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Criminal responsibility for intrusions on the rights of innocent persons:

The limits of self-defence, necessity and duress

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**A thesis presented for the degree of PhD
at the University of Durham**

**Anne Lodge LL.B (University of
Teesside)**

2009



13 MAY 2009

Declaration

I confirm that the thesis conforms to the prescribed word length for the degree for which I am submitting it for examination. I confirm that no part of the material offered has previously been submitted by me for a degree in this or in any other University. If material has been generated through joint work, my independent contribution has been clearly indicated. In all other cases material from the work of others has been acknowledged and quotations and paraphrases suitably indicated.

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Abstract

This thesis is an exploratory study of the boundaries of English and Welsh criminal law where the legally protected personal and proprietary interests of innocent persons are intentionally infringed by another. Despite fulfilling the definitional elements of a criminal offence, there may be circumstances in which the law is prepared to exculpate the actor even where the interests of an innocent person are set back by the conduct. The justifications and excuses to be considered fall predominantly within the province of self-defence, necessity and duress and the correspondence between these respective domains is addressed.

The aim is to explore the extent to which the criminal law in a liberal society negates criminal liability for deliberate intrusions on the rights of innocent persons by defining the precise scope of the relevant defences. The innocent persons to be considered fall into three main categories. First, the criminal responsibility of an actor who sets back the interests of an innocent incompetent person in their best interests will be addressed. Next, the liability of a defendant who infringes the rights of an innocent person who poses a threat, unjust or incidental, to the interests of the defendant or another will be analysed. Finally, the criminal responsibility of an actor who violates the rights of an innocent non-threatening bystander in order to stave off a threat to their own interests will be considered. It is argued that in English law the scope of criminal liability for intentional acts which set back the interests of an innocent person is ill-defined. An attempt is made to provide a more consistent philosophical and practical approach to the limits of criminal responsibility in this challenging area of law.

Chapter One:

Introduction

1.1 Introduction to the thesis: aims and objectives

The central aim of this thesis is to examine when, in English criminal law,¹ the person or property of innocent persons may be subject to certain forms of intrusion without the defendant incurring any criminal liability in respect of that intrusion. The concern is with the putative criminal responsibility² of an actor who claims some form of justification or excuse in circumstances where they have knowingly and deliberately infringed an innocent person's rights. The defendant may claim a justification or excuse for the intentional invasion on the grounds that they acted out of necessity, self-defence or under duress, all of which sustain a claim that the action was reasonably necessary to avoid a threat of harm.

To date, much of the theoretical discussion underpinning criminal law has centred upon general principles³ or specific offences.⁴ Although there has been some substantive work devoted to the general defences, self-defence, duress, and particularly necessity, are often sidelined in favour

¹ Any reference to 'English' criminal law made throughout the thesis should be taken to mean 'English and Welsh' criminal law.

² The position under civil law of persons who violate protected interests will not be considered. For instance, it may be the case that in some forms of emergency, the property of innocent persons may be taken or used without incurring any criminal liability in respect of the taking or use of property. However, damages may be payable to persons who have suffered a proprietary loss. The thesis will concern itself only with issues of criminal law.

³ See, for example, significant contributions offered by Stephen Shute and Andrew P Simester (eds.) *Criminal Law Theory: Doctrines of the General Part* (Oxford: Oxford University Press, 2002); Tony Honore and Herbert LA Hart, *Causation in the Law* 2nd edition (Oxford: Clarendon Press, 1985); Anthony Duff, *Intention, Agency and Criminal Liability* (Oxford: Basil Blackwell, 1990); Celia Wells, *Corporations and Criminal Responsibility* 2nd edition (Oxford: Oxford University Press, 2001).

⁴ Important contributions have been advanced by Anthony Duff and Stuart P Green (eds.) *Defining Crimes: Essays on the Criminal Law's Special Part* (Oxford: Oxford University Press, 2005); Andrew Ashworth and Barry Mitchell (eds.) *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000); ATH Smith, *Property Offences: The Protection of Property through the Criminal Law* (London: Sweet and Maxwell, 1994); John C Smith, *The Law of Theft* 7th edition (London: Butterworths, 1993).



of mental condition defences,⁵ or the defence of provocation.⁶ Some invaluable work has been advanced on the theoretical framework underlying defences generally⁷ and there has been some useful philosophical analysis of the individual defences pertinent to this thesis.⁸ In somewhat lesser supply is literature which offers extensive analysis of the relationship between self-defence, necessity and duress.⁹ Even where such analysis has been presented, the confines of the literary form dictate that the work cannot be as comprehensive as the analysis undertaken here. To the knowledge of the author no study to date has focused its attention on the particular challenges generated by innocent persons whose rights are infringed in situations of necessity, self-defence and duress.

⁵ Ronnie Mackay, *Mental Condition Defences in the Criminal Law* (Oxford: Oxford University Press, 1995); Robert F Schopp, *Automatism, Insanity and Psychology of Criminal Responsibility: A Philosophical Inquiry* (Cambridge: Cambridge University Press, 1991); Norval Morris, *Madness and the Criminal Law* (Chicago: University of Chicago Press, 1982).

⁶ Jeremy Horder, *Provocation and Responsibility* (Oxford: Oxford University Press, 1992). See also the recent proposals on the defence of provocation contained in the Law Commission Report, *Murder, Manslaughter and Infanticide* (Law Com No 304) (London: HMSO, 2006), from paragraph [5.1]-[6.1].

⁷ Jeremy Horder, *Excusing Crime* (Oxford: Oxford University Press, 2004); Robert F Schopp, *Justification Defenses and Just Convictions* (Cambridge: Cambridge University Press, 1998); Paul H Robinson, *Criminal Law Defenses* (St. Paul: West Publishing, 1984); George P Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978); John C Smith, *Justification and Excuse in the Criminal Law* (London: Sweet and Maxwell, 1989).

⁸ See in relation to self-defence, for instance, Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge: Cambridge University Press, 1994); Fiona Leverick, *Killing in Self-Defence* (Oxford: Oxford University Press, 2006); Boaz Sangero, *Self-Defence in the Criminal Law* (Oxford: Hart, 2006). Numerous less extensive philosophical accounts of self-defence are offered in relevant journals, many of which are considered later in the thesis, for example, Judith J Thomson, 'Self-Defense' (1991) 20 *Philosophy and Public Affairs* 283; Tziporah Kasachkoff, 'Killing in Self-Defence: an Unquestionable or Problematic Defence?' (1998) 17 *Law and Philosophy* 509; and Kimberly Kessler-Ferzan, 'Justifying Self-Defense' (2005) 24 *Law and Philosophy* 711. In relation to duress, important contributions have been made by Joshua Dressler, 'Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits' (1989) 62 *Southern California Law Review* 1331; Anthony Duff, 'Rule Violations and Wrongdoings' in Stephen Shute and Andrew P Simester (eds.) *Criminal Law Theory* (Oxford: Oxford University Press, 2002); and Kyron Huigens, 'Duress is not a Justification' (2004) 2 *Ohio Journal of Criminal Law* 303. The literature on necessity is arguably more sparse, but some significant work has been produced, see Larry Alexander, 'Lesser Evils: A Closer Look at the Paradigmatic Justification' (2005) 24 *Law and Philosophy* 611; and Alan Brudner 'A Theory of Necessity' (1987) 7 *Oxford Journal of Legal Studies* 338.

⁹ The most comprehensive work to date is attributed to Jeremy Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' (1998) 11 *Canadian Journal of Law and Jurisprudence* 143. See also Winnie Chan and Andrew P Simester, 'Duress, Necessity: How Many Defences?' (2005) 16 *King's College Law Journal* 121; and DW Elliott, 'Necessity, Duress and Self-Defence' [1989] *Criminal Law Review* 611.

This thesis intends to make an original contribution by developing a coherent account of the scope of criminal responsibility for intrusions on the rights of innocent persons in situations of extreme pressure. The criminal defences of necessity, self-defence and duress should effectively guard the boundaries between intrusions for which the defendant should take criminal responsibility, and intrusions which may be legitimately justified or excused in light of the difficult circumstances faced by the actor. The thesis aims to present and defend guidelines which clarify the boundaries of criminal responsibility where the defendant is compelled to act to avert some harm to themselves or another. In pursuit of this aim, the moral limits of the criminal law will be analysed at the outset in order to establish the type of conduct that should be criminalised in a liberal society and to outline a role for the exculpatory defences in deciding criminal liability. Issues surrounding the theoretical and philosophical foundations of self-defence, necessity and duress will be considered in depth and the appropriate parameters of the defences will be challenged with reference to the underlying rules and governing principles. In order to provide a backdrop to the subsequent discussion it may be useful to briefly consider the basis of the three relevant defence claims before the substantive analysis proceeds further.

1.2 Defining necessity, self-defence and duress

Ordinarily, if an actor intrudes on the legally protected personal or proprietary interests of another person *prima facie* a criminal offence is committed. That is, unless the defendant has a plausible explanation for the intrusion. Good reasons, agent-neutral or agent-specific, may furnish the actor with an exculpatory defence which negates any liability for the crime even though the definitional elements of the offence are satisfied. The exculpatory defences to be considered in this thesis are necessity, self-defence and duress, which operate as substantive defences to absolve the actor from any responsibility for what would otherwise have been a wrongful intrusion.

It is important to distinguish the defences examined in this thesis from others that fall outside of its scope. A defendant pleading a defence of necessity, self-defence or duress does not claim to be exempt from the criminal law on account of the fact that they do not have the status of a responsible agent.¹⁰ Nor is there any suggestion that the defendant is incapable of forming the requisite state of mind which is ordinarily required for responsibility to be attributed.¹¹ Indeed, a defining feature of cases involving genuine claims of self-defence, necessity and duress is that the crime is committed *voluntarily*, in that a conscious choice to act is made, and *intentionally*, in the sense that the action is deliberate. As indicated above, the reason that a defence is extended in situations of necessity, self-defence or duress is that in circumstances of extreme pressure the defendant did what was reasonably necessary to avoid harm to their own interests or those of another. If an actor pleads the defence of necessity, the claim is that they were morally compelled to break the letter of the law in order to avert some greater harm and the action is, all things considered, justified. A claim of self-defence denies the criminal responsibility of an actor for repelling an unjust threat to their own interests or those of another because the act is, from an objective view, permissible. A defendant may successfully plead duress if they can provide a sound personal reason for deflecting a threat of harm to themselves or another onto an innocent third party.

There is some debate surrounding the appropriate rationale and ambit of necessity, self-defence and duress and the conceptual overlap between them. However, one of the most challenging aspects of the defences is their ability to undermine the rights of innocent people by permitting legally protected interests to be infringed without the defendant incurring any criminal responsibility. In light of the growing significance of individual autonomy and the protection of human rights it is increasingly

¹⁰ Defendants who claim a defence of insanity might fall within this category, see *M'Naghten* (1843) 10 C & F 200.

¹¹ For instance, the defence of voluntary intoxication is only permitted in circumstances where the intoxication negates the *mens rea* element of a specific intent offence; see *DPP v. Majewski* [1977] AC 443; *DPP v. Beard* [1920] AC 479.

important that the circumstances in which rights infringements will be tolerated by the criminal law are carefully and transparently defined. Impinging on the rights of innocent autonomous people is generally to be discouraged, but in circumstances of compulsion it is clear that the criminal defences may allow the rights of innocent people to be overridden by other considerations. Before there is any further deliberation on the scope of the relevant defences it is important to define the categories of innocent persons to be considered in this thesis.

1.3 Defining ‘innocent persons’

The thesis examines the scope of criminal responsibility for intrusions on the rights of innocent people. The term ‘innocent’ is a technical expression, denoting persons who are lawfully at liberty and are neither committing nor are about to commit any criminal offence. The innocent persons to be considered essentially fall into three categories and the thesis is structured on this basis. The first category to be deliberated is the *innocent incompetent patient*, innocent in the sense that the victim of the infringement is unoffending and non-threatening, but simply unable to make meaningful decisions regarding their own welfare due to some permanent or temporary incapacity. It is suggested that the necessity defence may justify an infringement of the rights of an innocent incompetent patient if there is a moral imperative to act in the patient’s best interests. The second category of innocent persons to be considered is the *innocent unjust threat*, which includes both an *innocent active threat* and an *innocent passive threat* to the protected interests of the defendant or another. Where the defendant is actively attacked by a person who is, for instance, insane or below the age of criminal responsibility, the aggressor is innocent in the sense that they are not responsible for their behaviour. This category also accommodates the innocent passive threat, an individual who is not engaged in any sort of positive attack but who nonetheless unwittingly threatens the interests of the defendant. It is suggested that the defence of self-defence may

justify any intrusive action taken by the defendant to ward off either of the innocent unjust threats described here. The thesis will also consider the more precarious position of *innocent incidental threats*, a class of unoffending people who cannot convincingly be described as unjust threats, but are closely linked to the threat in that they expose themselves and others to it. It is suggested that in very carefully defined circumstances, the defence of necessity may exculpate an actor who intrudes on the rights of an innocent incidental threat. The third, and final, category of innocent persons to be considered is the *innocent non-threatening bystander*, who poses no threat whatsoever and is merely a spectator whose rights are infringed to stave off a threat to the actor or another person. It is argued that the rights of an innocent non-threatening bystander are paramount and can never be justifiably infringed; but nonetheless the rights violation may be excused by virtue of the defence of duress (by threats or of circumstances) if certain stringent conditions are fulfilled. Having shed some light on the coverage of the thesis, a brief synopsis of each chapter will now be provided.

1.4 Overview of the thesis

In the first substantive chapter a number of central issues are outlined which ought to provide some guidance for determining the general scope of criminal responsibility. The first step in analysing criminal liability is an investigation into the type of conduct the criminal law generally prohibits, as this should assist in defining the role that the exculpatory defences have to play in deciding whether to attribute criminal responsibility to the actor. Three predominant philosophical approaches to the limits of criminalisation are examined. Two accounts, legal moralism and paternalism, are assessed and rejected insofar as they cannot convincingly provide a singular basis for deciding criminality. The main reason for their dismissal is that they do not afford sufficient consideration to the principle of individual autonomy when deciding what sort of conduct people should generally take responsibility for. In view of this criticism,

liberalism is defended throughout the chapter and the thesis as a whole as the most plausible underlying political philosophy since it is predominantly concerned with the promotion and protection of autonomy.

However, it is conceded that autonomy must be subject to some constraint in order to prevent an inevitable conflict when individual autonomies collide. In deciding the appropriate scope of criminal responsibility, it is suggested that the criminal justice system ought to prohibit only that conduct which causes harm to others. Harmful conduct is that which not only results in a setback to the interests of another, but which is wrongful in the sense that it causes a violation of rights. This principle carves out a role for the exculpatory defences. It is proposed that if, all things considered, there is a good reason for the defendant's action from a societal perspective, no rights are violated and there is no wrongful or harmful setback to interests. Thus the action is outside the scope of criminal responsibility. The harm principle even leaves some scope for wrongful harms to fall outside of the bounds of criminal law because in deciding whether conduct is deserving of criminalisation, the likelihood and seriousness of the harm can be weighed against the blameworthiness of the actor and the consequences of criminalisation. Hence, if a defendant wrongfully violates the rights of another but offers good personal reasons for the violation, the actor may still avoid the attribution of criminal responsibility depending on an objective view of their blameworthiness.

Having established the general philosophical foundation for the thesis, closer analysis of the specific exculpatory defences which may preclude liability for intrusions on the rights of the categories of innocent persons outlined above is provided. In chapter three, medical interventions deemed to be necessary in the 'best interests' of the innocent incompetent patient are considered.¹² It is established at the outset of

¹² What will not be discussed is the extent to which failures of intervention (for example, the failure of a National Health Service Trust to provide particular drugs or procedures)

the chapter that invasive medical treatment administered to *competent* patients without their consent constitutes a wrongful intrusion which disrespects the patient's right to make their own decisions. However, the interests of an innocent incompetent person unable to consent to treatment may be permissibly infringed if the intrusion is necessary in the best interests of the patient. The necessity principle is considered in greater detail, and the historical development and theoretical and practical issues underlying the doctrine are addressed. Although the use of the defence to justify medical intrusions in emergency and non-emergency situations is relatively well established, there is some debate as to what constitutes the 'best interests' of an incompetent patient unable to communicate their wishes. Some particularly controversial examples of best interests intervention are considered which test the boundaries of the necessity principle. It is suggested that intrusions on the rights of an innocent incapacitated person can be justified on a rights-based analysis of the patient's best interests; but the balancing act must pay close attention to the protected rights and interests of the innocent person, particularly where the intrusion is non-therapeutic.

In chapter four, intrusions on the rights of innocent unjust threats are considered, where the defendant takes intrusive action to ward off a threat to their own interests or those of another. It is established that in these circumstances the defendant may rely on the doctrine of self-defence to justify the action. The theoretical functioning of the defence as a justification is examined and there is some analysis of the predominant philosophical explanations of the defence. It is argued that self-defence is not sufficiently explained by appeal to consequentialist considerations, personal partiality or the doctrine double effect as in all of these accounts rights are subordinate considerations. Hence, a rights-based account accompanied by a theory of forfeiture is defended as the most plausible rationale for the defence. It is suggested that this theory may permit intrusive action against an innocent active threat who is not culpable

may be characterised as a violation of legal interests; that might be considered a field in its own right.

because of the making of some mistake of fact, disability, or lack of competence. Perhaps more controversially, the theory is also invoked to justify the use of self-defensive force to set back the interests of innocent passive threats who are not aggressing against the defendant but nonetheless constitute a *direct* source of the threat which is posed. Following a detailed analysis of the conditions underlying the defence, which are relatively well established but subject to some criticism in this thesis, the uncertain territory between self-defence and necessity is called into question when innocent indirect or *incidental threats* are considered. Any intrusion on the rights of an innocent person who is not the source of the threat but merely exposes it to themselves and others, cannot be justified by self-defence. Necessity could provide the only possible justification; and even then the defence would only be available in exceptional circumstances where the innocent person's interests could not be honoured regardless of the defendant's action.

Finally, in chapter five interventions against non-threatening *innocent bystanders* will be considered and it is in these cases that the criminal law must confront perhaps the starkest choice between individual interests. This category deals with duress by threats cases where the personal or proprietary rights of entirely innocent bystanders are violated to stave off a threat to the accused. Following a detailed exposition of the historical development of the defence and its theoretical basis as an excuse, the legitimacy of intruding on the interests of an innocent third party in compliance with a serious threat to bodily integrity is explored, with a particular focus on the difficult relationship between duress and murder. It is argued that subject to appropriately strict conditions, which are explored in detail, and the proviso that any reasonable person would have acted in the same way as the defendant did, the duress defence should, in principle, excuse any intrusion on an innocent bystander's interests. The final part of the chapter considers whether, when threatened by naturally occurring events, the residual necessity justification extends to exculpate intrusions on the rights of innocent bystanders in situations other than those already outlined in previous

chapters. It is submitted that an intrusion on the rights of an innocent autonomous bystander can never be justified if the rights of that person can otherwise be honoured as this would show a complete disrespect for autonomy. However, the criminal law may, subject to the satisfaction of stringent conditions, provide an excuse for the intrusion in the form of duress of circumstances, where the actor violates the rights of an innocent non-threatening bystander to stave off a threat arising from circumstances. The provision of an excuse highlights that the objective observer at least understands the self-preferential action of the defendant, although the conduct is nonetheless regarded as wrongful.

Chapter six recalls the objectives set out at the start of the study and demonstrates how these aims have been fulfilled by the analysis. Some overall concluding remarks are also offered. In particular, it will be submitted that the criminal law should not generally intervene to restrict the autonomy of its citizens and may only legitimately do so to prevent harmful conduct. Where an actor intrudes on the rights of an innocent incompetent patient in their best interests necessity may provide a justification for the action. Similarly in cases where an actor is confronted by an innocent person who is actively or passively threatening their interests or those of another, the actor may, subject to certain limitations, respond by exercising self-defensive force without incurring criminal responsibility. The interests of an innocent person who is not the direct source of the peril but who exposes a threat to themselves and others may be justifiably infringed by virtue of a restrictively defined defence of necessity. In cases of duress, where the threat emanates from a human agent, violations of the rights of an innocent bystander may be excused but only if the pressure of the situation is such that any reasonable person would have responded in the same way. A defendant who violates the rights of an innocent bystander in response to naturally arising threats may not rely on the necessity justification to absolve them of liability; but if the circumstances would have driven any reasonable person to encroach on the rights of another to protect their own interests,

the actor may be afforded an excuse in the form of duress of circumstances.

The law is discussed as it stood on 1st September 2008.

Chapter Two:

Principles of criminalisation

2.1 Introduction to chapter two

Prior to any detailed discussion regarding the lawfulness of specific instances of intervention against innocent persons, it is necessary to pursue some philosophical guidance regarding the general principles which underpin the choice of the legislature to prohibit certain forms of conduct. Outlining the principles which dictate the type of conduct which should constitute a criminal offence should help to clarify our thinking about when it is inappropriate to impose criminal responsibility on an actor, even though the conditions of an offence have been fulfilled. Such analysis will, therefore, support any further examination of the scope and operation of necessity, self-defence and duress in the difficult sphere of crimes committed against innocent persons. It is argued in this chapter, and defended throughout the thesis, that the most fundamental principle on which the criminal law is premised is the protection of individual autonomy and human rights. The philosophy underlying the operation of the criminal law must therefore offer “certain protections for the freedom and basic interests of individuals.”¹ It is suggested that a political system which grants significant weight to a principle of autonomy when deciding what conduct to criminalise, must also provide a range of defences which grant corresponding weight to violations of a defendant's autonomy,² and this contention is explored further throughout the thesis.

The chapter begins with an overview of the main philosophical approaches to criminalisation in section 2.2. A liberal philosophy, which regards individual autonomy and the right to self-determination pertaining

¹ Herbert LA Hart, 'Utilitarianism and Natural Rights' in Herbert LA Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1988) at 194.

² Schopp, *Justification Defenses and Just Convictions* at 64.

to individual citizens as paramount, is defended in section 2.3. It is suggested that the criminal law promotes basic principles of liberalism by prohibiting only *harmful* behaviour which violates the protected interests of another person. The notion of harm is addressed in detail and, since harm denotes a *wrongful violation* of the rights of another there is further discussion of what constitutes a *wrongful* setback. It is contended that not all setbacks to the interests of others should be criminalised, since it may sometimes be necessary to infringe the rights of another if such action is necessary and would serve some overriding principle in the conventional morality. It is suggested that in order to reflect this notion that the actor is not always criminally responsible for setting back the interests of another, the criminal law provides a range of justificatory and excusatory defences. In section 2.4 legal moralism is evaluated, and rejected, as an alternative philosophical explanation of the limits of criminalisation, which focuses broadly on prohibiting immoral, as opposed to harmful, conduct. In section 2.5 paternalism is briefly examined, an approach which essentially encourages state intervention to protect the welfare interests of the individual for their own good. This approach is also rejected as a general principle. Finally, section 2.6 provides a summary of the main philosophical approaches, and acknowledges support for a liberal philosophy in which the autonomy of individuals is paramount. This sets the foundation for the subsequent theoretical discussion regarding the scope and appropriate parameters of necessity, self-defence and duress which are analysed in the following chapters.

2.2 The main philosophical approaches to criminalisation

The criminal law essentially dictates what actions can legitimately be carried out by the citizens under its rule and what conduct is impermissible by providing a range of offences and defences. The state is able to control and regulate the behaviour of its citizens; any individual who transgresses the prohibitions laid down will be convicted, and those convicted may accordingly be punished. However, due to the coercive

and punitive nature of the criminal law and its potential to undermine the liberty of its subjects, it should never be deployed without good reason. Simester and Sullivan highlight that as a regulatory device, the criminal law is a “bluntly coercive and morally loaded tool, something to be used sparingly and with care.”³ Resort to the criminal law is irrefutably necessary in certain clear cut cases, for example, where X strikes and kills Y in order to receive a windfall from Y’s life insurance policy.⁴ X is justifiably condemned by the criminal law, as most people would intuitively agree that such behaviour is harmful, wrongful and deserving of criminal sanction. However, not all harmful or wrongful action is necessarily criminal: if, during an argument, X insults Y with a hurtful comment about Y’s appearance the use of the criminal law to convict and punish X seems inappropriate, despite the fact that X’s behaviour may hurt Y’s feelings or be morally wrong.⁵ So when exactly is it legitimate to invoke the criminal law? If the criminal law should only operate to restrict the behaviour of individuals where there are compelling reasons for state intervention, what constitutes a *compelling reason*?

Joel Feinberg, in his masterful work of four volumes, identifies four possible grounds for legitimate state intervention via the criminal law: where the conduct causes harm to others; where the conduct causes offence to others; where the conduct is immoral; and where the conduct causes harm to self.⁶ The first two of these categories appeal to most liberal philosophers; legal moralists would support the third ground for

³ Andrew P Simester and Robert Sullivan, *Criminal Law: Theory and Doctrine* 3rd edition (Oxford: Hart Publishing, 2007) at 581.

⁴ This example is adapted from a similar scenario described in Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 5-6.

⁵ This example is also adapted from a similar scenario described in Simester and Sullivan, *Criminal Law Theory: and Doctrine* at 6. It refers to the type of verbal insult that occurs in ‘everyday’ argument. It should be distinguished from more serious forms of verbal threats which can result in psychological harm. The former behaviour would not ordinarily be the subject of criminalisation; the latter could constitute a common law assault, or possibly an offence under Section 47 (assault occasioning actual bodily harm) or Section 20 (inflicting grievous bodily harm) of the Offences against the Person Act 1861. See, for example, the cases of *R v. Ireland; Burstow* [1998] AC 147 and *R v. Constanza* [1997] 2 Cr App R 492.

⁶ Joel Feinberg, *The Moral Limits of the Criminal Law* (New York: Oxford University Press): volume 1, *Harm to Others* (1984); volume 2, *Offense to Others* (1985); volume 3, *Harm to Self* (1986); volume 4, *Harmless Wrongdoing* (1988).

criminalisation; and paternalists would advocate the fourth ground as an appropriate guide for criminal prohibition. These competing perspectives (liberalism, moralism and paternalism) form a central part of any philosophical inquiry into the moral limits of the criminal law. Indeed, it has been suggested by Roberts that these three broad theories cover virtually all aspects of the debate surrounding criminalisation, and that, “[a]ny arguments that fall outside their parameters are likely to be so outlandish that they would command very little support.”⁷ Therefore, these primary philosophical approaches to criminalisation will be evaluated in turn, by examining the underlying general principle(s) to which each approach adheres.

It is incredibly difficult to do justice to the wealth of literature and philosophical debate on the moral limits of the criminal law. The depth of discussion in this field is vast and, as acknowledged by Roberts, “often marred by the conflation of arguments that are incompatible or even mutually contradictory and by slippage between different levels of analysis which ought to be kept separate.”⁸ The following introductory analysis attempts to critically evaluate the main philosophical arguments regarding the appropriate ambit of criminalisation. It begins with a discussion of a liberal philosophy which regards individual autonomy as the cornerstone of the criminal justice system.

⁷ Paul Roberts, Appendix C, Law Commission *Consent and Offences against the Person* (Law Com CP No 134) (London: HMSO, 1994), paragraph C23 at 251. Stephen Shute has commented that describing these three broad perspectives as all-encompassing places an “unnecessary strait jacket around the debate...[and that]...further perspectives might be necessary”, see Stephen Shute, ‘Something Old, Something New, Something Borrowed: Three Aspects of the Project’ [1996] *Criminal Law Review* 684 at 691. Although there may be other relevant perspectives, this thesis is only primarily concerned with the main philosophical debates on criminalisation to provide a background for more specific discussion on the legitimacy of violations against the rights of innocent persons. The intention is not to provide an exhaustive survey of competing philosophies, but merely to analyse the broad general principles underpinning the main theories to establish a framework for the analysis of specific defences in subsequent chapters.

⁸ Roberts, Appendix C, *Consent and Offences against the Person*, paragraph C17 at 250.

2.3 Autonomy and the liberal philosophy

It is argued here that the most important principle which underpins a liberal society is autonomy. Individual freedom is a fundamental precept of any democratic society and should be promoted and protected wherever possible. The principle of autonomy is guarded by the criminal law in a number of ways. Respect for individual autonomy not only explains why the system of criminal law exists in the first instance; it also plays a role in limiting the scope of criminal prohibition and provides a function for criminal law defences by requiring criminal responsibility to be imposed only on those who make a free and unconstrained choice to do wrong. The impact of the principle of autonomy on the criminal justice system is considered in greater detail in the following sections.

2.3.1 Autonomy and the criminal law

In a liberal society, criminal law is underpinned by the basic premise that human beings are free to make their own choices as autonomous moral agents.⁹ Autonomous persons have sovereign authority over their own lives; the decisions they make, goals they set and relationships they forge throughout their lives are self-determined and self-created.¹⁰ A useful indication of the primacy of autonomy in a liberal society is provided by Roberts, who asserts that:

“It is essential to the liberal’s conception of the good life that people should be free to choose, follow and revise their own life projects, to have the opportunity to develop their talents and to indulge their tastes, and to be given the chance of living out a good and fulfilling life.”¹¹

⁹ It is important to note that there are considerable debates within liberalism regarding its precise tenets which are outside of the scope of this thesis, but the fundamental principle of autonomy is central to all versions of the philosophy.

¹⁰ For a general discussion of the fundamental importance of autonomy from a leading proponent, see Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1985) particularly chapter 14.

¹¹ Roberts, Appendix C, *Consent and Offences against the Person*, paragraph C34 at 255.

Life is meaningful because individuals have the freedom to choose different projects and goals and to pursue them; being forced by others to live our lives in a restricted way significantly diminishes the value of autonomy. This point is endorsed by Kymlicka, who suggests:

“...no life gets better by being led from the outside according to values the person doesn't endorse. My life only gets better if I'm leading it from the inside, according to my beliefs about value. Praying to God may be a valuable activity, but you have to believe that it's a worthwhile thing to do.... You can coerce someone into going to church and making the right physical movements, but you won't make someone's life better that way.”¹²

So, for liberal theorists, autonomy and the ability to make one's own life choices unhindered by external coercion are essential components of a good life.

Autonomous citizens have access to a wide range of options and there is always an opportunity to choose wisely or foolishly. Indeed, life choices, particularly the most valuable ones, often expose the individual to a risk of loss and suffering. People are free to make bad choices as well as good; and they must bear the consequences of their free choices. This is, after all, what makes for a meaningful life. This point was endorsed by Raz, who submits that:

“[a]nguish, frustration, and even suffering are often part and parcel of rewarding activities and experiences, which depend on the suffering, etc. for their meaning, and therefore for their value as well.”¹³

It is unsurprising, therefore, that a liberal philosophy, with autonomy as its foundational principle, supports the notion of minimum state interference in the lives of autonomous citizens. Criminal prohibition is the most

¹² Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Oxford University Press, 1989) at 12, cited in Roberts, Appendix C, *Consent and Offences against the Person*, paragraph C34 at 256, footnote 31.

¹³ Joseph Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994) at 14-15, cited in Roberts, Appendix C, *Consent and Offences against the Person*, paragraph C37 at 256.

coercive form of state control and places direct limits on freedom, as noted by Raz, who observes, “[c]oercion by criminal penalties is a global and indiscriminate invasion of autonomy.”¹⁴ It follows that, for liberals, criminalisation should be kept to a minimum. A criminal law which is unnecessarily dictatorial and which gratuitously constrains liberty is surely damaging to society; therefore over-criminalisation should be avoided in order to prevent the erosion of the principle of individual autonomy.

However, the criminal law also plays an important role in guarding individual autonomy by proscribing actions that violate the rights and interests of others. Inhibiting the individual choices of citizens through criminal prohibition is justified only if those choices reveal a disregard for the autonomy of others and lead to a diminution of their rights to self-determination. So, despite the primacy of autonomy, liberal thinkers accept that there are inevitable, and indeed *necessary*, limits to individual freedoms. Even the extreme liberal stance adopted by Mill acknowledges that, “[a]ll that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people. Some rules of conduct, therefore, must be imposed.”¹⁵ On a logical analysis, if each citizen had *absolute* autonomy to do as they freely chose, individual autonomies would be on an inevitable collision course. Autonomy is not, therefore, *absolute* but should be given the maximum possible effect insofar as that promotes a similar liberty for all citizens. In pursuit of this balance, the criminal law proscribes only conduct which leads to a violation of individual rights, and the imposition of liability in respect of that violation vindicates the sovereignty of the victim.¹⁶ The proposition that only conduct which violates the rights of another should be subject to criminal prohibition is explored further in the following section.

It is established here that the criminal law is coercive by its very nature, and will, rightly, impinge on the autonomy of an individual when the

¹⁴ Raz, *The Morality of Freedom* at 418-419, cited in Roberts, Appendix C, *Consent and Offences against the Person*, paragraph C39 at 257.

¹⁵ John Stuart Mill, *On Liberty* (Harmondsworth: Penguin, 1974) at 63-64.

¹⁶ Schopp, *Justification Defenses and Just Convictions* at 71.

behaviour is serious enough to warrant criminalisation. But, according to liberal principles, it will only do so if the choice of the autonomous agent causes a *wrongful setback* to, or violation of, the rights of another autonomous being. On this account, only the 'harm principle' or its subsidiary the 'offence principle' can ever provide compelling reasons for the imposition of criminal liability.¹⁷ The contention that only harmful (and sometimes offensive) conduct should be criminalised is addressed below.

2.3.1.1 The 'harm principle'

Liberal theory dictates that the state is only permitted to intervene and regulate the conduct of citizens when that conduct causes *harm to others*. This notion is commonly referred to as the 'harm principle', and was first espoused by John Stuart Mill:

“Th[e] principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection...[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot be rightfully compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right.”¹⁸

In short, Mill's “one very simple principle”¹⁹ dictates that the state cannot legitimately restrict the liberty of an individual citizen via the mechanism of the criminal law in the absence of ‘harm’. Commentators such as Wilson have acknowledged that this principle “provides a useful check

¹⁷ Most liberals agree that conduct which causes serious offence to others should be criminalised and this 'offence principle' is generally accepted as a subsidiary principle of criminalisation. However, the discussion here is limited to the harm principle since the cases in point all involve direct intrusions on the rights of innocent persons.

¹⁸ Mill, *On Liberty* at 68.

¹⁹ *Ibid.* at 68.

against the potentially overweening power of the state to restrict our liberty.”²⁰

Mill’s theory requires elaboration for it to be meaningfully applied, since the notion of ‘harm’ is left undefined, rendering the application of his account of the harm principle “hopelessly indeterminate.”²¹ Other liberal theorists have developed the foundations erected by Mill and perhaps the most comprehensive supplementation to date is Joel Feinberg’s work *The Moral Limits of the Criminal Law*.²² The governing principle when deciding what type of conduct should be criminalised is, for Feinberg, respect for individual autonomy, as opposed to Mill’s maximisation of utility.²³ Feinberg summarises the harm principle as follows:

“It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values.”²⁴

Feinberg’s account does not appear to be as restrictive or exclusive as Mill’s,²⁵ since although harm to others is acknowledged as a good reason for the intervention of criminal law, it is, on one interpretation, not necessarily the *only* grounds for criminalisation. Feinberg appears to leave open the possibility that there may be other supplementary reasons warranting the imposition of criminal liability.²⁶ What follows is a necessarily condensed explanation of Feinberg’s account of the harm

²⁰ William Wilson, *Central Issues in Criminal Theory* (Oxford: Hart Publishing, 2002) at 20.

²¹ A point emphasised by Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 582.

²² Feinberg, *The Moral Limits of the Criminal Law* volume 1, *Harm to Others* (1984); volume 2, *Offense to Others* (1985); volume 3, *Harm to Self* (1986); volume 4, *Harmless Wrongdoing* (1988).

