

Human Trafficking and Modern Day Slavery: When Victims Kill

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The Modern Slavery Act 2015 s.45 provides a defence for individuals compelled to commit a criminal offence because of slavery and/or exploitation. Many offences, including murder, are excluded from the ambit of this defence. In cases where s.45 does not apply, reliance must be placed on duress and necessity, prosecutorial discretion, and the power to stay a prosecution. These approaches are heavily circumscribed in murder cases where duress and necessity are inapplicable, the fact that there has been a killing tends towards prosecution and the power to stay is invoked in exceptional circumstances. The introduction of s.45 and the approaches to be adopted where the defence does not apply provides an opportunity to consider afresh whether a (partial) defence to murder based upon compulsion ought to be available. A review of domestic law suggests that failure to provide a (partial) defence is based on policy and possibly confusion regarding the excusatory nature of duress. This article advances a bespoke partial defence for slavery/human trafficking victims who kill based upon compulsion, which would sit cogently alongside the Modern Slavery Act 2015 s.45.

Introduction

By introducing a defence for slavery/human trafficking victims who commit an offence because of exploitation, the Modern Slavery Act 2015 s.45 (s.45) is the first law in the UK to transpose international obligations towards trafficking victims in this context.¹ Schedule 4 contains a list of over 100 excluded offences, for example, murder, manslaughter, assisting unlawful immigration, etc. This exclusion has been criticised because trafficking victims are vulnerable to committing several of the excluded offences.² The murder exclusion has received little attention, possibly because such cases are likely to be rare. The victim testimonies of Sanyu

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¹ Joseph [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [2] per Lord Thomas of Cwmgiedd CJ.

² For discussion see, *Hansard*, Public Bill Committee Debates, Modern Slavery Bill, col.386 (11 September 2014). See also, K. Laird, "Evaluating the Relationship between Section 45 of the Modern Slavery Act 2015 and the Defence of Duress: An Opportunity Missed?" [2016] Crim. L.R. 395, 396–397.

and Holly, considered below, illustrate that although such cases may be rare they raise wider issues of legal principle.

It is important to note that international law, and specifically art.26 of the Council of European Convention on Action against Trafficking in Human Beings which requires “the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so”³ does not provide absolute immunity from prosecution for trafficking victims, but it requires alternative options to imposing liability in some circumstances.⁴ Where s.45 does not apply, according to Lord Thomas CJ, international obligations are met through: the common law duress/necessity defences; prosecutorial discretion guidelines; and/or the power of the court to stay a prosecution for abuse of process.⁵ These alternative options are heavily circumscribed in murder cases where duress/necessity are inapplicable,⁶ the serious nature of the offence tends towards prosecution, and a stay for abuse of process applies in exceptional circumstances. A murder conviction carrying life imprisonment imposed without recourse to victim-perpetrator status, save (possibly) in the context of determining the minimum tariff,⁷ could, if the elements of murder are satisfied, apply to trafficking victims who kill.

The introduction of s.45 (a hybrid of duress by threats and of circumstances⁸) and the approaches to be adopted where the defence does not apply provides an opportunity to consider afresh the debate regarding whether a (partial) defence to murder based upon compulsion ought to be available. A review of domestic law suggests that failure to provide a (partial) defence in England and Wales is based on policy and possibly confusion regarding the excusatory nature of duress. This article seeks to address the imbalance in domestic law, which lacks an applicable (partial) defence for an offence where the mandatory life sentence applies. In doing so, an entirely bespoke partial defence for slavery/human trafficking victims who kill, aligned to s.45 and drawing upon earlier Law Commission and Joint Parliamentary Committee on the Modern Day Slavery Bill (Joint Committee) proposals, is advanced.

Modern Slavery Act 2015 s.45.

Section 45 introduced separate defences for victims of human trafficking over and under the age of 18.⁹ For adults, the section operates where the person performs the criminal act because they were compelled to do so; the compulsion is attributable to slavery or relevant exploitation; and a reasonable person in the same

³ Council of Europe Convention on Action against Trafficking in Human Beings. See also, *N* [2012] EWCA Crim 189; [2013] Q.B. 379; [2012] 1 Cr. App. R. 35 (p.471).

⁴ *N* [2012] EWCA Crim 189; [2013] Q.B. 379; [2012] 1 Cr. App. R. 35 (p.471) per Lord Judge CJ commenting on art.26 of the Council of Europe Convention on Action Against Trafficking in Human Beings (see also Directive 36/2011 [2011] OJ L101/1).

⁵ *Joseph* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [20(i)].

⁶ See the exceptional case of *Re A (Children) (Conjoined Twins: Medical Treatment) (No.1)* [2001] 2 W.L.R. 480; [2000] H.R.L.R. 721 CA where the Court of Appeal ruled on the separation of conjoined twins which would result in the inevitable death of one of the twins.

⁷ Criminal Justice Act 2003 Sch.21.

⁸ Laird, “Evaluating the Relationship Between Section 45 of the Modern Slavery Act 2015 and the Defence of Duress: An Opportunity Missed?” [2016] Crim. L.R. 395, 396–397.

⁹ For an excellent analysis of s.45 of the Modern Slavery Act 2015, see, Laird, “Evaluating the Relationship Between Section 45 of the Modern Slavery Act 2015 and the Defence of Duress: An Opportunity Missed?” [2016] Crim. L.R. 395.

situation as the person and sharing the person's relevant characteristics would have no realistic alternative to doing the act. A person may be compelled to do something by another person or by circumstances.¹⁰ Compulsion is attributable to slavery or to relevant exploitation if it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation. The term exploitation includes: slavery, servitude, and forced or compulsory labour; human trafficking; sexual exploitation; removal of organs; securing services by force, fraud or deception; and, securing services by children or vulnerable individuals.¹¹ The defence for under-18s is similar except there is no need to establish compulsion or the absence of a realistic alternative providing the criminal conduct was a direct consequence of being, or having been, a victim of slavery or relevant exploitation.¹² Relevant characteristics to be considered include age, sex, and any physical or mental illness or disability.¹³ A reverse burden of proof applies to the defence.¹⁴ Section 45 is not retrospectively applicable,¹⁵ and Sch.4 excludes many offences, including murder, and manslaughter.

Trafficking victims who kill innocents

Real life victim testimonies of people like Sanyu and Holly, derived from the US Department of State, *Trafficking in Persons Report*, demonstrate the unfairness associated with failing to provide a (partial) defence for victims of trafficking compelled to kill because of the situation. The following text is taken directly from the report:

When Sanyu's friend moved from Uganda to the UK [UAE—in the Trafficking Report], she told Sanyu she had found her a job that would even cover her travel expenses. Sanyu agreed to join her friend. Only a few days after arriving, her friend disappeared and Sanyu's situation changed drastically. A woman came to Sanyu's house and demanded Sanyu repay her for covering her travel expenses. The woman explained Sanyu would need to sell herself for sex. When Sanyu resisted, the traffickers tortured her, denied her food, and made her sleep outside for three weeks. She was trapped in a house with 14 other girls from Uganda and forced to have sex for money.¹⁶

The following text outlines a hypothetical ending to Sanyu's situation for the purposes of this article. Sanyu resolved to comply with the traffickers' demands to avoid further torture. Sanyu was forced to witness other girls being beaten, and starved. One girl, Kamali, continuously refused to cooperate, and Sanyu overheard one of the more violent traffickers, Bale, say he would kill Kamali, and anyone who tried to defend her if she was defiant again. The girls were afraid of Bale due

¹⁰ Modern Slavery Act 2015 s.45(1)(b)–(d) and (2).

¹¹ See the definitions provided under Modern Slavery Act 2015 s.3. See, generally, s.45(2)(a)–(b) and (5). For discussion see, J. Collins, "Exploitation of Persons and the Limits of the Criminal Law" [2017] Crim. L.R. 169.

¹² The "situation can become so normalised for children that they have no idea whether they are being forced to do something or not. If interviewed and questioned about what they thought, the chances are that they would not give the right answer to allow the defence to take place"; *Hansard*, Public Bill Committee Debates, Modern Slavery Bill, col.376 (11 September 2014) per Sarah Teather.

