THE NEED FOR A NEW ANGLO-AMERICAN APPROACH TO DURESS

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Introduction

The defence of duress involves a concoction of excuse, moral involuntariness, and human frailty. It is a defence which focuses attention on the legitimate societal expectations of the reasonable man in criminal law. Unfortunately the Anglo-American tradition vis-à-vis the operation of duress is replete with vagaries, inconsistencies and anomalies. These demand urgent consideration and reform which is the focus of this article. The salutary lessons from recent jurisprudence show that a more compassionate and logical approach must be established, reflecting an enhanced role for jury determination of excusing conduct.

Historical development of duress as a defence to murder

It has been the prevailing doctrine for centuries that English criminal law did not allow duress as a defence to murder. This inflexible doctrine, the product of common law not statute, demands fundamental change to reflect the implicit moral involuntariness of the actor in such a scenario. The lessons derived from recent English and US jurisprudence ought to presage a more realistic and enlightened approach, as adumbrated below. The denial of duress operating as an excuse to murder reflects an unbroken tradition of authority dating back to *Hale's Pleas of the Crown*[1] and was repeated by Blackstone in his *Commentaries on the Laws of England*.[2] It was stated by Hale that as a matter of principle:

...如果一個人被拼命地襲擊，有死亡的危險，否則無法逃脫，除非為了滿足襲擊者的憤怒，否則他會殺死一個無辜的人，如果他犯了事實，恐懼和實際力量不會免除他的罪行和謀殺的懲罰；因為他寧願自己死，也不願殺死一個無辜的人。

> . . . if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent.[3]

In the 19th century case of *R v Tyler and Price* (1838) 8 C & P 616; 173 ER 643, Denman CJ told the jury in emphatic language that they should not accept a plea of duress that was put up in defence to a charge of murder against those who were not the actual killers. Fifty years later, in *R v*

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[1] (1736) vol 1, pp 51, 434.
[2] (1809) ed, vol 4, p 30.
[3] (1736) vol 1, p 51.

Dudley and Stephens (1884) 14 QBD 273, the defence of necessity was denied to the men who had killed a cabin boy and eaten him in order that they might survive when cast adrift at sea. The reason underpinning the denial of duress as a defence to murder is based upon the special sanctity that the law attaches to human life, and which denies to a man the right to take an innocent life even at the price of his own or another's life. The law here demands heroism from the threatened individual coerced into criminal activity.

As a general matter when an individual pleads duress she is claiming that although committing the actus reus of an offence with the requisite mens rea none-the-less such conduct ought to be excused. The accused claims that her will has been overborne by the wrongful threats imposed by another to inflict harm on herself or her family.[4] An analysis of the correct operation of the duress defence was provided by Lord Wilberforce in *DPP for Northern Ireland v Lynch* [1975] AC 653 where he asserted (at p 680):

> At the present time, whatever the ultimate analysis in jurisprudence may be, the best opinion ... seems to be that duress ... is something which is superimposed on the other ingredients which by themselves would make up an offence, ie on the act and intention. Coactus volui sums up the combination: the victim completes the act and knows that he is doing so; but the addition of the element of duress prevents the law from treating what he has done as a crime.

A similar explanation of the operation of duress pertains under American law.[5] Duress is delineated from necessity as potential defences; duress arises from the wrongful threats or violence of another human being and necessity arises from any other objective dangers threatening the accused.[6] It is important, subsequent to this definition of the historical development of duress, to examine the current egregious position adopted by English law, to contrast more appropriate US amendments, and to propound an argument for change with duress operating as a concession to human frailty even to a charge of murder.

Current position under English criminal law

In relation to the defence of duress, as applied to murder or attempted murder, it is staggering how judicial law-making over the last two decades has created incumbent difficulties, and perceptible inconsistencies. It was established by a majority of the House of Lords in *DPP v Lynch* above

[4] Allen, *Textbook on Criminal Law* (3rd ed, 1995) at p 145.

[5] Another definition of duress is:

> A person's unlawful threat (1) which causes the defendant reasonably to believe that the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal law, and (2) which causes the defendant to engage in that conduct, gives the defendant the defence of duress (sometimes called compulsion or coercion) to the crime in question unless that crime consists of intentionally killing an innocent third person.

W Lafave and A Scott, *Criminal Law* (2nd ed, 1986), p 432.

[6] See eg *R v Howe* (1987) 85 Cr App R 32, at p 39 per Lord Hailsham.

that the defence was applicable to a person charged with aiding and abetting murder (a secondary party). Subsequently in *Abbott v R* [1977] AC 755 the Privy Council drew a dichotomy between secondary parties and principals, withholding any defence to the latter group. This delineation was rejected and removed by the House of Lords in *R v Howe* (1987) 85 Cr App R 32, denying duress as a defence to murder whether as a principal or secondary party, and thus reversing their decision in *Lynch*. The conflicting dicta contained within these authorities only serve to exemplify the problems of judicial law-making, and differing judicial attitudes to the legitimacy of such an approach. It is interesting to contrast the views here of Lord Wilberforce in *Lynch* with that of Lord Salmon in *Abbot*. In *Lynch* it was said by Lord Wilberforce ([1975] AC 653, at p 685) that:

> We are here in the domain of the common law: our task is to fit what we can see as principle and authority to the facts before us, and it is no obstacle that these facts are new. The judges have always assumed responsibility for deciding questions of principle relating to criminal liability and guilt, and particularly for setting the standards by which the law expects normal men to act ... The House is not inventing a new defence: on the contrary it would not discharge its judicial duty if it failed to define the law's attitude to this particular defence in particular circumstances.