²³ Larry Alexander, ‘Harm, Offense and Morality’ (1994) 7 *Canadian Journal of Law and Jurisprudence* 199 at 199.

²⁴ Feinberg, *Harm to Others* at 26.

²⁵ See John Kleinig, ‘Criminally Harming Others’ (1986) 5 *Crime, Justice & Ethics* 1 at 3-4, in which the author contrasts the work of Feinberg with that of his predecessor Mill.

²⁶ Feinberg concedes that legal moralism, for example, advocates reasons for criminalising conduct that are “sometimes (but rarely) good,” see Feinberg, *Harmless Wrongdoing* at 322-324. For further discussion of legal moralism, see section 2.4 below.

principle,²⁷ which provides a theory regarding what conduct should be criminalised and leaves room for defences to take the defendant's action outside the scope of criminalisation.

2.3.1.2 The meaning of *harm*

For the harm principle to be fully comprehended, it is necessary to consider the meaning of the concept of 'harm'. On Feinberg's interpretation, there are two relevant notions of harm: (1) harm consists of a "thwarting, setting back, or defeating of an interest,"²⁸ interests being the things that promote a person's general well-being or welfare; and (2) harm involves a *wrong* to another person, that is, a violation of their rights. Feinberg's version of the harm principle dictates that these two types of harm must coincide for an actor to be held criminally responsible.²⁹ He asserts that "only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense."³⁰ Both of these relevant senses of harm will be considered in turn below.

²⁷ The synopsis of the harm principle provided here is relatively brief for reasons of space.

²⁸ Feinberg, *Harm to Others* at 33.

²⁹ Cf. Joseph Raz, 'Autonomy, Toleration and the Harm Principle' in Ruth Gavison (ed.), *Issues in Contemporary Legal Philosophy* (Oxford: Clarendon Press, 1987) at 313, who, at 328, states, "Since 'causing harm' by its very meaning demands that action is *prima facie* wrong it is a normative concept acquiring its specific meaning from the moral theory within which it is embedded." Many other commentators have questioned Feinberg's account of the harm principle, Duff asserting that the artificial separation of setbacks to interests and wrongdoing distorts the character of the relevant harm, see Anthony Duff, 'Harms and Wrongs' (2001) 5 *Buffalo Criminal Law Review* 13. In the same volume of the same journal dedicated to Joel Feinberg, Hamish Stewart criticises Feinberg's account with equal rigour, but for distinct reasons. For Stewart, Feinberg's account lacks clarity because it conflates the notion of setbacks to interests and that of wrongdoing, see Hamish Stewart, 'Harms, Wrongs, and Set-Backs in Feinberg's Moral Limits of the Criminal Law' (2001) 5 *Buffalo Criminal Law Review* 47.

³⁰ Feinberg, *Harm to Others* at 36.

Harm (1): A setback to interests

If an actor's conduct adversely affects a person's well-being, then that person has been harmed as their interests have been *set back* by the conduct. Simester and Sullivan suggest that this type of harm is something which impairs the victim's personal and proprietary resources and hampers the attainment of self-determined activities, goals and relationships.³¹ In relation to harm which thwarts the victim's *personal* interests, Feinberg asserts: "A broken arm is an impaired arm, one which has (temporarily) lost its capacity to serve a person's needs effectively, and in virtue of that impairment, its possessor's welfare interest is harmed."³² Conduct which interferes with *proprietary* resources, Raz comments, denies the victim the value or use of their property, and is harmful in the sense that it sets back their interests, "precisely because it diminishes [the victim's] opportunities."³³

Interests in personal integrity and property are arguably not, however, the only types of harm worthy of consideration.³⁴ Gross offers a much broader categorisation of harm which causes a person's interests to be set back.³⁵ For Gross, it would appear that this type of harm may occur even if individual citizens are not *direct* victims of the setback as his account encompass harms which are, in a sense, 'victimless', such as violations of the collective welfare. For example, evading the payment of tax is intuitively a crime and one which affects society in general, but

³¹ Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 583-584.

³² Feinberg, *Harm to Others* at 53.

³³ Joseph Raz, 'Autonomy, Toleration, and the Harm Principle' at 256, cited in Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 584.

³⁴ Wilson has criticised the above evaluation of what constitutes harm as being too narrow to serve the interests which the criminal law acts to defend: "Restricting the scope of the criminal law to the prevention of direct harm-creating acts is a blue-print for legislation informed by political conservatism, rather than that which might be expected to advance general human flourishing. A society truly committed to the autonomy of its members would, one might suppose, be committed to a more radical set of dos' and don'ts' underwritten by the prospect of state coercion," in William Wilson, *Criminal Law: Doctrine and Theory* 3rd edition (Harlow: Longman, 2008) at 33.

³⁵ Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979) at 119-121.

which does not directly deprive an *individual* of any particular assets.³⁶ The suggestion is that the state can rightly intervene to prevent harm to these more general interests.³⁷ This interpretation is not necessarily in conflict with Feinberg's conception of harm, since state intervention is warranted on account of the setback that would consequently be experienced by society as a whole if such action escaped sanction.³⁸ However broad a conception of this type harm is adopted, the harms of concern in this thesis are, in any case, those which involve direct setbacks to the personal and proprietary interests of particular individuals. For these setbacks to be harmful not only must they cause a setback to interests but they must also *violate a right* of the victim.

Harm (2): A violation of rights

To fall within the harm principle, for Feinberg the harm must also be a *wrong*; and just because our interests have been set back does not mean that we have necessarily been *wronged* in any way.³⁹ This qualification is endorsed by Roberts:

“[not every] setback to an interest [is] morally objectionable. When one considers the moral limits of the criminal law one is concerned only with setbacks to interests that are also *wrongs*.”⁴⁰

In order to illustrate the point that conduct must constitute a *wrong* to fall within the harm principle, take a paradigm example of self-defence. If A

³⁶ Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 584.

³⁷ It must be noted that the issue of *remote harm*, that is, action which is not immediately harmful but may lead to harm indirectly, is outside of the scope of this thesis. For further discussion of the difficulties of remote harm and the harm principle, see Andrew von Hirsch 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation' in Andrew Simester and ATH Smith (eds.), *Harm and Culpability* (Oxford: Oxford University Press, 1996) at 267.

³⁸ Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 584-585.

³⁹ The most plausible rationale for the inclusion of a requirement of wrongfulness is this: flouting the criminal law is, by definition, subject to penal sanction. Such punishment can be only be justified if the defendant is deserving of punishment, that is, his/her conduct is blameworthy or wrongful. See Douglas Husak, 'The Nature and Justifiability of Nonconsummate Offences' (1995) 37 *Arizona Law Review* 151 at 155.

⁴⁰ Roberts, Appendix C, *Consent and Offences against the Person* paragraph C28 at 253 (emphasis added).

launches an unprovoked and aggressive attack on B for no good reason and B wards off the attack by pushing A, B has set back A's personal resources by interfering with A's autonomy. However, few would regard this setback as *wrongful* as A lost nothing to which s/he had a right.⁴¹ This example adequately illustrates that for conduct to be harmful and consequently criminal, in addition to setting back interests it must also violate some right of the victim. But when precisely does a setback to interests constitute a *wrongful* setback? Feinberg attempts to define the notion of wrong, offering the following exposition:

"One person *wrongs* another when his indefensible (unjustifiable and inexcusable) conduct *violates the other's right*, and in all but certain very special cases such conduct will also invade the other's interest and thus be harmful."⁴²

Douglas Husak elaborates on Feinberg's assertion:

"Harmful but permissible conduct is not eligible for criminal penalties because it fails to satisfy the wrongfulness requirement. Person A might set back the interests of person B...through a legitimate competition, for example. But A's conduct should not be criminalized because B has not been wronged or treated unjustly. The interests of B may have been set back and *infringed*, but they have not been *violated*."⁴³

So it is submitted here that a victim is harmed if they have suffered a *wrongful setback* to their interests. A setback is only wrongful if it results in a violation of the rights of another autonomous person, which is inexcusable, unjustified and has not been voluntarily consented to by the victim.⁴⁴ This suggests that a defendant may sometimes set back (or infringe) the rights of another person without incurring criminal responsibility for the infringement.

⁴¹ For other examples see Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 586. See section 4.3 for further discussion of the self-defence justification.

⁴² Feinberg, *Harm to Others* at 34 (emphasis added).

⁴³ Husak, 'The Nature and Justifiability of Nonconsummate Offences' at 156.

⁴⁴ Feinberg, *Harm to Others* at 215-216.

2.3.1.3 Harm, wrongful setbacks and defences

The logical corollary of the accounts of the harm principle articulated above is that if an actor sets back the interests of another individual, but has some justification for their action, they will not be criminally responsible as there has been no violation of any right, and consequently no violation of the harm principle.⁴⁵ This concept assumes that rights are not necessarily absolute and can be infringed without being violated.⁴⁶ This idea is crucial to the remainder of the thesis since it suggests that rights are only *violated* if a defendant acts wrongly, or unjustly, or, in other words, has no good reasons for their action.⁴⁷ If the defendant can offer sound reasons for intruding on the protected interests of another person, then criminal responsibility may be avoided even though the definitional elements of an offence are satisfied. What constitutes a good reason for infringing the protected interests of another will be discussed in due course when the justificatory and excusatory defences central to this thesis are examined in greater depth. For now, the important point to note is that the harm principle, in defining the type of conduct for which an actor should take criminal responsibility, leaves room for considerations regarding the type of conduct which should fall outside of its scope.

⁴⁵ See section 3.3.1 below for further discussion of the distinction between justification and excuse. This mode of classifying criminal law defences is adopted throughout the thesis to provide moral clarity.

⁴⁶ Husak, 'The Nature and Justifiability of Nonconsummate Offences' at 156. Husak usefully distinguishes between *violations* of rights (*wrongful* set-backs to interests) and *infringement* of rights (permissible set-backs to interests). See also Judith Jarvis Thomson, 'Some Ruminations on Rights' (1977) 19 *Arizona Law Review* 45; Joel Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life' (1978) 7 *Philosophy and Public Affairs* 93, at 102; and Andrew Botterell, 'In Defence of Infringement' (2008) 27 *Law and Philosophy* 269. However, Nozick appears to suggest that all basic rights are absolute and therefore every small infringement constitutes a violation, see Robert Nozick, *Anarchy, State and Utopia* (Oxford: Oxford University Press, 1974) at 29. Yet there are also passages in which he admits that the question remains open as to whether rights are absolute, or whether they may be overridden or violated "in order to avoid catastrophic moral horror," at 30, for example.

⁴⁷ Hohfeld's influential analysis of rights suggests that rights consist of claims and privileges. Where a defendant has a right or a privilege to act, they do not act unjustly in exercising that right or privilege. In other words, they may infringe (or set back) the rights of a victim in exercising their right/privilege, but they do not violate those interests; see Wesley N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1919).

It is established, then, that to fall within the scope of the harm principle there must be a wrongful setback to the interests of another. But the fact that there has been a wrongful setback to the interests of an individual, however, does not necessarily result in conviction for a criminal offence. This issue is considered in greater detail in the following section.

2.3.1.4 Not *all* wrongful harm should be criminalised

It does not follow from the analysis above that *all* wrongful violations of rights should necessarily be subject to criminal law prohibition. Some types of harm may, for instance, be too insignificant to result in conviction. Alternatively, it may be felt that although the actor has wronged a victim, they are not sufficiently blameworthy to be criminally responsible. The harm principle allows for the likelihood and seriousness of the harm to be weighed against the consequences of criminalisation and so is useful because it requires thought to be given as to *why* the activity is criminalised. This thought process allows us to consider where certain harms reside in terms of their severity or seriousness, and whether harm should fall within the scope of criminal prohibition at all. Establishing a threshold of seriousness should assist in limiting the scope of the criminal law to those who have committed culpable wrongdoing.⁴⁸

Von Hirsch and Jareborg have developed a way of gauging criminal harm by setting a threshold of seriousness to decide whether criminalisation is appropriate. Their undertaking was to develop concrete and illuminating criteria which eradicate the need to rely solely on simple intuition when deciding the scope of criminal prohibition.⁴⁹ For them, the most significant interests to be protected are those which are *central to a person's well-being*; and, the most grievous harms are consequently those which cause the most significant diminution to the standard of well-

⁴⁸ See Wilson, *Central Issues in Criminal Theory* at 22.

⁴⁹ Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1 at 3.

being.⁵⁰ They differ in this regard from the criteria set down by Feinberg, who claimed that the various interests infringed by criminal conduct could be ranked according to the degree to which such interests *affect a person's choice*.⁵¹ Von Hirsch and Jareborg acknowledge the appeal of Feinberg's approach, in that "...it helps to assure that the criminal law, in its criteria for harm, gives due recognition and scope to individual choice."⁵² Yet they are less complementary about his devotion to the idea that diminishing a person's choice is necessarily the worst thing that can happen to that person⁵³ and they argue that the reduction of other vital interests to a 'capacity to choose' dilutes the significance of the range of other interests which may be violated. Furthermore, the categories of interest identified by Feinberg do not offer sufficient distinction among harms, and are arguably so vague as to be "virtually unworkable."⁵⁴

Von Hirsch and Jareborg overcome these difficulties by examining the adverse affect criminal conduct can have on the victim's 'living standard', that is their ability to live a good life. They identify four generic interests pertaining to each individual citizen: (i) physical integrity; (ii) material support and amenity; (iii) freedom from humiliation or degrading treatment; and (iv) privacy and autonomy.⁵⁵ Only conduct which invades at least one of these protected interests is within the legitimate scope of the criminal law. The authors then identify four levels of 'living standard' which may be detrimentally affected by intrusion upon one of the four generic interests. These standards are: (a) subsistence; (b) minimal well-being; (c) adequate well-being; and (d) significant enhancement. Crimes

⁵⁰ *Ibid.* at 7.

⁵¹ For Feinberg, the interests of paramount importance are what he labels 'welfare interests', described as those interests required by a person in order to have the capacity to make meaningful choices and to shape their own lives, at 42. A less important set of interests are the so-called 'security interests', which constitute any interest needed to cushion or provide a safety margin to the welfare interests, described at 207. Those interests ranked lowest in terms of significance are what Feinberg calls, 'accumulative interests', which seems to accommodate all of the other interests not caught up by the previous categories, defined at 207; see Feinberg, *Harm to Others*.

⁵² Von Hirsch and Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' at 8.

⁵³ *Ibid.* at 8.

⁵⁴ *Ibid.* at 9.

⁵⁵ *Ibid.* at 19-21.

are graded by reference to how they affect quality of life, rather than how significantly they restrict choice. So, homicide is, rightly, criminalised because it impacts significantly on the victim's physical integrity and general well-being, and undermines even subsistence. Von Hirsch and Jareborg can boast that their work supplies, "a systematic conceptual framework for making such judgments – and [they] believe that [to be] superior to untutored intuition and guesswork,"⁵⁶ but they also recognise the limitations of their project, in that the living-standard categories are relatively imprecise and that much will still be left to judgement to assess the seriousness of the harm in question. In view of this, attention must also be paid to Feinberg's means of evaluating the seriousness of the harm by weighing it against the consequences of criminalisation.⁵⁷

Feinberg suggests that a number of factors, which he calls "mediating maxims,"⁵⁸ should be taken into account when the consequences of criminalising wrongful harm are considered. In short, he suggests that the harm principle requires a balance between the likelihood and extent of the wrongful harm, the level of intrusion into the lives of citizens if the conduct were to be subject to criminal prohibition, and the overall social value of the conduct in question.⁵⁹ The greater the magnitude of the risk of harm (taking into account individual rights and freedoms), the greater the case for criminalisation; however, the greater the social value of the conduct, the weaker the case for criminalisation.⁶⁰ These considerations, and those of von Hirsch and Jareborg discussed above,⁶¹ should assist in

⁵⁶ *Ibid.* at 38.

⁵⁷ Note the criticism of William Wilson who maintains that neither Feinberg nor von Hirsch and Jareborg's grading schemes may be considered adequate, since both focus on harms committed against individuals. For Wilson, criminalisation is also about "defining public interests worthy of enforcement and identifying the factors which convert wrongs against individuals into matters of public concern," see Wilson, *Central Issues in Criminal Theory* at 24.

⁵⁸ Feinberg, *Harm to Others* at 187. The mediating maxims are listed in full at 214-217.

⁵⁹ Feinberg, *Harm to Others* at 216.

⁶⁰ See Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 586, commenting on Feinberg's mediating maxims.

⁶¹ Other scholars have articulated other practical considerations which may limit the scope of criminal responsibility. For instance, Husak suggests that criminal laws should not punish innocent conduct, each criminal law must do more good than harm, and, perhaps most significantly for the purposes of this thesis, only conduct worthy of condemnation should be punished. See Douglas Husak, 'Limitations on Criminalisation

formulating appropriate judgements regarding the imposition of criminal responsibility in the difficult cases arising in subsequent chapters where the rights of innocent people are interfered with.

2.3.1.5 Criticisms of the harm principle

The harm principle is intuitively attractive since harming others would seem, to most, to be a plausible reason for criminal prohibition. But various criticisms have been waged at the liberal approach to criminalisation. Legal moralists, for instance, frequently challenge the ideology of liberalism, claiming that it is “filled with internal contradictions and will eventually explode as a result of the tensions generated by such conflict.”⁶² It has been contested that distinguishing between harms and non-wrongful injuries and performing the complex balancing exercise at the root of Feinberg’s account is predicated upon a background of moral values and judgements.⁶³ Murphy emphasises that many liberals like to rank liberties on a scale of importance, minor liberties being worthy of only minimal protection and more fundamental liberties worthy of the greatest protection. For Murphy, these fundamental rights and liberties cannot be defended on morally neutral grounds; appeal must be made to substantive moral theory and to an examination of the human values that these liberties and rights seek to protect.⁶⁴ However, Murphy appears to overlook the point that most liberal theorists do incorporate “at least a minimal account”⁶⁵ of morality in order to defend constitutional rights.⁶⁶

and the General Part of the Criminal Law’ in Stephen Shute and Andrew P Simester (eds.) *Criminal Law Theory: Doctrines of the General Part* (Oxford: Oxford University Press, 2002) at 13.

⁶² A criticism acknowledged by Jeffrie G Murphy, ‘Legal Moralism and Liberalism’ (1995) 37 *Arizona Law Review* 73 at 78.

⁶³ Whilst acknowledging the insightful and perceptive ideas emanating from Feinberg’s exposition of ‘wrongfulness’, Stewart comments that his theory is “left incomplete, with the result that much of his analysis relies on an implicit and rather intuitive specification of what a person’s rights are,” see Hamish Stewart, ‘Harms, Wrongs, and Set-Backs in Feinberg’s *Moral Limits of the Criminal Law*’ at 52. For Stewart, Feinberg’s account needs to be more explicit about the role and value of rights.

⁶⁴ Murphy, ‘Legal Moralism and Liberalism’ at 87.

⁶⁵ Clark Wolf, ‘Liberalism and Fundamental Constitutional Rights’ (1995) 37 *Arizona Law Review* 185 at 186.

Feinberg himself concedes that a strict application of the harm principle has limitations, and thereby rejects the notion that liberal philosophy should be morally neutral:

“Legislators must decide not only *whether* to use the harm principle...but also *how* to use it in cases of merely minor harms, moderately probable harms, reasonable and unreasonable risks of harm, aggregative harm, *harms to some interests preventable only at the cost of harms to other interests irreconcilable with them*, structured competitive harms, imitative harms, and so on. Solutions to these problems cannot be provided by the harm principle in its simply stated form, but absolutely require the help of supplementary principles, some of which represent controversial moral decisions and maxims of justice.”⁶⁷

According to Feinberg's view, the harm principle does not claim to be a genuine alternative to the claim of legal moralism, which dictates that the criminal law should enforce morality,⁶⁸ but rather identifies particular manifestations of immorality that should be the business of the criminal law.⁶⁹ For Duff, however, yielding to the idea that any free-floating evil⁷⁰ provides a relevant reason for criminalisation is a hasty and ill-considered concession to legal moralism.⁷¹ Alexander also suggests that Feinberg's case is weakened by several concessions he is prepared to make by:

“...allowing moralistic concerns to affect the interests that are covered by the Harm and Offence Principles and the amount of punishment meted out in criminalizing harmful and offensive conduct, and also in the exceptions he makes with varying degrees of reluctance for non-criminal regulation of immoralities

⁶⁶ Even those 'neutrality' liberals such as John Rawls and Ronald Dworkin import some (albeit limited) notion of morality and the human good into their theories. See, for example, John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 178 and Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

⁶⁷ Feinberg, *Harm to Others* at 187 (emphasis added). Feinberg appears to concede that prohibiting only harm which wrongfully violates another's interests may sometimes be difficult to apply in practice where there are competing interests at stake. For instance, in the case of duress, which is defended in sections 5.3.2 and 5.3.3 below as an excuse, there is a wrongful setback to the interests of the innocent victim, yet some consideration must also be given to the competing interests of the actor faced with extreme pressure to commit what would otherwise be a crime.

⁶⁸ See section 2.4 below for further discussion of legal moralism.

⁶⁹ Husak, 'The Nature and Justifiability of Nonconsummate Offences' at 157.

⁷⁰ That is, evils other than harm and offence.

⁷¹ Duff, 'Harms and Wrongs' (2001) at 37.

and for prohibiting truly grave evils and evils that are so because of their effects on welfare interests.”⁷²

In answer to the critics, however, Feinberg and others, most significantly von Hirsch and Jareborg, seek to retain the harm principle as a distinctive philosophical theory by setting down a number of more concrete and determinative maxims which should form part of the criminalisation process. These maxims supply the harm principle with its content and provide proper principles for ascertaining the moral limits of the criminal law. They may also prove valuable tools in determining the scope of the inquiry at hand, as they may form the basis of a more determinate set of principles upon which to decide whether the rights of innocent persons can ever be violated without the imposition of liability.

2.3.2 Summary of the liberal approach

In summary, the liberal position is built upon the paramount importance of the concept of individual autonomy. Although the primary consideration, liberals accept that the freedom of citizens to do as they please may sometimes be suppressed if those choices encroach on the protected rights and interests of others. So the liberal position is underscored by the harm principle: the conduct of any autonomous citizen may only be subject to coercion if the choices made cause harm to another. Harm involves a wrongful violation of rights; and a setback is not wrongful, and therefore falls outside of the criminal prohibition, if there is a good reason for it. Even if a setback is wrongful, however, an actor may still avoid criminal responsibility on account of the maxims governing the application of the harm principle in difficult cases. In applying the harm principle the more plausible liberal theories are not, however, morally neutral and many liberal philosophers have “strived to occupy a middle place between the impotence of radical moral neutrality on the one hand, and

⁷² Alexander, ‘Harm, Offense and Morality’ at 205.

the dogmatism of legal moralism on the other.”⁷³ This approach will be defended and applied throughout the thesis, but in order to understand why it is adopted as the most plausible philosophy underpinning the criminal law, two other approaches must first be briefly considered: moralism and paternalism.

2.4 Legal moralism

2.4.1 The enforcement of morals and the criminal law

Another prominent philosophical approach to the moral limits of criminal law is provided by legal moralism. Although, as with liberalism, this philosophical doctrine has numerous tenets which cannot be explored in great depth here, it is premised upon the central notion that:

“The law must protect...the institutions and the community of idea, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.”⁷⁴

So, the underlying feature of legal moralism is its conviction to the idea that, *in principle* at least, the criminal law can be used to enforce the shared moral beliefs of the community. In other words, the criminal law can be utilised to prevent certain actions which are *inherently immoral*, even where the conduct in question is not harmful to others and does not constitute a violation of another's rights.⁷⁵ With such renowned proponents as Stephen⁷⁶ and Devlin,⁷⁷ the appeal of legal moralism has even been acknowledged by some liberal thinkers.⁷⁸

⁷³ Wolf, 'Liberalism and Fundamental Constitutional Rights' at 186.

⁷⁴ Patrick Devlin, 'Morals and the Criminal Law,' in *The Enforcement of Morals* (Oxford: Oxford University Press, 1965) at 22.

⁷⁵ Murphy, 'Legal Moralism and Liberalism' at 74.

⁷⁶ James Fitzjames Stephen, *Liberty, Equality and Fraternity* (1874) (Chicago: University of Chicago Press, 1991).

⁷⁷ Devlin, *The Enforcement of Morals*.

⁷⁸ See Murphy, 'Legal Moralism and Liberalism' who, at 75, concedes that "the conservative position of legal moralism retains some philosophical power."

The seminal case of *Brown*⁷⁹ demonstrates how moralistic considerations sometimes permeate criminal prohibitions. The House of Lords decided that homosexual sadomasochistic activity, which involved the application of force upon the body of a consenting adult in private, was, legitimately, a criminal offence. The legal moralist would support this decision as it penalised conduct which, for advocates at the time, was inherently wrong; for these theorists the lack of harm, offence or infringement of rights is irrelevant and behaviour of which is offensive to the shared morality legitimately falls within the ambit of the criminal law. A number of distinct theories have emerged under the rubric of 'legal moralism': *strict legal moralism* and the related *social disintegration theory* are the only versions with which we will concern ourselves here. Each of these accounts will be briefly explained and analysed below.

2.4.1.1 Strict legal moralism

One version of legal moralist thought is advanced by 'strict' legal moralism. According to this classic thesis of moralism, "not only *may* the law be used to punish men for doing what morally it is wrong for them to do, but it *should* be so used."⁸⁰ Adherents to this approach believe that it is appropriate to utilise the criminal law to prohibit immoral conduct *per se*, despite the fact that such conduct causes neither harm nor offence to the actor or to any other person, and aside from the fact that it does not violate any of the protected interests of the victim.⁸¹ Legal moralism justifies the criminalisation of what Feinberg deems "free-floating, non-grievance evils,"⁸² 'free-floating' in the sense that they do not infringe human interests and 'non-grievance' because they give no one individual legitimate cause for complaint. For strict moralists, any conduct which is inherently 'evil' should be within the bounds of criminal prohibition. At first

⁷⁹ *R v. Brown* [1994] 1 AC 212.

⁸⁰ See Herbert LA Hart, 'Social Solidarity and the Enforcement of Morality' in Hart, *Essays in Jurisprudence and Philosophy* at 248 (emphasis added).

⁸¹ Feinberg, *Harm to Others* at 27.

⁸² Feinberg, *Harmless Wrongdoing* at 20-25 and 40-43.

glance, this account seems plausible. If liberals concede that the criminal law may justifiably be invoked to enforce *some* moral rules, that is, those resulting in harm or serious offence to others, then why should *all* immoral conduct not be the proper subject of criminalisation even if there is no wrongful violation of rights?

The standard counter-attack of the liberal is to deny the immorality of the action in question; indeed, there is little consensus about the scope of true morality. Despite the fact that there may be an “overlapping consensus”⁸³ between moralists and liberals regarding the core content of morality, there is much less certainty about peripheral issues.⁸⁴ Even if the liberal concedes that the conduct is, in fact, immoral, s/he will denounce resort to the criminal law unless there is also a wrongful violation of rights. The liberal and the strict legal moralist further disagree irreconcilably about autonomy. Although advocates of the moral approach do not generally deny the importance of autonomy, the moralist philosophy accords it much less significance than the liberal tradition. Fundamental liberal beliefs about the value of liberty, on the other hand, will not allow a liberal to yield to purely moralistic considerations.

2.4.1.2 Social disintegration theory

Distinguished from what Hart refers to as the ‘classical thesis’ of moralism summarised in brief above, is the ‘disintegration thesis’.⁸⁵ Devlin is perhaps the most well-known proponent of this version of legal moralism,

⁸³ John Rawls, ‘The Idea of an Overlapping Consensus’ (1987) 7 *Oxford Journal of Legal Studies* 1.

⁸⁴ For instance, if a defendant repels a threat to their own interests by exercising lethal force, but that threat comes from a child or an insane person who is not culpable for their action, reasonable people might disagree about the moral content of the action. On the basis of the harm principle, however, this conduct falls outside the scope of criminalisation as there is no wrongful violation of the innocent person’s rights. This argument is defended later in the thesis, in section 4.3 below.

⁸⁵ Devlin *The Enforcement of Morals* at 8-14. This thesis emerged in the 1960’s, building on the work of Emile Durkheim, who submitted that there are certain values that people must hold in order for society to survive, and only these values can be enforced by the state, see Emile Durkheim, *The Division of Labour in Society* (London: Macmillan, 1984).

and his viewpoint is premised upon the notion that a society's moral code is an integral part of its structure, and if harmless but immoral behaviour was beyond the ambit of criminal law that structure would erode, leading ultimately to anarchy.⁸⁶ On Devlin's account, a state should be permitted to criminalise even immoral acts carried out in private because it is precisely this sort of behaviour that would loosen and eventually dissolve the moral foundation of society. This school of thought values morality as "the cement of society, the bond, or one of the bonds, without which men would not cohere."⁸⁷ For Devlin, as distinguished from strict legal moralists, society may not criminalise an activity simply because the majority find it unacceptable or even repugnant, or because it is immoral *per se*; criminal sanctions should only be introduced if the behaviour constitutes a serious threat to the social structure. It is worth noting that this approach is not entirely discordant with the harm principle.⁸⁸ If permitting an immoral act would result in social disintegration this would, in itself, be a harmful thing for individual citizens.⁸⁹ So criminalising any such immoral act appears justifiable and non-offensive to the liberal spirit of the harm principle. The foundation of the liberal ideal is, however, completely undermined if the criminal law is used to proscribe *all* immoral acts,⁹⁰ including those which do not cause any harm or serious offence to others. Such a restriction on individual autonomy would be too significant for liberals to accept.

Devlin's approach appears to suffer from a number of further flaws.

Firstly, it demands an empirical link between immorality and the

⁸⁶ Devlin *The Enforcement of Morals* at 8-14.

⁸⁷ Hart, 'Social Solidarity and the Enforcement of Morality' in Hart, *Essays in Jurisprudence and Philosophy* at 248.

⁸⁸ William Wilson asserts that "[i]t is not difficult to reformulate Lord Devlin's legal moralism in terms which are consistent with the conceptual thrust if not the ethical spirit of the harm principle", see Wilson, *Central Issues in Criminal Theory* at 34.

⁸⁹ For example, tax evasion is a criminal offence on application of either the liberal or social disintegration theory.

⁹⁰ It is important to note that not even Devlin insists on the criminalisation of immorality generally. He submits: "I do not assert that any deviation from a society's shared morality threatens its existence any more than I assert that any subversive activity threatens its existence. I assert that they are both activities which are *capable* in their nature of threatening the existence of society so that neither can be put beyond the law", see Devlin, *The Enforcement of Morals* at 13 (emphasis added).

destruction of society.⁹¹ In a much-publicised dispute with Devlin over the enforcement of morality, Hart submits that, apart from one vague statement that “history shows that the loosening of moral bonds is often the first stage of disintegration,”⁹² there is otherwise no evidence given in support of the proposition and “no indication is given of the kind of evidence that would support it, nor is any sensitivity betrayed to the need for evidence.”⁹³ As noted above, even liberals would support the criminalisation of conduct which leads to social disintegration on the basis that this leads to harm but, crucially, only if it is factually proven that there is some truth to this claim. Arguably, human experience dictates that not all immoral acts destroy the fabric of society; adultery, for example, is an act regarded as immoral by many, but there is little evidence to suggest that adultery leads to a breakdown in social order, as Devlin’s theory proposes. For these reasons, legal moralism is rejected as a general guiding philosophy.

2.4.2 Summary of legal moralism

In general terms, legal moralism in all of its guises arguably suppresses change and is conservative in its approach, immorality being measured against prevailing social mores of the time. In their critique of moralism Simester and Sullivan note: “[d]ifference, even conflict, between the lives

⁹¹ It has been noted by Hart that when pressured to substantiate the claim that society will disintegrate unless morality is claimed, the disintegration thesis often collapses into another moral argument, which he labels the ‘conservative thesis’: see Hart, ‘Social Solidarity and the Enforcement of Morality’ in Hart, *Essays in Jurisprudence and Philosophy* at 249. On this ‘conservative’ approach, society has a right to enforce morality via the mechanism of the criminal law on the grounds that otherwise traditional ways of life will be eroded and that society has a right to defend its existing moral environment from change. Dworkin distinguishes that conservative approach from Devlin’s disintegration thesis in Ronald Dworkin, ‘Lord Devlin and the Enforcement of Morals’ (1965-66) 75 *Yale Law Journal* 986. This thesis suffers from fundamental flaws in that it cannot plausibly be assumed that innovation and change are necessarily detrimental to society; individual autonomy cannot surely be legitimately restricted purely on the basis of a preference for familiarity, emotional attachment and long-standing tradition. See also comments in Roberts, Appendix C, *Consent and Offences against the Person*, paragraph C75-C79.

⁹² Devlin, *The Enforcement of Morals* at 13.

⁹³ Hart, ‘Social Solidarity and the Enforcement of Morality’ in Hart, *Essays in Jurisprudence and Philosophy* at 250.

and values of citizens can be a dynamic force for the evolution of a vigorous, thriving, and valuable culture.”⁹⁴ Furthermore, it is inevitably difficult to categorise immoral acts; what appears immoral to one person may not to another. Criminal laws created purely on the immorality of the action are surely an example of legislators imposing their own moral value judgements upon society. According to Wilson, if such an approach was ever accepted as a general principle: “[t]he danger...is that we may be left with a society in which an irrational and unprincipled majority is given licence to impose their views of right conduct on a powerless minority.”⁹⁵

Perhaps the most robust criticism of legal moralism relates to its conflict with the fundamental principle of any liberal society: autonomy. According to Wilson, the main liberal argument with this position is that it:

“...substitutes the harm principle’s starting point to criminalisation, namely the enhancement of individual freedom and autonomy, with its polar opposite, namely the enhancement of state control over individual forms of life.”⁹⁶

As established in section 2.3 above, the criminal law, by its very nature, intrudes into the private lives of its citizens and encroaches upon individual autonomy. There must therefore be very strong reasons for deviating from the principle of autonomy.⁹⁷ The strongest reason for encroaching upon autonomy seems to be if the action of the defendant diminishes the opportunities of other citizens to live good lives. The criminal law justification for limiting the defendant’s autonomy is weighed against the encroachment by the defendant upon the autonomy of the victim. The defendant’s conduct is necessarily harmful in such instances,

⁹⁴ Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 592.

⁹⁵ Wilson, *Criminal Law: Doctrine and Theory* at 38.

⁹⁶ Wilson, *Central Issues in Criminal Theory* at 34.

⁹⁷ It is worth noting that most modern proponents of the moralist tradition acknowledge the undesirability of state coercion, and recommend that the only compelling reason for criminalisation must be to promote social cohesion; see, for example, Nicola Lacey, *State Punishment* (London: Routledge, 1988) at 100; and Michael S Moore, *Placing Blame* (Oxford: Oxford University Press, 1997) at 70, both cited in Wilson, *Central Issues in Criminal Theory* at 35.

intruding as it does upon the rights of another. If mere immorality is prohibited then the weighing exercise is between the autonomy of the defendant in criminalising the behaviour, and some abstract judgement of morality. It follows that there is no autonomy based reason for criminalisation, but merely one against. Since this thesis advocates that autonomy forms the foundation of any liberal society, and the self-determined, free choices of individuals therefore take priority, it is argued that actions should not be criminalised purely on the basis that they are immoral. Before any further conclusions can be drawn regarding the primacy of principles underpinning decisions to impose criminal responsibility, one further philosophical approach must be considered, which claims that criminal prohibitions should be underscored by beneficence.