¹³ Modern Slavery Act 2015 s.45(4).

¹⁴ See http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a20 [Accessed 26 June 2017].

¹⁵ *Joseph* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [4].¹⁶ See <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm> [Accessed 26 June 2017].

to his violent outbursts, and his psychotic reputation. When Kamali refused orders the following evening, Bale pushed Kamali to the floor and started kicking her in the stomach and head. Bale caught Sanyu's eye, and said "well don't just stand there, join in". Fearing for her own life, Sanyu also started kicking Kamali. It is unclear whose kick caused the death.

Sanyu could be convicted on secondary liability principles. To be convicted of murder, Sanyu must have intentionally assisted or encouraged Bale to act, with the requisite intent for murder. Sanyu's foresight may provide convincing evidence she intended to assist or encourage Bale in the intentional killing.¹⁷ Bale might receive a reduced sentence if his "psychotic reputation" is linked to a recognised medical condition, for which he might claim diminished responsibility; a manslaughter verdict and sentencing discretion would follow a successful diminished responsibility plea. The murder exclusion under Sch.4 means that s.45 would not assist Sanyu. Sanyu would still be at risk of conviction for murder, and a mandatory life sentence. The potential applicability of s.45 is different in the case of Holly below, where it would be relevant to the theft but not the killing. The following text is taken from the US Department of State, *Trafficking in Persons* Report directly with the exception of the theft which has been inserted for the purposes of the article:

Holly didn't recognise Emilie on Facebook, but seeing they had mutual friends, accepted her friend request. Holly and Emilie chatted and quickly became online friends. One day Emilie told Holly that her boyfriend, Karl had found them both jobs that would make them a lot of money. Emilie asked Holly to come to her apartment that weekend. When Holly arrived, Emilie, her boyfriend, and another man told Holly she had to have sex with men for money, in addition to stealing valuables from certain clients. When Holly refused, they threatened to hurt her seriously, and told her that if she ever attempted to escape they would kill her. They posted photos of Holly on an escort website and took her to different cities to have sex with paying clients.¹⁸

The following text outlines a hypothetical ending to Holly's situation for the purposes of this article. One evening, in addition to supplying sexual services, Holly was advised to collect money owed to Karl from V for drugs. This was not an uncommon practice. V was unsympathetic to Holly's situation. When Holly left V's premises, she handed the money together with a stolen watch to Karl who was waiting outside. Karl who had been drinking and taking drugs flew into a rage claiming that V owed him more money. He told Holly he was sick of her allowing people to underpay. He handed her a knife and told her to slash V's face to make an example of what they would do to those who did not pay. Holly pleaded with Karl to change his mind, but this only served to anger Karl more. He told Holly that if she did not kill V, he would kill her. Holly looked around and realised that there was no one who could help. She reluctantly, and fearing for her life, returned to V's premises. When V let her in, she stabbed him repeatedly in the chest knowing that she would seriously injure him. V died as a result.¹⁹

¹⁷ *Jogee* [2016] UKSC 8; [2016] 2 W.L.R. 681 [2016] 1 Cr. App. R. 31 (p.485) at [87].

¹⁸ See <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>, full report at p.36 [Accessed 26 June 2017].

¹⁹ For full details see: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm> full report at p.36 [Accessed 26 June 2017].

Joseph

Lord Thomas CJ outlined the approach where s.45 does not apply in six conjoined appeals in *Joseph*. None of the cases involved unlawful killing, but the ruling is important in establishing the approach to offences excluded by Sch.4.²⁰ The Competent Authority (the Modern Slavery Human Trafficking Unit)²¹ designated applicants in five out of six appeals as human trafficking victims.²² According to Lord Thomas, international obligations are met through: the common law duress/necessity defences; prosecutorial discretion guidelines; and, the power of the court to stay a prosecution for abuse of process.²³ However, I would argue that the absence of a (partial) defence fails to recognise the stigma attached to the murder conviction and the inherent unfairness in imposing a mandatory life sentence in cases like that of Sanyu and Holly.

The Court of Appeal was urged by Anti-Slavery International, as Interveners to the case, to re-assess the approach it had previously adopted in relation to trafficked victims who commit offences because of exploitation.²⁴ It was argued that duress should be developed, narrowly and within the confines of human trafficking, to accommodate trafficking victims who would be eligible to rely on s.45 “but for” its lack of retrospective application,²⁵ i.e. individuals who had committed offences not excluded under Sch.4. The common law defence of duress requires: the defendant was (or may have been) impelled to act by a reasonable belief that the coercer would kill or cause serious injury to the defendant if he or she did not commit the act; and a person of reasonable firmness sharing relevant characteristics of the defendant would have responded in the same way.²⁶ Lord Bingham in *Hasan*²⁷ set the parameters of the defence: (i) duress is not a defence to murder, attempted murder and possibly some forms of treason²⁸; (ii) the threat must be of death or serious injury; (iii) the threat must be directed at D, D’s immediate family or someone to whom D might reasonably regard themselves responsible; (iv) the reasonableness of D’s perception and conduct engages an objective assessment; (v) D’s conduct must have been a direct cause of the threats relied upon; (vi) there must have been no evasive action which D could have been expected to take; (vii) D may not rely on duress to which he has voluntarily laid himself open.

Whether duress should be extended to accommodate trafficking victims was considered in *Dao*,²⁹ where the court was “strongly disinclined to accept that a threat of false imprisonment suffices ... without an accompanying threat of death

²⁰ *Joseph* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [20(i)].

²¹ The Modern Slavery Human Trafficking unit is the Competent Authority charged with assessing referrals made by police, local authorities and NGO’s. The Home Office Visas and Immigration is the second UK Competent Authority which considers referrals identified in the immigration process.

²² *Joseph* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [6].

²³ *Joseph* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [20(i)].

²⁴ *Joseph* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [24].

²⁵ *Joseph* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [25].

²⁶ *Graham* [1982] 1 All E.R. 801 at 805–806 per Lord Lane. See also, *Howe* [1987] A.C. 417; (1987) 85 Cr. App. R. 32.

²⁷ *Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [21].

²⁸ *Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [21] See also, *Howe* [1987] A.C. 417; (1987) 85 Cr. App. R. 32; and, *Gotts* [1992] 2 A.C. 412; [1992] 1 All E.R. 832; (1992) 94 Cr. App. R. 312. The defence is also possibly excluded in relation to some forms of conspiracy; *Abdul-Hussain* [1999] Crim. L.R. 570.

²⁹ *Van Dao* [2012] EWCA Crim 1717 referred to *Joseph* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [29].

or serious injury.” Widening the duress defence in this manner was deemed “ill-advised”.³⁰ Approving of the ruling, Lord Thomas CJ in *Joseph* explained: the scope and limits of duress are set out in cases of the highest authority; Parliament enacted s.45 without providing for retrospective application; and, it would require “clear injustice” to justify a court amending the law of duress to extend its applicability.³¹ Gross LJ outlined four reasons for retaining the narrow approach in *Dao*. The first three were practical concerns: difficulties in disproving the defence once raised³²; the potential for criminals to manufacture the defence³³; and, lack of sufficient safeguards to prevent misuse of a widened duress defence.³⁴ These difficulties should not be underestimated, but they should not rule out extending the defence. The fourth reason, a justification for retaining the status quo, that justice can be achieved in sentencing, even where the defence fails³⁵ does not have the same effect in cases like that of Sanyu and Holly where the mandatory life sentence applies.

Prosecutorial discretion

The trafficking/slavery victim who kills will be subject to the usual Crown Prosecution Service (CPS) considerations in deciding whether to prosecute. The CPS must assess whether there is reason to believe the person is a slavery victim, and it is anticipated that this determination will be resolved after collaboration between the CPS and the Competent Authority.³⁶ The CPS decides whether to proceed with a prosecution. The CPS will make this determination after considering the potential application of s.45. The category of case under discussion is where Sch.4 excludes the offence from the purview of s.45, and where the offence would fall under s.45 but for the defence’s lack of retrospective application, i.e. where the offence was committed pre-2015 Act implementation. In such cases, prosecution should not occur where there is clear and credible evidence of duress, (unless the case is one of murder where duress remains inapplicable). In the absence of such evidence, but where there is evidence of compulsion through exploitation, the CPS must assess whether the public interest lies in prosecution.³⁷ A prosecution will usually take place, subject to sufficient evidence, unless public interest factors tending against prosecution outweigh those in favour.³⁸ In some instances the nature of the offence charged will render it in the public interest to prosecute the trafficked person.³⁹ For Holly, the CPS should discontinue a theft charge, but the gravity of the offence of murder tends to favour charging. If a case involving more than one offence reaches trial, jurors may have the unenviable task of considering a combination of disparate defences, and the relevance of trafficking status will depend on the offence charged; slavery status would be relevant to the theft but

³⁰ *Van Dao* [2012] EWCA Crim 1717 at [33].