A fundamentally more restrictive role for judicial legislation was propounded by Lord Salmon in *Abbott* where he stated ([1977] AC 755, at p 767):

> Judges have no power to create new criminal offences; nor in their Lordships' opinion have they the power to invent a new defence to murder which is entirely contrary to fundamental doctrine accepted for hundreds of years without question. If a policy change of such a fundamental nature were to be made it could, in their Lordships' view, be made only by Parliament. Whilst their Lordships strongly uphold the right and indeed the duty of the judges to adapt and develop the principles of the common law in an orderly fashion they are equally opposed to any usurpation by the courts of the functions of Parliament.

A striking example of the extension of the English criminal law by judicial development arose in *R v Gotts* [1992] 2 WLR 284 where a majority of the House of Lords held that duress was not a defence to attempted murder. It was already settled law that it was inapplicable to murder, as laid down in *Howe* (above). Of course such a rationale was eminently supportable, given that murder was excluded, since attempt requires greater 'evil intent' than murder in that it is predicated on simply an intent to kill[7] whilst for murder the intent to cause grievous bodily harm suffices.[8] This latter constructive liability illustrates the illogicality of the area, and in Lord Keith's strong dissenting judgment in *Gotts* there was, he thought, no reason for the courts to determine the exclusion of attempted murder (at p 287). It was a matter that ought to have been left to Parliament as, contrary to murder (and treason) where authorities dated to Hale and Blackstone for their exclusion, it had never been definitely laid down that duress was no defence to a charge of attempted murder.

[7] See eg *R v Whybrow* (1951) 35 Cr App R 141.
[8] See eg *R v Cunningham* [1982] AC 566.

It is instructive to consider the four main arguments advanced by their Lordships in *Howe* (above) denying duress as a defence to a principal or a secondary party to murder.[9]

(1) The prima facie reason involved the 'special sanctity that the law attaches to human life and which denies to a man the right to take an innocent life even at the price of his own or another's life' (per Lord Griffiths, at p 48). Lord Hailsham's analysis was quite unrestrained on this issue. According to his view, the law is neither 'just nor humane' which withdraws the protection of the criminal law from the innocent victim and 'casts the cloak of its protection upon the coward and the poltroon in the name of a concession to human frailty' (at p 42). Hence the ordinary man, rather than kill another, might be expected to sacrifice his own life (at p 42). As adumbrated later in this article such a view imposes a fundamentally false standard to individual conduct. There is palpably no duty of heroism in the criminal law, the standard is that of the reasonable man, not the reasonable hero, and to suggest otherwise is the apotheosis of absurdity.[10]

(2) The secondary argument focused on the dangers of terrorism, and the importance of the law standing firm against an increase in violence and terrorist threat.[11] Their Lordships were particularly concerned that terrorists via human tools could inflict many killings of innocent victims. It was viewed by Lord Lane CJ in the Court of Appeal,[12] supported by Lords Bridge and Griffiths[13] in the House of Lords, as a highly dangerous relaxation in the law to allow a person who has deliberately killed, maybe a number of innocent people, to escape conviction and punishment altogether because of a fear that his own life or those of his family might be in danger if he did not. This danger, according to their Lordships, was

[9] See *Legislating the Criminal Code: Offences against the Person and General Principles* (Law Commission No 122) at p 56.

[10] In this regard not the view of Joshua Dressler who states:

> But, since duress is an excuse rather than a justification, the real issue (it bears repeating with some additional emphasis) is whether a coerced person who unjustifiably violates the moral principle necessarily, unalterably, and unfailingly deserves to be punished as a murderer, as the common law insists. If a murderer were insane, involuntarily intoxicated, or especially young, society would not necessarily, unalterably and unfailingly demand punishment . . . I am afraid that such a rule, like Lord Hailsham's opinion, has the imprint of self-righteousness, which the law should avoid. The rule asks us to be virtuous; more accurately, it demands our virtual saintliness, which the law has no right to require. It is precisely in the case of kill-or-be-killed threats that the criminal law ought to be prepared in some cases to attempt to assuage the guilt feelings of the homicidal wrongdoer by excusing him—by reminding him that he acted no less valiantly than any person of reasonable moral strength would have done.

See Joshua Dressler, 'Exegis of the Law of Duress: Justifying the Excuse and Searching For Its Proper Limits' (1989) 62 *Southern California LR* 1331, 1373 (July).

[11] This view was propounded by Lord Griffiths who asserted 'we face a rising tide of violence and terrorism against which the law must stand firm recognising that its highest duty is to protect the freedom and lives of those that live under it'. See *R v Howe* (1987) 85 Cr App R 32, at p 52 (Lord Bridge concurring at p 47).

