else's. Even if there had been some who disagreed, that would hardly be evidence to support Lord Hailsham's majority view that the taking of an innocent life can never represent the lesser of the two evils.

defence to murder, whether as a principal offender or an accomplice,⁴⁰ because no reasonable person would ever regard the taking of an innocent life as the lesser of the two evils? If the answer is very little, then the major underpinning of the rule of law that eliminates duress as a complete or partial defence to murder has been emasculated beyond recognition. That raises the central question for purposes of this article; specifically, who is the more blameworthy as between a person who kills under sufficient provocation to reduce his or her conviction from murder to voluntary manslaughter, or a person who, despite the total absence of fault on his or her part, chooses to take an innocent life at the direction of another or others who have threatened to take his or her life or that of another innocent person if he or she refuses to follow the direction? The writer believes the answer to be so obvious that there is little, if any, room for debate.⁴¹

Readers will recall that Lord Hailsham's majority opinion gave one additional reason for declining to allow duress to operate as a partial defence to murder in the same manner as provocation does in the UK and all but three of the Australian jurisdictions: *precedent*.⁴² His Lordship opined that when successfully invoked, the defence of duress has historically entitled the accused to a complete acquittal in respect of the charge or charges to which it relates. Yet Lord Hailsham readily acknowledged that under the law of the UK as it existed prior to the House of Lords' decision in *Howe*, duress was available as a complete defence to the crime of murder, provided the accused was charged as an accomplice rather than a principal

40 *R v Howe* [1987] AC 417 at 433. For views in opposition to Lord Hailsham's reasoning in *Howe*, see I. Dennis, 'Developments in Duress' (1987) 51 JCL 463 at 469–71; P. Alldridge, 'Duress and the Reasonable Person' (1983) 34 Northern Ireland Legal Quarterly 125; Victorian Law Reform Commission, *Duress, Necessity and Coercion*, Report No. 9 (1980) 19–23.

41 Again, in the writer's 19 years of teaching criminal law and having put this question to nearly 2,000 students, the writer has never encountered one who believed that a person who kills under duress is more blameworthy than one who kills under circumstances that would allow him or her to invoke successfully the defence of provocation. To the contrary, the students have been unanimous in concluding that the latter is the more blameworthy of the two.

42 *R v Howe* [1987] AC 417, 430. In Australia, Victoria, Tasmania and Western Australia have abolished the defence of provocation: Crimes Act 1958 (Vic), s. 3B; Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas); Criminal Law Amendment (Homicide) Act 2008 (WA). In New South Wales, a Select Committee on the Partial Defence of Provocation was established on 14 June 2012 and reported on 23 April 2013: Legislative Council Select Committee on the Partial Defence of Provocation, Parliament of New South Wales, *The Partial Defence of Provocation* (2013). This report recommends that the NSW Government retain the defence renamed as 'the partial defence of gross provocation' (recommendation 4) and make relevant changes to s. 23 of the Crimes Act 1900 (NSW) which affect both the elements of the defence, circumstances where it may be claimed and evidentiary provisions. This reform towards a 'gross provocation' model is based on the UK Law Commission's recommendation (which was not followed by the UK legislature: see above n. 37): Law Commission, *Partial Defences to Murder—Final Report* (2004). The report also recommends that 'the NSW Government introduce an amendment similar to section 9AH of the Victorian Crimes Act 1958, to explicitly provide that evidence of family violence may be adduced in homicide matters' (recommendation 2). See also K. Fitz-Gibbon, 'Provocation in New South Wales: The Need for Abolition' (2012) 45 *Australian & New Zealand Journal of Criminology* 194. In New Zealand, the Crimes (Provocation Repeal) Amendment Act 2009 (NZ) abolished the partial defence of provocation.

offender.⁴³ If the doctrine of *stare decisis* is so sacrosanct that it must be followed even in the face of compelling arguments to the contrary, one cannot help but see the irony in purporting to accord such reverence to the doctrine in the same judgment in which it was flagrantly eschewed.

What remedial action should be taken by various legislatures and judiciaries to rectify the anomaly that provocation, but not duress, operates as a partial defence to the crime of murder?