³¹ *Joseph* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [28].

³² *Van Dao* [2012] EWCA Crim 1717 at [45].

³³ *Van Dao* [2012] EWCA Crim 1717 at [46].

³⁴ *Van Dao* [2012] EWCA Crim 1717 at [47].

³⁵ *Van Dao* [2012] EWCA Crim 1717 at [48]. See also, D. Ormerod, “*R. v Dao*: duress - extent of duress” [2013] Crim. L.R. 234.

³⁶ *Joseph* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [5] and [15].

³⁷ See http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a20 [Accessed 26 June 2017].

³⁸ See https://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html [Accessed 26 June 2017].

³⁹ *Joseph* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [6].

not the killing. If the client survived, s.45 would not apply to the serious bodily harm suffered, but duress of circumstances would potentially be available.⁴⁰ In the murder/serious bodily harm binary divide “[l]iability goes from zero to the maximum, all depending on the victim’s physiological powers of recovery. This should not be the result”.⁴¹ The mandatory life sentence and stigmatising effect of the murder conviction should elevate this type of case beyond others in terms of reform.⁴²

Stay of prosecution

A stay of prosecution though technically available would be unlikely to assist Sanyu and Holly. The court may stay a prosecution where proper consideration has not been provided in bringing that prosecution.⁴³ The Court of Appeal in *L* explained: “In some cases the facts will indeed show that the defendant was under levels of compulsion which mean that, in reality, culpability was extinguished”.⁴⁴ Nevertheless, the court should not “substitute its own judgement for that of the prosecutor”,⁴⁵ and the power of the court to stay a prosecution is invoked in exceptional circumstances only.⁴⁶ Under the old provocation defence, there was evidence that stays were granted in cases involving domestic violence, and given similarities across the experiences of victims of domestic violence and trafficking victims, considered below, there may be a temptation to extend this practice to trafficking cases.⁴⁷ Critical of this practice in provocation cases, the Law Commission observed:

“It is unsatisfactory that the [domestic violence] cases could only be treated as manslaughter by prosecutorial discretion which involved turning a blind eye to the law with the connivance of the judge.”⁴⁸

In the trafficking context, the argument that a murder prosecution would be stayed seems unconvincing (given that evidence of duress would be inadmissible) at trial.⁴⁹ Moreover, the analogy with provocation is imperfect since that at least provided a partial defence.

Section 45 and the common law regime are ill-equipped to deal with slavery/trafficking victims who kill. Given the murder label, and the mandatory life sentence attached, it is essential that special consideration is afforded to those faced with an “odious Hobson’s choice” between killing an innocent and protecting

⁴⁰ The Law Commission posited a similar example: D1 would have a defence to the torture of D2 where duress is established, but D2 would have no defence if D2 kills in response to threats from D1; *The Law Commission, A New Homicide Act for England and Wales?* (2005), Law Com. CP No.177, paras 7.36–7.43, 7.10.

⁴¹ S.J. Mulroy, “The Duress Defence’s Unchartered Terrain: Applying it to Murder, Felony Murder, and the Mentally Retarded Defendant” (2006) 46 *San Diego L. Rev.* 159.

⁴² The Law Commission, *Report on Defences of General Application* (1977), Law Com. No.83, para.2.43 cited by The Law Commission, *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993), Law Com. No. 218, para.30.17.

⁴³ *Van Dao* [2012] EWCA Crim 1717 at [20].

⁴⁴ *L* [2013] EWCA Crim 991; [2014] 1 All E.R. 113; [2013] 2 Cr. App. R. 23 (p.247) at [33] per Lord Judge CJ.

⁴⁵ *LM* [2010] EWCA Crim 2327; [2011] 1 Cr. App. R. 12 (p.135) at [19].

⁴⁶ *Attorney General’s Reference (No.1 of 1990)* [1992] Q.B. 630; (1992) 95 Cr. App. R. 296, CA; *Attorney General’s Reference (No.2 of 2001)* [2003] UKHL 68; [2004] 2 A.C. 72; [2004] 1 Cr. App. R. 25 (p.317), HL.

⁴⁷ The Law Commission, *Partial Defences to Murder* (2004), Law Com. No.290, paras 3.105–3.106.

⁴⁸ The Law Commission, *Partial Defences to Murder* (2004), Law Com. No.290, para.3.107.

⁴⁹ *Lynch* [1975] A.C. 675 at 685: “Reliance on executive discretion is not adequate in principle or in practice”; The Law Commission, *A New Homicide Act for England and Wales?* (2005), para.7.19.

themselves from death or serious bodily harm.⁵⁰ For Sanyu and Holly, the exploitation precipitates a state of “metaphorical involuntarism”,⁵¹ operating on the actor’s “free choice” capacity, thereby repudiating “fair opportunity” to conform to the requirements of the law.⁵² The conduct is “wrongful”, but the actor is not “morally responsible”.⁵³ In Holly’s case, for example, the theft is unjustified, but excusable, and, it is appropriate that s.45 and duress are available. The duress defence is the paradigm of concession to human frailty.⁵⁴ The question should be “whether the juror believes it unfair to punish the person, given the threatening circumstances, for having chosen the wrong option”.⁵⁵

This apparently neat theoretical underpinning, concededly more useful in moral than legal categorisations,⁵⁶ is sometimes obscured where attempts are made to treat as justifications matters that are really excuses.⁵⁷ This arises most vividly in the conflation of necessity and duress principles.⁵⁸ Predicated on the lesser of two evils approach, the utilitarian calculus of necessity represents a justification on grounds that the conduct was good, better or more tolerable than the alternative.⁵⁹ Duress does not engage a balancing exercise (provided the threshold test of a threat of death or serious harm has been satisfied) but recognises the wrongfulness of the conduct, and compassionately excuses the actor because he is “a normal person in an abnormal situation...it [is] impossible to separate him from ourselves”.⁶⁰ The nature of the threat, commonly utilised to separate duress from necessity claims, has been described by the House of Lords as a “distinction without a relevant difference”,⁶¹ and rejection of necessity as a defence to murder underpins the equivalent approach to duress.⁶²

It is not axiomatic that a full defence ought to be available where an actor’s “hard choice” response to emotional pressures was “understandable” or, at least, “socially comprehensible”.⁶³ Just as societal values seek to excuse, the seriousness of the crime may mean it is not “inevitably hypocritical for a juror to concede that most people in the same situation, including the juror would have acted as the

⁵⁰ A. Reed, “Duress and Normative Moral Excuse: Comparative Standardisations and the Ambit of Affirmative Defences” in A. Reed, M. Bohlander, N. Wake and E. Smith (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate Publishing, 2011), p.93.

⁵¹ S. Kadish, “Excusing Crime” (1987) 79 Calif. L. Rev. 257, 265.

⁵² J. Dressler, “Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code” (1987–1988) 19 *Rutgers Law Journal* 671, 701–702.

⁵³ M.N. Berman, “Justification and Excuse, Law and Morality” (2003) 53 Duke L.J. 1, 7.

⁵⁴ L.E. Chiesa, “Duress Demanding Heroism and Proportionality: The Erdemovic Case and Beyond” (2008)

41 *Vanderbilt Journal of Transnational Law* 741.

⁵⁵ J. Dressler, *The Oxford Handbook of Philosophy in Criminal Law* (Oxford: Oxford University Press, 2011), p.286. See also, Chiesa, “Duress Demanding Heroism and Proportionality: The Erdemovic Case and Beyond” (2008) 41 *Vanderbilt Journal of Transnational Law* 741, 751.