[12] [1986] QB 626, at p 641.

[13] (1987) 85 Cr App R 32, at p 47.

exacerbated as the defence of duress was so easy to raise and may be so difficult for the prosecution to disprove beyond reasonable doubt (at p 53).

(3) It was further propounded that the extreme rigour of the complete denial of the defence could simply be ameliorated by the exercise of executive discretion (at pp 47 and 53). Flexibility could prevail by the prerogative of executive decision not to prosecute, or alternatively the expeditious release by licence of an individual serving a life sentence for murder. Such an argument is staggering. Axiomatically if the defence is excluded in law, much of the evidence which would prove the duress would be inadmissible at the trial, not brought out in court, and not tested by cross-examination (per Lord Hailsham, at p 43; Lord Griffiths concurring, at p 54).

(4) Finally, their Lordships noted that apart from the majority decision in *Lynch*'s case, duress dating back to Hale and Blackstone had, as outlined, uniformly been understood not to be a defence to murder.[14] Any alteration in the law had to be through Parliament not by judicial legislation. As discussed later such an approach is correct albeit such a judicial reticence has not been replicated in other areas of the criminal law, notably in *Gotts* over the inapplicability of duress to attempted murder.

The arguments presented in *Howe* to deny duress for murder seem utterly fallacious. A number of brief criticisms are highlighted above, and these are expanded upon subsequently. However, it is vital to first consider the apposite test for duress. 脅迫的適當測試。

In this regard the test under English law involves a two-prong test with both subjective and objective elements. These were clearly enunciated by Lord Lane CJ in *R v Graham* (1982) 74 Cr App R 235 and have since been affirmed by the House of Lords in *R v Howe* (1987) 85 Cr App R 32, at p 37 per Lord Hailsham. The defence is available only if, from an objective standpoint, the accused can be said to have acted reasonably and proportionately in order to avoid a threat of death or serious injury. Assuming the defence to be open to the accused on his account of the facts, the defence should be left to the jury with a direction to determine two questions. First, the subjective limb involves consideration of whether the accused was, or might have been, impelled to act as he did, because as a result of what he reasonably believed the person issuing the threat had said or done, he had good cause to fear that otherwise death or serious physical injury would result. Secondly, the objective limb requires examination as to whether the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would have responded to the threat by acting as the accused had acted.

The objective test involves the standard of the reasonable man, the

[14] See eg *DPP v Lynch* [1975] AC 653, at p 685 per Lord Wilberforce.

standard of, 'a sober person of reasonable firmness'. It is thus highly unfortunate that under current law the defence is denied to the objectively weak or timorous accused who fails to meet the reasonable person standard. A welcome reform, adopting a subjectivist perspective, would be to apply a test simply whether in all the circumstances the individual in question could reasonably be expected to resist the threat.[15] Impressionistically the incumbent characteristics of timidity in an individual, a consequence of which makes him more willing to accede to the particular threat and undertake criminal activity, ought to be a circumstance that is evaluated when the pressure through duress is considered. An extremely welcome, and long overdue reform of the law, would be to adopt the proposals of the Law Commission whereby, 'the threat is one which in all the circumstances (including any of his personal characteristics that affect its gravity) he cannot reasonably be expected to resist'.[16] It must be remembered that duress operates as a concession to human frailty, and included within that group are undoubtedly the timid and weak. By adopting a subjectivist approach focusing on the peculiarities of the individual more logical and humane principles can be adopted. Similar alterations ought to be replicated in the US where the common law has demonstrated anomalies, vascillations and inconsistencies over adopting an applicable test for duress.[17] In *United States v Jennell* 749 F 2d 1302 (9th cir 1985)[18] the Ninth Circuit Court of Appeals set out three essential requirements of duress: '(1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no reasonable opportunity to escape the threatened harm' (at p 1305). Such a test has pervading difficulties in that it palpably fails to expound as to whether the test for a 'well-grounded fear' is an objective or subjective one, nor is any specification made as to which individual the threat has to be made against.[19] A welcome improvement on grounds of logic and fairness would be to adapt the subjectivist approach of the Law Commission as explained.

[15] See 'Legislating the Criminal Code: Offences against the Person and General Principles' (Law Com No 218) at p 52.

[16] Ibid, at p 104 (contained within draft clause 25).

[17] Unfortunately there is no universal applicable test for duress. In *People v Pena* 149 Cal App 3d 14; 197 Cal Rptr 264 (1983) (duress defence is available for driving under the influence), a California superior court laid down six quintessential features for a duress defence. It stated: (1) The act charged as criminal must have been done to prevent a significant evil; (2) There must have been no adequate alternative to the commission of the act; (3) The harm caused by the act must not be disproportionate to the harm avoided; (4) The accused must entertain a good faith belief that his act was necessary to prevent the greater harm; (5) Such belief must be objectively reasonable under all the circumstances; and (6) The accused must not have substantially contributed to the creation of the emergency. Such guidelines are unworkable on the basis of ambiguity and inflexibility. See Gerald Williams, 'Oklahoma Recognises Duress as a Defence for Felony Murder' (1988–1989) 41 *Oklahoma LR* 515, 524.