2.5 Paternalism

2.5.1 Paternalism and the criminal law

Paternalistic justifications dictate that state intervention may be justified where the action causes harm to the individual themselves, and criminal prohibition is justified purely for the individual's own good, as it promotes the actor's own welfare interests. This theory has roots in political philosophies advanced by, for instance, Plato, Aristotle and Hegel, who propose that achieving perfection or 'human excellence' takes priority over rigid adherence to autonomy. As with legal moralists, it is not necessarily the case that paternalists disregard the virtue of autonomy outright; it is simply that they do not afford it the same primacy that liberals do.

The paternalistic justification for criminalising conduct has been usefully summarised by Feinberg, although it is important to note that this is not a principle to which he subscribes:

“It is always a good reason in support of a prohibition that it is probably necessary to prevent harm (physical, psychological, or economic) to the actor himself and there is probably no other means that is equally effective at no greater cost to other values.”⁹⁸

A number of current laws appear to be underscored by paternalistic considerations or, as Feinberg suggests, have “paternalism as an essential part of their implicit rationales.”⁹⁹ Take, for instance, Simester and Sullivan’s example of the criminal law duty to wear a seat belt;¹⁰⁰ and further, the paternalistic intervention of the criminal law to protect children and the mentally incompetent from making certain ill-considered and irresponsible judgments, for instance, by restricting sexual activity.¹⁰¹ The prohibition of such activities for the benefit of the individuals concerned is often justified on the basis that the restriction of choice and infringement of autonomy is relatively minor and arguably outweighed by other welfare interests of the individual. But these are strong cases for paternalistic intervention and would appear, to most, sensible restrictions upon free choice. It is submitted here, however, that the criminal prohibition of such activities is better explained by reference to the harm principle without the need to appeal to paternalistic arguments.¹⁰²

⁹⁸ Feinberg, *Harm to Others* at 26-7.

⁹⁹ Feinberg, *Harm to Self* at 25.

¹⁰⁰ Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 594. However, the duty to wear a seatbelt might also be justified via the harm principle, in that wearing a seatbelt may also prevent the causing of harm to others in the event of an accident.

¹⁰¹ It could be argued that children and mentally incompetent or incapacitated persons are not autonomous and therefore a limited degree of ‘soft’ paternalism is necessary in such circumstances. ‘Soft’ paternalism is defined as coercion which interferes with non-voluntary choices, rather than fully voluntary choices, see Danny Scoccia, ‘In Defense of Hard Paternalism’ (2008) 27 *Law and Philosophy* 351 at 354-355.

¹⁰² For example, a doctor who administers invasive treatment to an incompetent patient incapable of communicating their wishes does not wrongfully violate the rights of that patient but merely infringes them, since the necessity justification provides good all things considered reasons for the action. For further discussion of the necessity principle in this context see chapter 3, particularly 3.3.3.

2.5.2 Criticisms of paternalism

The views of the legal paternalist are in direct contrast to those of the liberal, since for the latter the principle of autonomy always outweighs beneficence when the two values collide. Because liberty and autonomy are generally accepted as valuable features of our culture, paternalism faces an uphill struggle if it is ever to be accepted as a *general principle* of criminalisation. The wholehearted application of a theory which restricts personal autonomy simply for the actor's own good is, for many, offensive and undermines the principle that the rights of competent and responsible adults take precedence in a liberal society. The paternalist would support legislation which saves people from themselves and prevents them from making bad decisions which will detrimentally affect their welfare. As submitted by Roberts, advocates of this approach argue from a "philosophical slippery slope and [are] at constant risk of taking a tumble."¹⁰³ Feinberg suggests that wholesale adoption of a policy of legal paternalism would lead to the "creation of new crimes that would be odious and offensive to common sense, leading to the general punishment of risk-takers, the enforcement of prudence, and the interference with saints and heroes."¹⁰⁴ Many of the life choices made by human beings are not strictly in their best interests, but not all of these choices are subject to criminalisation. The implications of the paternalistic ideal are decidedly less attractive when considered in contrast to the liberal philosophy.

2.5.3 Summary of paternalism

In summary, in relation to specific crimes, it is easy to see why the concept of paternalism could be used to justify state intervention to promote the welfare interests of the individual, at the expense of

¹⁰³ Roberts, Appendix C, *Consent and Offences against the Person*, paragraph C63 at 264.

¹⁰⁴ Feinberg, *Harm to Self* at 25.

autonomy. But as a *general principle* of criminalisation, paternalism lacks rigour and should not be guiding our system of criminal law. Criminalising conduct for the defendant's own good seriously undermines autonomy of choice. Citizens have the freedom to determine their own self-chosen goals for life, and in pursuit of these goals, have the freedom to make some wrong choices. As Simester and Sullivan acknowledge, "[a] paternalistic legal system which made people's choices for them may well end up alienating people from their own conduct."¹⁰⁵ It must be reiterated that the shaping of our own lives through the pursuit of self-chosen goals is what makes life meaningful; but the criminal law is coercive and invasive and restricts the fulfilment of aspirations. Imposing criminal prohibitions purely for the individual's own good interferes with the accomplishment of a meaningful life.

2.6 Conclusion to chapter two

The philosophical foundations of the criminal law have been investigated in this chapter and the three main positive grounds for state intervention considered. This necessarily condensed critique of the competing philosophies underpinning decisions to criminalise illustrates that each of the main three theories has some merit. Liberalism protects individual autonomy and only endorses criminal prohibitions which cause harm to others.¹⁰⁶ Legal moralism promotes state intervention to prevent all forms of immorality, which, it is argued, could maintain the *status quo* in society or prevent the erosion of the social structure. Paternalism calls for criminal law intervention for the actor's own good, to protect the welfare interests of the individual. It is argued here that in a pluralistic and diverse society, the liberal ideal seems intuitively the most plausible and attractive. Indeed, Roberts contends that, "the presumption in favour of individual autonomy places the burden of persuasion firmly on the

¹⁰⁵ Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 595.

¹⁰⁶ Or serious offence.

shoulder's of liberalism's opponents."¹⁰⁷ Autonomy is, after all, the fundamental political value in western liberal democracies, and citizens closely guard and value their personal freedom. Moralism and paternalism are not completely ignorant of notions of autonomy; however, they place autonomy lower down the list of protected priorities than liberals do. Any philosophical perspective which gives insufficient weight to the value of autonomy cannot, it is submitted here, be adopted as a *basis* upon which to outline the limits of criminal responsibility.

Feinberg's liberal account remains the most comprehensive and convincing attempt to outline the boundaries of the criminal law to date. The general proposition which will be defended throughout the thesis is that an actor can only be held criminally responsible for conduct which wrongfully violates the rights of another. As Feinberg suggests, the authority of the state to impose criminal sanction should be limited by a theory which identifies a coherent set of principles which protect individual rights.¹⁰⁸ However, it is difficult to sustain an argument that rights to liberty, health, life and possessions are *absolute* and wholly inviolable. In view of this, Feinberg advances a *presumption* in favour of liberty, and is not rigidly committed to the claim that liberty has absolute priority whenever it is weighed against competing values. He acknowledges that the harm principle must be supplemented by other worthy considerations that are always *relevant*, if not good or decisive, reasons for the imposition of criminal liability. So even where rights are violated, it is conceded that there may be other relevant reasons for denying the criminality of certain conduct, depending, for instance, on the seriousness of the harm and the culpability of the actor.

So, it may be concluded that autonomous citizens are free to make their own choices, good or bad; but if conduct is chosen which causes a wrongful setback to the fundamental interests of an innocent autonomous

¹⁰⁷ Roberts, Appendix C, *Consent and Offences against the Person*, paragraph C109 at 281.

¹⁰⁸ See Husak, 'The Nature and Justifiability of Nonconsummate Offences' (1995) 37 *Arizona Law Review* 151 at 155.

person the actor must take responsibility. Conversely, respect for the autonomy of the defendant is manifested in the provision of a range of defences which may absolve the actor of criminal responsibility. The defences featured in this work include necessity, self-defence and duress, which are all exculpatory defences that negate liability despite the fulfilment of the definitional elements of an offence. Each defence contains a claim that the action of the defendant was reasonably necessary due to some threat to their own protected interests. When necessity and self-defence are raised they operate as *justificatory* defences which emphasise that there is no wrongful setback to the rights of another person, that is, no violation of their rights. In such circumstances there is no violation because there is no objectively wrongful act; a person who is compelled to act out of necessity or in response to an unjust threat to their own interests has a right to intrude on the personal sphere of another agent. A person does, however, wrongfully violate the rights of another if they commit crime in response to serious threats to their own interests, or those of another to whom they are connected. In situations of duress, the actor's choice to violate rights is coerced and therefore the criminal law provides the actor with an *excuse* in recognition of the unfair personal sacrifice demanded of the defendant. It is evident that the justificatory defences are compatible with the harm principle in that they exonerate an actor who is outside of the scope of criminalisation dictated by the principle since there is no wrongful violation of rights. On the other hand, excusatory defences exonerate defendants whose conduct would otherwise fall within the remit of the harm principle on account of the lack of fair opportunity for the actor to exercise free choice.

Important rights come into conflict in many of the dilemmas considered in the subsequent chapters of this thesis, and it is hoped that the basic principles established in this chapter will provide useful guidance as to whether intrusions on the rights of the innocent persons to be considered below are an appropriate target for criminal prohibition. The discussion begins with a consideration of the scope of criminal responsibility for

intrusions on the rights of innocent incompetent persons in their best interests.

Chapter Three:

Intruding on the rights of innocent persons in their 'best interests'

3.1 Introduction to chapter three

As established in chapter two, criminal law in a liberal society prohibits conduct which results in a wrongful setback to the rights of others.¹ The imposition of criminal responsibility for such violations supports the claim that English law “goes to great lengths to protect a person of full age and capacity from interference with his personal liberty.”² It follows that, as a general rule, anyone who violates the protected personal interests of an innocent non-threatening, non-consenting autonomous person will be committing a criminal offence. Hence a surgeon who performs an operation without the consent of a competent patient commits an assault.³ Indeed, it has been authoritatively asserted by Mill that each competent individual is the “proper guardian of his own health, whether bodily or mental and spiritual,”⁴ and, further, there is judicial recognition of the fundamental principle that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.”⁵ The imposition of criminal responsibility for intrusions on the protected interests of innocent persons reflects the basic principle that the bodily integrity and self-determined choices of autonomous patients must be respected. As Dworkin notes: “failure to respect [a person’s] wishes

¹ Husak, ‘The Nature and Justifiability of Nonconsummate Offences’ at 155.

² Per Lord Reid in *S (An Infant) v. S; W v W* [1972] AC 24 at 43.

³ Per Cardozo J in the American case *Schloendorff v. The Society of the New York Hospital* 105 NE 92 (1914). The assault referred to constitutes both the crime of battery and the tort of trespass to the person, a point reiterated in numerous cases, perhaps most authoritatively in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 71, per Lord Goff.

⁴ Mill, *On Liberty* at 72.

⁵ Per Cardozo J in the American case *Schloendorff v. The Society of the New York Hospital*.

concerning [their] body is a particularly insulting denial of autonomy,"⁶ which the criminal law, on the principles established in chapter two, rightly condemns.

However, it is also established in chapter two that although the definitional elements of a particular offence may be fulfilled in that rights have been infringed by the actor, sometimes s/he may be exculpated on the grounds of justification or excuse. So, despite admirable proclamations regarding the primacy of self-determination, the courts have sometimes declared that although certain intrusions undeniably encroach on another's individual autonomy, that conduct is not necessarily a wrongful setback to interests; or, alternatively, it is a wrongful setback for which the defendant should not be blamed. It would appear, then, that the fundamental rights of autonomy and non-interference with bodily integrity are sometimes limited and subservient to other considerations:

"The right to maintenance of the inviolability of a person's body exists for the benefit of all who inhabit our shores. But it is not an absolute right. It is subject to exceptions. Nor does it exist in a vacuum. It must co-exist with other rights, such as the right to skilled treatment by doctors who have assumed the responsibilities inherent in the doctor – patient relationship."⁷

It is submitted in this chapter and, indeed, throughout the thesis that intrusions on the rights of *competent* non-consenting innocent persons will rarely, if ever, be justified. But interference with the legally protected interests of an *innocent incompetent patient* who is unable to give valid consent to medical intervention due to incompetence or incapacity may be justified provided it is recognised as a legitimate and *necessary* response to a medical dilemma. Hence, the privileging of autonomy depends on the soundness of mind of the individual: if patients have the capacity to make treatment decisions, those decisions are conclusive.

⁶ Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988) at 113, cited in Elizabeth Wicks, *Human Rights and Healthcare* (Oxford: Hart Publishing, 2007) at 60.

⁷ *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 13.

However, if lacking the requisite capacity to consent, a doctor may lawfully encroach on the incompetent person's autonomy on the basis that treatment is necessary in the *best interests* of the patient.

This chapter examines the necessity doctrine which may, in certain circumstances, provide a defence to defendants who intrude on the rights of innocent incompetent persons. In section 3.2 the necessity doctrine is introduced and its development as a common law principle is charted. The scope of the necessity defence is uncertain and it has been applied in a broad range of contexts and it is perhaps for this reason that the rationale underlying the defence is problematic. Before attempting to elucidate the theoretical foundation of the defence, section 3.3 begins with a brief synopsis of the distinction between justificatory and excusatory defences, a categorisation which will be adopted as a mode of classifying the defences for the remainder of the thesis. The subsequent analysis considers whether necessity operates to justify or excuse rights violations in a medical context, and an attempt is made to rationalise the justificatory force of the defence. In section 3.4 the vague conditions limiting the defence are briefly considered before section 3.5 addresses in greater detail the general principle that necessity can rarely, if ever, be invoked to justify infringements on the rights of an autonomous, competent, non-consenting patient. Judicial commitment to the primacy of autonomy is also challenged, with particular concern for the treatment afforded to women who are compelled to undergo forced caesarean section operations. In section 3.6 the legitimacy of interventions in the *best interests* of the *innocent incompetent patient* is considered in both emergency and, somewhat more controversially, non-emergency situations. The ambiguous notion of best interests is discussed in detail in order to illuminate the scope of the necessity principle in the medical context. The remainder of the chapter comprises a more detailed examination of three particularly contentious examples of intervention for which criminal responsibility has been denied on the grounds of necessity. A summary of the scope and operation of the principle of necessity in this context is offered in section 3.7, which suggests that it

may only be justifiable to encroach on the protected interests of an innocent incompetent patient if the intrusion vindicates a superior right of the patient. There is also recognition that the justification does *not* extend to intrusions against innocent and autonomous competent patients. This chapter attempts to define the limits of the common law defence of necessity in respect of violations of the rights of innocent persons in their best interests; and the analysis begins with an inquiry into the current scope and application of the doctrine.

3.2 The doctrine of necessity

Necessity renders lawful conduct which is necessarily undertaken to prevent harm to the interests of the defendant or another in a situation where the alternative involves breaking the letter of the law. There has been considerable uncertainty surrounding the availability of necessity as a *general* defence, with both legislature and judiciary reluctant to give full commitment regarding its existence and, as a result, the defence has lingered in the common law shadows for centuries. Any argument to the effect that there is no such defence in operation now is, however, no longer sustainable,⁸ although the doctrine is relatively undeveloped and of limited applicability.

It is true that necessity has long been considered one of the “obscure”⁹ curiosities of English law and thus a topic generating immense interest amongst academics, since its tentative beginnings as far back as the sixteenth century.¹⁰ The doctrine has sound historical foundations, with Bracton, Hale, Hobbes and Blackstone all admitting the allure of “a discretionary judicial power to justify illegal acts in morally complex

⁸ Simester and Sullivan state that the defence is now “impossible to deny,” in *Criminal Law: Theory and Doctrine* at 714.

⁹ Per Brooke LJ in *Re A (Children: Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961 at 1032.

¹⁰ *Reniger v. Forgossa* (1552) 1 Plowd 1.

situations.”¹¹ It was conceded even then that there were certain situations in which otherwise criminal conduct is rendered lawful on account of this principle called necessity: for example, where a prisoner is forced to escape from a burning jail; or a cargo is jettisoned to save a vessel in a storm.¹² Indeed in *Moore v. Hussey*¹³ it was declared by Hobart J that “all laws admit certain cases of just excuse...where the offender is under necessity, either of compulsion or inconvenience.”¹⁴ Influential scholar Stephen reinforced this proposition, claiming that “[i]t is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it.”¹⁵ Historically, it would seem that there is at least some partial recognition of the possible effect of necessity on criminal responsibility.

Despite general support for the notion of necessity from influential scholars, the defence has often been rejected by the courts. Potent arguments have been articulated against the recognition of necessity as a general defence, largely borne out of an understandable concern for the consequences of allowing individuals to judge when the letter of the law can be overridden. This reluctance to admit the defence is evident from comments made by Dickson J in *Perka v. R* that:

“...no system of positive law can recognise any principle which would entitle a person to violate the law because *on his view* the law conflicted with some higher social value. To...hold that ostensibly illegal acts can be validated on the basis of their expediency, would import undue subjectivity into the criminal law. It would invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions.”¹⁶

¹¹ Elizabeth Wicks, ‘The Greater Good? Issues of Proportionality and Democracy in the Doctrine of Necessity as applied in *Re A*’ (2003) 32 *Common Law World Review* 15.

¹² *Mouse’s Case* (1608) 12 Co Rep 63.

¹³ *Moore v. Hussey* (1609) Hob 93.

¹⁴ However, Hale, with whom Blackstone subsequently agreed, restricted the availability of the necessity plea, stating that, “...if a person, being under necessity for want of victuals or clothes, shall...clandestinely and *animo furandi* steal another man’s goods, it is a felony and a crime by the laws of England punishable with death,” see Hale, *Pleas of the Crown* volume 1 at 54.

¹⁵ Stephen, *A History of the Criminal Law of England* at 109.

¹⁶ *Perka v. R* (1984) 13 DLR (4th) 1 at 14 (emphasis added).

Further, in *London Borough of Southwark v. Williams*¹⁷ Lord Denning dealt another blow to the operation of the doctrine of necessity by his declaration that, "[n]ecessity would open a door which no man could shut...The plea would be an excuse for all sorts of wrongdoing. So the courts must, for the sake of law and order, take a firm stand."¹⁸ Thus, for the judiciary, the operation of necessity is limited by the political and social implications of allowing such a defence to exist. This point can be seen in the following statement by Lord Denning noted in *Buckoke*:

"A driver of a fire engine with ladders approaches the traffic lights. He sees 200 yards down the road a blazing house with a man at an upstairs window in extreme peril...At that moment the lights turn red...I suggested to both counsel that the driver might be excused in crossing the lights to save the man. He might have the defence of necessity. Both counsel denied it. They would not allow him any defence in law. The circumstances went to mitigation, they said, and did not take away his guilt. If counsel are correct - and I accept they are - nevertheless such a man should not be prosecuted. He should be congratulated."¹⁹

Ironically, this excerpt highlights the drawback of denying a defence of necessity. By imposing criminal liability for such a breach of the letter of the law, appropriate conduct is actually discouraged and too much rests on the good sense of relevant authorities not to prosecute or to exercise sentencing discretion. But the prosecuting authorities cannot always be relied on to relax punishment to reflect the blameworthiness of the actor, as seen in the case of *Kitson*.²⁰ Although there was no express ruling in that case that necessity could not have been pleaded, if the defence was generally available "it is surprising that it did not emerge in that case."²¹

In the last two decades there has been increasing recognition of the role of necessity as a ground of exculpation and it is now accepted that the strictures placed on the defence by previous authorities are "not

¹⁷ *Southwark London Borough Council v. Williams* [1971] 2 All ER 175.

¹⁸ *Ibid.* at 179.

¹⁹ *Buckoke v. Greater London Council* [1971] 1 Ch 655 at 668.

²⁰ *R v. Kitson* (1955) 39 Cr App R 66.

²¹ Martin Wasik, 'A Case of Necessity?' [1984] *Criminal Law Review* 544 at 545.

conclusive of the matter.”²² Lord Goff authoritatively outlined three narrow categories of incident to which necessity has been held to apply. The final, and most relevant, group of cases²³ are those concerned with “action taken as a matter of necessity to assist another person without his consent.”²⁴ The judgment in *Re F* is grounded in this latter category, which is quite distinct from the other forms of circumstantial pressure in which a necessity defence has been invoked. In *Re F*,²⁵ Lord Goff attempts to articulate the criteria required for this type of defence:

“To fall within the principle, not only (1) must there be a necessity to act when it is not practicable to communicate with the assisted person, but also (2) the action taken must be such that a reasonable person would in all circumstances take, acting in the best interests of the assisted person.”

If the above criteria are fulfilled, interference with the person or property of the assisted adult is permitted and will not, therefore, be deemed unlawful. Analysis of the recent case law reveals growing appreciation of a more general defence of necessity, one which is not limited to its somewhat *ad hoc* application in the older cases, which generally involved victimless crimes, or very minor intrusions on the rights of another, but which could even be extended to justify intentional killing.²⁶ Although the defence can, in principle, be applied this broadly, necessity has only been explicitly recognised as a defence where there has been a significant intrusion on the rights of another in a medical context.²⁷ In healthcare,

²² *Re A (Children: Conjoined Twins)* [2000] 4 All ER 961.

²³ The first two include “cases of public necessity and cases of private necessity...the former [occurring] in the Great Fire of London in 1666. The latter cases occurred when a man interfered with another man’s property in the public interest,” see *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 74. Other instances of necessity will be addressed later in the thesis, see particularly sections 4.5.3 and 5.6.1.

²⁴ Lord Goff gives the example of “a man who seizes another and forcibly drags him from the path of an oncoming vehicle, thereby saving him from injury or even death, commits no wrong,” in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 74.

²⁵ *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

²⁶ Winnie Chan and Andrew P Simester, ‘Duress, Necessity: How Many Defences?’ (2005) 16 *King’s College Law Journal* 121 at 122. The applicability of the necessity defence to murder is discussed in more detail in sections 4.5.3 and 5.6 below.

²⁷ Wilson, *Criminal Law Doctrine and Theory* at 247. Glazebrook submits that there are many instances of a ‘concealed’ necessity principle where defendants are exonerated on the basis that they chose the lesser of two evils although no explicit reference is made to the necessity defence. He cites the example of *R v. Bourne* [1938] 3 All ER

the necessity principle is used to deny the criminal responsibility of a doctor who administers invasive treatment to an incompetent or otherwise incapacitated person, where that intervention would otherwise constitute an assault.²⁸ Indeed, necessity is relatively well-established as providing a defence to crimes involving serious intrusions where the interference is aimed at the preservation of the life, health or well-being of an incompetent person who is unable to decide their own best interests or welfare.²⁹ It is this manifestation of the necessity defence that forms the focal point of this chapter, but prior to any detailed consideration of the scope of the necessity principle in this particular context, it is important to establish the rationale of the defence in order to explain why it operates to exonerate a defendant. Such theoretical discussion is distinctly lacking, even where the defence has been accepted, perhaps because it evades easy classification. The discussion proceeds primarily with a general consideration of the difference between defences which are considered justificatory and those which are excusatory, a distinction which is adopted throughout the thesis as a means of providing moral clarity regarding the operation of the defences.

615 where a doctor was found not guilty of any criminal offence for procuring an abortion on a fourteen year old rape victim as he was purportedly acting 'for the purpose of preserving the life of the mother'. See Peter R Glazebrook, 'The Necessity Plea in English Criminal Law' [1972] 30 *Cambridge Law Journal* 87.

²⁸ Simon Gardner, 'Direct Action and the Defence of Necessity' [2005] *Criminal Law Review* 371.

²⁹ The reluctance of the English legal system to acknowledge a defence of necessity has resulted in such cases being considered in terms of constructive consent but, as affirmed by Glanville Williams, in 'Necessity' [1978] *Criminal Law Review* 128 at 132, "it is a case not of consent but of necessity." Similarly, other commentators regard the implicit consent argument as a "fictitious" response to the problem of treating incompetent patients unable to consent to treatment, see John K Mason and Greame T Laurie, *Mason & McCall Smith's Law and Medical Ethics* 7th edition (Oxford: Oxford University Press, 2006) at 350-351.

3.3 Theoretical foundations of necessity

3.3.1 The distinction between justification and excuse

It is suggested in chapter two that a liberal philosophy which promotes the autonomy of individuals should only criminalise conduct which causes harm to another.³⁰ Further, it is submitted that harm comprises a *wrongful* violation of the rights pertaining to an individual. An interference with rights is not thought to be harmful if the defendant can offer a *justification* for their action. Hence, it may be possible to encroach on the rights of an innocent person without incurring criminal liability for the action, provided the infringement is permissible. It is also proposed that even where there has been a violation of rights, criminal responsibility may be avoided if the actor is not deserving of blame because s/he has a good *excuse* for their action. It is commonplace in criminal law theory to distinguish between the underlying nature of a defence as either justificatory or excusatory;³¹ indeed, some theorists *insist* that the criminal law should categorise defences in this way.³² Since a discussion of the classification could fill the pages of a thesis in its own right, the analysis offered here is inevitably limited to a synopsis of the principal ramifications of the distinction which are pertinent to the subsequent analysis.

Justifications and excuses operate as substantive exculpatory defences which absolve an actor of criminal responsibility even though the

³⁰ For further discussion of the harm principle, see section 2.3.1 above.

³¹ It must be noted that not all commentators subscribe to this mode of classifying defences. Colvin is particularly critical, claiming that criminal law would be better off without the distinction since labelling defences in this simplistic way does not do justice to the varying circumstances in which defences may arise, see Eric Colvin, 'Exculpatory Defences in Criminal Law' (1990) 10 *Oxford Journal of Legal Studies* 381 at 382 and 385.

³² This is a central theme within the work of prominent American criminal theorists, such as Paul H Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 *Columbia Law Review* 199 at 213-229 and George P Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978) at 552-568. English academics have also followed this approach, see Glanville Williams, 'The Theory of Excuses' [1982] *Criminal Law Review* 732, and it is now the most common mode of classification in the theory of criminal law defences.

elements of an offence are made out. If a defendant successfully establishes a justification or excuse for their *prima facie* wrongdoing, they will be absolved of responsibility completely. But what separates a justification from an excuse? Justifications and excuses are completely distinct normative conceptions which serve to absolve the actor of criminal responsibility in very different ways. The distinction is appropriately captured by Fletcher:

“...claims of justification concede that the definition of the offence is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor. A justification speaks as to rightness of an act; an excuse as to whether the actor is accountable for a concededly wrongful act.”³³

It would appear, then, on this account that if a defendant claims a justification for intruding on the rights of an innocent person, they claim to have not acted wrongly at all; but if a defendant claims an excuse the action is concededly wrongful and thus ordinarily prohibited by the criminal law, but the actor has some good reason why they are not culpable. The substance of each of these claims is considered in greater detail below.

3.3.1.1 Justifications

It is universally accepted that justifications provide a much stronger form of exculpation than excuses, for they concern the rightness of the action itself. Hart described a justification as “something the law does not condemn or even welcomes.”³⁴ If conduct is justified, the *wrongness* of

³³ Fletcher, *Rethinking Criminal Law* at 759. See also Miriam Gur-Arye, ‘Should a Criminal Law Distinguish between Necessity as a Justification and Necessity as an Excuse?’ (1986) 102 *Law Quarterly Review* 71.

³⁴ Hart, *Punishment and Responsibility* at 13. But note, in an engaging study, Suzanne Uniacke argues that justified conduct is conduct that one has a ‘right’ to do in a particular situation. Rather than being ‘congratulated’ or ‘welcomed’, it is perhaps better categorised as conduct which is ‘permissible’; see Uniacke, *Permissible Killing* at 26, and chapter 2 generally.

the action is denied; so although an actor may set back the interests of another, the action is outside the scope of criminalisation as the infringement is not wrongful.³⁵ It is submitted that:

"In the context of justifications, a defence is allowed because the special circumstances in which the action (otherwise criminal) is performed make the action desirable,³⁶ or at least permissible, from a social and moral point of view...The action is not wrongful, it is warranted."³⁷

A justification asserts that what the actor did is, all things considered, an acceptable thing to do. In the typical case of justification, the actor will have, on balance, normative reasons for their action and those guiding reasons explain why they acted *prima facie* in breach of the letter of the law. For instance, if a defendant is randomly and brutally attacked in an unprovoked incident, the circumstances justify her/his reaction in warding off the threat, and the defendant acts for those reasons by intruding on the (ordinarily) protected domain of the attacker. There is, however, some debate amongst academics as to whether justification defences are purely objective and concerned primarily with the defendant's act, or whether the defendant's belief is also significant in deciding whether the action should be justified. In other words, there is disagreement among theorists as to whether justifications are available where there are normative, or *guiding*, reasons for action, but these are not the reasons for which the defendant acts,³⁸ or conversely, where the defendant acts for what they believe to be good reasons, but where the guiding reasons for action do not actually exist because the actor's perception of the

³⁵ In other words, there is no *violation* of the rights of another, merely a permissible infringement; see section 2.3.1.3 for further discussion of this point.

³⁶ In 1811 Mr. Purcell of County Cork was knighted for killing four burglars with a carving knife; see JW Cecil Turner, *Kenny's Outlines of Criminal Law*, 19th edition (Cambridge: Cambridge University Press, 1966) at 141-143.

³⁷ Kugler, 'Necessity as a Justification in *Re A (Children)*' at 441. An example of a justification defence would be self-defence; the action is praiseworthy, or at least warranted, or permissible.

³⁸ Robinson is an advocate of this objective approach (also known as the 'deeds' theory) which suggests that if the deed produces a net social benefit, the action is justified irrespective of the reasons for which the defendant actually acted, see Paul H Robinson, 'Competing Theories of Justification: Deeds v Reasons' in *Harm and Culpability* at 45.

circumstances is mistaken.³⁹ Although there is limited scope for detailed discussion of these issues here, the approach adopted in this thesis is that a justification is only available where there are guiding (or normative) reasons for action and these guiding reasons correspond with the actor's explanatory reasons for so acting.⁴⁰ This assertion has important implications for issues considered later in the thesis, for instance, where the actor mistakenly believes they are about to be attacked, since there would be no justification for the action as there were no guiding reasons for it.⁴¹ Since both guiding and explanatory reasons must coincide for the actor to rely on a justification defence, such a defendant would only be entitled to an excuse in the absence of justifying circumstances. The adoption of a subjective or objective approach to justification, or alternatively a hybrid model of defences which incorporates both guiding and explanatory reasons for action which is supported here, also has ramifications for the categorisation of excuses, which are considered in further detail below.

3.3.1.2 Excuses

It is widely accepted that an excuse is operative not to confer approval, but to deflect punishment or blame; but excuses manifest themselves in very distinct ways.⁴² Some excuses state that the agent did not intend to perform the proscribed act; others concede that the action was intentional but simultaneously deny it was entirely voluntary; and in other cases the

³⁹ Christopher supports the subjective approach to justifications (also known as the 'reasons theory') which would provide a justification for the defendant as long as they acted for good reasons, even if there was in fact no good reason to act, see Russell L. Christopher, 'Unknowing Justification and the Logical Necessity of the *Dadson* Principle in Self-Defence' (1995) 15 *Oxford Journal of Legal Studies* 229 and 'Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights?' (1994) 85 *Journal of Criminal Law and Criminology* 295.

⁴⁰ Gardner, 'Justification and Reasons' in Andrew P. Simester and ATH Smith (eds.) *Harm and Culpability* (Oxford: Clarendon Press, 1996) at 121-122 at 105.

⁴¹ See section 4.3.3 below. Similarly if the defendant was unaware of the existence of circumstances which justified their action, and did not, therefore, act on the basis of those reasons, a justification defence is precluded.

⁴² Further discussion on the rationale of excuses with particular reference to the defence of duress will follow in chapter five below, see section 5.3.3 in particular.

agent is either incapable of forming a criminal intent or lacks the capacity for full deliberation of the moral and legal issues involved.⁴³ The availability of an excuse for criminal conduct signifies that:

“...the action is morally and socially forbidden even in the special circumstances of the case, but because of a special characteristic of the actor or because of the special circumstances in which the action is performed, the actor is not morally culpable (or sufficiently morally culpable) for the wrongful conduct.”⁴⁴

In short, the presence of an excuse admits that the action constituted a wrongful violation of rights, but concedes that the actor is not blameworthy for some reason *pertinent to the individual*.⁴⁵ Although some conditions typically classified as excuses, such as automatism, are intrinsically based on subjective reasons offered by the actor,⁴⁶ uncertainty surrounds other defences often classified as excusatory, such as duress. As discussed further in chapter five, duress typically provides a defence to an actor who commits a crime when faced with serious threats to their own interests, or those of another with whom they have a connection. Yet if the crime undertaken is relatively minor in comparison with the interest spared, for instance if petty theft is committed to save the life of a family member threatened by a third party, there appears to be a

⁴³ Leading criminal law theorists have categorised these defences as excuses (Joshua Dressler, 'Reflecting on Excusing Wrong-Doers: Moral Theory, New Excuses and the Moral Penal Code' (1988) 19 *Rutgers Law Journal* 671 at 682; George P Fletcher, 'The Individualisation of Excusing Conditions' (1974) 47 *Southern California Law Review* 1269 at 1293; Paul H Robinson, *Criminal Law Defenses* (St. Paul Minnesota: West Publishing, 1984) at 118; Kent Greenawalt, 'The Perplexing Borders of Justification and Excuse' (1984) 84 *Columbia Law Review* 1897 at 1915; and Sanford H Kadish, 'Excusing Crime' (1987) 75 *California Law Review* 257 at 262), although others prefer to classify them as 'lack of capacity' defences, as distinct from excuses, see John Gardner, 'Justification and Reasons'. Colvin uses the phrase defences of 'mental impairment' to separate those who fall outside the scope of criminal law altogether so do not need to rely on an excuse; see Colvin, 'Exculpatory Defences in Criminal Law' at 383. The merits of this approach are not strictly relevant to the present discussion, although it does seem intuitively more plausible for defences such as insanity and automatism to be categorised separately from the defences under consideration in this thesis.

⁴⁴ Kugler, 'Necessity as a Justification in *Re A (Children)*' at 441.

⁴⁵ Horder refers to an excuse revealing some personal justification or agent-specific reason for action, see Horder, 'Self-Defence, Necessity and Duress' at 161-162.

⁴⁶ That is, assuming defences such as automatism are regarded as excuse defences at all, see footnote 43 above.

strong justificatory element to the defence.⁴⁷ However individual excuse defences are constructed, it is clear that excuses deny the criminal responsibility of the actor, despite the action being recognised as wrongful, because the psychological state of the defendant or the circumstances of compulsion when the crime was committed were such that it ruled out public condemnation and punishment.⁴⁸

3.3.1.3 Is the distinction important?

The significance of this theoretical categorisation has been doubted by some commentators who consider that the distinction has no important connotations as both justification and excuse lead to a complete acquittal.⁴⁹ It is conceded that in practice acquittals are given with no mention of whether the defendant was excused or justified, so the public are unaware of the subtle distinction.⁵⁰ It has also been suggested that the dividing line between justification and excuse is neither fixed nor definite and that reasonable people can disagree about where the boundaries should be drawn.⁵¹ The contention is that the distinction is pointless unless there is universal agreement regarding the categorisation of each defence.

In response it is submitted here that the classification assumes great moral significance and helps us think carefully about the reasons why we

⁴⁷ It is submitted below in section 5.3.2 that despite the presence of strong justificatory circumstances, the reasons remain agent specific and therefore duress is an excuse defence which retains an element of objectivity in that the response to threats must be reasonable in the circumstances.

⁴⁸ Hart, *Punishment and Responsibility* at 13-14.

⁴⁹ This opinion has been voiced recently by Chris MV Clarkson, 'Necessary Action: A New Defence' [2004] *Criminal Law Review* 81, in particular, at 85. See also Jerome Hall, *General Principles of Criminal Law*, 2nd edition (Indianapolis: New York, 1960) at 228, and 'Comment on Justification and Excuse' (1976) 24 *American Journal of Comparative Law* 638; see also Mordechai Kremnitzer, 'Proportionality and the Psychotic Aggressor: Another View' (1983) 18 *Israel Law Review* 178 at 196-199.