⁵⁶ Berman, “Justification and Excuse, Law and Morality” (2003) 53 Duke L.J. 1, 6.

⁵⁷ See, generally, Chiesa “Duress Demanding Heroism and Proportionality: The Erdemovic Case and Beyond” (2008) 41 *Vanderbilt Journal of Transnational Law* 741. Although cf. P. Western and J. Magnifico, “The Criminal Defence of Duress: A Justification, Not an Excuse And Why it Matters” (2003) 6 *Buff. Crim. L. Rev.* 833. See also, J.L. Hill, “A Utilitarian Theory of Duress” (1999) *Iowa Crim. L. Rev.* 275, and A. Eser, “Justification and Excuse” (1976) 24 *Am. J. Comp. L.* 621.

⁵⁸ See, generally, G.P. Fletcher, “Basic Concepts of Criminal Law” (1998) *I.C.L.* 132.

⁵⁹ J. Dressler, “New Thoughts About the concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking” (1984) 32(1) *UCLA L. Rev.* 61.

⁶⁰ Dressler, “Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code” (1987–1988) 19 *Rutgers Law Journal* 671.

⁶¹ *Lynch* [1975] A.C. 675 at 685.

⁶² *Howe* [1987] A.C. 417 at 429.

⁶³ Chiesa “Duress Demanding Heroism and Proportionality: The Erdemovic Case and Beyond” (2008) 41 *Vanderbilt Journal of Transnational Law* 741, 762–763.

defendant did, yet still believe the actor deserved to be punished”.⁶⁴ A juror might “expect people to manifest the utmost moral strength ... when they are playing a part, even a minor role, in an especially barbaric scenario, such as the Holocaust”.⁶⁵ It is wrong, however, to ignore victim-perpetrator status entirely, as would occur in relation to the killings in the cases of Sanyu and Holly.

Loss of control and diminished responsibility

Repeal of the mandatory life sentence would assist in ensuring that weight is attached to the victim-status of trafficked persons who kill, but the stigmatising murder label would remain inappropriate.⁶⁶ The suggestion by the Joint Parliamentary Committee on the Modern Slavery Bill (Joint Committee) that a partial defence be made available to trafficking victims who kill did not meet with universal approval.⁶⁷ Evidence submitted to the Joint Committee included some preference for the “prosecutorial discretion status quo” on grounds that “no such statutory defence is available for drug mules, or, in relation to terrorism for those who assist in terrorist offences through fear, threat or coercion”.⁶⁸ It was also advocated that any statutory defence ought to be aligned with duress, which remains unavailable to murder.⁶⁹

Some slavery/trafficking victims who kill may have existing partial defences available to them under the present law: for example, where D suffers a recognised medical condition, and/or where D kills a trafficker in fear of serious violence or in response to a justified sense of being seriously wronged. As with the preceding scenarios, the following victim testimonies are derived from the US Department of State, *Trafficking in Persons* Report. These scenarios illustrate the potential applicability of the partial defences. The following analysis also highlights potential difficulties Holly and Sanyu might experience in relying on the partial defence of loss of control. Importantly, where the elements of the partial defence(s) are satisfied, murder would reduce to manslaughter, and discretion in sentencing would follow. The following victim testimony is taken from the US Department of State, *Trafficking in Persons* Report directly:

When a British-Nigerian couple offered to take Paul, 14 years old, from Nigeria to the UK, enrol him in school, and pay him to perform housework, he accepted. Once in Britain, however, the family changed his name and added him to their family passport as an adopted son. They forced him to clean their house for as many as 17 hours each day for no pay and did not allow him to go to school. They took his passport, set up cameras to monitor his movements, and limited his contact with the outside world. Paul tried

⁶⁴ J. Dressler, “Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits” (1989) 62 S. Cal. L. Rev. 1331, 1366–1369. See also, see also the judgment of Lord Coleridge in *Dudley and Stephens* (1884) 14 Q.B.D. 273 QBD.

⁶⁵ J. Dressler, “Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits” (1989) 62 S. Cal. L. Rev. 1331, 1366–1369

⁶⁶ “if criminal punishment should be proportionate to desert, as virtually all criminal law theoreticians believe, a blanket exclusion of doctrinal mitigating claims and treatment of mitigation solely as a matter of sentencing discretion are not fair”; S. Morse, ‘Diminished Rationality, Diminished Responsibility’ (2003) 1 Ohio State J. of Crim. L. 289. See also, The Law Commission, *Partial Defences to Murder* (2004), Law Com. No. 290, para.3.15.

⁶⁷ Joint Committee, *Draft Modern Slavery Bill Report* (2013–2014), HL Paper No.166, HC Paper No.1019, p.57.

⁶⁸ Joint Committee, *Draft Modern Slavery Bill Report* (2013–2014), p.57.

⁶⁹ S. Bird and P. Southwell, “Does the new “slavery” defence offer victims of trafficking any greater protection?” (2015) Arch. Rev. 7, 9.

several times to escape; once he contacted the police, who told him they did not handle family matters.⁷⁰

The following text proffers a hypothetical ending to Paul's situation for the purposes of this article. After being refused help by the police, and being taunted for his failed escape attempts, depressed and despondent Paul lost self-control, grabbed a knife from the kitchen and stabbed his exploiters to death.⁷¹ As with the preceding testimony the following is taken from the US Department of State, *Trafficking in Persons* Report directly (the name Paul has been changed to John to avoid any confusion with the earlier scenario included in this article):

When Adelaide and John hit hard times, John suggested his wife consider prostitution for a year or two to supplement their income. Adelaide agreed, but when she wanted to quit, John forced her to continue. He took away her keys and cell phone, and would not let her leave the house or care for their son. He listed her on four escort websites, controlled what she wore and ate, and collected all the money she earned. John used psychological coercion and threatened Adelaide to keep her in prostitution; when she threatened to leave, he vowed he would find her.⁷²

The following text outlines a hypothetical ending to Adelaide's situation for the purposes of this article. Petrified of what her abuser would do to her son if she tried to leave, Adelaide poisoned her husband's drink, inducing a fatal overdose.⁷³ Note that in both scenarios, unlike the cases of Sanyu and Holly above, there is a relational link between the victims and the perpetrator. Home Office guidance explicitly refutes the myth that modern day slavery does not occur where the "organiser and victim are related, married, living together or lovers".⁷⁴ Familial relationships, such as those identified in the cases of Paul and Adelaide, are often utilised to "exploit and control others".⁷⁵ For example, the Home Office explained:

"there have been numerous incidents where 'boyfriends' have groomed women and children into sexual exploitation or family members have colluded (intentionally or unintentionally) in the exploitation."⁷⁶

In instances where there is no familial link between the trafficker and the victim, the experiences of a trafficked person may be likened to the experiences of an individual who suffers familial abuse. Terms, such as, "threats, force, coercion, control, abuse of power, exploitation, patterns of harm and entrapment" have been used to depict both trafficking and familial abuse.⁷⁷ Similarities across the behaviours of traffickers and perpetrators of familial abuse include "multiple intimidation, coercion and compulsion not only through threats of actual physical

⁷⁰ See <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>, full report, p.15 [Accessed 26 June 2017].

⁷¹ This represents an alternative outcome for the purposes of this article. The full details are available: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>, full report, p.15 [Accessed 26 June 2017].

⁷² See <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>, full report, p.12 [Accessed 26 June 2017].

⁷³ This represents an alternative outcome for the purposes of this article. The full details are available: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>, full report, p.12 [Accessed 26 June 2017].

⁷⁴ Home Office, *Victims of modern slavery: Competent Authority guidance* (2016), p.29. ⁷⁵ Home Office, *Victims of modern slavery: Competent Authority guidance* (2016), p.29. ⁷⁶ Home Office, *Victims of modern slavery: Competent Authority guidance* (2016), p.29.

⁷⁷ N. Wake and A. Reed, "Reconceptualising the Contours of Self-Defence in the Context of Vulnerable Offenders: A Response to the New Zealand Law Commission" (2016) 3(2) J.I.C.L. 208.

violence”.⁷⁸ Amendments to the partial defences, and the substitution of provocation with loss of control designed to accommodate victims of family violence who kill has by default rendered the partial defences potentially available to a broader category of vulnerable offender.

