The Historical Development of Duress and the Unfounded Result of Denying Duress as a Defence to Murder

# Introduction

The rationale for excusing those who act under a threat from another has been described as being that ‘as punishments are only inflicted for the abuse of free-will, which God has given to man, it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force or compulsion’.[[1]](#footnote-1) In cases of duress the defendant has chosen to commit a criminal offence when the alternative is that he himself, or someone he feels responsible for, would be subjected to death or serious harm. The defendant can be excused from his crime as he acted under compulsion.

Despite the existence of duress for many centuries it has never been legislated upon by Parliament. This has meant that the defence has been left to develop through common law. Holdsworth reflected ‘at all periods of our history it has been far more difficult to extend the criminal law by a process of judicial decision than other branches of the law. There has always been wholesome dread of enlarging its boundaries by anything short of an Act of the legislature.’[[2]](#footnote-2) It will be shown through a chronological examination of cases from the thirteenth, through to the nineteenth century that this reluctance has resulted, without theoretical foundation, in duress not being available to murder.

Much has been written discussing the judicial decision to restrict duress from murder.[[3]](#footnote-3) This article, however, examines the decision to do so from a historical perspective. Doctrinal methodology is adopted to examine all reported duress cases and the Statutes of the Realm, which significantly impacted on the development of the law, from the period from 1266 (the first found recorded use of duress) until the end of the nineteenth century with the landmark case of *Dudley and Stephens*.[[4]](#footnote-4) Academic literature from esteemed judges of the period that influenced the development of the law during this period will also be considered. It is noted within the article, however, that these sources of information must be understood in context of the political climate at the time they were written, or as opinion of judges outside of legal doctrine.

Examination of these sources will firstly show that duress was initially used for what could be considered the most heinous of crimes, treason, so arguably is if was created for this offence it should be available for the less serious offence of murder. Furthermore, that duress has previously been used as a defence to murder (and manslaughter) and that there is no solid legal authority in duress’s history as to why it should not be available as a defence when the defendant has killed. Comparison of duress to necessity will then establish that the defences are significantly different and, therefore, even though necessity may not be available to murder this does not provide reason to deny the defence of duress. Moreover, that the decision in *Dudley and Stephens*[[5]](#footnote-5)should not have been followed to deny duress as a defence to murder. As such, the conclusion will be formed that the decision to deny use of the defence in *Howe*[[6]](#footnote-6) cannot be substantiated by reference to the defence’s historical development.

**The emergence of duress**

It is a matter of dispute when the defence of duress first emerged. For instance, Lord Bingham states that since the 14th Century there has been a limited defence where a person is forced to act against their will by the threats of another,[[7]](#footnote-7) however, Sayre[[8]](#footnote-8) says that ‘after the twelfth century new general defences begin to take shape such as insanity, infancy, compulsion or the like, based upon the lack of a guilty mind and thus negating moral blameworthiness’.[[9]](#footnote-9) It is not disputed that duress, in some form, has existed for many hundreds of years and this article will trace the earliest examples of duress to establish its first recorded use, to show that duress was created as a full defence for treason, including where the defendant had killed.[[10]](#footnote-10)

**Origins of duress in medieval law**

Many of the initial cases where duress was used were where the defendant had been involved in some form of civil war or rebellion. In Henry III Statutes of the Realm 1266-67[[11]](#footnote-11) the excuse of duress was used to mitigate the punishments of those who had committed treason by assisting rebels in the battle of Evesham. The ordinary punishment for bailiffs and officers of the Earl of Leicester who had committed treason through actions amounting to robbery and manslaughter[[12]](#footnote-12) was a fine of as much as their lands were worth for 5 years, but the punishment for those that acted though fear had the lesser punishment of one year’s value of their land.[[13]](#footnote-13) This early reference to duress sets no limits on what type of offence duress would act to mitigate, although it is an early indication that acting under duress could be used to mitigate the punishment for manslaughter in treason cases.

From this example in 1266 up until the 19th century the lack of cases, or reference to duress in the Statutes of the Realm, suggests that at that time duress was not a widespread defence. It is possible that this can be attributed to the alternative options available during this period.[[14]](#footnote-14) Many of the earlier cases of duress occurred where the defendant had been charged with treason.[[15]](#footnote-15) Prior to 1351 there was no clear distinction between felonies and treason[[16]](#footnote-16) as both were against the King. Despite this lack of distinction, the offence a person was charged with could make a significant difference. If the defendant was charged with a felony he could plead benefit of clergy, which was not available to a charge of treason. Benefit of clergy was developed following the death of Thomas Becket and used up until the 19th century (when perhaps not coincidentally the pleading of duress became more prevalent before becoming more widely accepted in the 20th century). Benefit of clergy was available to those in holy orders and in 1692 was extended to women. It became common practice that being able to plead the benefit was based on being able to read. This led to widespread abuse as the benefit was frequently made available to those who were not actually clergy.[[17]](#footnote-17) A successful plea meant that the defendant would be tried in an ecclesiastical court, or be handed over to an ecclesiastical court once indicted and convicted by a jury in a secular court, and only be exposed to the ecclesiastical court’s punishments.[[18]](#footnote-18) This in turn meant that the defendant was subject to more lenient punishment, if any at all, for crimes for which he would have otherwise been hanged. Duress was left to provide a defence to those who could not use benefit of clergy due to being charged with treason.