⁵⁰ See Colvin, 'Exculpatory Defences in Criminal Law'. A possible solution would be the express declaration of classification as an integral part of the verdict, clarifying whether or not such behaviour will be tolerated in future, see Robinson 'Criminal Law Defenses: A Systematic Analysis' at 247.

⁵¹ Colvin, *Ibid.* at 384.

are prepared to deny the criminal responsibility of an actor.⁵² There is unlikely ever to be universal agreement regarding any theoretical discussion, but that does not render philosophical analysis futile. In any case, it has been suggested that the distinction has some important practical consequences. For instance, it is claimed that sanctions of some kind, punitive or rehabilitative, may be attached to excuse forms of a defence but not to justificatory defences.⁵³ The classification of conduct as justificatory or excusatory also has important implications for the rights of others, namely the victim and third parties. Where an act is justified, there is a corresponding duty not to resist the actor, since no two parties in any one conflict can be justified. The victim of an excused attack, say because the defendant mistakenly believed they were about to be attacked, may, however, permissibly resist such action. Perhaps more striking are the consequences for the rights of assistance of third parties. It is permissible for a third party to assist someone in performing a justified act; but a third party cannot justifiably assist an excused act.⁵⁴ Furthermore, it is suggested that justification defences may act as societal guides to acceptable behaviour,⁵⁵ in the sense that in a dilemmatic situation, an individual may rely on justification defences to illustrate the faultlessness of their action. Excuse defences do not convey an equivalent message, as excusable behaviour does not, in itself, denote a 'right way' to act.⁵⁶ Hence, the justification and excuse distinction is adopted here as a useful way of categorising the relevant defences in order to clarify our understanding of their moral substance. Further elaboration, and relevant application, of the justification and excuse doctrine will be offered at sections 3.3.2, 4.3 and 5.3 below when

⁵² Hart, *Punishment and Responsibility* at 13.

⁵³ For instance, if the defence of insanity is successfully invoked, the defendant may be subject to compulsory medical treatment as they are a continuing risk to the public and are at times incapable of co-operating with the criminal law (although this latter reason supports the assertion that insanity is a 'lack of capacity' defence rather than an excuse).

⁵⁴ Fletcher, *Rethinking Criminal Law* at 760; cf. Rodin, *War and Self-Defense* at 30-33.

⁵⁵ See Andrew Ashworth, *Principles of Criminal Law*, 3rd edition (Oxford: Oxford University Press, 1999) at 138; and Donald L Horowitz, 'Justification and Excuse in the Program of the Criminal Law' (1986) 49 *Law and Contemporary Problems* 109 at 112.

⁵⁶ However, excusable behaviour may operate as a negative guide to conduct, in that it may demonstrate, for example, that defenders should not utilise self-defensive force irrationally and should treat the accuracy of their beliefs with caution.

the theoretical underpinning of necessity, self-defence and duress is considered in more detail.

Although it is generally accepted that action taken as a matter of necessity to assist another in the absence of their consent is not unlawful, there is limited discussion as to why this is so. If necessity provides a defence for an otherwise unlawful intrusion, does it operate as a justification for the interference or merely an excuse? The theoretical underpinning of necessity is seldom addressed, perhaps because it does not appear to have any unitary rationale.⁵⁷ The residual nature of necessity and the lack of stringent conditions attached to the defence make it difficult to establish exactly when and why it denies criminal responsibility. It is suggested below that the defence provides a justification for what would otherwise be criminal action, and the precise nature of the justification, at least in relation to intervention in the best interests of the incompetent patient, is located in a rights-based theory.

3.3.2 Necessity: justification or excuse?

There is clearly a commixture of purpose within the necessity defence, which makes the underlying rationale variable. The theoretical underpinning of necessity is, however, an issue which may at least prove academically and morally significant, given that the reasons why we are prepared to excuse a defendant may be quite distinct from the corresponding reasons for justification.⁵⁸ As suggested in section 3.3.1.3 above, defining the appropriate theoretical classification conveys an important message regarding the rightness or wrongness of the action. The justification / excuse categorisation does not, however, appear to

⁵⁷ As suggested by Simester and Sullivan *Criminal Law: Doctrine and Theory* at 716.

⁵⁸ Michael J Allen, *Elliott & Wood's Cases and Materials on Criminal Law* 8th edition (London: Sweet & Maxwell, 2001) at 284.

have been applied to the necessity defence with any consistency;⁵⁹ it is treated as justificatory in some contexts and excusatory in others. The sub-division of the defence of necessity into one of excuse and one of justification is arguably necessary to reflect the preferences of society in cases where there are conflicting interests.⁶⁰

In comparison to other manifestations of the necessity defence, however, the theoretical underpinning of the 'best interests' formulation is relatively uncomplicated. At first blush, the only conceivable rationale for denying liability for crimes that violate the personal interests of another in pursuit of their best interests *must* surely be justificatory. Interference with the rights of incompetent or otherwise unconscious patients in order to treat them appropriately is surely something to be tolerated if not praised.⁶¹ It is submitted here that for the necessity defence to absolve the actor of criminal responsibility, there must be an *overriding reason* for the intrusion on the rights of an innocent person. If a reason for acting is overriding it outweighs any countervailing reasons for not acting and creates what Horder calls a *moral imperative* to act.⁶²

3.3.3 Necessity as a justification

The task of defining an appropriate theoretical underpinning of necessity is complicated by the fact that cases of necessity "do not always involve the same *type* of justification, with the same parameters and scope."⁶³ Essentially there are two different streams of justification which could be applicable to the necessity defence: consequentialist or utilitarian

⁵⁹ See the decision of Brooke LJ in *Re A (Children)*, where the necessity doctrine was introduced in its excusatory form; contrasted with, for example, Kugler, 'Necessity as a Justification in *Re A (Children)*'.

⁶⁰ Exponents of this view include Fletcher, *Rethinking Criminal Law* at 774-798 and 885; and Albin Eser, 'Justification and Excuse' (1976) 24 *American Journal of Comparative Law* 621 at 634-637.

⁶¹ To this end, cases involving intrusions against the person have a very strong affinity with self-defence cases, which are necessarily justificatory in nature.

⁶² Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' at 156.

⁶³ Chan and Simester, 'Duress, Necessity: How Many Defences?' at 124.

justifications; and justifications deriving from the rights of the person concerned. Although there is limited guidance as to which type of justification applies when, the following sections will define an appropriate rationale for the necessity principle, focussing on the application of the defence in a medical context.

3.3.3.1 Lesser evils justification

Traditionally necessity is often grounded on utilitarian calculations, that is, the harm done is outweighed by the resultant good.⁶⁴ On the basis of a utilitarian rationale, necessity as a justification is frequently referred to as the 'lesser evils'⁶⁵ or 'choice of evils' defence.⁶⁶ If society expresses approval of the sacrifice of a legitimate interest that is of substantially lesser value than another interest, such conduct may be justified. According to Robinson, the "harm [to the victim's interests] is outweighed by the need to avoid an even greater harm or to further a greater societal interest,"⁶⁷ and on this view conduct which maximises social welfare should be permitted, if not positively encouraged.

A defence of necessity based purely on utilitarian principles is, however, unsustainable since any account which focuses solely on the consequences of an action may justify conduct which is essentially immoral, such as the killing of one innocent person to save two. The utilitarian theory of necessity implies the subordination of individual rights in furtherance of the greater good,⁶⁸ with the result that there is no clear

⁶⁴ See Glanville Williams, 'The Defence of Necessity' (1953) *Current Legal Problems* 216; Fletcher, *Rethinking Criminal Law* at 788-798; and Paul H Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 *University of California at Los Angeles Law Review* 266.

⁶⁵ Suzanne Uniacke, 'Was Mary's Death Murder?' (2001) 9 *Medical Law Review* 208 at 215.

⁶⁶ Necessity in a 'lesser evils' form is recognised by the US Model Penal Code, section 3.02 and the German Penal Code, section 34, and on the definition offered would justify the taking of an innocent life to achieve a net saving of life.

⁶⁷ Robinson, 'Criminal Law Defenses: A Systematic Analysis' at 213.

⁶⁸ Wilson, *Criminal Law Doctrine and Theory* at 249, who comments that a utilitarian approach is "capable of defeating rights without democratic accountability."

'law' of necessity with any discernable principles. In *Perka*, Wilson J submitted that any assessment "cannot entail a mere utilitarian calculation of, for example, lives saved and deaths avoided in the aggregate but must somehow attempt to come to grips with the nature of the rights and duties being assessed..."⁶⁹ Decisions regarding the appropriateness of the justification would have to be made on a case-by-case basis.⁷⁰

This lesser evils explanation of necessity has been fiercely rejected in the case of medical interventions,⁷¹ and Wilson notes that there is certainly no reference in the cases to doctors having to make a choice between two evils.⁷² In cases where the concrete interests are vaguely comparable and the crimes are victimless, a lesser evils calculation may be satisfactory;⁷³ but in cases where life and liberty is at stake the balancing of harms proves much more difficult and it appears that the lesser-evils evaluation cannot do all of the work. By intruding on the bodily integrity of an innocent incompetent patient, in contrast to other necessity cases covered later in the thesis which involve a conflict between the actor's interests and the victim's,⁷⁴ the doctor is not acting in her/his own interests at all. Hence it is strongly suggested that the utilitarian approach is not the correct basis for necessity at least in the context of the 'best interest' cases.

⁶⁹ *Perka v. R* (1984) 13 DLR (4th) 1 at 36.

⁷⁰ For a particularly insightful critique, see Brudner, 'A Theory of Necessity' at 342-344.

⁷¹ As suggested by Simon Gardner, 'Necessity's Newest Inventions' (1991) 11 *Oxford Journal of Legal Studies* 125 at 131, Williams, *Textbook of Criminal Law*, chapter 26; and is implicit in the work of Brudner, 'A Theory of Necessity' who rejects any manifestation of a utilitarian theory of necessity as a justification.

⁷² Wilson, *Criminal Law Doctrine and Theory* at 253.

⁷³ Simester and Sullivan make this point in relation to the example of the driver of a fire engine who speeds through a red light on the way to effect the rescue of a person trapped in a burning building. The lesser-evils calculus is compatible with such cases as there is no difficulty in distinguishing the relative value of a minor traffic offence and the value of life, and the offence does not impinge on the rights of another (i.e. the crime is victimless); see Simester and Sullivan *Criminal Law: Theory and Doctrine* at 717.

⁷⁴ See section 4.5.3 and section 5.6.

3.3.3.2 Rights-based justification

If the balance of harms test does not provide a plausible explanation of the necessity defence in the context of medical interventions, it is submitted here that the necessity justification is better understood as a vindication of rights. That is, necessity provides a defence where a defendant sets back the interests of an innocent person in order to secure a superior interest. Such a rights-based analysis seems to offer a “more robust analytical tool”⁷⁵ than the utilitarian explanation offered above. In *Re F* Lord Goff suggests that encroaching on the bodily integrity of the patient is justified only on the basis that it promotes or respects the rights of a patient. The calculation of whether the invasive treatment is justified is, after all, governed by an evaluation of the *best interests* of the patient.⁷⁶ A rights-based justification of necessity maintains that intervention is not justified if it is contrary to the known wishes of the competent patient; so although treatment may appear to be in the best physical interests of the patient, it does not show sufficient respect for the patient’s right to autonomy.

As suggested in section 2.3.1.3 above, central to our understanding that rights can be justifiably setback is the idea that rights are not absolute. Brudner suggests that rights can be overridden in circumstances where ordinarily a breach of that right would constitute an unlawful violation.⁷⁷ Rights are capable of being ordered because some are more dispensable to the moral agent than others. For instance, a right to property is necessarily subordinate to a right to personhood, as the more essential value must be preferred in any conflict. Bodily intrusions which would otherwise be unlawful may therefore be justified if such action vindicates a right which is superior to the interest protected by the law.⁷⁸ In other words, the action of a doctor treating a mentally incompetent patient without consent may be justified if that treatment saves the life of the

⁷⁵ Gardner, ‘Direct Action and the Defence of Necessity’ at 377.

⁷⁶ Per Lord Goff in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 74.

⁷⁷ Brudner, ‘A Theory of Necessity’ at 360-361.

⁷⁸ Gardner, ‘Direct Action and the Defence of Necessity’ at 377.

individual, a right which is arguably more fundamental than the slavish protection of a right to bodily integrity. Although privacy, autonomy and physical integrity, for instance, are fiercely protected and would rank at the forefront of any hierarchy of the seriousness of harms, if the intrusion serves to enhance the living standard of the incompetent patient unable to consent and is, on balance, socially valuable to the actor and others, it is suitably exempt from criminal sanction.

It seems, then, that an anti-consequentialist rights-based theory of justification provides the most plausible explanation of the necessity defence in the context of intervention taken against an incompetent patient in their own best interests. Even though certain rights may be subject to legitimate infringement, these rights are enduring and only the minimum level of intrusion to protect the more essential value will be tolerated. The right of necessity only arises where there is no available legal alternative and where the threat to agency is imminent. Absent these restrictions, which are considered further below, the violated right would seem to be yielding to the self-preference of the accused as opposed to some higher value.

3.4 The conditions of necessity

Any consideration of the restrictions on the operation of necessity is inevitably brief since the defence is not, unlike self-defence and duress, furnished with easily discernable rules and principles. As established above, the necessity defence can, in principle, be used to justify the commission of both victimless crimes, such as driving offences, and intrusions on minor property rights to protect, say, the right to life of another, if breaking the letter of the law is required to avert some greater harm. It is also argued in chapter four below, that the defence may *very occasionally* permit intrusions on the personal rights of an innocent

person in strictly limited circumstances.⁷⁹ However, since there is no singular rationale and the defence is often used as a residual device when no other defence is available, it is not governed by precisely defined rules. Williams insightfully commented that the “peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to prevision.”⁸⁰ Nonetheless, an attempt will be made to illustrate some boundaries for the defence below.

Stephen articulated the most authoritative definition of necessity in his *Digest of Criminal Law*,⁸¹ and these rules were recently reiterated in *Re A (Children: Conjoined Twins)*.⁸² The success of a necessity plea is dependent on the satisfaction of three conditions: the act must be done to avoid inevitable and irreparable evil; no more should be done than is reasonably necessary; and the evil inflicted must not be disproportionate to that avoided. Taken literally, however, arguably these rules “would allow extreme invasions of the personal integrity of autonomous, non-threatening persons whenever...welfare overall would be increased.”⁸³ Suppose X is on his deathbed and urgently requires a blood transfusion; the hospital fail to locate an appropriate blood donor, given his very rare blood group, but another patient, Y, is found to be a perfect match. According to the rules articulated by Stephen and endorsed in *Re A*, the necessity defence may justify using force against Y to give blood in order to save X’s life. Although, on a balance of interests, the right to life is arguably superior to the right to bodily integrity, it is universally agreed that this kind of rights violation of an innocent person should not be permitted by law. Without further guidance as to the precise ambit of the defence, this kind of intrusion remains, conceptually at least, permissible on the rules articulated here. It has been asserted that the ill-defined

⁷⁹ See section 4.5.3 below for further discussion of this point.

⁸⁰ Glanville Williams, *Criminal Law: The General Part* 2nd edition (London: Stevens & Sons, 1961) at 724.

⁸¹ James Fitzjames Stephen, *A Digest of the Criminal Law* 4th edition (London: John Murray, 1887) at 9.

⁸² Per Brooke LJ in *Re A (Children: Conjoined Twins)* [2000] 4 All ER 961 at 1037-1038.

⁸³ Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 720.

scope of the defence, although regrettable, is perhaps unavoidable given that:

“...the law of cases of necessity is not likely to be well-furnished with precise rules...[since]...necessity creates the law; it supersedes rules; and whatever is reasonable and just in such cases is likewise legal. It is not to be considered a matter of surprise, therefore, if much instituted rule is not to be found on such subjects.”⁸⁴

It seems that the courts are reluctant to develop the necessity defence on anything other than a case-by-case basis, but this thesis will, in due course, attempt to provide a more principled approach to the wide-ranging defence. For now, the discussion will focus on the application of the necessity principle where the victim's rights are infringed in their ‘best interests’, one of the few contexts in which it has been explicitly recognised.

The English courts have, often controversially, utilised the necessity principle to defend non-consensual treatment including: caesarean section operations performed in spite of objections from the woman in labour; sterilisation operations on the mentally incapacitated for both therapeutic and non-therapeutic reasons; and detention of incompetent patients lacking the capacity to make decisions regarding such detention. The imposition of non-consensual treatment on innocent people strikes at the very core of individual autonomy but is often necessary to enhance the quality of life of the individual. The use of the necessity principle in this context thus raises many difficult issues. The courts are mindful of the fact that any deviation from the principle of self-determination is troublesome. This trepidation is acknowledged by the statement that, “We have too often seen freedom disappear in other countries not only by coups d'état but by gradual erosion: and often it is the first step that counts. So it would be unwise to make even minor concessions.”⁸⁵

⁸⁴ Per Sir William Scott in *The Gratitude* (1801) 165 ER 450 at 459.

⁸⁵ Per Lord Reid in *W v W* [1972] AC 24 at 43. Indeed, the right to bodily integrity is included within the ambit of Article 8 of the European Convention on Human Rights,

Nonetheless, minor concessions have been made, and it is within this context that the necessity defence and its applicability to interventions in the best interests of innocent persons will be examined. The discussion begins with an analysis of the primacy of a competent patient's right to make their own choices regarding medical care before proceeding to consider the more precarious position of the innocent patient incapable of giving consent to treatment where the principle of necessity plays a significant role.

3.5 Intruding on the rights of a *competent* patient

As expressed earlier in the thesis, self-determination lies at the heart of any democratic society: "...the power of self-direction as an embodied human being is even more substantively conditional of human worth and dignity than most of the political rights reputed to be basic in a liberal society."⁸⁶ It is a cornerstone of medical law that the right to bodily integrity and autonomy of the competent⁸⁷ patient are paramount and the right to accept or refuse treatment which constitutes an interference with those rights cannot be coerced. It is generally and universally accepted that, the human body is what separates the individual from the world and is therefore the primary object of each individual's autonomy.⁸⁸ This autonomy must be respected because it "encourages and protects people's general capacity to lead their lives out of a distinctive sense of their own character, a sense of what is important to and for them."⁸⁹ Indeed, respect for the competent patient's self-determination constitutes

which secures a right to respect for private life, as decided by the European Court of Human Rights in *X and Y v. Netherlands* (1986) 8 EHRR 235 at paragraph 22.

⁸⁶ Beverley W Harrison, *Our Right to Choose: Towards a New Ethic of Abortion* (Boston: Beacon Press, 1983) at 341.

⁸⁷ For a detailed discussion on the concept of competence, see Tom Buller, 'Competence and Risk-Relativity' (2001) 15 *Bioethics* 93. See also section 3.6.1 below for further discussion on the meaning of incapacity.

⁸⁸ Laurence H Tribe, *American Constitutional Law* (Foundation Press, 1979) at 15-19.

⁸⁹ Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (London: Harper Collins, 1993) at 224.

good medical practice⁹⁰ and autonomous treatment choices are now implicitly protected by the Human Rights Act 1998. Although the European Convention on Human Rights does not *expressly* preserve a right of self-determination, this notion is central to the other rights protected by it.⁹¹ So the overarching ethos of the Convention is the primacy of autonomy.

3.5.1 The primacy of patient autonomy

Judicial recognition of the unreserved right of a competent adult to refuse medical treatment, even where his or her own life depends on it, demonstrates the real significance of individual autonomy in a liberal society. The courts acknowledge that the personal rights of a competent patient trump any notion that medical intervention was 'necessary' from the doctor's perspective. In *Re F*, discussed further below, Neill LJ declared that the right of a competent adult to refuse medical treatment existed "even where there are overwhelming medical reasons in favour of the treatment and *probably* even where if the treatment is not carried out the patient's life will be at risk."⁹² A more robust commitment to patient autonomy was subsequently adopted by the House of Lords in the seminal case of *Airedale NHS Trust v. Bland*.⁹³ Lord Goff, in considering the issues surrounding the possible withholding of treatment of a victim of the Hillsborough disaster who was in a persistent vegetative state, authoritatively stated:

⁹⁰ British Medical Association, *Withholding and Withdrawing Life-prolonging Medical Treatment: Guidance for Decision Making* 2nd edition (British Medical Association, 2001) at paragraph 9.1, which states, "It is well established in law and ethics that competent adults have the right to refuse any medical treatment, even if that refusal results in their death."

⁹¹ Various rights contained in the European Convention on Human Rights may be relevant to patient autonomy, including, for instance, Article 5 (the right to liberty) and Article 8 (the right to respect for private and family life). See also Elizabeth Wicks, 'The Right to Refuse Medical Treatment under the European Convention on Human Rights' (2001) 9 *Medical Law Review* 17 at 17.

⁹² *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 29 (emphasis added). Note the typical reluctance of the judiciary to make any kind of commitment to principle when life and death decisions are at issue.

⁹³ *Airedale NHS Trust v. Bland* [1993] AC 789.

“...it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that, if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so... To this extent, the principle of the sanctity of human life must yield to the principle of self-determination.”⁹⁴

Further support for this view can be found in the words of Lord Mustill in that same case:

“If the patient is capable of making a decision on whether to permit treatment and decides not to permit it his choice must be obeyed, even if on any objective view it is contrary to his best interests. A doctor has no right to proceed in the face of objection, even if it is plain to all, including the patient, that adverse consequences and even death will or may ensue.”⁹⁵

The priority of the principle of patient self-determination and autonomy was also expressed in *Re T*⁹⁶, a case involving undue influence being placed upon a patient to deny a blood transfusion on religious grounds. Butler-Sloss LJ declared:

“A man or woman of full age and sound understanding may choose to reject medical advice and medical or surgical treatment either partially or in its entirety. A decision to refuse medical treatment by a patient capable of making the decision does not have to be sensible, rational or well-considered.”⁹⁷

It seems appropriate to acknowledge at this juncture that although patient autonomy should be encouraged, greater rationality and deliberation by patients should equally be promoted. As one commentator notes, “[n]ot to make the effort to promote rational, critical deliberation is to risk a very

⁹⁴ Per Lord Goff in *Airedale NHS Trust v. Bland* [1993] AC 789 at 864.

⁹⁵ Per Lord Mustill in *Airedale NHS Trust v. Bland* [1993] AC 789 at 891. This opinion is further validated in the speech of Lord Browne-Wilkinson at 882-884.

⁹⁶ *Re T (Adult: Refusal of Medical Treatment)* [1993] Fam 95, discussed in greater detail below.

⁹⁷ Indeed, the remaining judges in the Court of Appeal (Lord Donaldson MR and Staughton LJ) expressed similar support for the fundamental principle of patient autonomy.

contemporary form of patient abandonment: abandonment of human rationality.”⁹⁸ Great care should be taken to ensure that competent patients make considered decisions regarding medical treatment. To this end, a degree of paternalism appears justifiable in order to guard against excessively individualistic considerations, but only insofar as the intervention encourages an informed competent decision and does not interfere with patient autonomy. In support of this approach, Glick has submitted that:

“it is high time that the pendulum which has swung from overbearing, autocratic and insensitive paternalism to an often cruel and dangerous autonomy, be allowed to swing back to a more moderate and sensible balance between autonomy and beneficence.”⁹⁹

Nonetheless, although doctors may do all that they can to persuade a patient to undergo a particular course of treatment, ultimately a patient with the requisite capacity has, and indeed *should* have, the final word regarding any potential invasions of their bodily integrity. Despite judicial adherence to the view advanced in this thesis that the rights of autonomous patients should not be interfered with even for the patient's own good, the following discussion suggests that occasionally the primacy of patient autonomy is diluted.

3.5.2 Undermining patient autonomy?

Whilst the law in relation to the refusal of invasive treatment of a competent adult appears to be relatively settled, dispensing with the non-consensual treatment of mentally competent patients without further consideration ignores other serious issues arising from specific cases. The courts have sometimes permitted one possible exception to the

⁹⁸ Julian Savulescu & Richard W Momeyer, 'Should Informed Consent be based upon Rational Beliefs?' (1997) 23 *Journal of Medical Ethics* 282 at 287.

⁹⁹ Sharon Glick, 'The Morality of Coercion' (2000) 26 *Journal of Medical Ethics* 393 at 393.

primacy of patient autonomy, as respect for the treatment decisions of one particular group of competent adults has not been steadfast: pregnant women who refuse caesarean section operations. In these cases, the freedom to make valid treatment decisions appears almost illusory, as often women are legally compelled to undergo surgery as it is *necessary* in order to save the foetus.

When caesarean sections are forced upon a woman because the potential life of a foetus is at risk the intrusion on the woman's body raises important issues regarding individual autonomy and the rights and status of a viable foetus. In such a conflict it is clear that the courts will be faced with a "novel problem of considerable legal and ethical complexity."¹⁰⁰ The dilemma is concisely articulated as follows: "[i]f human life is sacred, why is a mother entitled to refuse to undergo treatment if this would preserve the life of the foetus without damaging her own?"¹⁰¹ This suggests that when deciding the necessity of intervention the courts must balance the right to bodily integrity of the woman with the "unborn child's right to live" and the "state's compelling interest in preserving the life of the foetus."¹⁰² When life (or more accurately, potential life) is at stake the justifications for unwanted medical intervention are particularly powerful as the right to life is a unique and fundamental right, and therefore, according to Kadish, "society must place a high value on preserving it."¹⁰³ However, if the right to life of the foetus were to be deemed paramount, assuming that the foetus could even claim a right to life in the first instance, this would undermine to the point of extinction the principle of

¹⁰⁰ Acknowledged by Lord Donaldson in *Re T (Adult: Refusal of Medical Treatment)* [1993] Fam 95 at 102. In this case, T, a pregnant patient of 34 weeks gestation was admitted to hospital following a road accident. When alone in a hospital room with her mother (a Jehovah's Witness) she had stated that she did not wish to have a blood transfusion, despite the fact that she was not a member of that faith. The child was stillborn and the patient's condition rapidly deteriorated; she was sedated and given artificial ventilation. Her father applied to the court for a declaration that the hospital could administer a blood transfusion in the absence of her consent. The declaration was granted.

¹⁰¹ *St. George's Healthcare NHS Trust v. S* [1998] 3 WLR 936 at 953.

¹⁰² As articulated in the US case *Jefferson v. Griffin Spalding County Hospital Authority* 524 F.2d 171 (5th Cir. 1975).

¹⁰³ Sanford H Kadish, 'Respect for Life and Regard for Rights in the Criminal Law' (1976) 64 *California Law Review* 871 at 871.

autonomy and the fundamental right to self-determination of the mother.¹⁰⁴ The overriding principle, it follows, should be that of self-determination; the individual has the fundamental right to decide what shall be done with their own body. In practice, however, a very different picture emerges.

In recent years, one of the most controversial cases involving an intrusion on the protected interests of a pregnant woman was the decision of *Re S*,¹⁰⁵ in which the High Court authorised a caesarean section operation to be lawfully performed despite the contrary wishes of the competent patient and her husband.¹⁰⁶ Sir Stephen Brown, the presiding judge, was mindful of the urgency of the declaration¹⁰⁷ and his decision was undoubtedly, and perhaps somewhat inevitably, coloured by the 'life and death'¹⁰⁸ situation with which the court was presented. By the time the hospital was notified of the decision, however, the foetus had died *in utero*. At first glance, this decision is arguably inconsistent with Article 8 of the European Convention on Human Rights as it constitutes a serious interference with the right to respect for private life.¹⁰⁹ Such interference can only be justified by necessity if the patient is incapable of giving or refusing consent; but this issue was not raised in *Re S*.¹¹⁰ The troubling implication is that the necessity defence could sometimes be used to justify an intrusion on the rights of a competent patient. Sir Stephen Brown P sought to rely primarily on the US authority of *Re AC* to support

¹⁰⁴ This view was supported in the US case of *McFall v. Shrimp* 127 Pitts LJ 14 (1978) in which Flaherty J stressed, "[f]or our law to compel the defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual..."

¹⁰⁵ *Re S (Adult: Refusal of Medical Treatment)* [1992] 3 WLR 806.

¹⁰⁶ The couple were described as 'born again Christians' and had thereby refused consent to the operation on religious grounds.

¹⁰⁷ The High Court hearing took less than an hour.

¹⁰⁸ *Re S (Adult: Refusal of Medical Treatment)* [1992] 3 WLR 806 at 807. It was stressed within the judgment that without the performance of a caesarean section there was a grave risk that the woman's uterus would rupture, which resulted in a potentially fatal risk to both the woman and the foetus.

¹⁰⁹ Wicks, 'The Right to Refuse Medical Treatment Under the European Convention on Human Rights' at 24. It is important to note, however, that at the time of the decision the Human Rights Act 1998 was not yet in force.

¹¹⁰ *Re S* is not an isolated example of such a decision. See also *Tameside and Glossop Acute Services Trust v. CH* [1996] 1 FLR 762 and *Norfolk and Norwich Healthcare NHS Trust v. W* [1996] 2 FLR 613.

his decision.¹¹¹ Further examination of an earlier American authority involving a forced caesarean section might also shed light on the *Re S* decision.

Re AC was preceded by the case of *Jefferson*¹¹², the only other *reported* example of a caesarean operation being forced on a competent woman in the United States.¹¹³ In *Jefferson*, a caesarean section was thought to be medically necessary as the woman was suffering from placenta previa, a condition which resulted in a 99 per cent chance of the foetus dying and around a 50 per cent chance of the patient dying. Despite this prognosis, the woman declined a caesarean section and refused a blood transfusion on religious grounds. The Court performed what it viewed as a balancing act between respect for the defendant's liberty and the "state's duty to protect a living, unborn human being from meeting his or her death before being given the opportunity to live."¹¹⁴ The following conclusion was reached;

"...we weighed the right of the mother to practise her religion and to refuse surgery on herself, against the unborn child's right to live. We found in favor [*sic*] of the child's right to live."¹¹⁵

Hence the obstetrical intervention was declared necessary to protect the child's rights at the subordination of the mother's.¹¹⁶ The Court used emotive language¹¹⁷ and, contrary to the earlier stance taken in the landmark case of *Roe v. Wade*,¹¹⁸ appeared to treat the foetus as a moral

¹¹¹ *Re AC* 573 A 2d 1235 (1990).

¹¹² *Jefferson v. Griffin Spalding County Hospital* 247 Ga 86 (1981).

¹¹³ Although there are purportedly many other unreported examples, see Veronica EB Kolder, Janet Gallagher and Michael T Parsons, 'Court Ordered Obstetrical Interventions' (1987) 316 *New England Journal of Medicine* 1192.

¹¹⁴ *Jefferson v. Griffin Spalding County Hospital* 247 Ga 86 (1981) at 88.

¹¹⁵ *Ibid.*

¹¹⁶ In the event, the mother gave birth by natural means and there was ultimately no requirement for a caesarean section operation; nonetheless the judgment had wider implications in the realm of medical intervention.

¹¹⁷ The foetus was referred to at various stages as a 'child'; a 'viable unborn child'; an 'unborn human being'; and an 'unborn child'.

¹¹⁸ *Roe v. Wade* 34 93 S Ct 705 (1973). Further analysis of the legal status of the foetus in American law can be found in Janet Gallagher, 'Prenatal Invasions and Interventions: What's Wrong With Fetal Rights?' (1987) 10 *Harvard Women's Law Journal* 9 at 40-41.

and legal individual with rights worthy of balancing against those of the mother.

In the subsequent case of *Re AC*¹¹⁹, Angela Carder became pregnant at the age of 28. She had cancer since childhood, and in her 26th week of pregnancy, the cancer attacked her lungs. The Medical Centre at which she was residing sought an emergency order to perform a caesarean section in an attempt to save the foetus, in light of the fact that Miss Carder was already destined for death. Despite the contrary wishes of the patient, her partner and her doctors, an order that the operation would be lawful as it was necessary on a balance of interests, was granted expeditiously. Angela Carder died two days after the operation and the foetus proved not to be viable. On appeal, the District of Columbia Court of Appeals initially approved the decision of the lower court, asserting that “the trial judge did not err in his subordinating AC’s right against bodily intrusion to the interests of the unborn child.”¹²⁰ This opinion was justified by the Court on the grounds that AC only had a couple of days to live irrespective of the operation, despite the fact that the decision meant that she “lost the last two days of her life, and her right to a dignified death, as she was forced to undergo major surgery for the benefit of an unviable fetus [*sic*].”¹²¹ In response to fierce criticism, the Court reheard the case and years later subsequently overruled the decision finally acknowledging that setting back the interests of a competent person against their wishes could not be justified by the necessity principle.¹²² However, a potentially significant caveat was inserted; that if there were ‘truly extraordinary and compelling reasons’, the court may be permitted to override the wishes of the competent patient.¹²³ It is submitted here that no such truly compelling reasons exist if the autonomy of the patient is to be respected.

¹¹⁹ *Re AC* 533 A 2d 611 (1987). After much criticism of the decision, the case was subsequently reconsidered in *Re AC* 573 A 2d 1235 (1990).

¹²⁰ Per Nebeker AJ in *Re AC* 533 A 2d 611 (1987) (DC Ct App).

¹²¹ Michael Thomson, ‘After *Re S*’ (1994) 2 *Medical Law Review* 127 at 136.

¹²² *Re AC* 573 A 2d 1235 (1990) at 1252.

¹²³ *Ibid.*

On closer investigation, *Re AC* is an authority which eventually concluded that any invasive treatment on the body of a competent patient against their wishes is indefensible, even if without it the foetus will die. The ultimate ruling in *Re AC* is, in fact, seen as a something of a landmark decision in the United States, “marking the conclusion of a decade of judicially sanctioned obstetrical intervention.”¹²⁴ The US authority does not seem to support or validate the declaration made in *Re S*. Consequently, returning to the decision in *Re S*, it appears to be based on somewhat dubious authority¹²⁵ and runs counter to settled common law precepts which dictate that competent individuals can legitimately exercise the right to refuse medical treatment and that any intrusion on their interests is unlawful and cannot be justified on the grounds that it was necessary. The judgment also contradicts another settled principle of English law; that the foetus has no legal personality and does not acquire legal rights until it exists as a live child, “that is to say breathing and living by reason of its breathing through its own lungs alone, without deriving any of its living to power to live by or through any connection with its mother.”¹²⁶ In *Re MB*¹²⁷, it was declared, albeit *obiter*, that:

“...the foetus up to the moment of birth does not have any separate interests capable of being taken into account when a court has to consider an application for a declaration in respect of a Caesarean section operation. The court does not have the jurisdiction to declare that such medical intervention is lawful to protect the interests of the unborn child even at the point of birth.”¹²⁸

This statement appears to reflect the general consensus in English common law that the foetus does not acquire individual rights until it can

¹²⁴ *Ibid.* at 128. This decade of judicial intervention began with the decision of the Supreme Court of Georgia in *Jefferson v. Griffin Spalding County Hospital* 247 Ga 86 (1981).

¹²⁵ Indeed, the decision appears to have more in common with the equally dubious judgment in *Jefferson v. Griffin Spalding County Hospital* 247 Ga 86 (1981).

¹²⁶ *Rance v. Mid-Downs Health Authority* [1991] 1 QB 587 at 621.

¹²⁷ *Re MB (Adult: Medical Treatment)* [1997] 2 FCR 541, in which the Court of Appeal ruled that it would be unlawful to require a caesarean section operation against the wishes of a competent patient.