Assuming readers agree that there is no reason in logic or principle for permitting provocation, but not duress, to operate as a partial defence to murder, the question becomes one of how best to rectify what may be seen as one of the most longstanding and obvious paradoxes in the criminal law. One solution would be simply to abolish the defence of provocation as is becoming increasingly common.⁴⁴ Although readers must consult, for example, the Second Reading Speech of the Crimes (Homicide) Bill 2005 (Vic) to be informed of all the factors that prompted the Victorian Parliament to abolish provocation as a defence,⁴⁵ the writer had a most intriguing conversation with a distinguished person who has since become a Justice of the Supreme Court of Victoria. In discussing what was then a mere proposal to enact legislation abolishing the defence in Victoria, the writer commented that if the proposal had already reached fruition, a woman accused of murder at the time and seeking to interpose provocation as a partial defence might be left with no viable defence despite her claim of mitigating circumstances. The person's response was that the type of scenario to which the writer was referring, meaning a woman accused of murdering her husband or boyfriend, 'rarely happens' and, furthermore, that the proposal should become law because 'provocation is a defence that is used by men who murder their wives and girlfriends'.

Astounded by these comments, the writer's response was to ask whether the continued availability of the defence should be contingent upon which of the two genders relied upon it more often when charged with the murder of a husband, wife, boyfriend or girlfriend of the opposite sex. Specifically, the writer asked whether the defence should be retained if statistics showed that women who killed their husbands or boyfriends accounted for more than 50 per cent of the cases in which provocation was relied upon as a partial defence to murder. When the person appeared to be dismissive of the question and merely reiterated that 'provocation is rarely used by women who kill their husbands or boyfriends', the writer

⁴³ *R v Howe* [1987] AC 417 439, citing *R v Kray* (1969) 53 Cr App R 569 at 576ff (extending the defence to those charged with murder as accessories before the fact); *DPP (Northern Ireland) v Lynch* [1975] AC 653 at 671–2, 674–8 (Lord Morris), 685 (Lord Wilberforce), 615–6 (Lord Edmund-Davies) (extending the defence to those charged with murder as principals in the second degree).

⁴⁴ See above n. 42.

⁴⁵ See Second Reading Speech of Crimes (Homicide) Bill 2005 (Vic). The typical reasons given for reform in this area appear to relate to gender-based matters. For example, in the Second Reading Speech of the Victorian Bill, it commences with references to the murder of two women where the defence of provocation was relevant.

took that as a concession that the answer was ‘yes’. If the continued existence of provocation or any other defence is made to depend on which of the two genders invokes it more often, then what remains of the cardinal precept that all persons are equal before the law? Taken to its logical extreme, the continued existence of all defences such as self-defence, defence of others, necessity, insanity and diminished capacity, for example, would also be made to depend on a statistical breakdown of which of the two genders invokes them more often. Irrespective of one’s attitude towards gender-based issues, most, if not all persons, would find such an approach to be indefensible.

If, as noted earlier, the impetus for the emergence of provocation as a partial defence to murder in the 17th century was as a concession to human frailty, one might ask what has changed in the past 300 plus years that would justify its abolition? It is the writer’s view that the common law defence of provocation, as with excessive self-defence or excessive-force-manslaughter as it is often referred to,⁴⁶ is based on the sound and humanitarian principle that there are certain mitigating circumstances which, if proved, should operate to reduce what would otherwise constitute murder to the lesser offence of voluntary manslaughter.⁴⁷ Stated differently, murder requires the presence of malice aforethought⁴⁸ that the common law regards as lacking in instances in which the killing occurs under prescribed extenuating circumstances that are sufficient to reduce the conviction to voluntary manslaughter.⁴⁹ In the overwhelming majority of jurisdictions that continue to recognise provocation as a partial defence to murder, provocative conduct on the part of the deceased is one of those extenuating circumstances,⁵⁰ provided it is of such a character as might