In most trafficking/family violence victim claims, the power imbalance in the relationship is likely to mean that circumstances in which these killings occur in spontaneous confrontations will be rare, as victims may wait until their “more powerful” exploiter is off-guard and/or resort to the use of a weapon, rendering self-defence inapplicable. The concepts of imminence and proportionality are criticised for working against vulnerable individuals who are more likely to wait until their exploiter/abuser is off-guard, in contrast to physically stronger aggressors who “can afford” to attack a smaller and weaker victim.⁷⁹ Where self-defence may be relevant, self-defence should take precedence over partial defences.⁸⁰

The qualifying triggers may be regarded sufficient to accommodate some trafficking victims who kill an exploiter, but the triggers remain “self-evidently exclusionary insofar as they seek to exclude any cause of the loss of control that falls outside of their purview”.⁸¹ Given the torture and threats experienced by Adelaide, and beatings suffered by Paul each could claim they feared serious violence (“fear trigger”)⁸² for the purposes of the loss of control defence. The fear trigger was introduced to accommodate the circumstances of victims of domestic abuse, but it is not limited to cases involving a familial link. Whether the defendant feared serious violence engages an entirely subjective enquiry.⁸³ The fear trigger, which applies where “D’s loss of self-control was attributable to D’s fear of serious violence from V against D or another identified person”⁸⁴ might have enabled a partial defence to be run in some duress contexts, but for the limitation that violence emanates from the victim.⁸⁵ For Sanyu and Holly the fear of serious violence does not emanate from the ultimate victim, but from the trafficker.

A generous interpretation of the fear trigger in third party contexts might apply, for example, where V had threatened to instruct a third party to kill D, or where X reports that V was armed with a knife or a gun and was going to kill D.⁸⁶ This approach to indirect qualifying triggers may be likened to the law on indirect threats in duress. Gross LJ, in *Brandford* explained that an indirect threat may be “very real”.⁸⁷ For example, a threat to “D and her family by a messenger from an organised crime group, conveying a threat from a “crime boss” or the equivalent passing on of a threat from an emissary of a terrorist group”.⁸⁸ For the purposes of

⁷⁸ S.M. Edwards, “Re-imagining Crimes and Defences” [2016] Crim. L.R. 876.

⁷⁹ The Law Commission, *Partial Defences to Murder* (2004), Law Com. No.290, paras 3.15, 3.28, 3.37, 4.18, and 4.20.

⁸⁰ The Law Commission, *Partial Defences to Murder* (2004), Law Com. No.290, para.87.

⁸¹ B. Livings, “A new partial defence for the mercy killer: revisiting loss of control” (2014) 65(2) N.I.L.Q. 187, 198.

⁸² Coroners and Justice Act 2009 s.55(3).

⁸³ The Law Commission, *Partial Defences to Murder* (2004), para.3.154.

⁸⁴ Coroners and Justice Act 2009 s.55(3).

⁸⁵ The Law Commission, *A New Homicide Act for England and Wales?* (2005), para.7.22. See also, The Law Commission, *Partial Defences to Murder* (2004), para.3.162.

⁸⁶ R. Fortson, “Homicide Reforms Under The CAJA 2009” Seminar 16 October 2010: Criminal Bar Association of England and Wales, para.1.51.

⁸⁷ *Brandford* [2016] EWCA Crim 1794; [2017] 4 W.L.R. 17; [2017] 1 Cr. App. R. 14 (p.197) at [39].

⁸⁸ *Brandford* [2016] EWCA Crim 1794; [2017] 4 W.L.R. 17; [2017] 1 Cr. App. R. 14 (p.197) at [39].

the defence, whether the threat is direct or indirect is less important than, inter alia, its “immediacy, imminence [and] the possibility of taking evasive action”.⁸⁹

The result is that, unlike duress, loss of control does not automatically extend to the killing of innocent third parties because of compulsion arising from exploitation, but it is not precluded from doing so. The Law Commission explained that this was “not a policy judgement that such an individual should never be entitled to a defence”, but this category of case was simply beyond the scope of the review.⁹⁰

The “seriously wronged trigger” applies to a thing said or done or both which constitute circumstances of an extremely grave character which may induce a justifiable sense of being seriously wronged.⁹¹ In contrast to the fear trigger, the seriously wronged trigger does not specify that the “thing said or done” should emanate from the victim,⁹² and although academics have been critical of the suggestion that an individual may feel wronged by circumstances,⁹³ there remains the possibility that the thing said or done could emanate from sources extraneous to the victim, for example, from a trafficker and/or from being trafficked. Slavery undeniably constitutes a thing said or done or both which constitute circumstances of an extremely grave character which may induce a justifiable sense of being seriously wronged.⁹⁴ The cumulative impact⁹⁵ of the forced prostitution, coercion, and threats experienced by Adelaide and Holly, the threats experienced by Sanyu, and the control and coercion Paul experienced from his “adoptive family” would also be likely to satisfy this requirement. Although there is the potential that the defence may be available in this context, it is more likely that Sanyu and Holly were acting out of fear rather than in response to a justified sense of being seriously wronged.

Other problems pervade the loss of control defence. Retention of a controversial loss of self-control requirement has been heavily criticised.⁹⁶ The Law Commission was of the view that it was better to render the defence unavailable where the defendant acted in a considered desire for revenge rather than retain the requirement that the loss of self-control had to be sudden as under the old law.⁹⁷ The inherent unfairness of the suddenness requirement in cases of domestic abuse was illustrated in, inter alia, *Ahluwalia*,⁹⁸ and *Thornton*.⁹⁹ This unfairness led to the recognition of the “slow burn” concept that victims of abuse were unlikely to respond immediately to provocation, and instead the suffering experienced would gradually build until an objectively ostensibly trivial incident may constitute the final straw causing the defendant to kill following a prolonged campaign of abuse.¹⁰⁰ Relaxation

⁸⁹ *Brandford* [2016] EWCA Crim 1794; [2017] 4 W.L.R. 17; [2017] 1 Cr. App. R. 14 (p.197) at [39].

⁹⁰ The Law Commission, *Partial Defences to Murder* (2004), para.3.161.

⁹¹ Coroners and Justice Act 2009 s.55(5).

⁹² For further discussion, see, The Law Commission, *Partial Defences to Murder* (2004), para.3.72.

⁹³ See, for example, A. Clough, “Mercy Killing: Three’s A Crowd?” (2015) 79(5) J.o.C.L. (2015) Vol.79(5) , pp.358–372. cf. B. Livings, “A new partial defence for the mercy killer: revisiting loss of control” (2014) 65(2) N.I.L.Q. 187.

⁹⁴ Coroners and Justice Act 2009 s.55(5).

⁹⁵ *Dawes* [2013] EWCA Crim 322; [2014] 1 W.L.R. 947; [2013] 2 Cr. App. R. 3 (p.24).[2013] WLR(D) 130.

⁹⁶ N. Wake, “His Home is His Castle and Mine is a Cage: A new partial defence for primary victims who kill” (2015) 66, N.I.L.Q. 149.

⁹⁷ *Duffy* [1949] 1 All E.R. 932.

⁹⁸ *Ahluwalia* [1992] 4 All E.R. 889; (1993) 96 Cr. App. R. 133(1993) 96 Cr App R 133.

⁹⁹ *Thornton* [1992] 1 All E.R. 306; (1993) 96 Cr. App. R. 112 [1992] 1 ALL ER 306, CA.