¹²⁸ *Re MB (Adult: Medical Treatment)* [1997] 2 FCR 541 at 561, per Butler-Sloss.

sustain an independent existence from the mother.¹²⁹ Similarly, numerous statutory provisions declare the primacy of the mother's rights over that of the foetus,¹³⁰ an assertion which is also supported by the Law Commission.¹³¹ In light of these declarations, any non-consensual performance of a caesarean section would arguably ignore the basic components of a competent woman's fundamental human rights, including the right to bodily integrity, equality, privacy and dignity.¹³²

The controversy surrounding the *Re S* decision split academic opinion regarding the future of English law. On the one hand, some commentators anticipated that Sir Stephen Brown's judgment signalled a move "towards greater recognition of the foetus as a legal person,"¹³³ whilst others dismissed the reasoning on the basis that it was "so fatally flawed, it could not survive the scrutiny of the House of Lords."¹³⁴ The latter prediction proved accurate. The emergence of foetal rights as a means of justifying medical intervention on the grounds of rights-based necessity in the case of competent patients would diminish the

¹²⁹ This point was highlighted more recently in *Attorney General's Reference (No.3 of 1994)* [1997] 3 All ER 936, a case which considered the potential liability for murder of a registered medical practitioner who performed a lawful abortion (i.e. within the provisions of the Abortion Act 1967), but where the foetus was born alive and subsequently died from injury inflicted in the womb. This case was preceded by numerous similar judgments, such as *Paton v. British Pregnancy Advisory Service Trustees* [1979] 1 QB 276 in which Baker P declared that "the foetus cannot, in English law...have a right on its own at least until it is born and has a separate existence from its mother"; see also *Paton v. UK* (1980) 3 EHRR 408; *B v. Islington Health Authority* [1991] 1 QB 638, where Potts J claimed at 647 that the foetus is "undefined in law and without status"; and *Re F (in utero)* [1988] 2 All ER 193, a case involving an unsuccessful attempt by a local authority to make a foetus a ward of court.

¹³⁰ The Abortion Act 1967, section 1(1)(b) provides that a pregnancy may be lawfully terminated if it is "necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman." Similarly, the Congenital Disabilities (Civil Liability) Act 1976 governs the right to sue for disabilities inflicted *in utero*. Such rights only accrue once the foetus has independent existence from the mother, and are derivative in that liability to a child depends on a pre-existing liability to a parent.

¹³¹ See Law Commission, *Report on Injuries to the Unborn Child* (Law Com No 60) (London: HMSO, 1974) which stated at paragraph 32 that "legislation should deal with the rights of the living person and no rights should be given to the foetus."

¹³² McLachlin J in Supreme Court of Canada in *Winnipeg Child and Family Services (Northwest Area) v. G* [1997] 2 SCR 925, declared that, "any intervention to further the foetus's interests would necessarily implicate, and possibly conflict with, the mother's interests."

¹³³ Thomson, 'After *Re S*' at 132.

¹³⁴ Katherine De Gama, 'A Brave New World? Rights Discourse and the Politics of Reproductive Autonomy' in Anne Bottomley and Joanne Conaghan (eds.) *Feminist Theory and Legal Strategy* (Oxford: Blackwell, 1993) 114 at 122.

significance of the concept of bodily integrity and consequently allow the infringement of fundamental rights. For this reason, the competent pregnant woman's rights must take priority and, after *Re S*, English law retreated from travelling any further down the road of recognition of the foetus as a 'person'.

In *St. George's Healthcare NHS Trust v. S*¹³⁵ a woman in the latter stages of labour was advised to have a caesarean section operation, without which her life and that of her unborn child were in serious danger. Wanting a natural delivery, the woman consequently refused the operation and she was compulsorily admitted to hospital under section 2 of the Mental Health Act 1983, for assessment. In the meantime the hospital authorities obtained an *ex parte* declaration permitting them to carry out the operation as it was necessary to vindicate the rights of the mother, despite the absence of her consent and the treatment was carried out accordingly. The Court of Appeal later confirmed that the court order should never have been granted, as the competent woman's right to bodily integrity was paramount in the eyes of the law. Since the woman was competent throughout, her autonomous decision, though it may have appeared irrational to many,¹³⁶ should have been respected by doctors regardless of the fact that it may have resulted in her death or the death of her unborn child:

"When human life is at stake the pressure to provide an affirmative answer authorising unwarranted medical intervention is very powerful. Nevertheless, the autonomy of each individual requires continuing protection even, perhaps particularly, when the motive for interfering with it is readily understandable, and indeed to many would appear commendable."

¹³⁵ *St. George's Healthcare NHS Trust v. S* [1998] 3 WLR 936.

¹³⁶ On this point, Lord Donaldson MR, *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 at 102, declared "[t]his right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent." This reflected the general opinion voiced in an earlier case, *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 at 904-905.

The Court of Appeal's judgment in *St. George's NHS Trust v. S* represents the current state of the law and demonstrates a firm commitment to patient autonomy as the foundation of all decisions. If non-consensual treatment is administered to a competent person there is consequently no applicable defence of necessity to justify the intrusion. It has been noted that: "[t]he entire judgment...is permeated by the theme of patient autonomy and the obligation of a free society to guard that autonomy from erosion."¹³⁷

This would seem an appropriate place to end the discussion of the competent patient; but one final issue must be addressed. Despite admirable declarations of the supremacy of patient autonomy by the courts, it is interesting to note that the operation had already been carried out in *St. George's NHS Trust v. S* by the time the Court of Appeal declared it unlawful. It could be argued that although *in principle* patient autonomy is the fundamental consideration and the courts hold the common law right of a competent patient to refuse medical treatment in high esteem *in practice* the reality is often quite different. The courts are sometimes willing to declare the pregnant women in similar cases *incompetent* to make the decisions in question, and thereby proceed with operations deemed to be necessary in the best interests of the incompetent patient.¹³⁸ There is general recognition that the English courts and the medical professions have a tendency to treat women in labour, for instance, as incompetent to exercise a reasoned choice, and this is regrettable.¹³⁹ If the patient disagrees with the belief of the clinician, there is a real risk that "assessments about a patient's competence can be muddled by disagreements over the relative value of deep-seated beliefs."¹⁴⁰ This has led to suggestions that the persistent

¹³⁷ Rebecca Bailey-Harris, 'Pregnancy, Autonomy and Refusal of Medical Treatment' (1998) 114 *Law Quarterly Review* 550.

¹³⁸ As in *Re MB (Adult: Medical Treatment)* [1997] 2 FCR 541.

¹³⁹ Wicks, 'The Right to Refuse Medical Treatment Under the European Convention on Human Rights' at 27-28; see also Ian Kennedy, *Treat Me Right: Essays in Medical Law and Ethics* (Oxford: Clarendon Press, 1991) at 337.

¹⁴⁰ Heather Draper, 'Anorexia Nervosa and Respecting a Refusal of Life-Prolonging Therapy: A Limited Justification' (2000) 14 *Bioethics* 120 at 130; see also Heather

assertion of patient autonomy by the courts is “more apparent than real.”¹⁴¹ The European Court of Human Rights have, however, highlighted that the Convention “is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”¹⁴² Therefore the courts must proceed with caution, to avoid the danger that medical practitioners will perceive an irrational or ill-considered refusal to consent as a manifestation of the patient’s incompetence.¹⁴³

When faced with life and death dilemmas, in practice it seems that the courts are not always so eager to rigidly adhere to the principle of self-determination. It is imperative that the English courts achieve a degree of clarity regarding the issue of non-consensual medical treatment because such cases are especially troublesome. As Wicks argues:

“If the law is that an individual may refuse consent to any treatment even if it will cause her death (and the death of an unborn child), this rule must be applied even when judges are under the pressure of an *ex parte* application. If the rule is not applied when lives are at stake, it is not a rule at all.”¹⁴⁴

Even if, hypothetically speaking, it was to become legally permissible on the grounds of necessity to subject a pregnant woman of sane mind to undergo any such operation in the interests of the foetus, it is surely in any case “not for the judiciary to extend the law.”¹⁴⁵ Should such a power be extended, it is for Parliament to stipulate the boundaries of that control, although this suggestion is strongly refuted here as the autonomy

Draper, ‘Women, Reproductive Responsibilities and Forced Caesareans’ (1996) 22 *Journal of Medical Ethics* 327 at 327-328.

¹⁴¹ Michael Wright, ‘Medical Treatment: The Right to Refuse’ (1993) 3 *Journal of Social Welfare and Family Law* 204.

¹⁴² *Airey v. Ireland* (1979-1980) 2 EHRR 305 at paragraph 24, cited in Rosamund Scott, *Rights, Duties and the Body: Law and Ethics of the Maternal-Fetal Conflict* (Oxford: Hart Publishing, 2002) at 231.

¹⁴³ This note of caution is exercised by DJ Harris, Michael O’Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1998) at 337-338.

¹⁴⁴ Wicks, ‘The Right to Refuse Medical Treatment Under the European Convention on Human Rights’ at 30.

¹⁴⁵ Per Balcombe LJ in *Re F (in utero)* [1988] Fam 122 at 143.

of a competent person should not be overridden. Since this opportunity has not been taken, the law seems fairly settled on this matter.

In summary, the cornerstone principle is that a competent adult can refuse any invasion of their bodily integrity even if the decision appears ill-considered to the objective observer. No intervention can be justified on the basis that it is necessary in the best interests of the patient where that patient has the capacity to govern his/her own life and to determine what happens to his/her body. One important qualification to this fundamental notion of autonomy and self-determination is the case of pregnant women, where the life of the patient or that of the foetus are at risk unless a caesarean section operation is performed. It has been suggested that in forced caesarean cases, "the clinicians and the courts have been more influenced by the perceived risky consequences than the principles of respect for autonomy."¹⁴⁶ Although the courts assert the primacy of autonomy when faced with such dilemmas, this principle is not always borne out in practice, and this section illustrates examples of women being compelled to undergo treatment against their will. This compulsion is, it seems, in some cases, based on the inadequate assumption that the foetus enjoys rights which sometimes outweigh those of the mother, and in others on the views that pregnant women in the throes of labour could not possibly be competent to make treatment decisions.¹⁴⁷ These assertions are contrary to the generally accepted view of the maternal / foetal conflict and judges should be mindful of the following submission:

"For our law to compel the [competent] defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn."¹⁴⁸

¹⁴⁶ Sameer Sarkar and Gwen Adshead, 'Treatment over Objection: Minds, Bodies and Beneficence' (2002) *Journal of Mental Health Law* 105 at 112.

¹⁴⁷ In *Rochdale Healthcare NHS Trust v. C* [1997] 1 FCR 274, Johnson J declared the pregnant patient to be incompetent as she was "in the throes of labour with all that is involved in terms of pain and emotional stress."

¹⁴⁸ Per Judge Flaherty in *McFall v. Shrimp* 127 Pitts. LJ 14 (1978).

Although not a domestic authority, the sentiments should resonate equally in English law whenever non-consensual treatment of competent patients arises and the defence of necessity should not be extended to justify such rights invasions. True to the liberal spirit of this thesis, the competent patient should not be subjected to invasion which encroaches upon privacy and autonomy, physical integrity,¹⁴⁹ or which causes humiliation or results in degrading treatment.¹⁵⁰ These intrusions inevitably affect the quality of life of the patient and constitute a form of harm which is, taking into account the extent of the harm weighed against the social utility of the conduct and the consequences of imposing liability, serious enough to warrant the imposition of criminal sanction.

3.6 Intruding on the rights of an *incompetent* patient

In the case of a competent patient, consent or refusal to undergo medical treatment is, in principle at least, conclusive; the status in law of an *incompetent* patient is, however, more uncertain. This is because the philosophical notion of autonomy is dependent on having the capacity and authority to govern oneself.¹⁵¹ Consent has no role to play in the treatment of the adult incompetent because the patient is necessarily incapable of offering valid consent, or dissent for that matter, and exercising autonomy. In the case of incapacitated innocent persons, beneficence is staking a claim for priority, leading to the possibility of paternalistic decision making.¹⁵² As Murphy acknowledges, incapacitated patients are:

¹⁴⁹ Article 8 of the European Convention on Human Rights protects the right to respect for private life, and this encompasses a right to privacy and a right to bodily integrity. It was held in *X v. Austria* that "compulsory medical intervention, even if it is of minor importance, must be considered as an interference with this right", see *X v. Austria* (1980) 18 DR 154 at 156, cited in Wicks, *Human Rights and Healthcare* at 93.

¹⁵⁰ Article 3 of the European Convention on Human Rights prohibits degrading treatment.

¹⁵¹ Sarkar and Adshead, 'Treatment over Objection: Minds, Bodies and Beneficence' at 107-108.

¹⁵² As suggested in Wicks, *Human Rights and Healthcare* at 92-93.

“...a class of persons who will never be in a position where it could reasonably be claimed that their destinies ought to be determined by their own choices and decisions, so if there are rights here, they will for the most part be rights to a certain kind of paternalistic protection.”¹⁵³

The incompetent patient retains some basic human rights¹⁵⁴ but they may also have a right to receive treatment, and not to have the maintenance of their health and well-being overlooked.¹⁵⁵ In short, an incapacitated, incompetent patient or a patient who is permanently unable to communicate¹⁵⁶ can be treated without consent, as any intrusion upon the bodily integrity of that patient may be justified (i.e. may fall outside the remit of the criminal law) by virtue of the common law doctrine that the treatment was necessary in the patient's 'best interests'. An understanding of the notion of 'competence' or 'capacity' is therefore critical before any analysis of the scope of the necessity principle can be undertaken.

3.6.1 Defining incapacity

The importance of establishing competence cannot be underestimated as the necessity defence is inapplicable to intrusions on the right of competent persons which constitute a wrongful violation of rights. The significance of capacity is captured by the following statement:

“Competence is a pivotal concept in decision making about medical treatment. Competent patient's decisions about accepting

¹⁵³ Murphy, 'Rights and Borderline Cases' at 238.

¹⁵⁴ As identified in Wicks, *Human Rights and Healthcare* at 93. This suggestion may be refuted by some commentators. Jeffrie Murphy refers to incompetent patients as: “individuals who have some of the features normally found in individuals who are clearly right-bearers, but who do not seem to have quite enough of such features to make us confident in ascribing rights to them. They are of such a nature...that they lack certain features (such as the power of rational choice) normally found in rights-bearers.” See Murphy, 'Rights and Borderline Cases' at 230.

¹⁵⁵ If a person agrees to medical treatment, but their choice was not free and informed, as in the case of an incompetent patient, then the criminal law is right to protect them. According to Duff, “such 'soft paternalism' is fully consistent both with liberalism and the Harm Principle”, see Duff, 'Harms and Wrongs' at 33.

¹⁵⁶ *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 71-77.

or rejecting proposed treatment are respected. Incompetent patients' choices, on the other hand, are put to one side, and alternative mechanisms for deciding about their care are sought. Thus, enjoyment of one of the most fundamental rights of a free society – the right to determine what shall be done to one's body – turns on the possession of those characteristics that we view as constituting decision-making competent.”¹⁵⁷

The right to make autonomous choices is not so potent when the patient is deemed to be incapable of giving valid consent to intrusions on their protected interests. Treatment may be justifiably administered if it is necessary in the patients interests but the intervener must, however, be mindful of the fundamental rights of the patient, and accord with “acceptable principles and values, which will involve the use of a substituted judgement test by preference or, in the alternative, a ‘best interests’ test.”¹⁵⁸

It is interesting to note that in some of the most significant authorities on the issue of medical intervention performed on the incompetent patient, there is little discussion as to whether the patients at the centre of the cases were actually able to make the treatment decision for themselves, and incapacity is often incorrectly assumed.¹⁵⁹ The leading English authority on the issue of capacity is *Re C*,¹⁶⁰ a case involving a 68 year old paranoid schizophrenic who refused a leg amputation despite an 85% chance he would die without it. Despite the fact that C was clearly mentally ill, Thorpe J declared that he “understood and retained the relevant treatment information, that in his own way he believes it, and that

¹⁵⁷ Thomas Grisso and Paul S Appelbaum, *Assessing Competence to Consent to Treatment: A Guide to Physicians and Other Health Officials* (Oxford: Oxford University Press, 1998) at 1.

¹⁵⁸ Michael Gunn, ‘The Meaning of Incapacity’ (1994) 2 *Medical Law Review* 8 at 8.

¹⁵⁹ See for example *Re F (A Mental Patient: Sterilisation)* [1990] 2 AC 1; *T v. T* [1988] 1 All ER 613; and *Re SG (Adult Mental Patient: Abortion)* [1991] 2 FLR 329. This point is emphasised by Gunn, ‘The Meaning of Incapacity’ (1994) at 9.

¹⁶⁰ *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 WLR 290. The *Re C* capacity test was subsequently endorsed by the Court of Appeal in *Re MB (Adult: Medical Treatment)* [1997] 2 FCR 541 and forms the basis of the statutory test for incapacity expounded in the Mental Capacity Act 2005. Although generally approved by the judiciary and Parliament, it has been suggested that *Re C* “does contain a few ambiguities”, see Emily Jackson, *Medical Law: Text, Cases & Materials* (Oxford: Oxford University Press, 2006) at 199.

in the same fashion he has arrived at a clear choice.”¹⁶¹ The judgment confirms that even though a patient may be suffering from a mental illness this does not preclude an ability to make important life and death decisions¹⁶², and that mental illness and mental incompetence are not necessarily synonymous. The Law Commission has also been keen to stress that patients should be “enabled and encouraged to take for themselves those decisions which they are able to take.”¹⁶³ Further, leading academic Kennedy has stated, the only valid criterion of capacity is the ability of the individual to understand the nature and consequences of the proposed procedure.¹⁶⁴ When deciding whether an adult patient retains the capacity to make a treatment decision the emphasis appears to be placed upon the decision-making *process* undertaken by the individual and whether the minimum threshold of ability has been achieved.¹⁶⁵

In response to criticisms directed at the existing law relating to incompetent patients and their treatment, Parliament launched a period of consultation, culminating in the passing of the Mental Capacity Act 2005 (hereafter MCA 2005). The Act does not radically alter the common law position in relation to determining the meaning of ‘capacity’ and is clearly underpinned by Thorpe’s criteria in *Re C*. According to the statute, in order to assess the capacity of a patient it must be established that the patient is suffering from “an impairment of, or a disturbance in the

¹⁶¹ Per Thorpe LJ in *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 WLR 290 at 295. Thorpe endorsed the view of an expert witness in the case, a Dr Eastman, who suggested a tripartite analysis of the process: (1) comprehending and retaining treatment information; (2) believing it; and (3) weighing it in the balance to arrive at choice.

¹⁶² See also *Re JT (Adult: Refusal of Medical Treatment)* [1998] 1 FLR 48, where a woman with severe learning and behavioural difficulties was judged to have the necessary capacity to make a meaningful decision regarding dialysis; and *Secretary of State for the Home Department v. Robb* [1995] 1 All ER 677, where a prisoner with a personality disorder was deemed to be competent to refuse consent to be force-fed.

¹⁶³ Law Commission, *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction* (Law Com CP No 128) (London: HMSO, 1993) at paragraph 1.9.

¹⁶⁴ Ian Kennedy, *Treat Me Right* (Oxford: Oxford University Press, 1988) at 57-58.

¹⁶⁵ See Jackson, *Medical Law: Text, Cases & Materials* at 193. For an empirical study into the scope and application of the concept of capacity, see also Michael Gunn *et al.*, ‘Decision-Making Capacity’ (1999) 7 *Medical Law Review* 269.

functioning of, the mind or brain.”¹⁶⁶ Once this is determined, it must be ascertained whether or not the patient is able to make decisions for her/himself. The assessment of capacity detailed in section 3(1) of the Act is essentially an enactment of the common law test in *Re C*, and it is emphasised that patients should be individually assessed in the context of the decision being made. No assumptions are to be made regarding a person’s capacity¹⁶⁷ and seemingly irrational decisions are not necessarily demonstrative of an inherent lack of capacity.¹⁶⁸

Although codification of the common law principles may be welcomed, the Act does not significantly resolve any of the outstanding problems. It remains extremely difficult to determine the capacity or otherwise of a patient, as the question is essentially one of degree. Capacity is thus an “extremely slippery concept.”¹⁶⁹ Gunn suggests:

“Capacity / incapacity are not concepts with clear *a priori* boundaries. They appear on a continuum which ranges from full capacity at one end to full incapacity at the other end. There are, therefore, degrees of capacity. The challenge is to choose the right level to set as the gateway to decision-making and respect for persons and autonomy.”¹⁷⁰

Although the line between capacity and incapacity can be extremely difficult to draw, what is clear is that once a patient is declared incompetent to consent to medical treatment, certain bodily invasions may be justified by necessity provided they vindicate some superior right of the patient. It is unfortunate, then, that the concept of capacity is shrouded in ambiguity.¹⁷¹ In the following discussion, it is acknowledged

¹⁶⁶ Mental Capacity Act 2005, section 2(1). According to the Code of Practice issued in April 2007, a wide variety of conditions will be covered, including the effects of a head injury, for example, alongside the obvious inclusion of categories such as mental illness.

¹⁶⁷ Section 1(2) declares that ‘[a] person must be assumed to have capacity unless it is established that he lacks capacity.’

¹⁶⁸ Section 1(4) confirms the common law approach that ‘[a] person is not to be treated as unable to make a decision merely because he makes an unwise decision.’

¹⁶⁹ Peter Bartlett, ‘The Test of Compulsion in Mental Health Law: Capacity, Therapeutic Benefit and Dangerousness as Possible Criteria’ (2003) 11 *Medical Law Review* 326 at 341.

¹⁷⁰ Gunn, ‘The Meaning of Incapacity’ at 14.

¹⁷¹ Wicks, *Human Rights and Healthcare* at 72.

that people may be incapacitated in different circumstances, each requiring slightly different considerations. Patients who are temporarily incapacitated in circumstances of *emergency* and incompetent adults requiring *non-emergency* treatment will be considered separately below.

3.6.2 Emergency treatment of incapacitated persons

One clear and relatively uncontroversial limitation to the exercise of the right to bodily integrity is emergency medical treatment performed on incapacitated subjects.¹⁷² There is little dispute that a patient admitted to an accident and emergency department following, for instance, a serious road accident should receive medical treatment despite the fact that they may be in no position to give or to refuse consent to treatment due to their injuries. But the doctor in such cases has little time to ponder the choices available in that moment; “[s]he must act in the best interests of his patient, as [s]he sees them, but [s]he can be more readily forgiven if [s]he errs in [her/]his judgement.”¹⁷³ So, the norm that prohibits the violation of bodily integrity without consent is not absolute, as emergency medical treatment administered to temporarily incapacitated subjects is justified by the doctrine of necessity. The necessity principle thus absolves the doctor of any liability for bodily intrusions against an otherwise competent adult: “in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained.”¹⁷⁴ This principle of necessity may also justify treatment in the case of a different sort of emergency where, for instance, a patient is unconscious during surgery and a doctor discovers a serious condition which may result in grievous harm or even death if the doctor does not act immediately.¹⁷⁵ There is little dispute that such action will be lawful by

¹⁷² The other most obvious exception to the rule is that which allows for the “exigencies of everyday life,” per Goff LJ in *Collins v. Wilcock* [1984] 3 All ER 374.

¹⁷³ Per Lord Donaldson in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 17.

¹⁷⁴ Per Cardozo J in *Schloendorff v. Society of New York Hospital* 105 NE 92 (1914) at 93.

¹⁷⁵ An example offered in Jackson, *Medical Law: Text, Cases & Materials* at 195. In *Williamson v. East London & City Health Authority* [1998] Lloyd’s Rep Med 6, a

virtue of the common law necessity justification, providing, of course, that is more than merely inconvenient to wait until the patient regains consciousness and is able to make a decision for him/herself.¹⁷⁶

So, in either type of emergency situation, where a patient is physically incapable of giving consent to any invasion of his/her bodily integrity, a doctor could lawfully proceed with any necessary intrusion. This *prima facie* interference with the patient's autonomy is not incompatible with liberal ideals because in such a situation, the doctor is not overriding the patient's self-chosen preferences. The patient's wishes for shaping his/her own life are not known, so the doctor proceeds on a safe assumption that the patient would consent to treatment if in a position to do so. The emergency circumstances therefore justify the invasion of bodily integrity and, all things considered,¹⁷⁷ there will be no wrongful violation of human rights. If, however, it is known that the patient would have refused treatment if conscious, then liberals robustly affirm the primacy of autonomy and demand that the treatment be withheld, even if the result is fatal. The Law Commission acknowledge that "[m]ost people may think that this is not in [the patient's] best interests, but it is the only way to respect his autonomy."¹⁷⁸ This position is supported here.

3.6.3 Non-emergency treatment of incapacitated persons

The position of the incompetent patient in cases where the circumstances are not those coloured by emergency is somewhat less settled. As indicated above, it is more generally accepted that in emergency

mastectomy performed by a surgeon whilst the patient was unconscious during an operation for the replacement of a breast implant was thought to be merely convenient rather than *necessary*. It follows that consent should therefore have been sought prior to the invasion, see Wicks, *Human Rights and Healthcare* at 95.

¹⁷⁶ Jackson, *Medical Law: Text, Cases & Materials* at 195.

¹⁷⁷ Although such intervention may *prima facie* violate rights of privacy, personal autonomy, bodily integrity and freedom from degrading treatment, the quality of life of the patient will be significantly enhanced by the intrusion and the social utility and value of the conduct will place it outside of the scope of criminal intervention.

¹⁷⁸ Roberts, Appendix C, *Consent and Offences against the Person* paragraph C48 at 260.

circumstances one can act on behalf of another without the consent of that person, but in *Re F* Lord Goff made it clear that, “the principle is one of necessity, not of emergency.”¹⁷⁹ It appears that far more is required by law of a doctor where deliberation is a luxury. Once incompetence has been established and it is clear that the patient is incapable of offering valid consent and thus incapable of exercising autonomy, intrusions may be justified on the common law principle of necessity, with careful consideration given to what constitutes the ‘best interests’ of the patient.

3.6.3.1 Treatment in the patient’s ‘best interests’

The defining criterion for any invasive treatment administered to an incompetent adult is that it must be necessary in the patient’s ‘best interests’. But, the calculation of best interests is not altogether clear¹⁸⁰ since there are tremendous conflicting medical, social and human rights considerations at play.¹⁸¹ In the other forms of necessity, duress, or self-defence for that matter which involve conflicting interests, a ‘best interests’ calculus would be an excluded consideration¹⁸² but in the case of medical intervention to protect the health and welfare of the incompetent person, it seems to be the *only* consideration.

In *Re F*, Lord Neill contended that an operation would only be deemed necessary if the “general body of medical opinion in the particular speciality would consider [it] to be in the best interests of the patient in order to maintain the health and to secure the well-being of the

¹⁷⁹ In *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 Lord Goff stated at 75, “[e]mergency is however not the criterion or even a pre-requisite; it is simply a frequent origin of the necessity which impels intervention.”

¹⁸⁰ Ian Kennedy & Andrew Grubb, *Principles of Medical Law* 2nd edition (Oxford: Oxford University Press, 2004) at 275.

¹⁸¹ A point emphasised by Lord Steyn in *R v. Bournemouth Community and Mental Health NHS Trust ex parte L* [1998] 3 All ER 289 at 493.

¹⁸² Despite attempts by Ward LJ in *Re A* to justify the separation operation with reference to self-defence, which he claimed involved considering the best interests of the children, see *Re A (Children: Conjoined Twins)* [2000] 4 All ER 961. Chan and Simester, ‘Duress, Necessity: How Many Defences?’ at 129 cite the following example, “where P attacks D when D has only one hour to live and P is healthy. D is still entitled, if necessary, to kill P in self-defence.”

patient.”¹⁸³ Lord Goff confirmed this approach in the House of Lords, claiming that doctors, “must act in accordance with a responsible and competent body of relevant professional opinion, on the principles set down in *Bolam*.”¹⁸⁴ Essentially, on Lord Neill’s synopsis of the *Bolam* test:

“one cannot expect unanimity but it should be possible to say of an operation which is *necessary* in the relevant sense that it would be unreasonable in the opinion of most experts in the field not to make the operation available to the patient. One must consider the alternatives to an operation and the dangers or disadvantages to which the patient may be exposed if no action is taken. The question becomes: what action does the patient’s health and welfare require?”¹⁸⁵

This declaration was further qualified by Butler-Sloss, who stated in recognition of the pressure of such circumstances that a decision as to what constitutes the best interests of a patient:

“...ought not to be left entirely to the decision of family and the medical profession alone. Public policy requires that there should be imposed the supervision of the courts in so important and delicate a decision.”¹⁸⁶

Butler-Sloss has more recently emphasised the view that the *Bolam* test does not decisively establish whether treatment is in the best interests of the patient, and it is now beyond doubt that the principle of best interests “extends beyond the considerations set out in...*Bolam*,”¹⁸⁷ to include broader considerations of social, ethical and moral significance. Indeed, it is apparent in a number of cases that best interests not only include the patient’s clinical needs, but also the broader social and psychological

¹⁸³ Per Lord Neill in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 32.

¹⁸⁴ Per Lord Goff *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 78.

¹⁸⁵ Per Lord Neill in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 32.

¹⁸⁶ Per Butler-Sloss LJ *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 42. Judicial sanction is also necessary in other jurisdictions: for instance, in the United States (see *In re Grady* 426 A 2d 467 (1981)); Canada (see *In re K* (1985) 19 DLR (4th) 255); and Australia (see *Re Jane* (unreported) 22 December 1988). Indeed, the dangers of leaving the evaluation of best interests to the immediate carers are emphasised in *Re D (A minor) (Sterilisation)* [1976] 1 All ER 326.

¹⁸⁷ *Re S (Adult Patient: Sterilisation)* [2001] Fam 15 at 28.

requirements.¹⁸⁸ There is also significant academic support for this interpretation of the best interests test, McLean highlighting the deficiency of the *Bolam* test in that it is “designed to judge the competence of a medical procedure – it is not designed to test its lawfulness.”¹⁸⁹ The rejection of *Bolam* as decisive on the issue of best interests represents a more favourable approach since it demands that *judges* choose the best possible option for the *individual* patient, rather than treatment being administered purely because it is deemed acceptable to a body of responsible and competent medical opinion. On this approach, deciding best interests involves a genuine reconciliation between the incompetent patient’s rights and the security of that patient’s welfare.¹⁹⁰ Although the inherently vague ‘best interests’ test is retained as the yardstick of appropriate medical intervention, the move away from the *Bolam* test in isolation represents a welcome step in the right direction.¹⁹¹

An important question still remains. How do the courts ultimately decide what is in the individual patient’s best interests when that patient is unable to communicate their wishes due to incompetence?¹⁹² Authority on this issue is, at best, vague and the courts have, on occasion, explicitly refused to articulate any general legal principle which might direct difficult decisions in the determination of best interests. It has been declared that:

¹⁸⁸ For further discussion, see *Re W (Mental Patient: Sterilisation)* [1993] 1 FLR 381; *Re HG (Specific Issue: Sterilisation)* [1993] 1 FLR 587; *Re A (Medical Treatment: Male Sterilisation)* [2000] 1 FLR 549. Indeed in a Practice Note issued in 2001, it was suggested that the calculation of best interests “will incorporate broader ethical, social, moral and welfare considerations [and the] emotional, psychological and social benefit to the patient,” see Practice Note (*Official Solicitor: Declaratory Proceedings: Medical and Welfare Decisions for Adults who Lack Capacity*) [2000] 2 FLR 158.

¹⁸⁹ Sheila McLean, *Old Law, New Medicine* (London: Pandora, 1999) at 100. See also Peter Bartlett, ‘A Matter of Necessity? Enforced Treatment under the Mental Health Act’ (2007) 15 *Medical Law Review* 86 at 95.

¹⁹⁰ This point is emphasised by Wicks, *Human Rights and Healthcare* at 100.

¹⁹¹ Wicks, ‘The Right to Refuse Medical Treatment Under the European Convention on Human Rights’ at 35-36.

¹⁹² The courts cannot consent to the medical treatment of an incompetent patient since the Crown lost its prerogative power as *parens patriae* under the Mental Health Act 1959; they can merely declare that a procedure is in the patient’s best interests are thus lawful.

“By transforming a ‘complex moral and social question’ into a question of fact, the best interests approach leaves that court in the hands of ‘experts’ who assemble a dossier of fact and opinion on matters which they deem relevant without reference to any check-list of legal requirements.”¹⁹³

It seems that the question to be posed in such cases is, what course of action will promote the true welfare and interests of the patient?¹⁹⁴ Lord Brandon in *Re F* claims that an operation will be in the best interests of a patient “if, but only if, it is carried out in order either to save lives, or to ensure improvement or prevent deterioration in their physical and mental health.”¹⁹⁵ According to Kennedy and Grubb, invasive treatment can sometimes be necessary to promote a patient’s best interests even though it is not therapeutically necessary,¹⁹⁶ carries some medical risks or, perhaps, no medical benefit,¹⁹⁷ and the primary purpose of the procedure is to further some interest of a third party.¹⁹⁸ In accordance with the general principles underpinning this thesis, such a claim must be strongly contested since the only way in which the invasion of the patient’s right to bodily integrity can be justified is on the basis that it protects *their own interests*. Subjecting an innocent, incompetent patient to the trauma, pain, discomfort and risk of, for instance, a bone marrow transplant for the benefit of another and which has no therapeutic benefit to the individual seriously undermines the patient’s rights and should not be tolerated in a liberal society.¹⁹⁹

¹⁹³ Per Brennan J in *Secretary, Department of Health and Community Services v. JWB and SMB* (1992) 175 CLR 218 at 270 and 272-273.

¹⁹⁴ Per Lord Donaldson in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 18.

¹⁹⁵ Per Lord Brandon in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 55.

¹⁹⁶ Kennedy and Grubb, *Principles of Medical Law* at 278-279. For instance, *Re F* involved the non-therapeutic sterilisation of an incompetent female; see section 3.6.4.2 below for further discussion of the case.

¹⁹⁷ See *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* [2000] 2 FLR 678 in which the perceived religious benefits to ritual circumcision of male children arguably outweighed the absence of medical benefit and the potential risks involved in such an operation. The courts will not, however, permit invasive treatment which is cruel, excessive, involves any sort of mutilation or is “socially obnoxious”, per Scarman LJ in *Re T (Minors) (Custody: Religious Upbringing)* (1981) 2 FLR 239 at 244.

¹⁹⁸ See *Re Y (Mental Patient: Bone Marrow Donation)* [1997] Fam 110; this controversial decision is discussed in greater detail in section 3.6.4.1 below.

¹⁹⁹ Wicks, *Human Rights and Healthcare* at 102.

The assessment of the patient's own views when competent appear to constitute an important consideration in a number of judgments and there is support for the view that "the patient's best interests would normally also include having respect paid to what seems most likely to have been his own views on the subject."²⁰⁰ This approach is common in America (where it is known as the *substituted judgement test*), but one of the major criticisms of this interpretation is the difficulty of ascertaining the subjective viewpoint of the patient.²⁰¹ For this reason English courts favour an *objective* best interests test,²⁰² which takes into account certain handicaps of the individual patient.²⁰³ Even where a patient has never been able to communicate their wishes due to a permanent incapacity, the personality, views and beliefs of the patient may still play a fundamental role in the best interests analysis.²⁰⁴ Parliament intervened in an attempt to elucidate the meaning of best interests with the passing of the Mental Capacity Act 2005, which dictates that any decision made on behalf of the incapacitated subject must be made in a way which least restricts that person's rights and freedoms of action.²⁰⁵ This is simply a restatement of the common law position, although there is some elaboration on the meaning of 'best interests' in section 4, which includes: consideration of the likelihood that the patient will regain capacity and the ability to make the decision for himself,²⁰⁶ acknowledging the patient's past and present beliefs, values and feelings, and any written statement to that effect,²⁰⁷ and taking into account the views of any potentially relevant parties to the decision-making process.²⁰⁸

²⁰⁰ Per Hoffmann LJ in *Airedale NHS Trust v. Bland* [1993] AC 789 at 827-828

²⁰¹ A point emphasised by Catherine Elliott, 'Patients doubtfully capable or incapable of consent' in Helga Kuhse and Peter Singer (eds.) *A Companion to Bioethics* (Oxford: Blackwell, 1998) at 452-462 and particularly 458.