46 Another mitigating circumstance that is recognised in many common law jurisdictions as sufficient to negate malice aforethought and reduce what would otherwise be murder to voluntary manslaughter is when the accused kills under the subjective belief that deadly force is necessary to protect himself or herself or others from death or grievous bodily harm, but the fact-finder does not accept, from an objective standpoint, that the belief was based on reasonable grounds. This is known as the doctrine of excessive self-defence or excessive-force-manslaughter: *R v Bozikis* [1981] VR 587; *Da Costa v The Queen* (1968) 118 CLR 186; *R v Howe* (1958) 100 CLR 448, but see *Zecevic v Director of Public Prosecutions* (1987) 71 ALR 641, a case in which the High Court abolished the doctrine under Australian common law doctrine). By virtue of statutes in South Australia, New South Wales and Victoria, the doctrine has now been reinstated: Criminal Law Consolidation Act 1935 (SA), s. 15; Crimes Act 1900 (NSW), s. 421; and Crimes Act 1958 (Vic), ss 9AC, 9AD. See also P. Fairall and S. Yeo, *Criminal Defences in Australia*, 4th edn (LexisNexis Butterworths: Chatswood NSW, 2005) 178–9; S. Yeo, ‘The Demise of Excessive Self-Defence in Australia’ (1988) 37 *International and Comparative Law Quarterly* 348; S. Yeo, ‘Revisiting Excessive Self-Defence’ (2000) 12 *Current Issues in Criminal Justice* 39; S. Yeo, ‘Excessive Self-Defence, Macauley’s Penal Code and Universal Law’ (1991) 7 *Australian Bar Review* 223.

47 *Parker v The Queen* (1964) 111 CLR 665 at 676 (Lord Morris). Malice aforethought, despite what it appears to entail, does not require that the accused acted with hatred or had given the matter a high degree of prior planning. Rather, it is a term of art which denotes an unlawful homicide that occurred under circumstances that amount to murder at common law: K. J. Arenson, M. Bagaric and P. Gillies, *Australian Criminal Law in the Common Law Jurisdictions: Cases and Materials*, 3rd edn (Oxford University Press: Melbourne, 2011) 42.

48 Arenson, Bagaric and Gillies, above n. 47.

49 *Parker v The Queen* (1964) 111 CLR 665 at 677 (Lord Morris).

50 Ibid.; *Mogilkooff v The Queen* [2010] NTCCA 10; *R v McCullagh* (No. 3) (2007) 179 A Crim R 334; *Verhoeven v The Queen* (1998) 101 A Crim R 24.

have induced an ordinary person to lose self-control to such an extent as to act as the accused did.⁵¹ The writer's view is that nothing has changed since that time that would justify the abolition of the defence.

In Victoria, Tasmania and Western Australia where the defence of provocation has been abolished,⁵² one possible solution is to enact legislation that codifies the common law version of the defence or some variation of it. Victoria, Western Australia, the ACT and the Commonwealth have already addressed the apparent anomaly discussed throughout this article by creating a statutory defence of duress that, if successfully invoked, constitutes a complete defence to murder.⁵³ If one accepts the writer's view

51 *R v The Queen* (1981) 28 SASR 321, 321–2.

52 Crimes Act 1958 (Vic) s 3B; Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas); Criminal Law Amendment (Homicide) Bill 2008 (WA).

53 Section 9AG of the Crimes Act 1958 (Vic) provides:

- (1) A person is not guilty of a relevant offence in respect of conduct carried out by him or her under duress.
- (2) A person carries out conduct under duress if and only if the person reasonably believes that—
 - (a) subject to subsection (3), a threat has been made that will be carried out unless an offence is committed; and
 - (b) carrying out the conduct is the only reasonable way that the threatened harm can be avoided; and
 - (c) the conduct is a reasonable response to the threat.
- (3) However, a person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out violent conduct.
- (4) This section only applies in the case of murder if the threat is to inflict death or really serious injury.

The Criminal Code (ACT), s. 40 provides:

- (1) A person is not criminally responsible for an offence if the person carries out the conduct required for the offence under duress.
- (2) A person carries out conduct under duress only if the person reasonably believes that—
 - (a) a threat has been made that will be carried out unless an offence is committed; and
 - (b) there is no reasonable way to make the threat ineffective; and
 - (c) the conduct is a reasonable response to the threat.
- (3) However, the person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating to carry out conduct of the kind required for the offence.

The Criminal Code (Cth), s. 10.2 provides:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.
- (2) A person carries out conduct under duress if and only if he or she reasonably believes that:
 - (a) a threat has been made that will be carried out unless an offence is committed; and
 - (b) there is no reasonable way that the threat can be rendered ineffective; and
 - (c) the conduct is a reasonable response to the threat.
- (3) This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

The Criminal Code (WA), s. 32 states:

- (1) A person is not criminally responsible for an act done, or an omission made, under duress under subsection (2).
- (2) A person does an act or makes an omission under duress if—
 - (a) the person believes—
 - (i) a threat has been made; and

that a person who kills under duress is less blameworthy from a moral standpoint than one who kills in response to sufficient provocation to warrant a reduction to voluntary manslaughter, this proposal appears to strike a proper balance between the two defences and the consequences that ensue when they are successfully invoked. In jurisdictions other than Victoria, Western Australia, the ACT and the Commonwealth in which duress is neither a partial nor a complete defence to murder,⁵⁴ the writer believes that the law should be changed accordingly.