An example of this is John de Culewen who in 1331 successfully used the defence of duress to a charge of treason that arose from him enlisting with the enemy.[[19]](#footnote-19) Although this case was before the Act of Treason it was classified as a treason offence as he had adhered to a King’s enemy, and therefore, the benefit of clergy would have been unavailable. Hale commented some 400 years later that this case showed that the defendant must fear immediately for his life and stop committing the treason, allegiance with the enemy as soon as he could. These criteria showed a development in the structure of the defence to what was later to become a widely recognised as the modern defence of duress. The application of the defence was still to a charge of treason, but in contrast with Henry III’s statutes the defendant was acquitted, as opposed to the punishment being merely mitigated. Therefore, this case demonstrates that not only was duress available to a charge of treason, but fully excused those who arguably committed the most heinous of crimes.

*Oldcastle’s case*[[20]](#footnote-20) in 1419 is another of the earliest case examples of duress, when duress was again available for treason. Much of what is known about Sir John Oldcastle was written after his death, however, it is reputed that he was a Herefordshire knight who became a Member of Parliament in 1409, known as Lord Cobham following his third marriage.[[21]](#footnote-21) He was found guilty and executed by being hanged and burned on 25 December 1417 following the case against him in 1413 for heresy.[[22]](#footnote-22) At the time he was found guilty he should have been immediately executed, but because of his social standing and relationship with the King (King Henry IV and later King Henry V) he was instead imprisoned in the Tower of London for 40 days and given the opportunity to renounce Lollardy[[23]](#footnote-23) (a religious movement of which he was a promoter and later leader).[[24]](#footnote-24) Before the 40 days were complete he escaped. He was not captured again until 1417.

In these three years when he was a fugitive several people provided him with provisions, some of whom claimed to have done so under duress.[[25]](#footnote-25) Despite the case being known as *Oldcastle’s case* the defendant was not Oldcastle, but those who provided him with aid. The recorded account of this case is provided by Hale, written over 300 years later, which only provides a brief summary that does not name these defendants. Richardson, however, in a separate account of Oldcastle’s years in hiding, discusses a commission formed in 1418 to inquire into the treasons, Lollardies and felonies committed by nine men.[[26]](#footnote-26) Four of the men were found not guilty by the inquiry. There was evidence that the other five had been in touch with Oldcastle during 1417.[[27]](#footnote-27) Four of these five men were believed to be Oldcastle’s tenants, and the fifth man, the only one named, was David Seys. The case against these five men for treason was referred to the King’s Bench after the jury failed to come to a decision and here they were acquitted. It is contended that these men are the same men that Hale is referring to in his account of *Oldcastle’s case.*

Hale states that the defendants were acquitted as they had acted *pro timore mortis* and *quod recesserunt quam cito potuerent.*[[28]](#footnote-28)This established the rule that in the 15th century a person could successfully plead duress in times of war or rebellion, if he was acting in fear of his life and committed the crime of treason, but stopped committing the offence as quickly as he was able. Allowing the defence in the manner prescribed by Hale is understandable when looked at in the context of the law surrounding superior orders for soldiers. English Law has never recognised a defence of superior orders, which is particularly harsh in the case of military orders,[[29]](#footnote-29) especially in cases where it is unclear whether the actions are manifestly illegal or not. As Dicey explains a soldier faces the risk of punishment by the courts if he does obey an order and the risk of court martial if he does not.[[30]](#footnote-30) To bridge this gap a limited defence of duress was introduced instead of reversing the fundamental principle of not allowing a defence of superior orders. Thus, *Oldcastle’s case*, again demonstrates that duress was available to those who committed treason, albeit within the context of war or rebellion.

**Rejection of the defence in the 17th century**

This early emergence of duress as a defence to one of the most heinous crimes was not without its challenges. In 1660 *Axtell* unsuccessfully pleaded a defence on grounds similar to that of duress.[[31]](#footnote-31) He was charged with treason under the statute of 3 Edward 25, based on compassing and imagining the death of King Charles I during the King’s trial and subsequent execution. The case was not brought until eleven years after the events had occurred. This is significant in understanding the outcome of the case, as arguably it was not a desire to limit the defence of duress per se that led to the Axtell’s lack of defence, but instead a reflection of the political climate at the time. The events of the case occurred in 1649 just before Charles I was executed. Cromwell then formed the Commonwealth of England and later became Lord Protector until the monarchy was restored in 1660 with Charles II on the throne. It was at that time that Axtell was brought to trial.