²⁰² At least as far as questions of physical and bodily welfare are concerned. With regard to the patient's property and affairs, the court does, in fact, apply a substituted judgement test which seeks to do that "which the actual patient, acting reasonably, would have [done] if notionally restored to full mental capacity, memory and foresight;" per Megarry VC in *Re D(J)* [1982] Ch 237 at 244.

²⁰³ See *Re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33 at 44 and 46-47.

²⁰⁴ See *Re T (Adult: Refusal of Medical Treatment)* [1993] Fam 95 at 103.

²⁰⁵ See the Mental Capacity Act 2005 section 1(5) and 1(6).

²⁰⁶ Mental Capacity Act 2005 section 4(3).

²⁰⁷ Mental Capacity Act 2005 section 4(6).

²⁰⁸ Detailed in the Mental Capacity Act 2005 section 4(7). Somewhat controversially, sections 24 and 25 of the Act also make provision for the competent patient to make an

In summary, the best interests test appears to be a sensible mechanism for safeguarding the rights and interests of incompetent patients, whether in emergency or non-emergency situations.²⁰⁹ Although there is little certainty surrounding the scope of the best interests test, the concept appears to include the patient's psychological health and well-being, and quality of life; ethical, moral, spiritual and religious welfare; relationship with carers (parents or otherwise); financial interests; ties of affection; and moral and civic obligations.²¹⁰ In order for the intrusion to be justified on the basis of the necessity principle, the advantage of any proposed treatment which may encroach on the protected interests of the individual must outweigh the potential detriment. The balancing exercise performed by the courts is, however, fraught with difficulty, and there have been persistent calls for the issues to be dealt with "in a more structured and proactive way, rather than leaving it to ad hoc pronouncements by courts adopting the vague rhetoric of best interests."²¹¹ It is submitted here that the test may be successfully retained, but only if greater consideration is given to the basic rights pertaining to each individual. As argued above, certain core rights to, for instance, bodily integrity and autonomy, the right to life and freedom from degrading treatment, are retained by incompetent patients, yet there appears to have been a general judicial reluctance to acknowledge their significance. The degree of intrusion on these protected rights and interests must be explicitly addressed and weighed against the effect it has on the patient's quality of life and the overall social utility of the invasion. The discussion will now turn to consider some particularly contentious applications of the best interests test by considering three specific examples of intervention: intrusions to facilitate the donation of a regenerative organ; intrusions involving non-

advance directive which sets out prior instruction for treatment in the event of incapacitation. For a critical discussion on the challenges presented by advance directives, see Alasdair R Maclean, 'Advance Directives, Future Selves and Decision-Making' (2006) 14 *Medical Law Review* 291.

²⁰⁹ Wicks, *Human Rights and Healthcare* at 106.

²¹⁰ Ideas taken from Kennedy and Grubb, *Principles of Medical Law* at 280-281.

²¹¹ Marie Fox and Jean McHale, 'In Whose Best Interests?' (1996) 60 *Modern Law Review* 700 at 709.

therapeutic sterilisations; and intervention to detain an incompetent patient.

3.6.4 Specific examples of necessary intrusions on the rights of incapacitated persons

The reported cases involving necessary interventions in the best interests of innocent people are many and varied, but some particularly controversial examples of the best interests principle have been selected for further consideration here. The analysis outlines the extent to which the courts are prepared to invoke the necessity justification to prevent criminal responsibility for infringements on the rights of innocent incompetent persons. A number of contentious applications of the broadly construed best interests test will be considered, including cases in which the interests of a third party are served by the intervention, cases where the intervention was not necessary to preserve the health of the patient, and others where a patient has been detained by virtue of the common law doctrine of necessity.

3.6.4.1 Necessity and organ donation

The donation of regenerative organs (or of other tissue or bodily fluid) inevitably involves invasive medical treatment which encroaches on the autonomy of the patient.²¹² Performing a donation operation on an incompetent patient will therefore only be lawful if it is justified on the basis that it is necessary in the 'best interests' of the patient. If it cannot be shown that the intervention was in the patient's best interests, it will constitute a wrongful violation of rights which could, in principle, entail criminal conviction.

²¹² It is highly doubtful whether the donation of a non-regenerative organ could ever satisfy the best interests test; see John K Mason and Greame T Laurie, *Mason & McCall Smith's Law and Medical Ethics* 6th edition (London: Butterworths, 2002) at 428-429.

It was suggested above that the best interests test appears to include, amongst other things, considerations relating to the patient's psychological health and well-being, and quality of life. Controversially, and it is suggested here, wrongly, this construction of the best interests test has permitted invasive treatment for the perceived benefit of a third party. One of the most striking examples of the broad interpretation of the best interests test is provided by the case of *Re Y*.²¹³ In this case, it was held to be in the best interests of a severely mentally and physically incapacitated patient to act as a bone marrow donor to her sister who was seriously ill. Despite the fact that there was clearly no medical benefit to be derived from this operation for the patient herself, the procedure was deemed to be necessary for her emotional, psychological and social benefit. Although emphasising that the concept of best interests relates wholly to the interests of the incompetent patient, the courts appear to have been tempted to find that invasive treatment that benefits a third party rather than the patient directly is, in fact, in the patient's best interests where it enhances the emotional and psychological welfare of the patient. Although there were obvious benefits for the potential *recipient* of the donated bone-marrow, the court acknowledged that this is "not relevant *unless*, as a result of the [donor] helping the [recipient] in that way, the best interests of the [donor] are served."²¹⁴ The restoration of physical and mental health to both Y's sister and mother respectively, coupled with the fact that the patient did not object to the donation and the relatively low risks attached to this surgery were clearly fundamental factors in the judgment. Mindful of the potential of the decision to cause controversy, the court was careful to emphasise that "[i]t is doubtful that this case would act as a useful precedent in cases where the surgery involved is more intrusive [than in the instant case]."²¹⁵

²¹³ *Re Y (Mental Patient: Bone Marrow Donation)* [1997] Fam 110.

²¹⁴ Per Connell J in *Re Y (Mental Patient: Bone Marrow Donation)* [1997] Fam 110 at 113 (emphasis added).

²¹⁵ *Ibid.* at 116.

Aside from this case, there is limited English authority on the issue of organ donation operations being permitted on the grounds of necessity. It appears that in *Re Y* some American authority was relied upon to support the decision that although performance of a medical operation without consent is *prima facie* unlawful, the prohibitory norm can be overridden in cases where the operation can be justified as necessary on the basis of a broadly construed best interests test.²¹⁶ That this case was confined to its own facts does not mask the blatant intrusion on protected human rights and the detrimental effect this invasive surgery may have had on the innocent patient. Although the best interests test has the potential advantage of enhancing a patient's right to beneficial medical treatment, it appears that "there remains the possibility of treatment being imposed which is not therapeutically necessary"²¹⁷ and which therefore may breach, for instance, Article 3 of the ECHR, which prohibits torture and inhuman or degrading treatment or punishment, or Article 8, which secures the right to respect for a private life. It is submitted here that if more overt balancing acts were carried out by the courts with express reference to the significance of certain basic human rights, troubling decisions such as *Re Y* would no longer slip through the judicial net.

3.6.4.2 Necessity and non-therapeutic sterilisation

The necessity principle has been recognised as a justification for the sterilisation of an incompetent patient in their best interests. The features of an operation of this nature mean that it is similar to the donation of a non-regenerative organ in that both involve the removal of an undamaged and naturally present organ in the body which is functioning normally. A sterilisation operation is, in most instances, irreversible and potentially impinges most significantly on two fundamental human and personal

²¹⁶ See, for example, *Strunk v. Strunk* 445 SW 2d 145 (1969) where the Court authorised the donation of a kidney by an incompetent patient on the basis that it was necessary in the patient's best interests.

²¹⁷ Wicks, 'The Right to Refuse Medical Treatment Under the European Convention on Human Rights' at 24.

rights. The first is, in general terms, a right to self-determination, which is essentially enshrined by the more concrete right to respect for private life secured by Article 8 of the Convention, and is also promoted by the general ethos, which is the enhancement of autonomy. The second is the right of reproductive autonomy, which finds its legal force in Article 12 of the Convention, which protects a right to found a family. Depriving an incompetent woman of such fundamental rights inevitably involves complex moral considerations, but the courts have considered it necessary in some instances to override these rights in order to protect the health and general welfare of the patient.

Therapeutic sterilisations carried out on incompetent adults²¹⁸ will usually be declared lawful by the court with little controversy, if indeed resort to the court is necessary at all.²¹⁹ Non-therapeutic sterilisations, for contraceptive reasons, for example, are more difficult to defend. Nonetheless, most notably in *Re F (Mental Patient: Sterilisation)*,²²⁰ it was held that a sterilisation operation was necessary to prevent a sexually active thirty-six year old woman with the mental age of a child becoming pregnant, despite her being in no position to give consent due to mental incapacity. It was thought by both hospital staff and the woman's mother that a sterilisation operation would be in her best interests as it would prevent any future risk of pregnancy. This was a prime example of intrusive intervention which was not therapeutically necessary in circumstances where there was "no opportunity to consult with the beneficiary,"²²¹ here, due to the patient's incapacity.

Similar facts arose in the case of *Re B*²²² in which the courts had to decide whether it was lawful to sterilise a mentally incapacitated seventeen year old girl who was deemed incapable of giving valid

²¹⁸ For instance, where a woman becomes sterile as a result of a hysterectomy operation.

²¹⁹ See for example *Re GF (Medical Treatment)* [1992] 1 FLR 293; and *Re ZM and OS (Sterilisation: Patient's Best Interests)* [2000] 1 FLR 523.

²²⁰ *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

²²¹ Chan and Simester, 'Duress, Necessity: How Many Defences?' at 127.

²²² *Re B (A Minor) (Wardship: Sterilisation)* [1988] AC 199.

consent to such a procedure, again, in order to avoid the risk of any future pregnancy. The House of Lords responded, again, in the affirmative. In making this decision the judges appear to have hastily sidelined important issues of human rights,²²³ considering the notion of rights only to, almost instantaneously, reject their application in the case. Lord Oliver indicated that, "the right to reproduce is of value only if accompanied by the ability to make a choice."²²⁴ This statement found further support from the judgment of Lord Hailsham in that same case, who declared that:

"To talk of the 'basic right' to reproduce of an individual who is not capable of knowing the casual connection between intercourse and childbirth, the nature of pregnancy, what is involved in delivery, unable to form maternal instincts or to care for a child appears to me wholly to part company with reality."²²⁵

In defence of the decision, it may be conceded that if it is sometimes in the interests of a competent woman to be sterilised, it is equally plausible that it may sometimes be in the best interests of an incompetent person to have that operation.²²⁶ Nonetheless, there has been much criticism of sterilisation operations which are carried out for what could be construed as questionable reasons. Sterilisation operations have been carried out on incompetent patients merely for the prevention of future pregnancy, or in anticipation of the risk of sexual assault, or, sometimes, for some other non-therapeutic reasons.²²⁷ It is arguable, however, that although it may prevent conception, sterilisation does not decrease the vulnerability of the patient to sexual assault, for instance, or sexually transmitted disease. Unconvinced by the reasons sometimes presented by the courts, McLean insightfully observes that, "the actual reasons given for non-consensual

²²³ Although it must be remembered that, like *Re F*, *Re B* is a pre-Human Rights Act decision, and it is hoped that greater consideration would be given to the protected interests of the incompetent patient if the courts were confronted by a similar case today.

²²⁴ *Re B (A Minor) (Wardship: Sterilisation)* [1988] AC 199 at 211.

²²⁵ *Ibid.* at 204.

²²⁶ See Raanan Gillon, 'On Sterilising Severely Mentally Handicapped People' (1987) 13 *Journal of Medical Ethics* 59 at 61.

²²⁷ For example, in *Re HG (Specific Issue: Sterilisation)* [1993] 1 FLR 587 a sterilisation operation was authorised as being in the patient's best interests even though sexual intercourse was unlikely.

sterilisations are not [always] the same as those which are overtly given.”²²⁸

In response to this scepticism, more recently there has been a positive move towards requiring proof that a non-therapeutic sterilisation operation is *actually necessary* in the protection of health of the incompetent adult. In *Re S (Medical Treatment: Adult Sterilisation)*²²⁹ the courts refused to authorise the sterilisation of an incompetent woman simply because she might be at risk of some sexual abuse *at some time in the future*. This represents an encouraging shift away from the blatant paternalism that underscores many of the contrary decisions discussed above which have led to a denial of autonomy. A purely speculative risk of harm is now seemingly insufficient justification for the performance of such invasive surgery, and it seems that the risk must now be identifiable.²³⁰ This advance should surely be encouraged to prevent officious intervention which potentially undermines the interests of the patient, and to foster an approach which places greater emphasis upon respect for concrete human rights.

It must be acknowledged, however, that non-consensual sterilisation operations are, in practice, extremely rare. Nonetheless, the human rights implications of such decisions remain significant. It is submitted here that the basic rights of incompetent patients have to be more closely guarded than the rights of their competent counterparts as they are, in a sense, more susceptible to violations which may be overlooked. It follows that when the treatment is such that it will have a profound and irreversible effect on a patient, and has no palpable therapeutic benefit, it will be difficult to justify on the basis of the necessity principle. English

²²⁸ Sheila McLean, *Old Law, New Medicine* (London: Pandora, 1999) at 100. Wilson also comments that although the patient's best interests are supposed to be the only consideration in deciding whether the intrusion is justified, in many cases these interests conveniently coincide with a broader network of interests pertaining to the immediate carers and to the public generally, see Wilson, *Criminal Law Doctrine and Theory* at 254.

²²⁹ *Re S (Medical Treatment: Adult Sterilisation)* [1998] 1 FLR 944.

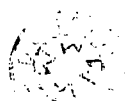
²³⁰ Jackson, *Medical Law: Text, Cases & Materials* at 209-211. This approach is also endorsed by Practice Note (*Official Solicitor: Declaratory Proceedings: Medical and Welfare Decisions for Adults Who Lack Capacity*) [2001] 1 FLR 549.

courts have, however, frequently found a way to do just that. Although the non-consensual non-therapeutic sterilisation operations considered here were addressed prior to the introduction of the Human Rights Act 1998, the suggestion that such invasive treatment is necessary will surely become increasingly difficult to defend in future against a backdrop of growing judicial recognition of human rights. If, as this thesis suggests, incompetent patients retain some basic human rights, it is difficult to see how those rights can be permissibly encroached upon where there is no therapeutic benefit to the incompetent patient. On balance, this intrusion appears to be a harmful, wrongful intrusion for which there is no justification. The use of best interests necessity to justify the intrusion upon an incompetent adult in non-therapeutic sterilisation operations is therefore limited and, if anything, likely to be subject to even further restriction in the future as human rights considerations become more prevalent.

3.6.4.3 Necessity and detention

Necessity has long been used as a common law justification for the detention of incompetent patients for specialist medical care. In *R v. Bournewood*,²³¹ the House of Lords controversially applied the necessity doctrine to justify the informal detention and treatment of a mentally incompetent person, who was autistic and mentally disabled, had a history of self-harm, and had become a danger to himself. The patient, L, was a forty-eight year old adult male who had spent thirty years of his life in hospital on account of an autistic disorder. He had eventually been settled in a community for three years, with weekly visits to a day centre. On one such visit L's behaviour became agitated and the psychiatrist at the hospital demanded that L should be assessed in the behavioural unit. Since L did not resist the admission, as he did not have the capacity to dissent or consent, the clinical staff thought it inappropriate for him to be

²³¹ *R v. Bournewood Community and Mental Health NHS Trust, ex parte L* [1998] 3 All ER 289.



formally detained under the Mental Health Act 1983.²³² L's carers brought an action in judicial review to the effect that L's informal admission could not be justified by the common law doctrine of necessity.²³³

On appeal, the House of Lords was presented with a difficult dilemma as the detention and treatment inevitably involved some interference with the patient's body and liberty, and therefore undeniably interfered with his rights. But only if the intrusion was wrongful, that is, not justified on the grounds of necessity, would the hospital be held responsible. In response, the consultant at the detaining institution argued that the action taken was *necessary* since, "[the patient's] best interests required his readmission to the unit with a view to stabilising his condition."²³⁴ The prosecution in the case sought to argue that there was no scope for the Trust to invoke the common law doctrine of necessity to justify the detention, since the Mental Health Act 1983 had a regime designed specifically to deal with a patient in the position of the victim and that the hospital only had a right to detain the victim under that particular statutory regime.²³⁵ The dispute raised an important question regarding the use of the common law doctrine of necessity to justify detention in preference to the extensive statutory powers vested in the medical profession to detain and treat. In resolution of the conflicting arguments, it was asserted by

²³² If L had resisted admission or had attempted to leave he would have been detained under the Mental Health Act 1983. Because he was not detained under the Act, the Hospital had to resort to the common law principle of necessity to justify the detention. Detaining a patient via the common law as opposed to the Act directly impacts on the position of relatives and carers as under the legislation, such parties have a right to be consulted or even to veto admission; but the common law denies any such rights.

²³³ They also argued that the detention fell outside of the scope of section 131 Mental Health Act 1983, which preserved the informal admission of patients but did not extend to the admission of patients who lacked the capacity to make any meaningful decision regarding their detention.

²³⁴ *R v. Bournewood Community and Mental Health NHS Trust, ex parte L* [1998] 3 All ER 289 at 291.

²³⁵ This argument was apparently supported by Sir Thomas Bingham in *Re S-C (Mental Patient) (Habeus Corpus)* [1996] QB 599 at 603 and is implicit in the speech of Lord Brandon in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 55. In a Scottish case, *Black v. Forsey* (1988) SLT 572, Lord Keith of Kinkel went so far as to say, at 576, that any common law power of detention (that is, on the basis of necessity) that a hospital authority might have had has been impliedly removed by the introduction of a comprehensive statutory scheme.

Goff LJ that although there had been no compulsory detention in L's case,²³⁶ the actions taken, "in so far as they might otherwise have constituted an invasion of his civil rights, were justified on the basis of the common law doctrine of necessity."²³⁷ Goff observed the long history of using the doctrine to detain patients²³⁸ and concluded that the detention of those who are a danger, or potential danger, to themselves or another may be permitted by common law principles, at least until the danger subsides. It was thereby declared that the action taken was necessary in the circumstances; that is, on balance of the competing rights and interests involved, the health and welfare of the patient was the overriding consideration. Accordingly no tort or crime had been committed on the facts.

Many commentators have expressed concern that the common law doctrine of necessity does not contain a transparent set of criteria on which principled decisions can be made. Further, according to Fennell, the common law powers should only be available "where it is in the patient's best interests, not merely where [s]he is 'dangerous to self or others'".²³⁹ Despite these anxieties, Lord Goff reaffirmed the continued relevance of the common law doctrine in preference to the statutory powers to detain vested in doctors:

"In the present case all the steps...taken by [L's psychiatrist] were...lawful because justified under the common law doctrine of necessity and this conclusion is unaffected by the realisation that she might have to invoke the statutory power of detention."²⁴⁰

²³⁶ This suggestion has been treated with scepticism, being described by one commentator as a "convoluted and unconvincing claim," see Kirsty Keywood, 'Detaining Mentally Disordered Patients Lacking Capacity: The Arbitrariness of Informal Detention and the Common Law Doctrine of Necessity' (2005) 13 *Medical Law Review* 108 at 110.

²³⁷ Per Lord Goff in *R v. Bournewood Community and Mental Health NHS Trust, ex parte L* [1998] 3 All ER 289 at 300.

²³⁸ Authorities dating as far back as the eighteenth century were cited in support of the principle, see *Rex v. Coate* (1772) Lofft 73; *Scott v. Wakem* (1862) 3F & F 328; and *Symm v. Fraser* (1863) 3F & F 859.

²³⁹ Phillip Fennell, 'Doctor Knows Best? Therapeutic Detention Under Common Law, The Mental Health Act, and the European Convention' (1998) 6 *Medical Law Review* 322 at 343.

²⁴⁰ Per Lord Goff in *R v. Bournewood Community and Mental Health Trust, ex parte L* [1998] 3 All ER 289 at 301.

Mindful of the imminent incorporation of the European Convention on Human Rights into English law at the time of the hearing in the House of Lords, it is somewhat surprising that the their Lordships did not show a greater willingness to consider decisions emanating from Strasbourg on the issue of detention. At international level, it was apparent that a broad discretion was granted to the medical profession with regard to invasive treatment administered to the incompetent patient, as seems to be the case in domestic law, but this discretion did not extend to detention.²⁴¹ This limitation was acknowledged in the case of *Herczegfalvy v Austria*,²⁴² in which the European Court of Human Rights held that although medical treatment of incapacitated subjects could, in principle, amount to a contravention of Article 3 of the European Convention on Human Rights, which prohibits inhuman and degrading treatment, a measure which is deemed a *therapeutic necessity* cannot be so regarded.²⁴³ In contrast, according to Article 5 of the Convention, detention on the grounds of unsoundness of mind is permitted, but subject to the more stringent safeguard that the detention is carried out in accordance with a procedure prescribed by law, and the lawfulness of the detention decision is open to external review.²⁴⁴

Following the House of Lords ruling, L and his carers appealed to the European Court of Human Rights alleging that there was no lawful detention in accordance with the requirements of Article 5 of the European Convention on Human Rights. In October 2004, the

²⁴¹ This issue is discussed further by Fennell, 'Doctor Knows Best? Therapeutic Detention Under Common Law, The Mental Health Act, and the European Convention' at 323.

²⁴² *Herczegfalvy v Austria* (1992) 15 EHRR 437 at paragraph 82.

²⁴³ So, although the patient in this case was heavily sedated and handcuffed to a bed for a period of time, the Court held that medical necessity justified the treatment. This judgment may have wider implications for the rights of incompetent patients who are subject to non-therapeutic treatment, such as *Re Y* and *Re F*, discussed in more detail in sections 3.6.4.1 and 3.6.4.2 respectively.

²⁴⁴ See Article 5(4) of the European Convention on Human Rights. It is noteworthy that because the detention was justified on common law principles, L had no right to have his detention considered by a Mental Health Review Tribunal.

Bournewood saga reached its climax in the case of *HL v. UK*.²⁴⁵ The European Court of Human Rights held that L had, in fact, been detained on grounds of unsoundness of mind, in accordance with the substantive criteria required by Article 5(1). However, the Court was not prepared to accept that the detention was in accordance with a procedure prescribed by law, as required by Article 5(4). Whilst acknowledging such procedures need not necessarily be entrenched in statute, it was suggested that where incompetent patients were deprived of their liberty, the common law doctrine of best interests necessity was too vague and had insufficient safeguards to be compatible with the Convention. Hence, the informal admission of a compliant but incompetent adult patient, lacking the capacity to make decisions about his own psychiatric care, therefore violated Article 5(4) and constituted an arbitrary detention.²⁴⁶

So, the Court found that the scope of the necessity doctrine was not sufficiently precise to justify the intrusion on the rights of the incompetent patient. This sentiment has been echoed by others who have questioned the piecemeal development of the doctrine and, particularly, its “gradual extension to welfare issues that extend considerably beyond its original domain of healthcare decision-making.”²⁴⁷ It was acknowledged above in section 3.6.3.1 that the best interests test which forms the foundation of the necessity doctrine has been significantly expanded since it is no longer determined solely by a responsible body of medical opinion, but ‘objectively’ by a judge. Consequently the application of the doctrine in this context is vague and imprecisely defined. On a similar point, the Court expressed a further objection that the ‘extensive network of safeguards’ offered by the Mental Health Act 1983 to detained patients to prevent any injustice is in stark contrast to the loose regulatory scheme at

²⁴⁵ *HL v. United Kingdom* (2005) 40 EHRR 32.

²⁴⁶ Similar questions have been raised in other jurisdictions; see the US Supreme Court case of *Zinermon v. Burch* 494 US 113 (1990), where Blackmun J submitted, at 133-134 that the informal admission of persons lacking capacity to consent to admission was ‘unconstitutional’.

²⁴⁷ Keyword, ‘Detaining Mentally Disordered Patients Lacking Capacity: The Arbitrariness of Informal Detention and the Common Law Doctrine of Necessity’ at 111.

the root of the doctrine of necessity.²⁴⁸ It would appear, therefore, that the informal detention of patients lacking capacity to make decisions regarding such detention, if justified, would operate to marginalise the fundamental and basic rights of an already very vulnerable group of people.²⁴⁹

In response to these criticisms the government consulted widely on the issues raised by *Bournewood* and produced a new framework which declares it unlawful to deprive the liberty of an intellectually incapable adult who cannot consent to admission to a hospital or care home.²⁵⁰ The result is that hospital / care home managers wishing to deprive patients of their liberty will have to seek authorisation for their action to be lawful.²⁵¹ A request for authorisation will result in numerous assessments of the patient's age, mental health and capacity, whether the deprivation is necessary, proportionate and in the best interests of the patient.²⁵² It seems that the criteria that will result in a deprivation of liberty are more rigorous than those in the common law. However, "they remain vague, depending as they do on such comparatively abstract notions as 'best interests', 'necessity', 'proportionality' and the 'likelihood of harm'".²⁵³ Despite these shortcomings, the framework is now enshrined in statute and it remains to be seen whether it will effectively close the *Bournewood* gap and result in a diminished role for the common law defence of necessity. The European Court of Human Rights decision in *Bournewood* must be welcomed as a positive move towards recognition and protection of the fundamental rights of vulnerable groups. It is an example of the Court engaging in a more overt human rights analysis to

²⁴⁸ This point was emphasised by the Court in *HL v. United Kingdom* at paragraph 120.

²⁴⁹ See Keywood, 'Detaining Mentally Disordered Patients Lacking Capacity: The Arbitrariness of Informal Detention and the Common Law Doctrine of Necessity' at 115.

²⁵⁰ Department of Health, *Protecting the Vulnerable: The Bournewood Consultation* (London: Department of Health, 2006). Deprivation of liberty appears to go beyond simple confinement, and medical treatment could amount to deprivation of liberty.

²⁵¹ Section 50 of the Mental Health Act 2007 amends the Mental Capacity Act 2005 on this issue.

²⁵² Department of Health, *Bournewood Briefing Sheet* (London: Department of Health, 2006) at 3.

²⁵³ David Hewitt, 'Closing the *Bournewood* Gap?' (2006) 156 *New Law Journal* 1234 at 1234-1235.

evaluate the suitability of domestic decisions regarding potential invasions of the rights of innocent persons. This explicit and reasoned approach could be developed further in domestic courts to include a more precisely defined analysis of conflicting rights.

3.7 Conclusion to chapter three

This chapter has considered the scope of criminal responsibility for intruding on the rights of innocent incompetent patients. It is clear from an analysis of the case law that the necessity principle is used routinely in medical cases to justify otherwise criminal intrusions on the bodily integrity of patients who are unable to give consent to treatment due to some incapacity. Beyond this category of cases, however, the defence has been used sparingly. Although necessity has been recognised as a residual defence for centuries it has seldom been exploited, only in comparatively uncontroversial cases where there is either no victim whatsoever, or where proprietary or minor personal rights are invaded to prevent significant harm to the actor or another. It is submitted here that necessity principle has been extended as a justification for medical treatment administered to an incompetent patient, but only to vindicate some superior right of the innocent patient and not merely because the treatment causes a lesser evil than that which it averts. Although the necessity justification is not beset by rules and restrictions it is submitted that in the medical context, it may only be used if the intrusion is in the incapacitated patient's best interests.

The starting point for the analysis in this chapter was the assertion that any medical intervention which intrudes on the rights of an innocent *competent* patient in the absence of consent will constitute a wrongful violation. The broad notions of autonomy and liberty, which proved fundamental in the development of a moral framework for criminalisation in chapter two, are particularly significant in the context of medical intervention. To reiterate:

"The right to determine what shall be done with one's body is a fundamental right in our society. The concepts inherent in this right are the bedrock upon which the principles of self-determination and individual autonomy are based. Free individual choice in matters affecting this right should...be accorded very high priority."²⁵⁴

Since such basic and fundamental rights are paramount, any encroachment on the autonomous individual's bodily integrity could result in a charge of criminal assault. In the case of medical intervention, the consent to treatment of the *competent* patient negates any wrongful intrusion on their rights and no offence is committed. Should consent be withheld, any invasive treatment would be unlawful. This is so even if the invasion would dramatically enhance the living standard of the patient, because the right to self-determination must protect both rational and unorthodox decisions. However, it is evident that when life (or potential life) is at stake, the principle of self-determination can effectively be overridden by other perceived societal interests.²⁵⁵ This is particularly apparent in a number of cases where caesarean section operations have arguably been forced upon competent women because of the court's misguided attempt to protect the foetus. Although the courts are eager to declare the primacy of a competent individual's freedom of choice, it is argued, particularly in section 3.5.2 above, that this superficial commitment to patient autonomy is often a mask for paternalistic considerations. Sometimes the courts have circumvented the problem of patient choices that are perceived to be detrimental to the individual's welfare, or the potential life of a foetus, by declaring the patient incompetent to make their own welfare decisions. This paternalistic attitude should be discouraged as it is contrary to the basic liberal ideals set forth in chapter two.

²⁵⁴ Per Robins JA in *Malette v. Shulman* (1990) 67 DLR (4th) 321 at 338.

²⁵⁵ This difficult balancing act was acknowledged by Hoffmann LJ in *Airedale NHS Trust v. Bland* [1993] AC 789, where he stated at 827, "[T]here is no morally correct solution which can be deduced from a single ethical principle like the sanctity of life or the right of self-determination. There must be an accommodation between principles, both of which seem rational and good, but which have come into conflict with each other."

Some have argued that “involuntary treatment constitutes a paternalistic intervention into the lives of those who are merely socially deviant...[and] that involuntary treatment for mental disorder represents the most severe intrusion by the state into individual civil liberties.”²⁵⁶ Despite such scepticism, it is widely accepted that in the case of the *incompetent* patient who is incapable of consenting to medical intervention, the doctor’s action is not generally considered unlawful, especially in emergency circumstances. Even where there is time for deliberation serious intrusions on the bodily integrity of the patient are invariably permitted in the case of incapacitated subjects, provided that intervention is necessary on a balance of the patient’s best interests. It has been asserted that in such cases, “...when the magnitude of the beneficence is huge, and the weight of the autonomy consideration weak...beneficence [should be permitted to] override autonomy.”²⁵⁷

In calculating best interests, the courts have struggled, or perhaps more accurately have been reluctant, to determine any clear principles and the legislature have not assisted in any significant way. It may be argued that the difficulty of calculating the best interests of a patient who cannot consciously or rationally consent to treatment can never be eradicated, but that more guidance could be made available to the medical profession.²⁵⁸ Even with such guidance, however, best interests calculations are essentially performed on a case-by-case basis, resulting in a lack of consistency and giving rise to potential human rights challenges. This point was emphasised by the analysis of the best interests test in three specific contexts: where necessity has been used to justify the non-consensual donation of organs; non-therapeutic sterilisation; and the detention of incompetent adults. These cases and the commentary arising from them highlight that human rights issues are becoming increasingly difficult to ignore and the permissibility of medical

²⁵⁶ Sameer Sarkar and Gwen Adshead, ‘Treatment Over Objection: Minds, Bodies and Beneficence’ [2002] *Journal of Mental Health Law* 105 at 106, citing the views of Thomas S Szasz, ‘The Myth of Mental Illness’ (1960) 15 *American Psychologist* 113 at 113-118.

²⁵⁷ Glick, ‘The Morality of Coercion’ at 394.

²⁵⁸ Per Lord Donaldson (CA) in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 18.

treatment can arguably only be fully comprehended by reference to a more concrete human rights framework.²⁵⁹ What is required in relation to incompetent subjects is a greater respect for human rights, equivalent to that afforded to the competent patient, whose rights are far less likely to be exploited. Medical treatment administered to incompetent patients highlights the tension between patient autonomy and competing forces of paternalism. The legislature and judiciary have a fundamental role to play in steering a middle path between autonomy and paternalism.²⁶⁰ A more principled approach, which respects autonomy and physical well-being as primary values and invokes the language of human rights to arrive at carefully considered solutions, should be developed at judicial level; and if the infringement genuinely vindicates a superior right of the patient then it should be justified by the necessity principle.

The necessity justification is arguably available beyond the confines of victimless crimes, or infringements on the rights of incompetent patients. It appears that the defence may even justify a *lethal* intrusion on the rights of another in certain limited circumstances. The discussion will now turn to the scope of criminal responsibility for intruding on the rights of an innocent threat to the interests of the defendant or another and it is argued that it may sometimes be justifiable to lethally setback the rights of an innocent person if they actively or passively threaten the interests of the actor on the grounds of self-defence. Further the necessity doctrine may also be used outside of the context in which it was employed in this chapter to justify infringements on the rights of an innocent incidental threat, but only in very limited circumstances.

²⁵⁹ The rights-based approach is supported by Wicks, 'The Right to Refuse Medical Treatment Under the European Convention on Human Rights' at 17. Other commentators are more cautious. Murphy pleads that philosophers "[do] not give into the romantic and knee-jerk liberal temptation to multiply rights beyond necessity." He warns: "The more one attempts to go above the minimum to assert something more substantial as a matter of right, the more one runs the risk of developing a list of 'rights' which are either so economically expensive to support or so morally intrusive to enforce that no sane society will in fact support or enforce them. They will be paid at most a kind of lip service in manifestos – something which cheapens the concept of a right, makes people cynical about rights, and deprives them of their moral force," see Murphy, 'Rights and Borderline Cases' (1977) 19 *Arizona Law Review* 228 at 240.

²⁶⁰ Wicks, *Human Rights and Healthcare* at 61.

Chapter Four:

Intruding on the rights of innocent threats

4.1 Introduction to chapter four

It was established in chapter three above that an actor may not be criminally responsible for interfering with the rights of an innocent incompetent person if the interference was justified by the necessity to act in the best interests of the person concerned. This chapter considers setbacks to the interests of a very different category of innocent victim, one who *poses a threat* to the personal or proprietary interests of the actor (or another). Unlike the innocent victims discussed in chapter three, a denial of liability for interference with the rights of a non-culpable yet threatening individual involves a difficult appraisal of the protected interests of two innocent parties: defendant and innocent threat.

Intrusions on the interests of two distinct categories of threat will be examined in this chapter: *innocent unjust threats* and *innocent incidental threats*. At the outset the chapter will consider the extent to which a defendant is exempt from responsibility for intruding on the rights of a person who represents an *innocent unjust threat*¹ through the defence of self-defence. In order to provide a cohesive and robust evaluation of criminal responsibility for force used against an innocent unjust threat it is essential to outline the theoretical, philosophical and practical challenges posed by the defence of self-defence. Despite being a well-established feature of the criminal law, much of the literature pertaining to this comparatively neglected defence concentrates on its boundaries, with limited analysis of important theoretical questions such as whether the defence is justificatory or excusatory. Any comprehensive account of the

¹ The term *unjust threat* is preferred to *unjust attacker* as the latter phrase unduly restricts the scope of self-defence. This point is addressed in greater detail in section 4.2.2 below.

legitimacy of using self-defensive force to ward off an innocent unjust threat also necessitates detailed investigation of the philosophical foundations of the defence, since establishing a clear philosophy will, it is hoped, provide useful guidance on the boundaries of using defensive force against innocent unjust threats. Whilst such philosophical analysis is paramount,² regard must also be paid to the legal requirements, or conditions, of self-defence in order for the account to be complete.