A compromise position in jurisdictions other than Victoria, Western Australia, the ACT and the Commonwealth would be to enact legislation or alter the common law so as to make both provocation and duress available as partial defences to the crime of murder. If one accepts that a person who kills under duress is less blameworthy than one who kills in response to sufficient provocation to succeed in that defence, such a compromise would have the salutary effect of at least partially addressing the gross imbalance that currently exists between the two defences. It would not, however, create a regime whereby each defence, if successfully invoked, would entail consequences that are commensurate with the relative blameworthiness of the accused's conduct. In the writer's view,

- (ii) the threat will be carried out unless an offence is committed; and
 - (iii) doing the act or making the omission is necessary to prevent the threat from being carried out; and
- (b) the act or omission is a reasonable response to the threat in the circumstances as the person believes them to be; and
 - (c) there are reasonable grounds for those beliefs.
- (3) Subsections(1) and (2) do not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of—
 - (a) doing an act or making an omission of the kind in fact done or made by the person under duress; or
 - (b) prosecuting an unlawful purpose in which it is reasonably foreseeable such a threat would be made.

⁵⁴ Duress is not available as a defence to murder in the Northern Territory, Queensland, Tasmania, South Australia, New South Wales, England, Ireland, Canada and New Zealand: Criminal Code (NT), s. 40; Criminal Code (Qld), s. 31(2); Criminal Code (Tas), s. 20(1); *R v Brown and Morley* [1968] SASR 467; *McConnell v R* [1977] 1 NSWLR 714. In New South Wales, the defence of duress is available to one who is charged as an accessory to murder: *McConnell v R* [1977] 1 NSWLR 714. For English law, see *R v Gotti* [1992] 2 AC 412. Previously the defence was allowed for an accessory to murder: *DPP for Northern Ireland v Lynch* [1975] AC 653. This, however, was overruled by *R v Howe* [1987] 1 AC 417. In Ireland, duress remains a common law defence. *Attorney-General v Whelan* [1934] IR 518 confirmed that duress is not available as a defence to the crime of murder. Ireland considered the defences of duress and necessity in the Law Reform Commission (Ireland), *Report: Defences in Criminal Law* (2009) and recommended that 'the defence of duress should be generally available as a defence, but not in the case of treason, murder or attempted murder'. The Canadian judiciary recently considered the defence of duress in *R v Ryan* [2013] SCC 3. The defence of duress (expressed as compulsion) is available to primary offenders except for listed offences that include murder and attempted murder: Criminal Code (RSC, 1985, c. C-46), s. 17. At common law, the defence of duress is available to those who are charged as accessories to any offence: *Paquette v The Queen* [1977] 2 SCR 189. In New Zealand, the defence of duress at common law is not a defence to murder: *R v Howe* [1987] AC 417; *R v Dudley and Stephens* (1884) 14 QBD 273. The Crimes Act 1961 excludes murder and attempted murder (together with a number of other crimes) from application of the defence of compulsion: s. 24. The partial defence of provocation (formerly under the Crimes Act 1961, s. 169) was repealed on 8 December 2009 by s. 4 of the Crimes (Provocation Repeal) Amendment Act 2009 (2009 No. 64).

the proposal advanced in the preceding paragraph would, insofar as possible, achieve that objective.

Conclusion

This article has examined the essential elements, operation and underlying rationale of the common law defences of provocation and duress. In so doing, particular attention has focused on the apparent anomaly that currently exists in many jurisdictions; specifically, an indefensible and strange dichotomy whereby the defence of provocation, but not duress, may be interposed as a partial defence to murder.

What can be gleaned from the forgoing discussion is that the reasons enunciated by Lord Hailsham for refusing to allow duress to be interposed as a defence to murder are seriously flawed. Although it is unnecessary to go further than the above example involving the kidnapped mother and child in order to buttress this point, it requires nothing more than a rudimentary understanding of basic human instinct to appreciate that it is unrealistic to expect any person, let alone all people who are subject to the law as it now exists in every jurisdiction other than Victoria, Western Australia, the ACT and the Commonwealth, to refuse to follow a direction to take an innocent life when the consequence of that refusal is all but certain to result in the loss of one's own life or that of a close friend or family member.