Axtell was the leader of a regiment who was present at the trial of Charles I. During this trial, it was alleged he ordered his troops to shout ‘Justice, Justice’ and on the last day of the trial ‘Execution, Execution’. Axtell is then said to have given orders for an executioner to be fetched following the trial of Charles I. These actions led to Axtell being charged with treason. At his trial Axtell claimed that he had not compassed or imagined the death of King Charles I, stating that his actions had been misconstrued. Furthermore, despite Axtell appearing to act as a duressor to the troops under his command, he himself claimed that anything he had done during the trial of Charles I he had not done voluntarily. He said that he had only committed the alleged actions, due to his commission as a soldier. He claimed that had he not obeyed what he believed to be his orders from his superior officer, Lord Fairfax, then he would have been subject to death by the rules of war,[[32]](#footnote-32) thus fulfilling the criteria laid down in *Oldcastle’s case* that the defendant must be in fear of death.

The prosecution argued that the defendant’s actions were outside his commission, which was to preserve the King’s life. They argued that he had not been ordered to behave in the way he did at the King’s trial,[[33]](#footnote-33) therefore, rebuffing his defence on this ground. Even if Axtell could have proved that he was acting under his commission or superior orders, which would not have provided a defence in itself, L.C. Baron held that ‘there is no excuse at all for treason’.[[34]](#footnote-34) Thus, contradicting the previous law established in *John de Culewen’s case* and *Oldcastle’s case*, leaving some doubt as to whether the defence did exist. As previously stated, however, this case must be understood in the political climate of the time. King Charles II had just been reinstated to the throne and those seemingly in support of Cromwell would be easy subjects for punishment. Furthermore, as the previous cases were not stated to be *per incuriam*, this comment that duress is not available for treason is seemingly inaccurate and so does not provide sound evidence that duress should not be available to the most heinous of crimes.

**Structuring the defence**

So far it can be seen that duress had only been accepted in times of war to a charge of treason, but because of the wide definition of treason this did not necessarily include where the defendant had killed. Thus, providing little evidence to support the supposition that the historical development of duress means that it is unfounded that it does not provide a defence to murder in times of peace. The next section will demonstrate, however, that the defence was developed to be available in times of peace as well as war and could be available when the defendant had killed.

In considering the defence of duress in the 18th Century, Hale, a judge and influential writer of the time, made the point that the law is different in times of war to times of peace; stating that duress would not be a defence to treason, murder or robbery in times of peace, but could be (a defence to treason) in times of war or rebellion. [[35]](#footnote-35) Hale’s rationale for this was that in times of peace the defendant could seek legal protection for these crimes called a writ *de securitae pacis*, which may not be available in times of war.[[36]](#footnote-36) This seems an illogical conclusion if the threat was immediate and so no protection could be sought even in times of peace, as will be demonstrated in later case law.

After the writings of Hale, the law of duress was developed further in *M’Growther’s case*.[[37]](#footnote-37) The defendant was one of several defendants charged with treason; he tried to plead the defence of duress after arguing that he had been forced against his will to fight for a rebel army in 1745. The rebel army of about three thousand men were armed and hostile. They had assembled and levied war against King George II. They killed the King’s faithful subjects and took possession of Carlisle castle and city, which they then defended against the King. M’Growther’s defence rested on the fact that he was forced to join the rebel army as he was in fear of having his house burnt down and his cattle driven away. In this case there was no suggestion that duress could not be a defence to treason, as was declared by L.C. Baron in *Axtell’s case*, but the defence still failed due to the inadequate nature of the threat. The threat to destroy his property was not sufficient to excuse the defendant from treason. There was also no suggestion in this case that duress could not be a defence to the killings that M’Growther had participated in whilst he was part of the rebel army. Thus, suggesting that there was no restriction on duress being available to murder.

Thirty years later in *R v Stratton*[[38]](#footnote-38)the defendants, Stratton, Brooke, Floyer and MacKay, were charged with arresting, imprisoning and deposing Lord George Pigot, Commander in Chief of the forces in St George and President and Governor of the settlement of Madras. Following a dispute over council matters the defendants had imprisoned Lord Pigot as they felt that he was trying to control the democratic council. The defendants claimed that they were forced into their action in response to Lord Pigot’s behaviour. In directing the jury, the Earl of Mansfield recognised that there could be a defence (referred to by the Earl of Mansfield as necessity) where someone is charged with high treason when they have been forced to the point that human nature could not be expected to resist, again showing the acceptance of the defence for the most heinous of crimes even in times of peace.