[18] (Trial court did not err in refusing to instruct the jury on duress in a case of conspiracy to import and to distribute marijuana.)

[19] See Williams, op cit, note 17, at p 525.

The US approach on the applicability of duress as a defence to murder

Ineluctably over centuries the virtually unassailable position of Anglo-American common law has been that duress never excuses murder, and the threatened individual ought to die himself rather than escape through the killing of another human being.[20] The US historical equivalent of the English 19th century authority of *R v Tyler and Price* (1838) 8 C & P 616; 173 ER 643 is that of *Arp v State* 97 Ala 5; 12 So 301 (1893). Therein the coerced perpetrator took the life of an innocent third party, acting under the threat to his own life from duressors who were present and armed with double-barrelled shotguns. Subsequent to the killing all parties stole money from the victim and the duressee followed the duressors, making no effort to leave them. It was held by the Alabama Supreme Court, invoking the common law principle, that it was incumbent that a threatened defendant ought to die himself rather than escape by murdering an innocent victim (12 So 301 (1893), at p 302).[21] The established doctrine was that duress was inapplicable as a defence to an intentional killing.

Clearly given the prevailing orthodoxy on both sides of the Atlantic it is necessary to provide strong arguments for any fundamental changes to the current position.[22] Palpably all coerced defendants who kill ought not to be excused. Nevertheless the approach adopted by the American Law Institute, under the Model Penal Code, imposing the excusing decision even for murder upon juries under a contextual basis, ought to be adopted in England. The most significant difference from the common law is that the Code does allow duress to be pleaded as a defence, even for murder. Additionally the role of the jury is vastly enhanced in the determination of the excuse than under the common law.[23] It is incumbent upon them to consider whether the hypothetical 'person of reasonable firmness' would have resisted the threat.[24] Bound up within that dilemmatic choice is in essence a moral judgement on the ambit of fortitude legitimately determined of individuals constrained by the prevailing circumstances. Thus a fundamental dichotomy exists with their limited role under common law, restricted simply to examination of whether a threat was there and if so was it imminent (essentially a role of basic fact-finding).[25] The material part of the Code, adopted unfortunately by only a limited number of states,[26] provides as follows:

(1) It is an affirmative defence that the actor engaged in the conduct

[20] See Joshua Dressler, 'Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits' (1989) 62 *Southern California LR* 1331, 1370 (July).

[21] See also *State v Nargashian* 26 RI 299, 58A, 953 (1904) (duress is not a defence to homicide). Williams, op cit, note 17, at p 519.

[22] In this regard note the dictum of Lord Hailsham in *R v Howe* (1987) 85 Cr App R 32, 44 that, 'it ill becomes those of us who have participated in the cruel events of the 20th century (such as genocides and international terrorism) to condemn as out of date those who wrote in defence of innocent lives in the 18th century'.

[23] Dressler, op cit, note 20, at p 1345.

[24] Ibid.

[25] Ibid.

[26] See eg Alaska Stat, s 11.81.440 (1983); Haw Rev Stat, s 702–231 (1985): NJ Stat Ann, s 2C: 2–9 (West 1982): Utah Code Ann, s 76.2.302 (1978).

> charged to constitute an offence because he was coerced to do so by the use of, or threat to use, an 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.
>
> (2) The defence . . . is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defence is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offence charged.[27]

The Code adopts a significantly different test from current English practice, whereby under *R v Graham* (1982) 74 Cr App R 235 the threat must be that of death or serious physical injury. Under the Model Penal Code it suffices that the threat is to cause a less serious physical injury to either the coerced actor or a third party. This flexibility, acknowledging the moral involuntariness of the defendant, is to be welcomed, and reflects a laudable approach.

By contradistinction the majority of US states still apply the common law predicated on the requirement of a deadly threat, an objective criterion, and the overwhelming view in jurisdictions that have decided the issue is that duress is not a defence to any form of homicide or attempted murder.[28] A rare exception is provided by Oklahoma wherein the Court of Criminal Appeals allowed duress to operate as a defence to felony-murder[29] in *Tully v State* 730 P 2d 1206 (Okla Crim App 1986). This decision and the rationale behind the concession demands closer attention, especially given the extremely limited pre-*Tully* category of cases accepting duress as a defence to felony-murder.[30]

The coerced defendant in *Tully* was threatened by the duressor with a baseball bat if he did not participate in a robbery from the stricken victim. The defendant contended that this demand was initially refused and that his eventual participation only occurred through no valid choice.[31] On appeal the claim was that the trial court's lacuna in failing to give the jury any instruction on duress constituted a reversible error.[32] The court categorically refuted the principle that it was incumbent on a defendant to die himself rather than kill a wholly innocent victim, and the defence of duress was affirmed as limited simply to intentional homicides but not

[27] Model Penal Code. s 2.09(1)–(2) (1985).