¹⁰⁰ The Law Commission, *Partial Defences to Murder* (2004), para.3.29.

of the suddenness requirement so that cumulative provocation was relevant represented an imperfect compromise designed to accommodate circumstances of abused defendants,¹⁰¹ while preventing misuse of the defence in gang-related contexts.¹⁰² However, the experiences of victims of domestic violence were still required to fit the parameters of a defence more suited to those who exhibited angry, violent responses to conduct rather than those who, living in a state of perpetual fear, responded when their abuser was off-guard.¹⁰³

Maintaining loss of self-control at the heart of the reformulated partial defence has meant that there is less likely to be a need for courts to deny the defence on the basis that D acted from a considered desire for revenge, since many cases are filtered out prior to consideration of the exclusion. It has also resulted in a more liberal interpretation of the loss of self-control requirement.¹⁰⁴ The effect is that loss of self-control may amount to “loss of the ability to act in accordance with considered judgment or a loss of normal powers of reasoning”.¹⁰⁵ Despite this apparent neutralisation of the loss of self-control requirement, it is likely to prove difficult for an individual to claim a loss of self-control following an assertion that their response was proportionate in the circumstances for the purposes of self-defence.¹⁰⁶ For Sanyu and Holly, their reluctance to engage with the demands of the traffickers may make it difficult to establish a loss of self-control.

The loss of control defence is restricted by the further limbs requiring comparison with the ordinary person and subsections stipulating that the defence is not available in cases of self-induced provocation, where the defendant acted in a considered desire for revenge, or on the basis that no jury, properly directed, could reasonably conclude that the defence might apply.¹⁰⁷

The loss of control defence, although not automatically excluded in the context of third party killings, was not designed for such purposes. The Law Commission explained that the objective test should filter out third party killing cases, save in the context of accident and mistake.¹⁰⁸ According to the Law Commission, “[n]o person of ordinary tolerance and self-restraint would deliberately respond to provocation by one person by using violence against another”,¹⁰⁹ but Sanyu and Holly’s responses present a more difficult case because their responses were arguably understandable in the circumstances. There is a significant difference between the cases of Sanyu and Holly and other third party killing cases where the defence should clearly remain unavailable, for example, where, “X walks in on Y raping his daughter. X loses control and tries to attack Y only to be bestopped

¹⁰¹ *Thornton (No.2)* [1996] 1 W.L.R. 1174; [1996] 2 Cr. App. R. 108.

¹⁰² The Law Commission, *Partial Defences to Murder* (2004), paras 3.135–3.138.

¹⁰³ J. Loveless, “*R v GAC: battered woman “syndromisation”*” [2014] Crim. L.R. 655, 667.

¹⁰⁴ Note that the “cumulative impact” of provocation remains relevant and the loss of self-control need not be sudden. See, *Dawes* [2013] EWCA Crim 322; [2014] 1 W.L.R. 947; [2013] 2 Cr. App. R. 3 (p.24)[2013] WLR(D) 130, and Coroners and Justice Act 2009, s.54(2).

¹⁰⁵ *Jewell* [2014] EWCA Crim 414 at [23] citing D. Ormerod, *Smith and Hogan Criminal Law*, 13th edn (Oxford: Oxford University Press, 2011).

¹⁰⁶ The Law Commission, *Partial Defences to Murder* (2004), para.3.88).

¹⁰⁷ Coroners and Justice Act 2009 s.54(5)–(6). See also, *Evans* [2012] EWCA Crim 2; [2013] Q.B. 1; [2012] 1 Cr. App. R. 26 (p.362).

¹⁰⁸ The Law Commission, *Partial Defences to Murder* (2004), para.3.72.

¹⁰⁹ The Law Commission, *Partial Defences to Murder* (2004), para.3.72.

by a friend, whom he kills” for trying to stop him.¹¹⁰ It is essential that a bespoke partial defence for those who kill in response to compulsion is made available.

Diminished responsibility may also be a relevant defence given that exposure to slavery may induce mental ill health. In terms of mental illness, the World Health Organisation identifies psychological consequences of trafficking inclusive of depression, as in Paul’s case, post-traumatic stress disorder and related anxiety disorders.¹¹¹ Paul may be able to claim diminished responsibility. In Adelaide’s case, battered spousal syndrome may potentially form the basis of a diminished responsibility claim, but the utility of battered spousal syndrome is doubted, and reliance on “PTSD or other medical conditions might be preferable.”¹¹² Requiring domestic violence victims who kill to rely on diminished responsibility rather than provocation, such as occurred in the case of *Ahluwalia*,¹¹³ was heavily criticised for pathologising the victim’s response, when the reaction may be regarded understandable in the circumstances.¹¹⁴ It is worth noting that, diminished responsibility would also potentially be available to Sanyu and Holly were they suffering from a recognised medical condition at the time of the killing.

A slavery victim who kills their exploiter may be eligible to claim loss of control or diminished responsibility, despite both defences potentially having a weaker moral excusatory claim to murder than duress, given the actor under external pressures has killed to protect innocent life and avert harm.¹¹⁵ This will depend upon the circumstances given that loss of control might be close to justified self-defence (excessive self-defence), and an individual operating under diminished responsibility may perceive the circumstances as being equivalent to duress in some cases, yet loss of control and diminished responsibility are not limited to the aversion of harm predicated on external pressures.

A new partial defence

The absence of a duress defence in “hard choice” situations like that of Sanyu and Holly is “simply indefensible”, and the logic that a partial defence ought to be available is “irresistible”.¹¹⁶ The Law Commission has revisited the issue of whether duress should provide a defence to murder on several occasions, most recently advancing an absolute defence.¹¹⁷ During Parliamentary debate on the 2015 Act, Mark Durkan, then MP (SDLP), argued that s.45 should extend to all offences.¹¹⁸ This would have aligned s.45 to the equivalent Trinidad and Tobago Trafficking in Persons Act that provides an absolute defence for victims of trafficking who commit offences because of being trafficked.¹¹⁹ Most consultees to the Law

¹¹⁰ J. Dressler “Some very modest reflections on excusing criminal wrongdoers” (2009) 42 Texas Tech. L. Rev. 247.

¹¹¹ See http://apps.who.int/iris/bitstream/10665/77394/1/WHO_RHR_12.42_eng.pdf [Accessed 26 June 2017].

¹¹² J. Loveless, “R. v GAC: Battered Woman “Syndromisation” [2014] Crim. L.R. 655, 667.

¹¹³ *Ahluwalia* [1992] 4 All E.R. 889; (1993) 96 Cr. App. R. 133.

¹¹⁴ Loveless, “R. v GAC: Battered Woman “Syndromisation” [2014] Crim. L.R. 655.

¹¹⁵ The Law Commission, *Murder, Manslaughter and Infanticide* (2006) Law Com. No.304, para.6.60.

¹¹⁶ *Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [21], per Lord Bingham of Cornhill.

¹¹⁷ The Law Commission, *Murder, Manslaughter and Infanticide* (2006), p.119.

¹¹⁸ PBC Deb, col.386 (11 September 2014).

¹¹⁹ “Where a victim has been compelled to engage in unlawful activities as a direct result of being trafficked and has committed any immigration-related offence, or any other criminal offence for which he is being prosecuted, he may offer as a defence, evidence of having been compelled as a victim of trafficking to engage in such unlawful activities;” s.31.

Commission's paper to favour duress as a defence to murder believed it should be a partial defence.¹²⁰ The Joint Committee also recommended a partial defence for slavery/trafficking victims who kill.¹²¹ Three options arise from the Law Commission; the Joint Committee; and, the enactment of s.45.

The Law Commission's recommendations

In the context of the Law Commission's earlier recommendations to introduce "individuated offences of homicide, and partial defences to murder ... within a graduated system or hierarchy of offences",¹²² the Commission advocated that duress should provide a partial defence to first degree murder, resulting in a finding of second degree murder.¹²³ D must have reasonably believed he or she or someone for whom he or she is responsible was being threatened with death or life threatening harm.¹²⁴ In assessing whether a person of reasonable firmness would have acted as the defendant did, the jury may consider the circumstances of D including his age, but not those bearing on his capacity to withstand duress.¹²⁵ The threat need not be objectively life threatening,¹²⁶ but D's view of the nature of the threat or circumstances must be reasonably held.¹²⁷ The prosecution would retain the burden of disproving the defence.¹²⁸

The Law Commission's proposed defence of duress to first degree murder, while preferable to the current position, would prove problematic for trafficking victims who kill. The concept of life threatening harm is "vague and ambiguous",¹²⁹ and s.45 provides statutory recognition that it is "inherently contradictory" to excuse based on threats, but not circumstances.¹³⁰ Taking account of circumstances in assessing the reasonable person potentially invites judicial flexibility in relation to "relevant" factors, but the exclusion of factors bearing on D's capacity to withstand duress is purposely restrictive. The recommendation is considerably narrower in scope than the current objective test for duress, where sex,¹³¹ age, psychiatric disorder, recognised medical conditions and serious physical disability¹³² are relevant.¹³³ Battered spousal syndrome is potentially relevant but this is heavily circumscribed and applies only where the victim suffers from a very "extreme form" of the syndrome.¹³⁴ The Law Commission argued that exclusion of individual

¹²⁰ The Law Commission, *Murder, Manslaughter and Infanticide* (2006), para.6.36.