**Retreating from the defence?**

Following these cases, the question of duress was once again raised in the courts, in *R v Cundell and Smith*.[[39]](#footnote-39)In this case British prisoners of war were being held in a prison on the Isle of France (now known as Mauritius) in 1808. The conditions were crowded and filthy and the prisoners were treated in an inhumane manner. To escape these conditions, the prisoners were offered the opportunity to pledge allegiance to the French and fifty prisoners did so. Cundell and Smith were two of the fifty men who pledged allegiance. Eventually the island was surrendered to the British and at this point thirty-eight of the men who had changed allegiance marched off with the enemy to France. The remaining twelve men threw themselves on British mercy. They were all charged with high treason and at the trial seven of the men, including Cundell and Smith, were found guilty. Even though there was no lack of evidence against them the charges against the other five were dropped. The Attorney-General felt that the ends of justice had been sufficiently obtained by an example being made of the seven convicted men, which would deter others, and that the shades of criminality between the defendants had warranted the distinction.[[40]](#footnote-40) Cundell and Smith were sentenced to be hanged, drawn and quartered. The other five men who were found guilty were pardoned on condition of serving in colonies abroad.[[41]](#footnote-41) Regardless of the defendants possibly suffering some actual harm through their inhumane treatment, it seems that dirt and overcrowding were not enough to excuse treason. For this reason, they were rightly found guilty of treason even though they had quitted the service as soon as they could. Therefore, showing that the defence of duress could still be available to treason but, if it was to be available to the most serious of crimes, restrictions must be put in place and as such the threat must be of a serious nature.

Later in the 19th Century in *R v Crutchley*[[42]](#footnote-42)the defendant was found not guilty of breaking and destroying a threshing machine[[43]](#footnote-43) after hitting it once with a sledgehammer when forced by a gang of duressors. He had left the gang as soon as he could (after about fifteen minutes), which was essential to the success to his plea of duress. Unlike previous cases, this case did not involve an act of treason during the time of war or rebellion. Thus, showing that the defence was available to a range of offences, or at least for breaking and destroying a threshing machine, in times of peace.

This expansion in the law could be said to only apply where the defendant had caused damage to property as a few years later *R v Tyler*[[44]](#footnote-44) provided another example of duress in times of peace, but this time the plea was unsuccessful to a charge of murder. The defence was rejected and Lord Denman went as far as to say, ‘that no man, from fear of consequence to himself, has a right to make himself a party to committing mischief on mankind’.[[45]](#footnote-45) The offence in question was murder, however, Lord Denman does not specify that this was the only type of ‘mischief on mankind’ he was excluding from the defence of duress. It could reasonably be argued that he is stating the defence is only available where the defendant damages property under duress (as this is not ‘to mankind’ and it had only seven years earlier been accepted that the defence was available to breaking and destroying a threshing machine). This interpretation would represent a huge restriction to the defence, and it is perhaps unlikely that he is stating that duress is never available where the defendant has caused any harm to another person when there was no previous authority to support this.

Alternatively, and perhaps more likely in view of the case facts, it could be argued that Lord Denman is only saying that the defence of duress is not available to murder in this situation and, therefore, is potentially available to all other offences in times of peace. Nonetheless, this does not necessarily mean that duress could never be a defence to murder because Lord Denman clearly states that the defence is unavailable when the defendants are acting in apprehension of personal violence. As stated above, the requirement to have the defence for a charge of murder the threat must be of a serious nature, which is arguably more than just an apprehension of personal violence. In addition, this case is later explicitly discredited by Lord Morris in *DPP for Northern Ireland v Lynch*[[46]](#footnote-46)who asserts that the defendants joined the duressor of their own free will and could have easily detached themselves from him. This would mean the defence would be unavailable regardless of the type of crime committed and thus provides no sound authority for duress not being available to a charge of murder.

**Distinguishing Duress**

In addition to the duress defence explained above, other forms of duress, or compulsion, have been recognised throughout the same period of history. These alternative defences include necessity. To draw a comparison to duress (and its availability to murder), and to identify duress’s place within the historical context of the alternatives available, the application of necessity will be briefly considered.

Historically, a defence of necessity has been recognised alongside duress. Hale recognised an additional defence of necessity where crimes had been committed for reasons other than fear.[[47]](#footnote-47) He stated that this could be used in limited circumstances, for example, to preserve the peace if a riotous assembly was formed. In such a situation Justices of the Peace, the sheriff, major or other officers could raise a power to suppress and apprehend the rioters. Should any of the rioters get hurt or killed by the law enforcement officers or those that they have assembled they would be subject to no punishment. Blackstone also gives the examples of necessity as being where someone must wound or even kill under a commandment of the law to arrest someone for a capital offence or to disperse a riot. Additionally, according to Hale a person can supply the King’s enemies with goods, which would normally be treason, when the enemies are invading in times of war if it is necessary to prevent the devastation of the country.[[48]](#footnote-48)

Blackstone’s defines necessity as occurring when the defendant has been compelled to act due to some external force or fear, which means he must choose the lesser of two evils.[[49]](#footnote-49) The requirement that the defendant’s actions be the lesser of two evils can be seen in *Mouse’s case.*[[50]](#footnote-50) The defence of necessity was accepted when passengers of a barge, which had encountered a tempest, had thrown the ferryman’s belongings overboard to save their lives due to their fear of the barge sinking. This makes the distinction between duress and necessity less clear as both can arise when the defendant has acted from fear.