[28] See eg *People v Dittis* 157 Mich App 38, 403 NW 2d 94 (1987) (duress is not a defence to first degree murder); *State v Chism* 436 So 2d 464 (La 1983) (duress defence does not apply to a charge of being an accessory after the fact to murder); *Kee v State* 438 NE 2d 993 (Ind 1982) (duress is not a defence for attempted murder).

[29] Where an unlawful homicide transpires during the commission of a felony then under the felony–murder rule a charge of first degree murder results.

[30] Restricted to the three cases of *People v Merhige* 212 Mich 601; 180 NW 418 (1920); *People v Pantano* 239 NY 416, 146 NE 646 (1925); *People v Kelly* 51 Mich App 28, 214 NW 2d 334, 335 (1973). The case of *Merhige* was expressly cited with approval by the court in *Tully*.

[31] 730 P 2d 1206 (Okla Crim App 1986); Brief for Appellant, at p 7 (No F–82–671).

[32] Tully had been convicted and received a life sentence for second degree murder and a seven-year sentence for second-degree burglary. See Gerald Williams, 'Oklahoma Recognises Duress as a Defence for Felony Murder' (1988–1989) 41 *Oklahoma LR* 515, 523.

felony-murder (730 P 2d 1206, at p 1210). The decision is to be welcomed in that it extends the ambit of duress, reflecting that it is contrary to correct legal analysis to seek to punish individuals who ought not to be held legally responsible in that a defendant acting under duress cannot be said to be acting under his own intentions. There is no voluntary breaking of the criminal law, no truly evil intent on behalf of the accused, and both Lords Keith[33] and Lowry[34] in their dissenting judgments in *Gotts* questioned the conclusion that presence of an intent to kill, formed by duress, made the coerced actor so immoral to deny a defence.[35] The view of Lord Keith (at p 418) seems particularly apposite:

> But I find it difficult to accept that a person acting under duress has a truly evil intent. He does not actually desire the death of the victim.

Although *Tully* introduces a welcome relaxation in allowing duress for felony-murder it needs to be examined whether intentional killing (murder) ought similarly to be included. Certainly the same arguments are applicable in either scenario.

Application of the defence of duress to murder

Persuasive arguments prevail over extending the ambit of duress. These arguments ought to be pervasive and run directly contrary to their Lordships' analysis in *Howe,* outlined earlier. The duress defence requires us to consider the type of conduct legitimately expected of our fellow citizens threatened by dire consequences and coerced into completely atypical behaviour, morally repugnant to them and their previous code of conduct. Lord Hailsham demands heroism and rejects the coward in such a scenario. But criminal law does not require or demand heroism, rather it imposes the reasonable man standard, an individual who is a sober person of reasonable firmness. To demand more and attach liability upon such a demand is ludicrous. Innocent life is not effectively protected by a rule of which the individual is likely to be unaware, or unable to comply.[36]

Let us postulate the following hypothetical scenario presenting an odious choice. A woman army officer in Virginia is driving her two young children to school when the car is hijacked by gunmen who tell her both children will be shot unless she drives the car back to the army barracks where they intend to shoot a guard. The woman constrained by the threat to her children, and the imminent peril of those deaths, acts as an accomplice by driving the vehicle—the plan is accomplished and the guard is killed. Under prevailing Anglo-American doctrine the woman is guilty of murder—the law states it is incumbent upon her to sacrifice her own life and that of her children with duress inapplicable to murder.[37] The

[33] [1992] 2 AC 412, at p 418.
[34] Ibid, at p 436.
[35] See Law Com No 218, at p 53.
[36] See Law Com No 122, at p 57.
[37] Of course it may be possible for prosecutional discretion for the individual not to be prosecuted, nevertheless by strict analysis liability is incurred for murder.

logical corollary must be that where an individual cannot reasonably be expected to behave otherwise than the way they did then no criminal liability should be attached.[38] In such a scenario there is no real choice, and the actions involve moral involuntariness. The correct analysis was provided by Lord Morris in *DPP v Lynch* [1975] AC 653 who stated (at p 670):

> . . . [i]t is proper that any rational system of law should take fully into account the standards of honest and reasonable men. By those standards it is fair that actions and reactions may be tested. If then someone is really threatened with death or serious injury unless he does what he is told to do is the law to pay no heed to the miserable, agonising plight of such a person? For the law to understand not only how the timid but also the stalwart may in a moment of crisis behave is not to make the law weak but to make it just. In the calm of the court-room measures of fortitude or of heroic behaviour are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and the well disposed.