The second category of threat to be considered is the individual that will be classified here as an *innocent incidental threat*. Strictly speaking such a person does not constitute a threat *per se*, but is so closely linked to an independent immediate threat that one might consider them to be part of that threat. It is this latter connection with the immediate source of the threat that sets the innocent incidental threat apart from the innocent bystander addressed in chapter five. The innocent incidental threat unwittingly brings the immediate threat, initiated by another agent or circumstances, closer to fulfilment yet the direct source of the threat exists independent of their action (or inaction). If a defendant's interests are indirectly endangered by an innocent person then there is some dispute as to whether the defendant's response in infringing the rights of the innocent incidental threat may be justified on the grounds of self-defence or, alternatively, a residual defence of necessity. The precise coverage of these two related defences and the conceptual overlap between them must be determined before any principled guidance can be offered regarding the scope of criminal responsibility.

With these aims in mind, the chapter proceeds with a brief introduction to the defence of self-defence in broad, general terms in section 4.2. It is

² As indicated by the attention focused on philosophical perspectives in the comprehensive analysis offered by Uniacke, *Permissible Killing*. Other less extensive accounts have been offered by other commentators including, Kasachkoff, 'Killing in Self-Defence: An Unquestionable or Problematic Defence?' at 509-531; Susan Levine, 'The Moral Permissibility of Killing a 'Material Aggressor' in Self-Defense' (1984) 45 *Philosophical Studies* at 69-78; Phillip Montague, 'Self-Defense and Choosing Between Lives' (1981) 40 *Philosophical Studies* at 207-219; Brian J Smart, 'Understanding and Justifying Self-Defense' (1989) 4 *International Journal of Moral and Social Studies* at 231-244.

suggested that self-defensive force may be legitimately exercised against any unjust threat to one's protected interests and the discussion determines what constitutes an *unjust threat*. Section 4.3 analyses the theoretical basis of the defence and examines the manifestation of self-defence as a justification and putative self-defence as an excuse. The section also scrutinises competing philosophical accounts in order to clarify where the defence derives its justificatory force and proposes a coherent philosophy which incorporates both paradigm and non-standard cases of self-defence, paying particular attention to the correct treatment of cases involving *innocent* unjust threats. A rights-based philosophy with an accompanying theory of forfeiture is defended as the most plausible explanation of why we are permitted to use self-defensive force, even against innocent threats. Section 4.4 explores the limitations on the availability of self-defence by examining and defending appropriate parameters of the defence which are compatible with the general aims of the criminal law in a liberal society. In particular the operation of necessity and proportionality requirements will be considered, insofar as they underscore the central notion of reasonableness. Having established a satisfactory theoretical and practical basis for the defence which accommodates cases involving intrusions against innocent unjust threats, section 4.5 considers in greater detail the precarious position of the innocent incidental threat, the person who is not technically a threat at all, but who is closely linked to the threat in that they expose it to themselves and others. The limits of self-defence are challenged, and the conceptual overlap between self-defence and necessity is explored with reference to some difficult, thought provoking, examples. Finally, section 4.6 summarises and concludes the arguments presented and defended throughout the chapter. In essence, the submission is that criminal responsibility shall not be imposed on an actor who intrudes on the rights of an innocent unjust threat by virtue of the self-defence justification, provided certain conditions are fulfilled; and that intrusions on the rights of an innocent incidental threat can be justified, in rare and carefully defined circumstances, on the grounds of necessity.

4.2 The doctrine of self-defence

4.2.1 Introduction to self-defence

In modern society aggression and violence create formidable challenges within moral, legal and political spheres. Aggressive violence cannot be tolerated in any civilised society, save for special exceptions; and it is on this basic premise that the defence of self-defence³ is both permitted to ward off unjust violence, but is also subject to stringent limitation to prevent its misuse.⁴ Self-defence intrinsically represents an attempt to resolve the tension between the fundamental prohibition against intruding on the personal and proprietary rights of another and the permitted exceptions to such action. For this reason, even in the paradigm case where aggressive violence perpetrated by a malevolent aggressor is warded off by a defendant, the defence poses a special challenge to criminal jurisprudence as it often appears to endorse shameless self-interest⁵ and can, in the most serious cases, involve intentional killing,⁶ at times instantiating an ostensibly unjustified preference for one human life

³ The term 'self-defence' is used throughout this thesis in a broad sense to encompass defence of self, defence of another and defence of property; other authors prefer the use of the phrase 'private defence', see Glanville Williams, *Textbook of Criminal Law* 2nd edition (London: Stevens, 1983) at 501; and Boaz Sango, *Self-Defence in Criminal Law* (Oxford: Hart Publishing, 2006) at 1.

⁴ See section 4.4 for further discussion of the conditions of self-defence.

⁵ Defence of oneself is regarded as the most problematic form of defensive action to justify in light of the self-interest involved.

⁶ This aspect of self-defence distinguishes it from the related defences of necessity and duress, which currently provide no defence to murder, see section 4.5.3 and section 5.4 respectively. Some of the most difficult cases to resolve involve lethal self-defensive action that leads to the death of the unjust threat, whether that threat is culpable or, even more challenging, non-culpable. If the justifiability of self interested killing, arguably the most serious form of the defence, can be sustained then other somewhat lesser self-defensive acts will be correspondingly justified; see the approach taken by Leverick, *Killing in Self-Defence* (Oxford: Oxford University Press, 2006). Leverick has been criticised for limiting her monograph to lethal self-defensive acts in a publication review authored by Rogers, who comments that "...to focus on homicide at all is rather distracting...[i]n explaining the commission of non-fatal offences in self-defence, a wider theory of rights of bodily integrity will be needed," see Jonathan Rogers, 'Publication Review: Killing in Self-Defence' (2008) *Law Quarterly Review* 172 at 172-173. Others have also criticised such a restrictive approach, see Sango, *Self-Defence in Criminal Law*. In light of these criticisms it is hoped that this account incorporates a broader theory of rights of bodily integrity.

over another.⁷ However, legitimate defensive force exonerates the actor for a much broader range of responses beyond the typical case involving a reaction to aggressive violence. Self-defence may, for example, provide a complete defence for an actor who is not defending themselves against any aggression or violence, but who instinctively preserves her/his own interests by thwarting a threat posed by an innocent passive person.

Self-defence absolves a defendant of any criminal responsibility by providing a legal permission⁸ to intrude on the personal or proprietary rights of an unjust threat in order to protect private or public interests, provided the defendant uses a reasonable level⁹ of force¹⁰ in the circumstances as s/he believes to exist.¹¹ The defence has two distinct legal sources, which differ according to whether public or private interests have been defended. Section 3(1) of the Criminal Law Act 1967 is applicable where defensive force is exercised to protect public interests in the prevention of crime (that is, in response to an *unlawful* threat) or to effect an arrest.¹² Most instances of public defence will also be cases of private defence, since most involve the use of force against an *unlawful*

⁷ Kasachkoff, 'Killing in Self-Defence: An Unquestionable or Problematic Defence?' at 513. Although the circumstances in which a *lethal* act of self-preservation is morally or legally permitted are infrequent, understanding why even such a serious intrusion on the rights of another is permitted in the case of self-defence is crucial to the development of a coherent theory of self-defence which is generally applicable as a justification for all degrees of defensive force used against all manner of unjust threat.

⁸ Jeremy Horder highlights the defendant's legal permission to act as *the* key issue in cases of self defence, see Jeremy Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' (1998) 11 *Canadian Journal of Law and Jurisprudence* 143 at 143. If a defendant's action is legally permissible it is thereby rendered *lawful*.

⁹ The level of force must be reasonable on an objective evaluation, see *R v. Owino* (1996) 2 Cr App R 128; *Shaw v. R* [2001] UKPC 26; and *R v. Martin (Anthony)* [2002] 1 Cr App R 27. See also section 4.4 below for detailed analysis of the conditions of the defence.

¹⁰ It is accepted that the defence may be available where something other than 'force' is used defensively, see Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' at 144. Horder uses the example of releasing poisonous gas into a room to defend oneself from an attacker.

¹¹ See *R v. Gladstone (Williams)* (1984) 78 Cr App R 276; and *Beckford v. R* [1988] AC 130. See also section 4.4 below.

¹² Section 3 dictates that: "(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large; (2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose."

attack. Indeed, conventional accounts of self-defence restrict the availability of the defence to use of force against an *unlawful* attack. But the central theme of this thesis is the legitimacy of intrusions on the rights of innocents, who have, by definition, done nothing unlawful. It follows that the subsequent discussion is limited to consideration of the common law defence of self-defence which contains no such restriction.¹³

4.2.2 The scope of self-defence

In the common law of self-defence it is well established that the defensive action must be directed against the *source* of the threat to one's interests. Relying on theories advanced by Uniacke and developed by Horder, it is submitted here that *any unjust threat*, culpable or innocent, may be the legitimate target of self-defensive force.¹⁴ If it is accepted that self-defensive force can only be exercised in these conditions, it is necessary to explore what constitutes an unjust threat.

4.2.2.1 Culpable unjust threats

Typically in paradigm case of self-defence the threat emanates from a *fully competent and culpable aggressor* who launches an attack on, for instance, an entirely innocent passer-by in order to steal her/his personal property. If the victim of the attack instinctively exercises defensive force

¹³ However, it is accepted that the statutory defence may be of some use if the person attacked is unaware of the non-culpability of their attacker. If, for example, a random attack is launched against a defendant by an attacker who is not committing any crime because s/he is in a state of automatism, the defendant is unlikely to be aware of the circumstances which absolve the attacker of guilt. Section 3 may provide a statutory defence as the defendant intended to use force in the prevention of crime. Where the defendant is aware of the circumstances that exempt the attacker of responsibility, section 3 is inapplicable, but the common law defence would yield a similar result.

¹⁴ Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge: Cambridge University Press, 1994) chapter 5; Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship'; and Wilson, *Criminal Law Doctrine and Theory* chapter 10. At 268, Wilson emphasises the significance of the requirement that the defensive force be taken against unjust threats, claiming that it "ensures that what counts as 'good consequences' is firmly tethered to society's expressed priorities, not unpredictably to the whims of the action taker."

by kicking the attacker in the shins to prevent their escape, the offence elements for assault have been fulfilled and the victim of the attack has intruded on the attacker's rights of physical integrity. Yet subjecting the self-defender to punishment in such circumstances would, for most, be unpalatable since the defensive reaction is morally and legally justified. The response is a reasonable one in the circumstances, does not wrongfully intrude on the rights of the aggressor and is therefore outside the scope of criminal law prohibition. Defending the claim that the threat posed by a fully competent and culpable aggressor can be warded off is relatively uncomplicated. All things considered, there is no moral justification for the malevolent aggressor's action; the attack represents objectively unjustified action which the defendant has a right to exercise self-defensive force to ward off. This objective appraisal of the action may not be quite so straightforward, however, if the threat emanates from a non-culpable source.

4.2.2.2 Innocent unjust threats

In order for any account of self-defence to be complete, it must accommodate the more difficult cases which form the basis of this thesis in which the legitimacy of employing self-defensive force is rather more complicated. When an actor is confronted by a threat to their personal or proprietary interests and that threat emanates *directly* from an innocent person, intuitively it seems that no criminal responsibility should be imposed for thwarting the threat. From the defendant's perspective, the threat is equally hostile to their interests whether the source is culpable or blameless, active or passive. As indicated in section 4.2.1 above, there is no requirement in the common law of self-defence that the threatening conduct is unlawful. The defendant who impinges on the rights of an innocent unjust threat in self-defence is, it is submitted here, beyond criminalisation as s/he has a legal permission to act. This permission derives from the fact that there is, objectively, no good reason for the threat being posed; the blamelessness or otherwise of the threatening

person is irrelevant in the contemplation of the normative position of the defendant.¹⁵ Where the defendant is attacked¹⁶ by an insane person, a child, or someone who mistakenly believes the defendant is about to attack them, the threat posed is unjust in the sense that there is, overall, no sound reason for it. If sanity was restored, maturity reached or full knowledge of the circumstances imparted, these three innocent targets of self-defensive force would appreciate that there was, in fact, no good reason for their action.¹⁷

This analysis may be extended to innocent threats who are not positively *attacking* at all, but who pose a threat as a consequence of something that has happened to them, rather than some voluntary or involuntary *action* on their part.¹⁸ Take, for instance, Smith and Hogan's familiar case of the two mountaineers (A and B) connected together by rope on a climbing expedition.¹⁹ A falls over the edge of a cliff and subsequently drags B to a precarious position perilously close to the edge of the cliff. In the knowledge that both will imminently fall to their deaths if no action is taken, B decides to sever the rope attaching the two, with the result that A falls to his death. B has undoubtedly infringed the fundamental rights of his fellow mountaineer, but should his action fall within the scope of criminal prohibition? Instinctively, the answer is no. Whilst some commentators have attempted to avoid the criminal liability of the actor on the grounds of necessity,²⁰ the more convincing view is, on a careful analysis of the facts, that this is more naturally an example of self-defence.²¹ The dangling mountaineer, A, represents a *direct and unjust threat* to his colleague: direct because he is the *source* of the threat;

¹⁵ In support of assertions made by Horder, it is submitted here that the normative position of the defendant is of paramount importance, rather than the culpability of the threat; see Horder, 'Self-defence, Necessity and Duress: Understanding the Relationship' at 146.

¹⁶ Uniacke suggests that an 'attack' is an offensive act which causes harm or danger to another. For further discussion, see Uniacke, *Permissible Killing* at 160-164.

¹⁷ The idea that an absence of a moral justification for the threat entitles the defendant to respond to protect their interests without the threat of criminal sanction is developed further in section 4.3.9 below.

¹⁸ Uniacke, *Permissible Killing* at 164.

¹⁹ Ormerod, *Smith and Hogan: Criminal Law* at 350.

²⁰ *Ibid.* at 350.

²¹ Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' at 147.

unjust because the threat is posed for no objectively justified moral reason. The absence of fault on the part of A does not affect the normative status of B who is, on this account, justified in exercising his right to defensive force against the unjust threat.

It is unfortunate that the dangling mountaineer became caught up in such a terrible situation, but he is, undeniably, a direct source of the unjust threat to the defendant, who is under no obligation to surrender her/his life by not responding to the threat.²² This reasoning may be extended to other difficult cases. Take, for instance, Nozick's famous falling projectile example.²³ The defendant (D) is standing at the bottom of a well; an innocent person (V) is thrown down the well by a third party²⁴ and is hurtling towards D. D will certainly die if s/he does nothing. D instinctively protects her/his life by killing the projectile, using a vaporising gun to eradicate the threat. It is submitted here that the self-defence justification is sufficiently broad to permit serious infringements²⁵ on the rights of the innocent unjust threat in self-preservation,²⁶ even where the threat is *passive*.²⁷ This *passive* innocent threat is someone absent of fault, who is not positively 'aggressing' at all and whose "mere movements *qua* physical object or mere presence constitutes a threat to our life"²⁸ and a potential violation of our rights.²⁹ On Horder's persuasive analysis, the projectile poses a *direct and unjustified threat* to the

²² Simester and Chan, 'Duress, Necessity: How Many Defences?' at 129.

²³ Nozick, *Anarchy, State and Utopia* at 34-35.

²⁴ It matters not for the present discussion whether the innocent man was pushed down the well by a villain or a gust of wind.

²⁵ Logically it follows that less serious intrusions on the rights of innocent unjust threats (for instance on rights of bodily integrity or proprietary interests) will thereby be permitted in self-defence, provided the use of force is deemed reasonable.

²⁶ There are, however, some who maintain that the protected interests of innocent threats cannot be usurped by a right of self-preservation, see Michael Otsuka, 'Killing the Innocent in Self-Defense' (1994) 23 *Philosophy and Public Affairs* 65 and Richard Norman, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1995) at 32. The suggestion is that harm incurred by, say, our meeting with a crazed mad man in a lift or by walking into the path of a falling fat man is simply a product of our bad luck and this harm cannot be justifiably transferred.

²⁷ This terminology is also preferred by Nancy Davis, 'Abortion and Self-Defense' (1984) 13 *Philosophy & Public Affairs* 171.

²⁸ Davis, 'Abortion and Self-Defense' at 190.

²⁹ Although the claim that an innocent passive threat can cause a rights violation is resisted by some commentators, see Otsuka, 'Killing the Innocent in Self-Defense' at 82.

defendant's protected interests, even though there is an absence of fault and no active attack.³⁰ The projectile is therefore a legitimate target of self-defensive force.

To summarise, the self-defence justification may be extended not only to force used against a culpable unjust threat, but also to an innocent unjust threat, whether active or passive. Provided the innocent person is the direct source of the threat to the defendant's interests and the threat is unjust, the fault of the threatening person and the activity or passivity of the threat is irrelevant to the exercise of legitimate self-defensive force. The above discussion provides some insight into the kind of innocent person who may find themselves a target of self-defensive force.³¹ But it offers limited analysis of the reasons *why* the actor has a legal permission to intrude on the rights of another. Appeal must be made to the theoretical basis of the defence to provide this critical explanation. To begin with, the implications of the justification and excuse distinction, adopted throughout this thesis as the most convenient mode of classifying defences,³² will be examined in the context of self-defence.

4.3 Theoretical foundations of self-defence

4.3.1 Introduction to the theoretical challenges

Self-defence "identifies certain circumstances in which the conventional public morality underlying the criminal law provides an exception to the prohibitory norm represented by the homicide and assault statutes."³³

From a liberal perspective, conduct which causes harm to other persons, in that it consists of a wrongful violation of their rights, is proscribed.

³⁰ Horder, 'Self-defence, Necessity and Duress: Understanding the Relationship' at 145-146.

³¹ There is further discussion of another sub-set of cases involving innocent persons whose interests are intruded on as an incidental effect of repelling the immediate threat in section 4.5 below.

³² See section 3.3.1 above for an introduction to the general distinction.

³³ Schopp, *Justification Defenses and Just Convictions* at 64.

Although self-defence involves the infringement of personal or proprietary rights of other human beings, such action is generally thought to be outside the scope of criminalisation, a recognised exception to the prohibitory norm. The most severe cases concern serious intrusions on the victim's right to life, bodily integrity, or autonomy, which may affect even basic subsistence; but if justified the action is not wrongful and should not, therefore, be the subject of criminal sanction. But why is this so? According to some theorists self-defence provides the actor with a positive right to defend themselves or another against an unjust threat, with the result that although another person's interests are set back by the self-defensive conduct, they are not violated or wronged.³⁴ Rodin suggests that self-defence may be considered a 'right' consisting of a simple Hohfeldian liberty to intrude on the legally protected interests of others in defence of oneself or another.³⁵ The exceptional nature of this liberty in terms of outlining and protecting important individual interests and providing guidance for future normative deliberation, "enables it to function as a genuine right within legal and moral normative systems."³⁶

Intuitions regarding the scope of the right to use force to defend protected interests tend to converge when considering standard cases of self-defence against a culpable aggressor, but theoretical explanations are often thwarted by non-standard cases. A credible theoretical account of self-defence must accommodate all cases and the theory advanced below has been developed with a particular emphasis on the problems presented by hard cases involving innocent unjust threats. Before the account is considered in greater detail, we must first determine how self-defence fits into the justification and excuse scheme of classification.

³⁴ Alternatively, Uniacke suggests that self-defence is not a justified infringement of another's right, but rather an exception to the general rule that rights should not be violated since the unjust threat is not wronged in any way. Uniacke, *Permissible Killing* at 26-28; see also Kent Greenawalt, *Conflicts of Law and Morality* (Oxford: Oxford University Press, 1989) at 286.

³⁵ Rodin, *War and Self-Defense* at 26 and again at 33.

³⁶ *Ibid.* at 33.

4.3.2 Self-defence: justification or excuse?

On what theoretical basis is self-defensive force permitted: is it excusatory or justificatory in nature? This particular query was articulated by Smith:

“It is debated whether certain acts done by way of self-defence or the defence of others are properly described as justified or excused. Whether the act done is one which society wants to be done, or merely tolerates, is a question which is not easy to answer if society has not expressed its wishes in the form of legislation or judicial decision.”³⁷

Although early historical classifications of the defence claimed it provided an excuse for action,³⁸ it is now widely accepted that self-defence is a justification.³⁹ Justification is defended here as an all things considered judgement about the conduct under consideration.⁴⁰ Even though conduct which is justified may cause a setback to the interests of another person (for instance, causing someone pain by striking them) the action is not, on an all things considered evaluation, wrongful. Justified conduct is, therefore, permissible or right.⁴¹

If an action is permissible or right on an all things considered evaluation the implication is that justifications are to be assessed objectively, rather

³⁷ Smith, *Justification and Excuse in the Criminal Law* at 12.

³⁸ Blackstone, *Commentaries on the Laws of England* IV volumes at 176. See Sangero, *Self-Defence in Criminal Law* at 30-35 for a concise history of the historical development of the defence; also Bernard J Brown, 'Self-Defence in Homicide: From Strict Liability to Complete Exculpation' [1958] *Criminal Law Review* 583. More recently others have attempted, unsuccessfully, to classify self-defence as an excuse, see Cathryn J Rosen 'The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill' (1986) 96 *American University Law Review* 11 and Claire Finkelstein, 'Self-Defense as a Rational Excuse' (1996) 57 *University of Pittsburgh Law Review* 621.

³⁹ See Sangero, *Self-Defence in Criminal Law* at 14 and Rodin, *War and Self-Defense* at 29-30. Fiona Leverick, describes self-defence as the “archetypal justification” in *Killing in Self-Defence* at 2. It has been suggested that this assumption, without further qualification, is ill-conceived, see Jonathan Rogers, 'Publication Review: Killing in Self-Defence' (2008) *Law Quarterly Review* 172 at 173-175. See also Uniacke, *Permissible Killing* at 35.

⁴⁰ See the discussion in section 3.3.1.1, and also Uniacke, *Permissible Killing* at 12-14.

⁴¹ Uniacke concedes that there are weaker (permissible act) and stronger (right act) standards of justification but wherever conduct is justified it is not wrongful, see *Permissible Killing* at 14.

than based on an agent-specific evaluation. If a defendant mistakenly believes s/he is about to be viciously attacked by an entirely innocent victim, from the defendant's agent-specific perspective s/he is justified in her/his response; but from a more informed objective all things considered perspective the action is wrongful and unjustified. It is proposed here that an action which is wrongful will be merely excused.

4.3.3 Putative self-defence: justification or excuse?

The self-defence justification is only available if the defendant responded to an unjust threat, that is, a threat posed for no objective moral reason. Hence, the defence may be relied on if the defensive action is, all things considered, the right thing to do. There are, however, some facets of self-defence which weaken the claim that self-defence is justificatory,⁴² one of which is the position of the person who mistakenly believes they need to use self-defensive force to ward off a threat. An all things considered judgement allows no room for mistaken beliefs on the part of the defendant and, as Horder correctly indicates, there is a conspicuous distinction between a self-defensive action being *objectively* morally justified, and that action being justified from the *personal perspective of the agent*.⁴³

If a defendant mistakenly believes they are being attacked there is no guiding justificatory reason for their action, even if the defendant acted for what they personally believed were good reasons. As discussed previously in section 3.3.1.1, individual justification for law-breaking is thought to be present only if, "there [is both] an applicable (guiding) reason for so acting...and that this correspond[s] with the (explanatory) reason why the action was performed."⁴⁴ So where the individual lacks

⁴² This point is highlighted by Uniacke, *Permissible Killing* at 9.

⁴³ Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' at 147, drawing on the work of Uniacke, *Permissible Killing* at 15-17.

⁴⁴ Gardner, 'Justification and Reasons' in Simester and Smith (eds.), *Harm and Culpability* at 105. As discussed in greater detail in section 3.3.1.1 above, others

guiding reasons for actions because s/he mistakenly but reasonably believes s/he is justified in using self-defensive force, the individual would merely be excused.⁴⁵ The absence of an objectively good reason for acting means that the defendant must rely on the authenticity of her/his belief to avoid criminal responsibility and this type of defence is consequently excusatory in structure.⁴⁶ To this end, there is an excuse form of self-defence whereby there is, overall, no guiding reason for the use of force but the defendant has a genuine well-grounded belief that they must act. The reasons behind the self-defensive action are personal to the actor rather than sound objective reasons to act, so on that basis the actor is merely excused and the excuse reflects the wrongness of the action. If the belief in the need to use force is, however, well-grounded,⁴⁷ the stronger the personal reasons for the action and the more likely it is that a complete excuse will operate to absolve the actor of any criminal responsibility.

propose that justified conduct requires either the existence of guiding reasons for the action, *or* explanatory reasons, but does not require both. Robinson has articulated the debate in terms of a 'deeds' theory of justification and a 'reasons' theory. On the 'reasons' theory action is justified on the basis of *explanatory* reasons alone; an individual who mistakenly but genuinely believes in the need for self-defensive force is justified irrespective of whether the force was actually necessary. Regarding putative self-defence as a justification seems untenable, since it conveys the confusing message that an action is lawful permissible or right even though it is objectively wrongful. Conversely, the 'deeds' theory justifies criminal conduct on the basis of *guiding* reasons alone; an individual is justified whenever justifying circumstances exist, regardless of whether they acted for a good reason, see Smith, *Justification and Excuse in the Criminal Law* at 28-44. Robinson is a chief proponent of this approach, along with Dressler and Greenawalt. On this theory of justification, a mistaken (self) defendant would merely be excused as there was no guiding reason for their action.

⁴⁵ Indeed, Fletcher addresses some difficult, non-standard cases by virtue of the vehicle of excuse: (1) innocent victims who protect themselves by utilising equally innocent shields should be excused for their conduct rather than justified; see George P Fletcher, 'The Right to Life' (1980) 63 *The Monist* 135; (2) victims who defend themselves on the basis of a mistaken belief that they are being attacked (putative self-defence) must be excused and not justified; see Fletcher, *Rethinking Criminal Law* at 762-769; and 'The Right and the Reasonable' (1985) 98 *Harvard Law Review* 949 at 971-980.

⁴⁶ As discussed in section 3.3.1.3 above, the classification of putative self-defence as an excuse has implications for third party rights of assistance and resistance: a third party would have a corresponding right to intervene to prevent the mistaken defendant from exercising what s/he believes to be self-defensive force, and the innocent victim would have a right to resist the force employed by the mistaken defendant.

⁴⁷ See section 4.4.1.3 below for further discussion on whether the actor's belief must be reasonable or merely honest.

4.3.4 A summary of the self-defence classification

It may be concluded that in a situation where the circumstances are correctly perceived, the defendant is justified in exercising self-defensive force and their conduct is, therefore, lawful. If the individual is mistaken as to the existence of a threat, however, the action is merely excusable and consequently wrongful. Individual perception of events is therefore crucial to the nature of the classification. Having successfully established an appropriate structural classification for the defence attention must now turn to the reasons *why* self-defensive action which encroaches on the personal or proprietary interests of another is justifiable.

4.3.5 Self-defence as a justification

Although it is relatively uncontroversial to characterise self-defence as a justification, it is more difficult to explain the moral foundation of that justification. Determining *why* the criminal law offers complete exoneration for those who use self-defensive force to repel unjust threats is central to any analysis of the scope of self-defence, particularly when force is permitted against innocent unjust threats. At first blush, self-defence may seem a “morally transparent”⁴⁸ defence in that its underlying doctrine is relatively simple. The most intuitive response to the question of why we are permitted to impinge on the protected interests of unjust threats in self-defence is, quite simply, that we are entitled to protect our own interests (or those of another) from any unjust threat against them. That is as much explanation as is required by many theorists; but it is clear that in order to construct a defensible account of the legitimacy of self-defensive force a more convincing explanation is required, one which goes beyond mere intuition. Against a moral theory which promotes the importance of autonomy and rights, what gives the self-defender the right to regard the interests of an unjust threat, particularly an innocent

⁴⁸ Judith J Thompson, 'Self-Defense' (1991) 20 *Philosophy and Public Affairs* 283 at 283.

threatening person, as less worthy than their own? To avoid criminal responsibility there must be a strong moral justification for encroaching on the protected interests of another person, particularly where they are not at fault for the threat they pose.

A number of divergent theories have been advanced to explain the moral foundation of self-defence. The following sections provide a brief summary of some of the main contemporary approaches to this problem. The discussion will include accounts which explain the permissibility of self-defensive action on the grounds that it is beneficial, on a balance of harms (alternatively branded the 'lesser evils' or consequentialist approach); others that accept the personal preference of the defendant as paramount; and others based on the fact the self-defensive intrusions are essentially unintentional. Having rejected these competing theories, a rights-based approach is defended here based on a supplementary theory which dictates that the unjust threat forfeits their interests on account of the threat they pose. It is argued that this account succeeds where others fail in justifying the use of self-defensive force against *innocent* unjust threats, whilst precluding the justification in the case of intrusions against innocent non-threatening bystanders.

4.3.6 Consequentialist approaches

Philosophical explanations which may broadly be categorised as 'consequentialist' provide the most significant alternative to the rights-based philosophies defended in section 4.3.9 below. For some theorists the moral foundation of self-defence is grounded in consequentialism which, as a general theory, dictates that "...the moral value of any action lies in the consequences."⁴⁹ In essence, consequentialism maintains that actions are right or wrong according to the consequences they produce as opposed to any intrinsic features of the conduct itself. Proponents of

⁴⁹ Bernard Williams, 'A Critique of Utilitarianism' in JJC Smart & Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973) at 79.

consequentialist accounts of self-defence claim that the use of force is justified because the consequences of invading the interests of the aggressor are preferable to the consequences of allowing the victim's interests to be violated.⁵⁰

One account based on consequentialist reasoning is that self-defence is justified if, on balancing the harm caused by the use of force against the harm avoided, overall harm is minimised or the 'lesser evil' is chosen. Although this approach seems commendable in that it promotes the greater good, most subscribers take into account the guilt of the aggressor in carrying out the balancing exercise and this inevitably excludes innocent unjust threats from consideration.⁵¹ The challenge for consequentialist accounts is that they must explain why the defendant chooses the lesser evil when, for instance, a lethal attack is warded off with lethal harm: on the face of it the harms are equal. In response, one variant of such a theory suggests that the value of the aggressor's interests is reduced on account of their moral blameworthiness. This explanation is labelled the 'discount' approach, as the value of the harm to the aggressor's interests is discounted on the overall balance of harms. For Robinson, the aggressor's culpability is "seen as discounting the value of their lives in the balance."⁵² For Montague, the interests of the aggressor are morally weakened by virtue of the threat they pose and this renders their interests less worthy than that of the victim.⁵³ Harm can

⁵⁰ Many commentators have ignored consequentialist accounts altogether, see Uniacke *Permissible Killing* and Kasachkoff, 'Killing in Self-Defence: an Unquestionable or Problematic Defence?' Others have dismissed them as unworthy of consideration, see Judith J Thomson, *Rights, Restitution and Risk: Essays in Moral Theory* (Cambridge: Harvard University Press, 1986) at 43.

⁵¹ Fletcher, *Rethinking Criminal Law* at 858.

⁵² Robinson, *Criminal Law Defenses* at 70. A similar approach was taken more recently in a monograph penned by Sangero although the term 'consequentialism' is avoided and the account also takes a broader range of considerations into account, such as the social-legal order, see Sangero *Self-Defence in Criminal Law* at 90-106.

⁵³ Montague, 'Self-Defense and Choosing Between Lives'; Phillip Montague, 'The Morality of Self-Defense: A Reply to Wasserman' (1988) 17 *Philosophy and Public Affairs* 81.

thus be distributed to the aggressor because the culpability of the latter forced the defendant to choose between competing interests.⁵⁴

An alternative consequentialist approach suggests that the use of self-defensive force is justified by the fact that an overall beneficial result is achieved through the adoption of a rule that permits such action.⁵⁵ This 'rule-consequentialist' approach is argued to be desirable on the basis that "awareness by a potential aggressor that force against him is legitimate is itself a deterrent factor."⁵⁶ It appears, however, to justify infringements on the aggressor's interests when the force was no longer necessary to repel the threat, for example because the aggressor has become incapacitated.⁵⁷ It is also submitted here that a rule permitting attacked persons to legitimately intrude on the interests of aggressors in self-defence is unlikely to deter the aggressor from engaging in violent attacks.⁵⁸ Other theorists⁵⁹ have essentially amalgamated the 'act' and 'rule' forms of consequentialism in the various theories they have advanced. Leverick summarises the contention of these hybrid consequentialist accounts as follows: "if the benefits to society in having a rule likely to deter aggression are placed on the 'same side of the scales' as the life of the victim, then self-defensive killing is justified on this

⁵⁴ Other proponents of the 'forced choice' conception include Cheyney Ryan, 'Self-Defense, Pacifism and the Possibility of Killing' (1983) 93 *Ethics* 508. The credibility of this explanation is doubted by Seamus Miller, 'Self-Defence and Forcing the Choice between Lives' (1992) 9 *Journal of Applied Philosophy* 239.

⁵⁵ Rodin criticises this reasoning in *War and Self-Defense* at 54.

⁵⁶ Richard B Brandt, 'Conscience (Rule) Utilitarianism and the Criminal Law' (1995) 14 *Law and Philosophy* 65 at 88. This is effectively the approach articulated by Sangero *Self-Defence in Criminal Law* at 90-106. In his proposed rationale Sangero attempts to justify self-defence by invoking a complex evaluation exercise which balances the interests of the aggressor with the interests of the attacked person, and which takes into account the guilt of the aggressor and the need to protect the 'social legal order'.

⁵⁷ This point is acknowledged by Kadish, 'Respect for Life and Regard for Rights in Criminal Law' at 883 and Wasserman, 'Justifying Self-Defense' at 360.

⁵⁸ Conversely, Fiona Leverick suggests that such a rule may, in fact, promote aggression, "either by encouraging aggressors to arm themselves more heavily because they know that their intended victims are permitted to use self-defensive force, or by encouraging victims to utilize self defensive force against aggressors too quickly, safe in the knowledge that they will not face punishment for doing so," Fiona Leverick, 'Defending Self-Defence' (2007) 27 *Oxford Journal of Legal Studies* 563 at 568.

⁵⁹ Including Robinson *Criminal Law Defenses*; Miriam Gur-Arye, 'Should the Criminal Law Distinguish between Necessity as a Justification and Necessity as an Excuse?' (1986) 102 *Law Quarterly Review* 71; and Mordechai Kremnitzer, 'Proportionality and the Psychotic Aggressor: Another View' (1983) 18 *Israel Law Review* 178.

balance of interests.”⁶⁰ It is argued below that no matter how theories based on consequences are explained they suffer from fundamental deficiencies which render a rights-based approach decidedly more attractive.

It is undeniable that the consequences of an action are morally relevant to an evaluation of permissibility but it is questionable whether consequences are the *only* or even the *dominant* moral consideration.⁶¹ Many commentators have rejected approaches which discount the value of the aggressor’s interests on account of their culpability, since all human interests should be valued equally.⁶² Further, if culpability diminishes the value of the aggressor’s life and moral worth is the priority, the presumption is that the general moral character of both aggressor and victim should be taken into account. The logical implication of the discount approach is that the victim’s life is subject to discount in the same way as the aggressor’s if s/he has a poor moral history.⁶³ Conversely, what if the aggressor threatened the defendant in a rare moment of rage, but was on the verge of discovering a cure for cancer? In such circumstances consequentialist theories would presumably prefer for the victim of the attack to be harmed rather than the aggressor, but this is unjust to the individual and completely neglects notions of individual rights and justice.⁶⁴

A more rigorous objection to such theories is the absence of guidance on the relative worth of competing interests. Suppose a victim is attacked by ten yobs; although of bad character, they retain some value in terms of what their lives are worth. The danger is that the collective worth of this

⁶⁰ Leverick, *Killing in Self-Defence* at 49.