Necessity, however, is considered a justificatory defence based on this requirement that the defendant’s actions are the lesser of two evils.[[51]](#footnote-51) As such, duress can be distinguished from necessity as duress can operate when the defendant’s actions are not the lesser of two evils, and equally can fail when the defendant’s actions are. Horder compares necessity and duress. He states that necessity is a strong justificatory defence because the defendant has a moral imperative to act. He claims that duress, on the other hand, is an excuse because it only requires the defendant to make a personal sacrifice.[[52]](#footnote-52) Thus, duress is an excusatory defence, as the defendant is not acting to promote a greater moral good for everyone but is acting to protect himself (or his family). Meaning that on balance no objective value is served. This is because although protecting one’s family is an auxiliary reason that upholds a value that is operative to the whole of society, harming an innocent person to achieve this outcome is not. This indicates, that although both defences can operate when the defendant has acted out of fear, they do not have the same theoretical underpinning or rationale. Therefore, as will be discussed further below, despite necessity being denied for a charge of murder in *Dudley and Stephens*, this does not provide authority for duress not to be available to murder, as the two defences have different theoretical underpinnings.

**The unfounded result of denying duress to murder**

The House of Lords in *Howe* decided that duress could not be a defence to murder. This is an important decision as it has the effect that someone who was charged with murder cannot plead an excuse despite meeting the historically set criteria of acting under fear of threat of a serious nature. Furthermore, in addition to being convicted as a murderer (in the same way as someone who had not acted under duress), the convicted person would receive a mandatory life sentence. Therefore, it would seem imperative that such a decision would have strong historical, doctrinal based, foundations. It is, however, argued below that this is not the situation.

In coming to the decision to deny duress as a defence to murder in *Howe*,[[53]](#footnote-53) the House of Lords followed *Tyler*.[[54]](#footnote-54)Lord Wilberforce, however, in *Abbott*[[55]](#footnote-55) asserted that it must be observed that there is little use in looking back at authorities that are earlier that 1898 as until then the accused could not give evidence on his own behalf. This would have meant that before 1898 putting forward a plea of duress would almost certainly be foredoomed to failure, as the defendant would not be able to explain why he acted as he did. This supposition is supported by the increasingly successful use of duress since this gag on the defendant was removed. Despite these comments by Lord Wilberforce that pre-1898 cases should not be depended on due to a lack of reliability, this is exactly what the House of Lords did in *Howe* when they were persuaded to deny duress as a defence to murder by a case of *Tyler* that was decided in 1834.[[56]](#footnote-56) Furthermore, as argued above, of all the case authority available *Tyler* is perhaps not the most convincing. As Gearty states it should not have been followed in *Howe* as it was out of date as it presumed that duress was a defence to no crimes.[[57]](#footnote-57) If it is accepted, however, that earlier cases are relevant in deciding the applicability of duress, *Howe* should have consideredthat duress, as discussed above, had historically been accepted to the most heinous crime of treason and that there was no clear authority to deny it to murder.

In coming to their decision in *Howe* the House of Lords also followed *Dudley and Stephens.*[[58]](#footnote-58) *Dudley and Stephens,* the notorious case of two ship-wrecked sailors eating the cabin boy in order to survive, depended on the defence of necessity whereas in *Howe* a defence of duress was used. As identified above the two defences have different theoretical underpinnings and thus the outcome of *Dudley and Stephens* should not have been as persuasive on the outcome of *Howe* as it appears to have been. As Walters argues, by holding the decision in *Dudley and Stephens* to be applicable in *Howe* it means that there is no distinction between justified killing under necessity in the former case and killing under the excuse of duress in the latter.[[59]](#footnote-59)

Moreover, *Dudley and Stephens* was decided in Queen’s Bench Divisional Court, meaning that it was only persuasive precedent. As such, it was not binding on the House of Lords who could have chosen not to follow it without declaring *Dudley and Stephens* bad law due to its lack of applicability.[[60]](#footnote-60) As Walters aptly states, the House of Lords choosing to rely on a precedent that was made by an inferior court over a hundred years ago was ‘surprising’.[[61]](#footnote-61) Furthermore, even if it was accepted that *Dudley and Stephens* was the correct precedent to follow in *Howe*, the more recent decision in *Re A*[[62]](#footnote-62) now suggests that necessity could be a defence to murder. [[63]](#footnote-63) Thus, whilst it is acknowledged that this was a Court of Appeal civil decision that considered the defence of necessity, which only provides persuasive authority, it further casts doubt on whether the door to allowing a defence to those who kill in order to save life is now as firmly shut as previously supposed following *Dudley and Stephens*.