At present, there are no Australian jurisdictions, aside from Victoria,⁵⁵ Western Australia,⁵⁶ the ACT⁵⁷ and the Commonwealth⁵⁸ that allow the defence of duress to be interposed as a complete defence to murder. Even in Victoria, s. 3B has statutorily abolished provocation as a partial defence to the same. The writer is unaware of any scientifically conducted survey which comports with the view that one who kills under duress is any more blameworthy than one who kills for no other reason than in response to provocative conduct on the part of the deceased that the law regards as within the normal ambit of human temperament.⁵⁹ The failure of the writer to encounter a single student out of nearly 2,000 taught over the past 19 years, nor any other person who agrees with that view, cannot be ignored. Similarly, the writer has yet to encounter any person who concurs with Lord Hailsham's core justification for refusing to allow duress as either a complete or partial defence to murder. Indeed, the example of the kidnapped mother and daughter is an unassailable argument against that justification.

This view is further buttressed by the fact that in order to succeed in the common law defence of duress, the accused must adduce sufficient evidence that he or she did not, through any fault on his or her part, and at a time when he or she was free of duress, expose himself or herself to

⁵⁵ Crimes Act 1958 (Vic), s. 9AG.

⁵⁶ Criminal Code (WA), s. 32.

⁵⁷ Criminal Code (ACT), s. 40.

⁵⁸ Criminal Code (Cth), s. 10.2.

⁵⁹ *Stingel v The Queen* (1990) 171 CLR 312 at 328–9 (quoting *R v Enright* [1961] VR 663 at 669 (Herring CJ, Smith and Hudson JJ).

its application. The term ‘fault’ in this context was partially explained by Winneke CJ in the following passage from *Hurley and Murray*:

A person who without threat of death or serious violence voluntarily makes himself a party to a criminal enterprise cannot excuse his criminal conduct in participating in that enterprise by showing that after he had embraced the cause he was subjected to the threats of violence at the hands of other parties to ensure that he did not resile from the bargain he had voluntarily entered into.⁶⁰

In legal parlance, the term ‘fault’ denotes ordinary negligence at a minimum, any other form of negligence such as recklessness or any of the *mens reas* that are expressly or presumptively⁶¹ made elements of a particular crime.⁶²

Thus, a constituent element of duress requires that the accused be free of any degree of fault in exposing himself or herself to the application of the threat that coerced him or her into committing the nominated offence(s). In the scenario postulated by Winneke CJ, any person who voluntarily makes himself or herself a party to a criminal enterprise is, at the very least, negligent, and therefore at fault in having exposed oneself to its application in the event that there is a subsequent attempt to resile from the criminal scheme.

For all of the reasons discussed throughout this piece, Lord Hailsham’s reasoning in *Howe* cannot withstand careful analysis. It is equally apparent that one who kills under duress⁶³ at common law is less morally blameworthy than one who kills in response to provocation that would be a sufficient mitigating circumstance to reduce murder to the lesser offence of voluntary manslaughter. The writer has put forth three proposals to rectify what has long festered as an anomaly in the law that will inevitably lead to unfair results. The proposal that comes closest to ensuring that the consequences of conviction will be commensurate with the moral culpability of the accused’s conduct is to retain the defence of provocation, whether by statute or common law doctrine and, at the same time, follow Victoria’s example by enacting a statutory version of duress that, if successfully invoked, constitutes a complete defence to murder. This makes eminently good sense if one accepts that a person who kills under duress should not be treated the same, much less worse, than a person who kills without lawful excuse and for no other reason than the anger that he or she feels as a consequence of provocative words, actions, or both on the part of the deceased. For centuries the law has not only declined to treat the two with parity, but has inexplicably opted to treat the more blameworthy person with more compassion than the one who is arguably devoid of any fault whatsoever.

This article has exposed this longstanding anomaly for the unfair and paradoxical rule that it is. It is the writer’s view that the time is long overdue for the legislative and judicial branches of the various governments to act on the proposal set out above.

60 *R v Hurley and Murray* [1967] VR 526 at 533.

61 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 534.

62 Gillies, above n. 15 at 42.

63 Except, of course, for the requirement that the offence is not murder or some other offence so heinous as to be excluded from the defence: *R v Hurley and Murray* [1967] VR 526 at 543.