¹²¹ Joint Committee, *Draft Modern Slavery Bill Report* (2013–2014), p.57.

¹²² The Law Commission, *A New Homicide Act for England and Wales?* (2005), para.1.32.

¹²³ The Law Commission, *A New Homicide Act for England and Wales?* (2005), paras 7.31–7.32.

¹²⁴ The Law Commission, *A New Homicide Act for England and Wales?* (2005), para.7.44.

¹²⁵ The Law Commission, *A New Homicide Act for England and Wales?* (2005), paras 7.36–7.43.

¹²⁶ The Law Commission, *A New Homicide Act for England and Wales?* (2005), para.6.76.

¹²⁷ The Law Commission, *A New Homicide Act for England and Wales?* (2005), paras 7.45–7.50. ¹²⁸ The Law Commission, *A New Homicide Act for England and Wales?* (2005), paras 7.67–7.70. ¹²⁹ The Law Commission, *Murder, Manslaughter and Infanticide* (2006), para.6.75.

¹³⁰ Dressler, "Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code" (1988) 19 *Rutgers L.J.* 671, 673.

¹³¹ The proposed defence benefits from exclusion of the gender qualifier explicit under extant duress precepts. If the qualifier in duress relates to physical strength, it fails to recognise that divergent strength levels may arise across genders, and individuated vulnerabilities. It also inappropriately implies that moral strength differs axiomatically across genders; K.J.M. Smith, "Duress and Steadfastness: in Pursuit of the Unintelligible" [1999] *Crim. L.R.* 367.

¹³² *Bowen* [1997] 1 W.L.R. 372; [1996] 2 Cr. App. R. 157.

¹³³ *Bowen* [1997] 1 W.L.R. 372 at 380.

¹³⁴ GAC [2013] EWCA Crim 1472.

characteristics is less problematic in murder cases, since diminished responsibility provides an alternative partial defence.¹³⁵

The Joint Parliamentary Committee on the Modern Slavery Bill

The Joint Committee recommended that any partial defence for slavery/trafficking victims who kill should adopt the “ordinary person” test operating under loss of control. The Joint Committee’s partial defence would reduce murder to manslaughter where the killing is “a direct and immediate result” of being a victim of several specified offences, including, inter alia, trafficking and slavery, and “a person of the same sex and age as the accused, with a normal degree of tolerance and self-restraint and in the circumstances of the accused, might have reacted in the same or in a similar way.”¹³⁶

Under the loss of control defence the circumstances of D are excluded from the jury’s consideration where their *only* relevance is that they bear upon the defendant’s capacity for tolerance and self-restraint. The “only” qualifier injects a layer of judicial flexibility into the assessment of circumstances to be considered. For example, Lord Judge CJ noted, obiter, that alcoholism may be a relevant circumstance for the purposes of the objective test where D is mercilessly taunted about the condition to the extent it amounts to a qualifying trigger.¹³⁷ This judicial flexibility in the ordinary person test, potentially renders the Joint Committee’s test broader in scope than the recommendations of the Law Commission, considered above, which would exclude any conditions bearing upon D’s capacity to withstand duress. It is submitted that the broader approach to the ordinary person test is preferable, since this might allow individual vulnerabilities of the defendant to be considered, where relevant.

The “public policy”¹³⁸ argument that a broader ordinary person test might be exploited by serious criminals can be met through the minimum threat level required in order to engage the defence. Compulsion arising from slavery and specified forms of exploitation could meet that standard. The relevant circumstances to which the jury are to have regard when assessing the reasonableness of D’s response should be directed at the reasonableness of any options to avert the threat.¹³⁹ The “no realistic alternative” requirement under the Law Commission’s duress proposals is preferable to the Joint Committee’s approach that the offence constituted an immediate response to the threat. The circumstances of the exploitation are likely to be ongoing so the better question to ask is whether there was a reasonable or realistic alternative to neutralise or avert the threat.¹⁴⁰ The “no realistic alternative” requirement will often, in practical terms, relate to the immediacy of the threat and the temporal divide between the threat and the commission of the offence since lack of immediacy might imply opportunity to avert/neutralise the threat. The realistic alternative approach does not assess D’s perception, but whether a

¹³⁵ The Law Commission, *Murder, Manslaughter and Infanticide* (2006).

¹³⁶ Joint Committee, *Draft Modern Slavery Bill Report* (2013–2014).

¹³⁷ *Asmelash* [2013] EWCA Crim 157; [2014] Q.B. 103; [2013] 1 Cr. App. R. 33.

¹³⁸ *Graham* [1982] 1 All E.R. 801, 806.

¹³⁹ Smith, “Duress and Steadfastness: In Pursuit of the Unintelligible” [1999] Crim. L. Rev. 366, 370 and 375.

¹⁴⁰ See, generally, *Hudson* [1971] 2 Q.B. 202; (1972) 56 Cr. App. R. 1.

“reasonable person” would have identified a “realistic alternative”.¹⁴¹ What may be regarded a “realistic alternative” to a juror may appear entirely counterintuitive to a victim of slavery. Like a victim of domestic abuse, the victim of slavery may fear that alerting the authorities, attempting to escape or trying to avoid the situation will put them or their families in greater danger. A sensible approach must be adopted in recognising that the objective assessment ought to be made in the context of the trafficking situation, and age ought to be relevant.

In requiring the killing to be a direct result of the exploitation suffered, the Joint Committee’s recommendations are closely aligned to duress, which requires the act to be a direct result of the threats, and to s.45 that applies where D committed the relevant act as a direct consequence of the exploitation.¹⁴²

Extending s.45 of the Modern Slavery Act 2015

An alternative option would be to extend s.45 to murder as a partial defence. Section 45 engages a reverse burden of proof (beyond disproving victim status). An objection to expansion of duress in *Dao* was the difficulty prosecutors would have in disproving the defence.¹⁴³ A defence might consist of “little more than assertions, only expanded upon at trial”.¹⁴⁴ This issue might be mitigated by legislative requirements regarding defence disclosure.¹⁴⁵ In practical terms, forcing D to reveal the nature of the defence early is likely to be of little assistance in preventing the fabrication of a defence in most cases.

The reverse burden is preferable in addressing the concerns outlined in *Dao*.¹⁴⁶ The prosecution would still be required to disprove trafficking status, and prove the constituent elements of the offence charged. The defendant would be required to prove compulsion on the balance of probabilities.¹⁴⁷ Compulsion or duress is likely to take place separately to the offence charged; the person making the threat and the ultimate victim are likely to be different people; and the ultimate victim may not be present when the threat is made. This will often result in D being the “sole source” of defence evidence, and D may give testimony, which the prosecution cannot compel.¹⁴⁸ Sources external to D, particularly in the human trafficking context where the threat may emanate from another jurisdiction and relate to children or relatives residing elsewhere, may be difficult to locate.¹⁴⁹ The reverse burden also reduces the “desire” to retain the stringent reasonable person

¹⁴¹ See, for example, *Van Dao* [2012] EWCA Crim 1717.

¹⁴² Modern Slavery Act 2015 s.45(2)(b) and (5). Compulsion is also attributable to slavery or to relevant exploitation if—is, or is part of, conduct which constitutes an offence under s. 1 or conduct which constitutes relevant exploitation; s.45(2)(a).

¹⁴³ The Law Commission, *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993), para.30.15 quoting Lord Lane in *Howe* [1986] Q.B. 626 at 641.

¹⁴⁴ *Van Dao* [2012] EWCA Crim 1717 at [45], referring to Lord Bingham in *Z*: Duress is “peculiarly difficult for the prosecution to investigate and disprove beyond reasonable doubt;” [2005] UKHL 22, [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [20].