In *Howe* the Lords also referred to the decision in *Abbott v The Queen* when the Privy Council decided that duress was not available to the principal in a murder case.[[64]](#footnote-64) Again, *Abbott* was only persuasive authority, which again the House of Lords could have chosen to ignore. Just five years after *Abbott* in *R v Graham* the Court of Appeal were faced with determining the definition for duress.[[65]](#footnote-65) The defendant was tried for of murder as a principal after assisting his homosexual partner to kill his wife. Interestingly, the position in *Abbott* was not followed as the prosecution did not argue, nor the did the Court of Appeal examine, that the defence was unavailable to a charge of murder.[[66]](#footnote-66)

Equally strong persuasive authority, that the House of Lords could have followed in *Howe*,was provided from the *obiter* comments in *Lynch.* In *Lynch* the House of Lords not only held that duress was allowed to a secondary party to murder, but Lords Wilberforce and Edmund-Davies (who formed part of the majority) also stated *obiter* that duress could be a defence to principals who committed murder under duress;[[67]](#footnote-67) comments that they both repeated in their dissenting judgments in *Abbott.*[[68]](#footnote-68)

In addition to the precedent that was considered in *Howe,* the House of Lords also referred to writings of both Hale[[69]](#footnote-69) and East.[[70]](#footnote-70) Hale opined that the defence should not be available to murder even when a writ *de securitae pacis* was not available as the defendant “ought rather die himself than kill an innocent”.[[71]](#footnote-71) Despite this statement not being based on authority, as none existed, it was used in *Howe* to strongly influence the way the defence of duress operates today. East, another influential writer and judge during the time of duress’s historical development, also considered that there should be no defence of duress to murder.[[72]](#footnote-72) East, however, continues to say that duress may merit consideration when punishing the defendant.[[73]](#footnote-73) This suggests that East did not envisage a complete rejection of duress when the defendant had killed. Moreover, like Hale, East did not reference any precedent as authority for duress being no defence to murder. Therefore, arguably, the writings of East and Hale should not have been relied upon so heavily to make such a significant decision of denying duress to murder.

**Conclusion**

In conclusion, it is seen that duress has been developed throughout history by judges to fill the gaps left by other pre-existing defences, including superior orders, and other devices for avoiding secular punishment, such as benefit of clergy. Since duress has never been legislated upon by Parliament it has been left to common law to determine in what situations the defence should apply. Duress was originally used for the most heinous of all crimes, treason, and during this time provided a defence to those who had killed in the course of conducting the treason. Therefore, the availability of the duress defence to treason (including killing) suggests that denying the defence to murder alone would be illogical.

As it stands, the current defence of duress is denied to murder, as stated in *Howe.*[[74]](#footnote-74) The judgment in *Howe* cited the writings of Hale[[75]](#footnote-75) and East.[[76]](#footnote-76) As set out above, neither Hale nor East cited any case authority for their assertions that duress should not be a defence to murder. *Howe* relied heavily on the ratio in *Dudley and Stephens.* The Lords were not bound to follow this decision as it was a case of necessity (a justificatory defence) rather than duress (an excusatory defence) and, further, it was made by a lower court. Therefore, in *Howe*, the judges had a choice of whether or not to allow the defence of duress to murder. The House of Lords*,* lacking any binding precedent, decided that duress should not be a defence to murder despite the availability of persuasive precedent from *Lynch* to convince them otherwise. In the context of its historical roots, having been allowed to one of the most heinous crimes of the realm, choosing to deny the defence to murder is at best unfounded.