In essence the criminal law demands that a person who killed another under duress, whatever the circumstances, has to comply with a higher standard than that demanded of the average person.[39] Such an exception to the general rule which applies in criminal law is not justified. Nor is it sufficient to rely simply on an executive discretion not to prosecute, or through quick release on licence as a mitigatory device. As the Law Commission stresses, most cogently, such a rationale is improper both in principle and in practice.[40] Clearly even where the prosecutor is aware of the duress plea he may believe it incorrect to rule on its merits, and additionally those with the duty to rule on a prisoner's release would have to examine the defendant's claim to have acted under duress without recourse to any proper trial of that matter.[41]

It is eminently logical that under current law duress is not available to members of criminal or terrorist groups.[42] However it is illogical to deny it to innocent tools of such groups, as in the earlier postulation. Axiomatically such matters ought to be for jury determination, and there is no doubt that juries are commendably robust in rejecting the defence where appropriate.[43] The more heinous the offence, and the greater number killed, then juries will palpably determine the desert of punishment.[44] It is the jury who are peculiarly well situated to determine society's legitimate expectations of moral courage and should be charged with applying duress to murder. Lord Hailsham's jury demanding heroism would leave the current law unaltered, but a less rigorous test, that of the reasonable man, would attach a more humane and compassionate test,

[38] See Professor Smith, 'Case Commentary' [1992] Crim LR 726.
[39] See the South African case of *State v Goliath* (1972) 3 SA 1, 25 per Rumpff J.
[40] Law Com No 122, at p 57.
[41] Ibid.
[42] See eg *Fitzpatrick* [1977] NI 20; *R v Sharp* [1987] 1 QB 853; *R v Shepherd* (1988) 86 Cr App R 47.
[43] Even Lord Hailsham was prepared to accept that juries are commendably robust. See *R v Howe* (1987) 85 Cr App R 32, 44.
[44] Note in *Graham* the jury convicted where the accused pleaded duress on charge of murder and, on the re-trial of *Lynch* for murder, the jury in Northern Ireland convicted.

and the jury ought to be charged with making such determinations. In this regard the renewed onus on jury determination would replicate the excusing decision imposed on juries under the Model Penal Code.

Finally it is necessary to highlight a flagrant anomaly under current English law. It is apparent that duress may be pleaded on a charge under s 18 of the Offences against the Person Act 1861, that of wounding with intent to cause grievous bodily harm. The mens rea of murder embraces this latter constructive liability, based on an intention to kill or to cause serious bodily injury. Hence a defendant may be acquitted of wounding with intent to cause grievous bodily harm based on the defence of duress, but if the victim subsequently dies, then a murder conviction is operative (duress inapplicable). In each scenario the culpability of the coerced criminal actor is identical with liability imposed depending on whether the victim dies or survives. Such an anomaly can cause gross injustice and provides example of the need for urgent reform of this sorry area of the law.

A dichotomy between stare decisis and judicial law-making as uncharted seas for judicial circumnavigation

Given the anomalous state of the current law on duress it is to be hoped that reform proceeds expeditiously. However ought this to be left to legislation or is judicial law-making a suitable mechanism? Certainly the vascillations over the last two decades under English law pertinent to the applicability of duress to murder and attempted murder, exemplified by *Lynch, Abbott, Howe* and *Gotts,* fail to establish any cogent reasons for the latter approach. Recent case developments have demonstrated a clear dichotomy between principles of stare decisis and those of judicial law-making.

In *R v R* [1992] 1 AC 599 the issue was whether the offence of rape was one not known to law where the defendant was the husband of the alleged victim. There existed, similarly to the denial of duress to murder doctrine, a common law line of authorities dating back to Hale and Blackstone denying rape convictions where marital partners cohabited together, albeit that assault charges could be brought.[45]

Notwithstanding the common law situation the House of Lords in *R* by judicial creativity and law-making held that there was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband; and that, therefore, a husband could be convicted of the rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse. The common law was capable of evolving in the light of changing social, economic and cultural

[45] Sir Matthew Hale in his *History of the Pleas of the Crown* (1st ed, 1736) vol 1, ch 58, p 629 wrote:

> But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up in this kind unto her husband which she cannot retract.

developments. Hale's propositions meant that by marriage a wife gave her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happened to be feeling at the time. Their Lordships, the leading judgment of Lord Keith, asserted that in modern times any reasonable person must regard that conception as quite unacceptable (at p 605). Certainly it is egregious to countenance that a husband in our world today could intentionally or subjectively recklessly by force have non-consensual sexual intercourse with his wife and not be liable for a rape conviction. However less certain is that such fundamental alteration in the criminal law should be as a consequence of judicial legislation, and not by statute, especially against a background as in *R* where statutory reform of the whole law of rape was in immediate contemplation. The defendant in *R* was retrospectively liable for attempted rape of his wife where no such offence existed at the time of his conduct, hardly a logically rational scenario.

It is extremely noteworthy that their Lordships, as outlined above, were prepared to disregard the common law position in *R* adopted by Hale and Blackstone vis-à-vis the marital rape exemption. However in the recent authority of *C (A Minor) v DPP* [1995] 2 WLR 383 they categorically refused to do so over the doli incapax presumption,[46] whereby the prosecution must show a mischievous discretion for children aged between 10 and 14, despite obvious dissatisfaction with the doctrine. It is self-evident, as Lord Lowry commented in *C (A Minor)*, that it is extremely difficult when discussing the propriety of judicial law-making to reason conclusively from one situation to another (at p 392). Ineluctably, it is problematic to exemplify aids to circumnavigation across the extremely uncharted sea of judicial law-making, the more so given the opaqueness in the judgments. However in *C (A Minor)* Lord Lowry at least attempted to charter the voyage of judicial legislation (at p 392). The following guidelines were stressed as being of pertinence.