¹⁴⁵ The Law Commission, *A New Homicide Act for England and Wales?* (2005).

¹⁴⁶ Law Com 218 paras 30.16 and 33.1–33.16.

¹⁴⁷ The Law Commission, *Murder, Manslaughter and Infanticide* (2006), para.6.108. All members of the judiciary who responded to the Law Commission Consultation were of the view that a reverse burden for duress would not offend art.6(2) ECHR: at para.6.94.

¹⁴⁸ The Law Commission, *Murder, Manslaughter and Infanticide* (2006), paras 6.104 and 6.108.

¹⁴⁹ The Law Commission, *Murder, Manslaughter and Infanticide* (2006), para.6.107. Note, trafficking may occur over a short distance and is not limited to cross border travel; *Rehman* [2017] EWCA Crim 106.

standard, allowing consideration of a broader range of circumstances/credible characteristics.¹⁵⁰

The reverse burden would also assist in addressing Lord Thomas CJ's concern that false claims are easy to assert and difficult to disprove. In the absence of a reverse burden, it remains possible for an individual to concoct a false claim of duress where the prosecution is unable to disprove voluntary gang membership.¹⁵¹ Caution is urged here on the basis that it is often difficult to identify victims, and engagement with a trafficking organisation may be perceived as voluntary when the victim is being exploited.

The current law excludes the duress defence involving inter-gang-related threats:¹⁵² "nothing should turn on foresight of the way, in the event, the dominant party chooses to exploit the defendant's subservience. There need not be foresight of coercion to commit crimes".¹⁵³ The s.45 defence does not apply such an exclusion presumably because in most cases victim status has been established through the Competent Authority, however such a decision is not binding on the court¹⁵⁴ and the Court of Appeal has already refused to admit expert evidence based "almost entirely on the applicant's own account".¹⁵⁵ Another reason could be that victims of trafficking may have exposed themselves to the risk to commit a criminal offence.

A voluntary association exclusion would apply to the proposed partial defence which assesses whether the individual foresaw the risk of threats "of such severity, plausibility and immediacy that one might be compelled to do that which one would otherwise have chosen not to do".¹⁵⁶ The defence ought to apply where there is a "reasonable excuse" for the voluntary exposure.¹⁵⁷ This would provide flexibility in cases akin to Adelaide's, for example,¹⁵⁸ while avoiding an "unworkable" requirement of foresight of the nature of the offence one might be compelled to commit.¹⁵⁹ For those under the age of 18, this assessment should be undertaken by reference to the individual's age. The test is objective, and the practical reality is that in circumstances where a jury would reasonably perceive a risk, and in the absence of a legitimate excuse, jurors are unlikely to believe the defendant did not foresee the risk.¹⁶⁰ The voluntary association exclusion is needed to filter out unmeritorious claims, but a careful balancing exercise ought to take place to ensure that the defence is not excluded to those like Sanyu and Holly who may have a reasonable excuse for their voluntary exposure.

¹⁵⁰ *Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [74]

¹⁵¹ The Law Commission, *Murder, Manslaughter and Infanticide* (2006), para.6.109.

¹⁵² *Z* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314).

¹⁵³ *Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [38] per Lord Bingham.

¹⁵⁴ *Joseph* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [20] and [38].

¹⁵⁵ *Joseph* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [67].

¹⁵⁶ *Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [77] per Baroness Hale (dissenting).

¹⁵⁷ *Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [77] per Baroness Hale (dissenting).

¹⁵⁸ The Law Commission, *Report on Defences of General Application* (1977), Law Com No.83, para.2.37.

¹⁵⁹ *Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [77] per Baroness Hale.

¹⁶⁰ *Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [38] per Lord Bingham.

A new partial defence

To summarise, the proposed partial defence would apply to murder only. As per s.45, the prosecution bears the burden of disproving trafficking status to the usual criminal standard. Thereafter, the defendant bears the burden of proving the defence on the balance of probabilities. The act or omission in doing or being a party to the killing must be a direct result of compulsion attributable to relevant exploitation. Compulsion may arise from another person or individuated circumstances. The term exploitation includes: slavery, servitude, and forced or compulsory labour; human trafficking; sexual exploitation; removal of organs; securing services by force, fraud or deception; and, securing services by children or vulnerable individuals.¹⁶¹ The jury must be satisfied that a person of ordinary tolerance and self-restraint in the same situation would have had no realistic alternative to doing the act. The jury may consider the age and circumstances of the defendant, but not those bearing *only* on his capacity to withstand compulsion. The defence would be unavailable in cases involving voluntary exposure, without reasonable excuse, to the risk of exploitation where the defendant ought reasonably to have foreseen the risk of compulsion to do that which one would otherwise have chosen not to do.¹⁶² A variant would apply to those under 18 repudiating the compulsion, and the no realistic alternative requirements. The normal person test and voluntary association assessments must be undertaken by reference to the age of the defendant. The defence aligns with s.45, except for the broader “ordinary person” test, and voluntary association exclusion. This departure is justified on grounds that a more subjectivised approach embracing circumstances/credible characteristics is mandated, given the impact of slavery/trafficking on the victim, and that the victim may be selected because of vulnerabilities.

Concluding remarks

The introduction of s.45 and the case of *Joseph* provides an opportunity to consider afresh the debate regarding whether a defence based upon compulsion ought to be available in murder cases. Many of the issues raised in this article in relation to trafficking victims who kill may apply outwith the trafficking scenario: for example, in intimate partner violence, domestic violence,¹⁶³ and third party abuse contexts, amongst others.¹⁶⁴ The preference should always be for general (partial) defences, wherever possible, to ensure that vulnerable individuals in like situations are not unfairly excluded. The issue as to whether duress should provide a full or partial defence to murder has been revisited on several occasions, and the majority remain in favour of extending the defence. These proposals have not been afforded sufficient weight by Parliament.

The recommendation of an entirely bespoke statutory defence for trafficking victims who commit certain offences introduces a new argument in favour of a partial defence based on compulsion. Given prior victim-status must be established

¹⁶¹ See the definitions provided under Modern Slavery Act 2015, s.3. See, generally, s.45(2)(a)–(b) and (5). For discussion see, J. Collins, “Exploitation of persons and the limits of the criminal law” (2017) *Crim. L.R.* 169.

¹⁶² *Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [77] per Baroness Hale.

¹⁶³ See, for example, *W* [2007] EWCA Crim 1251; [2007] 2 Cr. App. R. 31 (p.411).

¹⁶⁴ For further discussion see, N. Wake and A. Reed, “Re-conceptualising the contours of self-defence in the context of vulnerable offenders: a response to the New Zealand Law Commission” (2016) 3(2) *J.I.C.L.* 195.

for the purposes of the partial defence, and the Competent Authority and CPS are already charged with making such determinations, the proposed defence would sit neatly alongside s.45.¹⁶⁵ The recommendations for an alternative approach to young people should also be welcomed but it is recognised that ad hoc allowances for young people are not ideal, and reconsideration of the Law Commission's work on developmental immaturity in the context of defences would be beneficial.¹⁶⁶ The proposed defence in its current form would go some way to prevent the injustice that the absence of a duress defence for murder creates in trafficking contexts.¹⁶⁷ There remain, however, strong arguments in favour of introducing duress as a full¹⁶⁸ or partial defence¹⁶⁹ to murder, and a variant on the above defence focusing on compulsion and exploitation could be developed.

¹⁶⁵ Laird, "Evaluating the Relationship Between Section 45 of the Modern Slavery Act 2015 and the Defence of Duress: An Opportunity Missed?" [2016] Crim. L.R. 395.

¹⁶⁶ With thanks to Dr Lisa Claydon (Senior Lecturer, Open University) for making this point.

¹⁶⁷ See, for example, *W* [2007] EWCA Crim 1251; [2007] 2 Cr. App. R. 31 (p.411).

¹⁶⁸ The Law Commission, *Murder, Manslaughter and Infanticide* (2006).

¹⁶⁹ Reed, "Duress and Normative Moral Excuse: Comparative Standardisations and the Ambit of Affirmative Defences" in Reed, Bohlander, Wake and Smith (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (2011).