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1. William Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1765 -1769, vol 4 (Oxford University Press: Chicago, 1979) 27. See also, James Fitzjames Stephen, History of the Criminal Law of England, vol 2 (Cambridge University Press: London, 1883) 97 who states that to be guilty of an offence the defendant must act voluntarily and be free from compulsion. [↑](#footnote-ref-1)
2. William Searle Holdsworth, A History of English Law, (Sweet and Maxwell: London, 1966) 277. [↑](#footnote-ref-2)
3. For example: P Alldridge, ‘Duress, Murder and the House of Lords’ (1988) 52 J Crim L 186; I Dennis, ‘Developments in Duress’ (1987) 51 J Crim L; J Dressler, ‘Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits’ (1989) 62 S Cal L Rev 1331; C Gearty, ‘Howe to be a Hero’ (1987) CLJ 203; HP Milgate, ‘Murder and the Killer Who Acts under Duress’ (1986) 46 CLJ 183; M Naylor, ‘Resistance is Futile: Duress as a Defence to International Killing’ [2006] CSLR 24; Reed, ‘Duress and Provocation as Excuses to Murder: Salutary Lessons from Recent Anglo-American Jurisprudence’ (1996) 6 J Transnational L and Policy 51; L Walters, ‘Murder Under Duress and Judicial Decision Making in the House of Lords (1988) 8 LS 61. [↑](#footnote-ref-3)
4. R v Dudley and Stephens (1884) 14 QBD 273. [↑](#footnote-ref-4)
5. Above n. 4. [↑](#footnote-ref-5)
6. *R v Howe* [1987] AC 417 [↑](#footnote-ref-6)
7. *R v Hasan* [2005] UKHL 22 [17]. Lord Bingham, however, fails to specify which case authority he is referring to. [↑](#footnote-ref-7)
8. Francis Bowes Sayre, 'Mens Rea' (1931 - 1932) 45 *Havard Law Review* 974, 1004. [↑](#footnote-ref-8)
9. Duress and Compulsion are can be considered synonymous according to J.L.J. Edwards, ‘Compulsion, Coercion and Criminal Responsibility’ (1951) 14 MLR 297, 297. [↑](#footnote-ref-9)
10. After much research, the earliest example of duress found was in the thirteenth Century in 1266. [↑](#footnote-ref-10)
11. Henry III Statute of the Realm 1266-67, 14-16. [↑](#footnote-ref-11)
12. Both deemed to be treason at the time. [↑](#footnote-ref-12)
13. Henry III Statute of the Realm 1266-7, 16. [↑](#footnote-ref-13)
14. For example, benefit of clergy, sanctuary and abjuration. [↑](#footnote-ref-14)
15. For example, *John de Culewen* (1331) cited in Sir Matthew Hale, Historia Placitorum Coronae 1736, (London, 1971) 167-168. [↑](#footnote-ref-15)
16. Treason was one of the first crimes to gain a statutory definition in the Treason Act 1351. [↑](#footnote-ref-16)
17. C.B. Firth, ‘Benefit of Clergy in the time of Edward IV’ (1917) 32 *The Historical Review* 175, 182- 183. [↑](#footnote-ref-17)
18. See Holdsworth, above n. 2 at287–372. [↑](#footnote-ref-18)
19. Above, n. 15 at 167-168. [↑](#footnote-ref-19)
20. *Oldcastle's case* (1419) 1 Hale 50. [↑](#footnote-ref-20)
21. W.T. Waugh, 'Sir John Oldcastle' (1905) 20 *The English Historical Review* 434, 434-43. [↑](#footnote-ref-21)
22. *R v Oldcastle* (1413)1St Tr 226. [↑](#footnote-ref-22)
23. See Waugh, above n. 21 at 455. [↑](#footnote-ref-23)
24. Maurice Keen, England in the Later Middle Ages, 2nd edn (Routledge: London, 2003) 189. [↑](#footnote-ref-24)
25. John A.F. Thomson, Oldcastle, John, Baron, Cobham, Oxford Dictionary of National Biography (Oxford University Press: Oxford, 2008). [↑](#footnote-ref-25)
26. H.G. Richardson, 'John Oldcastle in Hiding August - October 1417' (1940) 55 *The English Historical Review* 432, 432. [↑](#footnote-ref-26)
27. Ibid, at 432, states 1317 at this point in his account, but this appears to be an error. [↑](#footnote-ref-27)
28. See Hale above, n. 15 at 50. [↑](#footnote-ref-28)
29. David Ormerod and Karl Laird, Smith, Hogan and Ormerod’s Criminal Law, 16th edn (Oxford University Press: Oxford, 2021) 399. [↑](#footnote-ref-29)
30. A.V. Dicey, The Law of the Constitution, 10th edn (MacMillan and Co: London, 1959) 302-306. [↑](#footnote-ref-30)
31. *Axtell’s case* (1660) 5 St Tr 1146. [↑](#footnote-ref-31)
32. Ibid. at 1161. [↑](#footnote-ref-32)
33. Ibid. [↑](#footnote-ref-33)
34. Ibid. [↑](#footnote-ref-34)
35. See Hale, above, n. 15 at 50-51. [↑](#footnote-ref-35)
36. Ibid. at 51. [↑](#footnote-ref-36)
37. *M’Growther’s case* [1746] Fost 13 14 16 ER 8. [↑](#footnote-ref-37)
38. *R v Stratton* (1779) 21 St Tr 1045. [↑](#footnote-ref-38)
39. *R v Cundell and Smith* (1812) 4 Newgate Calendar 62. [↑](#footnote-ref-39)
40. Ibid. at 62. [↑](#footnote-ref-40)
41. Andrew Knapp and William Baldwin, The Newgate Calendar*,* (J Robbins: London, 1824) 62. [↑](#footnote-ref-41)