(1) If the solution is doubtful, then judges should beware of imposing their own remedy.
(2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched.
(3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems.
(4) Fundamental legal doctrines should not be lightly set aside.
(5) Judges should not make a change unless they can achieve finality and certainty.

The House of Lords in *C (A Minor)*, applying the above principles, refused to alter the doli incapax presumption. Such an approach is commendable. Overall the best policy on the grounds of legal certainty and tidiness is to wait for parliamentary legislation where the law is out of step with the needs of the modern world for social, moral or educational

[46] This again is a presumption which dates back to Hale and Blackstone.

reasons. It is to be hoped that legislation over duress as a defence to murder proceeds expeditiously applying proposals suggested by academics and the Law Commission. The present Anglo-American common law seems fundamentally flawed. In the US it would be extremely beneficial if more states were to adopt the Model Penal Code applying a more logical and compassionate approach as outlined.

Development of duress of circumstances replicating necessity

The English courts have never expressly recognised a general defence of necessity, a situation where an individual commits an offence to avoid the greater evil to herself or another which would occur from objective dangers arising from the circumstances in which she or that other are placed.[47] It was expressly denied recognition over intentional killings in the famous case of *R v Dudley and Stephens* (1884) 14 QBD 273. As Lord Denning stated in *London Borough of Southwark v Williams* [1971] 2 All ER 175 the dangers are, 'Necessity would open a door which no man could shut . . . The plea would be an excuse for all sorts of wrongdoing' (at p 179). So the courts must, for the sake of law and order, take a firm stand. However significant developments in several recent Court of Appeal cases has allowed a form of necessity excuse, albeit within the duress terminology, to be allowed in through the back-door by judicial sleight of hand.

The limited defence of duress of circumstances has developed in English law in relation to road traffic cases involving reckless driving[48] and driving whilst disqualified.[49] In *R v Conway* [1989] QB 290; 53 JCL 173 the defendant was charged with reckless driving and pleaded necessity on the ground that he drove as he did because his passenger was extremely fearful of an attack from two men who were approaching the car. In actual fact these two individuals were plainclothes police officers who were approaching the car to arrest the passenger. The court treated the defence of duress of circumstances (necessity) as a logical corollary of duress per minas (by threats), involving similar limitations in that the harm sought to be avoided must be death or serious injury. It was expressly stated by Woolf LJ ([1989] QB 290, at p 297) that:

> We conclude that necessity can only be a defence to a charge of reckless driving where the facts establish 'duress of circumstances', as in *R v Willer* (1986) 83 Cr App R 225, ie where the defendant was constrained by circumstances to drive as he did to avoid death or serious bodily harm to himself or some other person. As the editors point out in Smith and Hogan, *Criminal Law* (6th ed, 1988), p 225, to admit a defence of 'duress of circumstances' is a logical consequence of the existence of the defence of duress as that term is ordinarily understood, ie 'do this or else'.

The applicable principles pervading this area were established by Simon

[47] See Allen, *Textbook on Criminal Law* (3rd ed, 1995) at 156.

[48] See eg *R v Willer* (1986) 83 Cr App R 225; 51 JCL 278; *R v Conway* [1989] QB 290; 53 JCL 173.

[49] *R v Martin* [1989] 1 All ER 652; 53 JCL 291.

Brown J in *R v Martin* [1989] 1 All ER 652; 53 JCL 291. The defendant in this case drove his stepson to work by car, whilst disqualified, following threats from his wife that she would commit suicide if he not do so. The wife had suicidal tendencies. D pleaded guilty to the driving whilst disqualified charge as the trial judge ruled it to be an absolute offence, and thus necessity was not a defence. The Court of Appeal quashed the conviction as necessity (duress of circumstances) ought to have been left to jury determination. The principles governing duress of circumstances were summarised by Simon Brown J who stated (at p 653):

> . . . [f]irst, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress that is pressure on the accused's will from the wrongful threats or violence of another. Equally however it can arise from objective dangers threatening the accused or another. Arising thus it is conveniently called 'duress of circumstances'.

The defence is only available if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.[50] In essence the test for necessity, derived from the principles established by *Graham*, with the consequential imposition of both subjectivist and objectivist limbs as discussed, is identical to that for duress by threats with the exception of the situational source from which the threat emanates. In this regard it is only through these recent significant developments that English law has caught up with those limited number of US jurisdictions which have adopted the Model Penal Code provisions, applying an approach requiring a balancing of competing evils. The relevant provisions of which provide as follows:

> Conduct that the actor believes to be necessary to avoid a harm or evil to himself or another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offence charged.[51]

The test allows flexibility and compassion to be shown to the coerced actor, similar to the duress of circumstances approach. However, the extent of such defence needs to be considered. The ambit of duress of circumstances, closely related to duress by threats, has recently been determined by the Court of Appeal in *R v Pommell* [1995] 2 Cr App R 607; 60 JCL 173, a vitally important decision which bears closer examination.

The facts can be briefly stated. Police officers had entered D's home to execute a search warrant, and he was found lying in bed with a loaded gun in his right hand. He was convicted of possessing a prohibited weapon and ammunition without a firearms certificate contrary to the Firearms Act 1968. D contended that during the night someone had come to see him, carrying the gun, with the intention of going to shoot some people because they had killed his friend. D said that he had persuaded the man to give him the gun which he took upstairs. He took the bullets out, then put them back, having decided to wait until morning to give the gun to his brother to hand to the police. The trial judge stated that in his view

[50] See eg *DPP v Pittaway* [1994] Crim LR 600.
[51] Model Penal Code, s 3.02(1)(a) (1985).

necessity could not be an issue because even assuming that D was orginally driven by necessity to take possession of the gun his failure to go immediately to the police robbed him of the defence. However the Court of Appeal stressed that even though all previous cases applying the defence of duress of circumstances were road traffic offences none-the-less no grounds existed for limiting it simply to cases of that kind. On the contrary, since the defence, being closely related to the defence of duress by threats, appeared to be general, it applied to all crimes except murder, attempted murder, and some forms of treason.[52] Hence the defence was open to the defendant in *Pommell* in respect of his acquisition of the gun.[53]

鑑於這是一個沒有相關差異的區別，因為脅迫只是由不當威脅引起的必要性屬的物種，將脅迫的防禦和環境的防禦等同起來似乎非常合乎邏輯。

It seems eminently logical to equate the ambit of the defence of duress per minas and of duress of circumstances given that it is a distinction without a relevant difference since duress is only that species of the genus of necessity which is caused by wrongful threats. Hence the decision in *Pommell* is correct in the sense that it draws the line under murder and attempted murder. However the whole tenor of this article focuses on allowing duress by threat to operate as a defence under Anglo-American law. The ambit of duress of circumstances ought similarly to be determined and should include intentional killings.

Conclusion: the need for urgent reform

It seems self-evident that Anglo-American jurisprudence demands radical alteration with regard to the inapplicability of duress as a defence to murder. If a criminal trial represents a theatre of morality, then the jury symbiotically the audience to such a production are perfectly fit to pronounce upon legitimate societal expectations of the coerced actor in the human tragedy. The approach adopted by those US states applying the Model Penal Code provisions is the best solution, imposing the excusing decision even for murder upon juries under a contextual basis. The common law decision in *Tully* over felony-murder, albeit laudatory, does not go far enough. An enhanced role for the jury over even intentional killings represents the only legitimate approach to the dilemmatic choice involved here.

The Law Commission have expounded their view that the concerns about the operation of duress, expressed by their Lordships in *Howe* and

[52] In this regard the Court of Appeal approved Professor Smith's commentary of *R v Bell* [1992] Crim LR 176.

[53] A related matter that arose in *Pommell* is that of a duty to desist. In their Lordships' judgment a person who had taken possession of a gun in circumstances where he has the defence of duress of circumstances must desist from committing the crime as soon as he reasonably can. It is a factual question on the evidence for determination by the jury. Clearly the defendant must desist from the unlawful conduct as soon as he is aware that the threat is no longer operative. In *DPP v Jones* [1990] RTR 33 the defendant may have had a defence of duress when he began to drive with an excess of alcohol, but it was held that there was no necessity for him to drive the whole of the two miles to his home. It seems clear that on the possibility of duress becoming operative the burden is imposed on the prosecution to demonstrate that it ceased in operation at the time of criminal activity, and D failed the duty to desist.

Gotts, cannot rationally or justly be met by withholding duress as a defence to murder or by reducing it to a mere ground for mitigation of sentence.[54] It is impossible to disagree with such sentiments. Additionally their proposal to reverse the burden of proof contained within clause 25 of their draft Bill seems unobjectionable.[55] The evidential onus ought to be on the defendant to show on a balance of probabilities that duress applies. Prima facie this would allow the jury to concentrate more directly on the plausibility or otherwise of the accused's story.[56] It would be incumbent upon the jury to decide on all the evidence whether it was more likely than not that what the defendant claimed had in fact occurred.[57] The salutary lessons from recent jurisprudence demand changes and an immediate relaxation from the current intransigence. By analogy to duress per minas the operative defence ought similarly to apply to necessity (duress of circumstances) given the equating of the two defences. The moral involuntariness of the coerced actor needs to be recognised.

[54] See Law Com No 218, at p 59.

[55] Ibid, at p 104. Clause 25 provides as follows:

(1) No act of a person constitutes an offence if the act is done under duress by threats.

(2) A person does an act under duress by threats if he does it because he knows or believes—

(a) that a threat has been made to cause death or serious injury to himself or another if the act is done, and

(b) that the threat will be carried out immediately if he does not do the act or, if not immediately, before he or that other can obtain effective official protection, and

(c) that there is no other way of preventing the threat being carried out, and the threat is one which in all the circumstances (including any of his personal characteristics that affect its gravity) he cannot reasonably be expected to resist.

It is for the defendant to show that the reason for his act was such knowledge or belief as is mentioned in paragraphs (a) to (c).

[56] Law Com No 218, at p 61.

[57] Ibid.