42. *R v Crutchley* (1831) 5 Car & P 133. [↑](#footnote-ref-42)
43. An offence under 7 & 8 George 4. [↑](#footnote-ref-43)
44. *R v Tyler* (1838) 8 C & P 616. [↑](#footnote-ref-44)
45. Ibid. at 620. [↑](#footnote-ref-45)
46. *DPP for Northern Ireland v Lynch* [1975] AC 653, 672. [↑](#footnote-ref-46)
47. See Hale, above n. 15 at 52-56. [↑](#footnote-ref-47)
48. Ibid. at 56. [↑](#footnote-ref-48)
49. See Blackstone, above n. 1 at 30-31. Blackstone called duress, coercion and acting from extreme want of food or clothes forms of necessity. [↑](#footnote-ref-49)
50. *Mouse’s Case* (1608) 77 ER 1341. [↑](#footnote-ref-50)
51. E Arnolds and N Garland, ‘The Defence of Necessity in Criminal Law: The Right to Choose the Lesser Evil’ (1974) 65 *Journal of Criminal Law and Criminology* 289, 290; M Bohlander “In Extremis – Hijacked Airplanes, “Collateral Damage” and the Limits of Criminal Law” [2006] Crim LR 579; E Colvin, 'Exculpatory Defences in Criminal Law' (1990) 10 *Oxford Journal of Legal Studies* 381, 387; I Dennis, ‘On Necessity as a Defence to Crime: Possibilities, Problems and the Limits of Justification and Excuse’ (2009) 3 *Criminal Law and Philosophy* 29, 33; J Dressler, ‘Justifications and Excuses: A Brief Review of Concepts and Literature’ (1986 -1987) 33 *Wayne Law Review* 1155, 1164; J Dressler, 'Exegesis of the Law of duress: Justifying the Excuse and Searching for its Proper Limits' (1989) 62 S Cal L Rev 1331, 1352; G Fletcher, ‘The Individualization of Excusing Conditions (1973-1974) 47 S Cal L Rev 1269, 1274 -1280. [↑](#footnote-ref-51)
52. Jeremy Horder, 'Self Defence, Necessity and Duress: Understanding the Relationship' (1998) 11 *Canadian Jouranl of Law and Jurisprudence* 143, 143. [↑](#footnote-ref-52)
53. Above n. 6 at 439. [↑](#footnote-ref-53)
54. Above n. 44. [↑](#footnote-ref-54)
55. *Abbott v The Queen* [1977] AC 755, 772. [↑](#footnote-ref-55)
56. See *Tyler,* above n. 44. [↑](#footnote-ref-56)
57. Conor Gearty, ‘Howe to be a Hero’ (1987) *Criminal Law Journal* 203, 204. [↑](#footnote-ref-57)
58. Above, n. 4 cited in *Howe* [1987] AC 417 at 439 (Lord Griffiths). [↑](#footnote-ref-58)
59. Lynden Walters, ‘Murder Under Duress and Judicial Decision Making in the House of Lords’ (1988) 8 *Legal Studies* 61. [↑](#footnote-ref-59)
60. See *Howe,* above n. 6 at 429 where Lord Hailsham states that by allowing the appeal it would mean that the House of Lords would have to say that *Dudley and Stephens* (1884) 14 QBD 273 was bad law. [↑](#footnote-ref-60)
61. See Walters, above n. 59 at 64. [↑](#footnote-ref-61)
62. [2000] EWCA Civ 254. [↑](#footnote-ref-62)
63. See Ormerod and Laird, n. 29 at 394-5 who state that it would be premature to conclude that necessity could never be a defence to murder. M Bohlander, ‘Of Shipwrecked sailors, unborn children, conjoined twins and hijacked airplanes – taking human life and the defence of necessity’ (2006) 70 J Crim L 147, 161 also argues that ‘the general maxim that necessity is not a defence to murder can no longer be regarded as sacrosanct’ More recently, however, in *Nicklinson v Ministry of Justice* [2015] AC 657 it was held that necessity could not be a defence to assisted suicide or euthanasia, which may point to necessity not being a defence to murder should the question arise in the future. [↑](#footnote-ref-63)
64. See *Abbott*, above n. 55 at 772 cited in *R v Howe* [1987] AC 417 at 436 (Lord Hailsham). [↑](#footnote-ref-64)
65. *R v Graham* [1982] 1 WLR 294. [↑](#footnote-ref-65)
66. Ibid. at 297 [↑](#footnote-ref-66)
67. Above, n. 46 at 680-81 (Lord Wilberforce) and at 715 (Lord Edmund Davies). [↑](#footnote-ref-67)
68. Above, n. 55 at 770 (Lord Wilberforce and Lord Edmund-Davies). [↑](#footnote-ref-68)
69. Above n. 15 cited in *R v Howe* [1987] AC 417 at 427, 449 and 451. [↑](#footnote-ref-69)
70. East Pleas of the Crown cited in *R v Howe* [1987] AC 417 at 449. [↑](#footnote-ref-70)
71. Above, n. 15 at 51. [↑](#footnote-ref-71)
72. EH East, Pleas of the Crown (Butterworth: London, 1803) 225. [↑](#footnote-ref-72)
73. Since, s1 (1) of the Murder (Abolition of Death Penalty) Act 1965 judges have no discretion in the sentence for murder and therefore now not only is duress no defence to murder it cannot be a mitigating factor, although may reduce the minimum term to be served under Criminal Justice Act 2003 schedule 21, paragraph 11(e) as inserted by the Coroners and Justice 2009 schedule 21, paragraph 52(b). [↑](#footnote-ref-73)
74. Above, n.6. [↑](#footnote-ref-74)
75. Above, n. 15. [↑](#footnote-ref-75)
76. Above, n. 72. [↑](#footnote-ref-76)