⁶¹ Consequentialist approaches are criticised by Leverick, *Ibid.* at 45-50 and Rodin *War and Self-Defense* at 51-55.

⁶² See Wasserman, ‘Justifying Self-Defense’ at 358; Shlomit Wallerstein ‘Justifying the Right to Self-Defense: A Theory of Forced Consequences’ (2005) 91 *Virginia Law Review* 999 at 1003; and Leverick ‘Defending Self-Defense’ at 566. Indeed, Robinson himself appears to disassociate himself with the discount principle throughout his later work, see *Criminal Law Defenses* at 70-71.

⁶³ Leverick, *Killing in Self-Defence* at 46.

⁶⁴ This point is emphasised by Leverick, ‘Defending Self-Defense’ at 567.

multiplicity of aggressors may outweigh the relatively high value of the sole victim's life, and thus self-defensive killing in such circumstances is, by virtue of this approach, unjustifiable.⁶⁵ Unless the aggressor's life is devalued to the point of worthlessness, the discount approach does not account adequately for the problem of multiple aggressors.⁶⁶

Arguably the most central criticism to accounts based on balancing harms⁶⁷ is the lack of consideration afforded to innocent unjust threats.⁶⁸ Any argument based on the culpability of the aggressor cannot justify the use of lethal self-defensive force against innocent threats, active or passive.⁶⁹ Innocent aggressors lacking technical fault for their actions cannot plausibly be subject to any kind of discounting of their moral worth; nor can innocent passive threats who are not positively aggressing at all. In general, advocates of such theories refute any suggestion that the exclusion of innocent threats leaves the theory flawed.⁷⁰ They simply require self-defence against innocent aggressors and passive threats to be alternatively excused,⁷¹ or justified by some other means.⁷²

⁶⁵ This point is highlighted by Rodin, *War and Self-Defense* at 53 and Wasserman 'Justifying Self-Defense' at 359.

⁶⁶ Leverick questions the plausibility of this criticism on the basis that it assumes the interests of the multiple aggressors are jointly discountable, when they may in fact be severally discountable, see Leverick, *Killing in Self-Defence* at 47-48.

⁶⁷ A point conceded by Sangero, *Self-Defence in Criminal Law* at 48.

⁶⁸ Fletcher 'Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory' at 378; Kadish, 'Respect for Life and Regard for Rights in the Criminal Law' at 884.

⁶⁹ Mindful of these deficiencies, some, including Nancy Davis, 'Abortion and Self-Defense' (1984) 13 *Philosophy and Public Affairs* 171 at 189-190, have grounded the justification of self-defence in terms of the 'future harm' approach, which claims that self-defensive force is justifiable on the basis that it leads to a net prevention of harm as the aggressor is dangerous and likely to attack again. The benefit of this approach over the discount theory is that it can at least justify the intrusions on the rights of innocent aggressors (such as the insane who, although blameless, may be dangerous) and multiple aggressors. But it is not thorough enough to be convincing as it does not justify the use of force against innocent passive threats discussed in section 4.2.2.2 above.

⁷⁰ Sangero's rationale for self-defensive force based on the culpability of the aggressor does not extend to innocent aggressors. He does not see this limitation on his rationale as fatal to his account; he merely proposes that attacks by an innocent aggressor are outside the scope of self-defence and fall instead within the sphere of excusatory necessity, see Sangero, *Self-Defence in Criminal Law* at 48. Sangero has subsequently been criticised for this unexplained and consequently unconvincing submission, see Leverick, 'Defending Self-Defence' at 569.

⁷¹ See Larry Alexander, 'Justification and Innocent Aggressors' (1987) 33 *Wayne Law Review* 1177 at 1185; and Kremnitzer, 'Proportionality and the Psychotic Aggressor: Another View' (1983) at 196, cited in Sangero, *Self-Defence in Criminal Law* at 58.

It seems that, in general, consequentialist explanations of self-defence which count the aggressor's guilt as a relevant factor are inadequate. Although in essence the approach is meritorious in that it justifies the conduct that causes least harm, the evaluation of actions on mere consequences alone neglects fundamental issues of individual human rights and justice, and does not explain what weight should be attached to competing interests. No one consequentialist account would provide a fair result in respect of non-culpable threats and an explanation of why it is permissible to intrude on the rights of innocent unjust threats is essential to this thesis. It is submitted here that these criticisms are insurmountable and that a more robust account of self-defence which is applicable to all unjust threats and which gives sufficient respect to the rights of all parties must be located elsewhere.

4.3.7 Personal partiality approach

An alternative explanation suggests that self-defence is justified because people are entitled to give preference to their own lives in situations of forced choice simply because they personally value it more. This approach is deemed the 'personal partiality' or 'indifference'⁷³ argument.⁷⁴ Unlike consequentialist accounts focused on the fault of the aggressor, this theory provides a plausible justification for certain intrusions on the rights of innocent threats in self-defence. A situation may arise whereby there is a genuine conflict of equal rights where, say, an insane person lunges at the defendant with a knife in an unprovoked attack. On the face of it, due to the non-culpability of the threat, there is no moral reason to justify the defensive response of the accused if, for instance, they kill the

⁷² For instance, on the basis of the personal partiality approach, see Montague, 'Self-Defense and Choosing Between Lives' at 211-212.

⁷³ Kasachkoff, 'Killing in Self-Defence: An Unquestionable or Problematic Defence?' at 520.

⁷⁴ Proponents include Davis, 'Abortion and Self-Defense'; Levine, 'The Moral Permissibility of Killing a Material Aggressor in Self-Defense'; and Montague, 'Self-Defense and Choosing between Lives'.

insane attacker. It follows that in such circumstances the defendant is simply permitted to use self-defence because s/he *personally* values the protection of his/her own interests over that of any person who poses a threat to them. Indeed, it is understandable that a defendant would give priority to their own interests, even if they are aware that the threatening person is innocent. On this view, concession is made to what Blackstone has termed “the passions of the human mind”⁷⁵ arising from a moral permission to prefer oneself over even an innocent threat if circumstances arise for which no one is morally or legally responsible. This moral explanation has consequentialist overtones in that self-defence is phrased in terms of justifying a particular distribution of harms. Accordingly it may be conceived as an ‘agent-relative’ form of consequentialism in that the victim is entitled to protect her/his interests over those of a threatening person because s/he personally values them more.

Semantics aside, this approach is, like consequentialist accounts based on the aggressor’s culpability, vulnerable to criticism. The theory is substantially flawed as it is ill-equipped to defend claims that the aggressor is equally justified in launching a counterattack by virtue of their personal preferences. The account also lacks appropriate boundaries and therefore allows latitude for the justification of, for instance, killing an innocent bystander in self-preservation.⁷⁶ On this approach, for instance, a woman suffering from a weak heart would be justified in killing another to obtain their healthy heart with no respect being afforded to the rights of the innocent unoffending victim. Perhaps the most potent criticism is that the personal partiality approach simply does not offer a sufficient explanation of *why* the self-defender is permitted to override the rights of the threat. The absence of any clear reasoning renders this approach nothing short of “egoism.”⁷⁷ It may be

⁷⁵ Blackstone, *Commentaries on the Laws of England* volume III at 3-4.

⁷⁶ See Michael Gorr, ‘Private Defence’ (1990) 9 *Law and Philosophy* 241 at 252 and Kasachkoff, ‘Killing in Self-Defence: An Unquestionable or Problematic Defence?’ at 526.

⁷⁷ Gorr, ‘Private Defence’ at 252.

more acceptable to suggest that a defendant who attaches greater value to their own interests could be provided with an excuse for their conduct, but as a theory of justification, personal partiality is insubstantial.

4.3.8 The doctrine of double effect

A further justification for the use of self-defensive force derives from the doctrine of double effect.⁷⁸ In essence, the theory asserts that intentionally doing bad acts for the sake of good consequences to follow is always wrong; but it may be permissible to do a good act in the knowledge that bad consequences may follow. Thus it can be morally permissible to bring about the death of another provided it was not intended. If the good effect is proportionate to the foreseen bad effect, the act may be permitted by virtue of this doctrine.⁷⁹ The term 'double effect' derives from the influential work of Aquinas, who claimed that:

“...moral acts take their species according to what is intended and not according to what is beside the intention, since that is accidental...Accordingly, self-defence may have two effects: one, the saving of one's life; the other, the slaying of the aggressor.”⁸⁰

The central tenets of the doctrine were developed through the work of Anscombe, who stated that killing in self-defence was justified whereby the death of the other was not intended, but was a mere side effect of the measures taken to ward off the attack.⁸¹

The primary objection generated by this theory is that it is questionable whether there is any meaningful distinction between the intended effects

⁷⁸ Double effect is a predominant theory within Roman Catholic theology.

⁷⁹ See Suzanne Uniacke, 'The Doctrine of Double Effect' (1984) 48 *The Thomist* 188, and the subsequent development of the critique in Uniacke, *Permissible Killing* chapter 4.

⁸⁰ Thomas Aquinas, *Summa Theologica* (London: Blackfriars, 1975) at Article 7.

⁸¹ Gertrude EM Anscombe, 'War and Murder' in Gertrude EM Anscombe, *Ethics, Religion and Politics. Collected Philosophical Papers* (Minneapolis: University of Minnesota Press, 1981) at 54.

of self-defensive force and merely foreseeable consequences.⁸² The moral difference between the two is arguably too fine to have any real significance. Drawing on the example given by Kadish, if a self-defender is confronted by a person who is threatening her with a weapon and responds by shooting the threatening person at close range between the eyes, "it seems strange to allow [her] to say [she] did not choose to take [the life of the threatening person], but that [she] chose only to prevent the attack."⁸³ These are fundamental deficiencies which enable the doctrine of double effect to be dispensed with expeditiously, and help us to understand why even supporters of the general doctrine have doubted whether it can be applied with any relevance to the law on self-defence.⁸⁴

4.3.9 Rights-based approaches

4.3.9.1 Introduction to rights-based philosophies

None of the competing philosophical explanations of self-defence considered thus far have satisfied intuitions regarding the scope of self-defensive force. This is arguably because less attention is focused on the rights and protected interests of the defendant and innocent victim, as other moral considerations take precedence. By subordinating rights the accounts presented above have been either over-inclusive (that is, they have permitted self-defence to be used against innocent bystanders) or under-inclusive (in that certain innocent threats have been excluded from the justification). It is therefore submitted here that an explanation which emphasises the significance of rights will provide the most plausible justification for using self-defensive force. The account will accommodate the use of force against innocent threats and exclude force used against

⁸² On this point see Douglas Husak, 'The Complete Guide to Self-Defense' (1996) 15 *Law and Philosophy* 399 at 405.

⁸³ Kadish, 'Respect for Life and Regard for Rights in Criminal Law' at 880.

⁸⁴ Germain Grisez, 'Towards a Consistent Natural Law Ethic of Killing' (1970) 15 *American Journal of Jurisprudence* 64 at 79.

innocent bystanders.⁸⁵ The basic tenets of the approach are explained in greater detail below.

In a liberal society autonomy is a fiercely guarded right and one popular explanation of the self-defence justification is based on the notion that if the defendant's autonomy is compromised by an intrusion from a threatening person, then the defendant has a right to repel the threat to protect her/his autonomy.⁸⁶ In other words, any encroachment on the living standard of another is sufficient to justify a self-defensive response. The advantage this approach has over others rejected above is that the culpability of the aggressor is irrelevant, due to the central notion of objective wrongdoing:

“what counts is the objective nature of the aggressor's intrusion...Defending one's living space is not to punish the intruder for his culpable conduct, but to nullify an objectively hostile intrusion by an enemy.”⁸⁷

The definition of an unjust threat has already been established in section 4.2.2 above as one which is posed for no objectively justified reason and both culpable and innocent threats (active or passive) are accommodated by this definition. The account developed thus far, then, asserts that an unjust threat violates the autonomy of the defendant and the defendant can respond with self-defensive force by encroaching in some degree on the (usually protected) domain of the threatening person. But why are the rights of the unjust threat subordinated in this way? If both the defendant and the aggressor have equal rights of autonomy why is it permissible for the defendant to intrude on the rights of the threatening person but not

⁸⁵ For a detailed exposition of the virtues of this approach see Leverick, *Killing in Self-Defence* at 54-68. For some commentators, however, rights-based considerations are categorically rejected, see Sangero, *Self-Defence in Criminal Law* at 44.

⁸⁶ John Locke talked of an absolute right of the defendant to protect one's own liberty and other rights from intrusions by an aggressor, see Locke *Treatise of Civil Government* at 14.

⁸⁷ Fletcher, *Rethinking Criminal Law* at 862.

vice versa, despite the fact that at the point of engagement each is an equally potent threat to the other?⁸⁸

Further explanation is required in order to fully comprehend why the defendant's autonomy outweighs the equivalent rights of the victim. According to some theorists, the outstanding problem with any rights-based theory of justification is that it does not provide a satisfactory account of why, given the universality of basic human rights,⁸⁹ the defendant can protect his own rights by diminishing the rights of the threatening person. It is acknowledged here that to be workable, such accounts require a corresponding theory of forfeiture in order to make these issues morally comprehensible. With a forfeiture theory, there is some rationalisation of *why* the threat does not possess the same basic and universal rights as the defendant in equal measure.⁹⁰ It has been suggested that, in cases of self-defensive force, the threat may sacrifice their rights in one of two ways: first, by forfeiting rights by virtue of their threatening action; or alternatively, by virtue of the fact that rights contain implicit limitations meaning that their effective functioning depends on non-engagement in aggressive action.⁹¹ Although presented as separate explanations, they are theoretically and moral indistinct in that they both deny the unconditional nature of rights, which is explained with reference to significant facts about the relationship between the threatening person and the defendant.⁹² In essence, by virtue of their behaviour being objectively wrong, or unjust, the defendant secures a right of self-defence which entails a corresponding duty incumbent upon the threat not to

⁸⁸ Rodin articulates this difficulty as the 'moral asymmetry' between aggressor and defender, in David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002) at 70-71.

⁸⁹ Leslie J Macfarlane, *The Theory and Practice of Human Rights* (London: Maurice Temple Smith, 1985) at 3.

⁹⁰ Some writers have deemed 'forfeiture' as a theory of justification in its own right, see Nancy M Omichinski, 'Applying the Theories of Justifiable Homicide to Conflicts in the Doctrine of Self-Defense' (1987) 33 *Wayne Law Review* 1447 at 1449. It is, however, more fruitful to ground forfeiture as part of a justification of self-defence that also includes appeals to rights. As Leverick highlights, there would be nothing to forfeit if the unjust threat possessed no rights in the first instance, see Leverick, *Killing in Self-Defence* at 61.

⁹¹ Rodin, *War and Self-Defense* at 70-77.

⁹² *Ibid.* at 74.

respond. In order to give the rights-based account a more profound explanatory force it is necessary to examine *why*, at the moment of engagement, the defender has the right to intrude on the autonomy of the threat and the threatening person no longer has the right to respond (or, conversely, has a duty not to resist).

4.3.9.2 Rights and a supplementary theory of forfeiture

The most sophisticated and stimulating contributions to date on the forfeiture theory emanate from the work of Suzanne Uniacke⁹³ and Judith Jarvis Thomson.⁹⁴ For both, the permissibility of self-defensive force is grounded on the premise that all human beings have basic rights⁹⁵ and rights are worthy of protection even if that means recourse to defensive force. Both schemes provide an objective account of what constitutes an unjust threat to a person's rights. Whilst many features of the two accounts are similar, there is some disparity in that Thomson's account is constructed upon a notion of *temporary forfeiture* whilst Uniacke's is predicated upon what she terms '*qualification*'. To elaborate, for Thomson the aggressor only forfeits their rights as long as they pose an unjust threat to the victim. When the unjust threat ceases, the rights of the formerly threatening person are immediately restored.⁹⁶ This proposed temporary state of forfeiture does not, however, sit comfortably with the concept that fundamental human rights cannot be temporarily disengaged.⁹⁷ In response to this criticism Uniacke developed a theory couched in slightly different terms in order to avoid the difficulties

⁹³ Whose most comprehensive contribution to date consists of *Permissible Killing*. See also 'In Defence of Permissible Killing: A Response to Two Critics' (2000) 19 *Law and Philosophy* 627; and 'Rights and Relativistic Justifications: Replies to Kasachkoff and Husak' (2000) 19 *Law and Philosophy* 645.

⁹⁴ Whose most significant work in this area is entitled 'Self-Defense' (1991) 20 *Philosophy and Public Affairs* 283. See also *Rights, Restitution and Risk: Essays in Moral Theory*. See also the careful analysis of these two accounts in Leverick, *Killing in Self-Defence* at 60-68.

⁹⁵ Both accounts focus on the right to life, but a broader conception of rights is considered here, with a right to autonomy being of paramount importance.

⁹⁶ Thomson, 'Self-Defense' at 320; and Rodin, *War and Self-Defense* at 71-72.

⁹⁷ Kadish, 'Respect for Life and Regard for Rights in Criminal Law' at 884; Wallerstein 'Justifying the Right to Self-Defense: A Theory of Forced Consequences' at 1020.

associated with forfeiture⁹⁸ but sharing almost identical features. On this account, the acquisition of rights is conditional upon appropriate conduct. For example, if a human being becomes an unjust and immediate threat to another person's life, rather than having lost or forfeited their right to not be killed they simply do not acquire a right to life in the first instance.⁹⁹ As already mentioned, it appears that the distinction between the two accounts is principally one of expression, and Uniacke herself concedes that there is little theoretical difference between more explicit forfeiture theories and the mask for forfeiture that is the *specification theory*.¹⁰⁰ Thus the two accounts will be treated as one insofar as they both explain with equal rigour that it is permissible to exercise self-defensive force against an unjust threat because their rights are absent subject to the continued presence of the threat.

4.3.9.3 Forfeiture and culpability

Some commentators suggest that a considerable chink in the armoury of the rights-based forfeiture explanation of self-defence is that it does not spell out why self-defensive force can be used against an *innocent* active or passive unjust threat. It is, morally speaking, undeniably more challenging to rationalise self-defensive force which involves a serious intrusion against innocent active and passive threats. Some forfeiture accounts exclude self-defensive force used against innocent threats on the basis that rights cannot be forfeited unless the threatening person is

⁹⁸ Uniacke has consistently maintained that her explicit rejection of the term 'forfeiture' is intended to avoid the negative connotations of the term, which suggests that the unjust threat deserves to be punished in some way, see 'In Defence of *Permissible Killing: A Response to Two Critics*' at 627 and *Permissible Killing* at 195.

⁹⁹ Thomson calls this theory 'the method of factual specification' in *Rights, Restitution and Risk: Essays in Moral Theory* at 38. Rodin suggests that there is no material difference between the accounts offered by Thomson and Uniacke, see *War and Self-Defense* at 74.

¹⁰⁰ Indeed, there are numerous instances of Uniacke's seemingly mistaken referral to 'forfeiture' as opposed to 'specification' throughout her work, a discrepancy highlighted by Tziporah Kasachkoff, 'Comment and Reply to Suzanne Uniacke's 'A Response to Two Critics'' (2000) 19 *Law and Philosophy* 635 at 636-637.

blameworthy.¹⁰¹ It is submitted here that the version of forfeiture expounded by Thomson and Uniacke successfully accommodates the difficult cases involving innocent unjust threats, since no significance is attached to the culpability of the threatening person. This latter approach offers a defensible account of the philosophical underpinning of self-defence since it supports the premise maintained throughout this thesis that defensive action taken to repel an objectively unjust innocent threat is permissible, whilst action taken against an unoffending non-threatening bystander is wrongful.

For some commentators, however, fault is the *central* issue in any account of forfeiture. Rodin, for instance, advances an explanatory account of the self-defence justification in which fault plays a decisive role which, for him, completes any rights-based justification of self-defence. He undertakes a moral comparison between the threatening person, whose conduct puts her/him at a moral disadvantage in respect to the defendant, and the latter, whose inherent innocence enables him to reap the moral advantage. The defendant does no moral wrong to the threat¹⁰² and does not forfeit her/his own rights at the point of engagement. For Rodin, it is not permissible to use self-defensive force against an innocent threatening person who lacks responsibility for the harm caused. For him, the self-defence justification simply cannot extend to force used against innocent active or passive threats. Kasachkoff and Dressler are equally of this view, and for all three the forfeiture principle is transparently linked to culpability.¹⁰³ By adhering to a rights-based justification of self-defence which acknowledges a role for fault, Rodin *et al* profess the view that because innocent threats lack technical fault within the meaning of the criminal law, intrusions on their rights are impermissible and unjustifiable. Rodin bases his premise on the assumption that even when confronted by a threat of death we must

¹⁰¹ See Rodin, *War and Self-Defense* at 77.

¹⁰² Assuming that the defendant did not provoke the incident in the first place.

¹⁰³ See Kasachkoff, 'Killing in Self-Defence: An Unquestionable or Problematic Defence?' at 519; Joshua Dressler, 'Rethinking Heat of Passion: A Defence in Search of a Rationale' (1982) 73 *Journal of Criminal Law and Criminology* 421 at 454. See also Ryan, 'Self-Defence, Pacifism and the Possibility of Killing'.

acknowledge the vulnerability of certain classes of people. On this view, innocent threats are, by virtue of their absence of criminal responsibility, worthy of exclusion from the exercise of legitimate self-defensive rights. Rodin claims that innocent aggressors are acting without volition or intention, and thus cannot plausibly be under any duty to abstain from conduct which they essentially have no responsibility for. For him, the suggestion that someone can *involuntarily* violate the rights of another is nonsensical, and because they lack responsibility innocent aggressors are excused for their conduct. Following this reasoning, an innocent threat cannot be understood as a moral subject as there is no connection between the threat they pose and their movement sufficient to warrant the exercise of self-defensive force.¹⁰⁴ It would seem therefore, on this account, that the nature of the excuse rendering the threat non-culpable could affect the defensive rights of the defendant.¹⁰⁵ An innocent aggressor has contributed nothing to the harmful behaviour and that is why, for Rodin, killing her/him in self-defence is impermissible. Since it may seem hard justice to hold a person guilty for using lethal self-defensive force against a dangerous automaton or a mistaken aggressor to save their own life, the defendant may alternatively avoid criminal responsibility on the basis of an excuse defence.

¹⁰⁴ Rodin suggests that threats must derive from a person who is properly understood as a moral subject rather than a mere physical entity, see *War and Self-Defense* at 88.

¹⁰⁵ Rodin classifies excuses into three forms, so the effect that the character of the excuse has on the permissibility or otherwise of self-defensive action can be analysed. (1) Excuses may take the form of those in which the agent lacks the intention to perform the proscribed act. This category is comprised of agents affected by physical compulsion, automatism or complete mistakes, and negates the use of lethal defensive force in such circumstances as the threats could not appropriately be treated as 'moral subjects'. (2) Duress, necessity and provocation constitute excuses whereby actions are intentional but the will is so overwhelmingly overborne by threats that the action could no longer be treated as voluntary. (3) Infancy, involuntary intoxication and insanity are excuses in which the agent lacks the capacity for full and proper deliberation of the legal and ethical issues involved to form the necessary *mens rea*. See Rodin *War and Self-Defense* at 90. In response to this criticism, not all excuses render the threatening person 'innocent' in the sense that they lack volition or intention. If harmful acts are excused because of mistake or duress, for instance, the actors are not necessarily removed entirely beyond obligation and duty; to invoke these excuses the actors are acting from their own volition and with intention. Thus, the rights of the defendant are still violated, even though the actor would be excused from liability.

It is asserted here that forfeiture theories which are devoted to the culpability of the threat are unsustainable and it is arguably more plausible to view the threatening conduct objectively, absent any consideration of the fault of the threatening individual. For Uniacke and other proponents of a similar theory,¹⁰⁶ forfeiture should be unconcerned with notions of fault since it is the conduct of the threatening person that is critical to the rationalisation of the self-defence justification.¹⁰⁷ In short, the non-culpable threatening person's rights are abrogated purely by virtue of the threat s/he poses.¹⁰⁸ In defence of this somewhat controversial stance is the persuasive argument that an absence of fault on the part of the threatening person does not affect the normative position of the defendant, whose interests remain under threat for no good reason.¹⁰⁹ The unjust nature of the threat is therefore what makes defensive action taken to ward off that threat *permissible* as opposed to *wrongful*. Necessary and proportionate action taken to repel an unjust threat arguably does no injustice as the threatening person is not wronged where the threat itself is unjust from an objective perspective. It is submitted here that in such circumstances the defendant is not merely excused for a wrongful violation of the threatening person's rights; s/he has a legal permission to set back the interests of the innocent threat in self-defence. Consequently, a version of the forfeiture theory which is indifferent to the culpability of the threatening person arguably provides the most acceptable explanation of the scope of the self-defence justification. It delineates appropriate boundaries for the defence and gives effect to the morally salient distinction between an unoffending non-threatening innocent bystander, against whom rights violations are unjust or wrongful, and an innocent person who poses an objectively unjust threat. A defendant is permitted to utilise self-defensive force against the

¹⁰⁶ Leverick, *Killing in Self-Defence* at 60-68.

¹⁰⁷ Uniacke, 'In Defence of *Permissible Killing*: A Response to Two Critics' at 629.

¹⁰⁸ *Ibid.* at 629.

¹⁰⁹ This view reflects Uniacke's desire to reject any notion of forfeiture as a punishment; see also Wallerstein 'Justifying the Right to Self-Defense: A Theory of Forced Consequences' at 1013; Frances Kamm, 'Insanity Defence, Innocent Threats and Limited Alternatives' (1987) 6 *Criminal Justice Ethics* 61; and Lana K Stell, 'Close Encounters of the Lethal Kind: The Use of Deadly Force in Self-Defence' (1986) 49 *Law and Contemporary Problems* 113.

latter on account of the existence of the threat to their own interests or those of another, which is posed for no good reason.

4.3.9.4 Other criticisms

The forfeiture account defended here is not only criticised for its ignorance of fault. Ryan¹¹⁰ claims that forfeiture accounts permit self-defensive force even where it could have been avoided by invoking some lesser means of defence. According to general liberal philosophy we are duty-bound to avoid encroaching on the living standard of another person, and presumably to use the least harmful method of overcoming the threat posed. It must be conceded that Thomson and Uniacke do little to address this issue in their respective accounts, but this problem may be circumvented by adding a further qualification to the theory. Where a person poses an unjust and immediate threat to the life of the defendant, and there is *no alternative* means of repelling the threat, then, and only then, the defendant may legitimately invoke self-defensive force.¹¹¹ A related criticism of the forfeiture account is that it does not explicitly restrict the use of self-defensive force when it is no longer necessary to avoid the threat posed.¹¹² *Prima facie* the forfeiture theory seems to advocate that once the rights pertaining to the threat have been forfeited it is permissible to exercise self-defence even if the threat has dissipated. Kasachkoff makes the insightful point that the forfeiture theory, “seem[s] to undercut the requirement that we use the least force necessary to defend ourselves,”¹¹³ by focusing too intently on the conduct of the unjust threat. In response to this criticism, it must be emphasised that neither version of the forfeiture account advocated here asserts that aggressors forfeit their rights *indefinitely*. It is not permissible to use self-

¹¹⁰ See Ryan, 'Self-Defence, Pacifism and the Possibility of Killing'.

¹¹¹ See Smart, 'Understanding and Justifying Self-Defense'. See also Leverick, *Killing in Self-Defence* at 65-66.

¹¹² A more detailed discussion on the necessity and proportionality limitations of self-defence can be found at section 4.4 below.

¹¹³ Kasachkoff, 'Killing in Self-Defence: An Unquestionable or Problematic Defence?' at 517.

defensive force against a non-threatening person who no longer poses an unjust threat, because such a person has attained (Uniacke) or regained (Thomson) equal rights to life and liberty. Rodin helpfully deflects any argument that forfeiture accounts do not explain the limitations of imminence, proportionality and necessity generally by claiming that forfeiture is not only concerned with the forfeit of the threatening person's rights but also with "facts about the status, condition, actions and intentions of both the parties."¹¹⁴ Hence, the limitations on the defence are still relevant even though the unjust threat has forfeited their rights.

4.3.10 A summary of the moral basis of self-defence

It is relatively uncomplicated to establish a workable philosophy to explain the justification of defensive force against a malevolent attacker engaging in aggressive conduct which is manifestly unlawful. Thus, most people would accept that self-defence is legitimate to ward off a villainous aggressor who would otherwise violate rights.¹¹⁵ Non-criminal threats, however, pose a more significant obstacle. The analysis above reveals that some predominant competing philosophies, including consequentialist accounts, personal partiality and the doctrine of double effect, fail to provide adequate philosophical guidance and are incompatible with the intuition that self-defensive force may be legitimately used against an innocent threat but not against an innocent bystander.

A more plausible explanation of the self-defence justification is grounded in a rights-based theory complemented by forfeiture principles. There is some disagreement between proponents of this approach regarding the significance of the culpability of the aggressor when assessing whether rights have been deprived. Rodin proposes a limited theory of forfeiture, exposing notions of fault and punishment, which appears to promote self-

¹¹⁴ Rodin, *War and Self-Defense* at 76.

¹¹⁵ Gorr, 'Private Defence' at 241. Of course the use of such force must be necessary and proportionate in the circumstances, see section 4.4.1 and 4.4.2 respectively.

sacrifice by claiming that innocent threats belong to a class which should be recognised as in some way immune to self-defensive force. A philosophy requiring martyrdom is unrealistic and Rodin's theory is simply too demanding, providing only an excuse for a defendant who infringes on the rights of an innocent threat. The forfeiture account developed by Thomson and Uniacke and subject to appropriate modification, arguably provides the most persuasive and comprehensive justification for the use of defensive force in both the central *and* non-standard cases involving innocent active and passive threats. A careful analysis of this contemporary approach reveals a defensible explanation of the justification of self-defence which accommodates intrusions against innocent unjust threats and rightly excludes intrusions on the rights of innocent non-threatening persons from its scope. However, any account of self-defence that relies on a principle of forfeiture and thus permits the use of self-defensive force against some categories of innocent persons is likely to attract controversy. But, as demonstrated above, the account advanced here responds confidently to criticism. Hence the class of persons against whom the right of self-defence may be exercised is relatively broad, but the requirement of an unjust threat prevents the justification being extended to intrusions against innocent non-threatening persons, a conclusion which is supported throughout this thesis.

An appropriate rationale for self-defence has now been established which is consistent with the broad themes of the thesis by appealing to general liberal principles. The philosophical model proposed above sets a foundation for evaluating the appropriate functioning of the conditions attached to the defence. It is well established in English law that individuals may only exercise their right to defend themselves or others from unjust threats by whatever means are necessary and proportionate. These crucial limitations on the exercise of the right of self-defence are considered in the following section.

4.4 The conditions of self-defence¹¹⁶

In order to gain a comprehensive understanding of the limits of defensive action it is vital to appreciate that defensive rights are not absolute and the legal permission to act is restricted where the defensive measures themselves involve an encroachment on the interests of another. The exercise of the defendant's right of self-defence will inevitably conflict with the legally protected interests of the unjust threat and the law must accommodate these conflicting rights.¹¹⁷ In short, there must be conditions under which one may exercise self-defensive force to protect one's own interests which also reflect concern for the autonomy of others.

There are primary, intrinsic limitations on the right of self-defence existing within the legal system, as required by the interests of justice. The right of self-defence should not be abused and is qualified by a broad measure of *reasonableness*.¹¹⁸ This standard reflects concern for the interests of others by requiring that the defendant should only use such force as is reasonable in the circumstances s/he believes to exist. The requirement of reasonableness dictates that the defensive act must be necessary and must constitute a proportionate response to the threat as it is perceived by the defendant. No workable account of self-defence could operate apart from such restrictions,¹¹⁹ but the precise functioning of these limiting

¹¹⁶ Section 76 of the Criminal Justice and Immigration Act 2008 puts into statutory form four well-established common law principles relating to self defence in pursuit of its aim to clarify the operation of the (public and private) defence. The provision has been described by many as pointless and unhelpful, see Ian Dennis, 'A Pointless Exercise' [2008] 7 *Criminal Law Review* 507.

¹¹⁷ Fletcher, *Rethinking Criminal Law* at 872.

¹¹⁸ Indeed, the English courts have demonstrated a preference for use of the broad flexibility offered by the concept of reasonableness. The deference to a broader test of reasonability is criticised by many commentators, who maintain that the unification of necessity and proportionality requirements erodes the individual significance of the concepts and is therefore undesirable; see Williams *Textbook of Criminal Law* at 503; Andrew Ashworth 'Self-Defence and the Right to Life' (1975) 32 *Cambridge Law Journal* 282 at 284; and Sangero, *Self-Defence in Criminal Law* at 146.

¹¹⁹ The concrete articulation of these limiting factors is missing from the theory proffered by Fletcher. He claims, against the background of a theory that self-defensive force is justified if it protects the autonomy of the individual, that no regard need be paid to requirements of proportionality and necessity, see Fletcher, *Rethinking Criminal Law* at 864-868. It is submitted here that clearly defined limitations are required by the interests of justice to balance the respective rights of autonomy of the defendant and victim.

factors is beset by doubt and uncertainty.¹²⁰ In order to complete the delineation of the theoretical and practical boundaries of the defence in relation to the difficult case of the innocent unjust threat, several of the controversies surrounding the appropriate parameters of self-defence will be examined below.

4.4.1 The necessity requirement

An established and decisive factor in determining the availability of self-defence is whether the defensive force used was actually necessary in order to repel the unjust threat. Necessity is accepted as a fundamental condition of self-defence¹²¹ and its significance is rarely challenged.¹²² So, what is the content of the necessity requirement? The necessity for self-defensive action may be evaluated by considering three principal derivations which are central to the framework of self-defence: the existence of an opportunity to retreat; the imminence of the threat; and any mistaken belief the defendant has regarding the circumstances that exist. Although imminence of the threat is often treated as a separate requirement of self-defence, it is arguably more appropriately considered as a conceptual derivative of necessity. One cannot know whether defensive action is absolutely necessary until the infliction of harm is immediately pending. Imminence is closely related to retreat in this way, because if the threatened harm is not imminent then the victim arguably has a reasonable opportunity to retreat and avoid the intrusion. For the purposes of the present account of self-defence imminence, mistake and retreat will be treated as corollaries of the broader requirement of necessity and an evaluation of each component requirement is undertaken below.

¹²⁰ Williams, *Textbook of Criminal Law* at 501.

¹²¹ Smith describes the necessity requirement as a "cardinal principle," Smith, *Justification and Excuse in the Criminal Law* at 101.

¹²² An exception is found in the work of Hume, who claimed that necessity is not a pre-requisite for the use of self-defensive force against a criminal; this point was highlighted by GH Gordon, *The Criminal Law of Scotland* 2nd edition (Edinburgh: W Green, 1978) at 752.

4.4.1.1 The duty to retreat

There is some dispute regarding the extent to which the accused is under a duty to retreat before resorting to self-defensive force. Traditionally, the duty to retreat has been viewed as a derivation from the requirement of necessity¹²³ and the account offered here proceeds on that premise. The main contributions to this debate are examined in brief below in order to ascertain the most appropriate approach to the controversial issue of retreat.

On one view, the law of self-defence may operate upon a rule of absolute retreat, in which retreat is viewed as an independent variable which always requires the defendant to attempt an escape before resorting to the use of force. Advocates of an absolute retreat rule maintain that if there is no attempt to retreat whatsoever then, regardless of the circumstances, self-defence cannot be invoked.¹²⁴ In *Julien* Lord Widgery suggested that before a defendant could lawfully use force to ward off an unjust threat "he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal."¹²⁵ It is submitted here that this approach simply demands too much of a defendant and does not afford sufficient respect to the attacked individual's right of autonomy. An alternative retreat rule must be sought. It is frequently stated that the morally preferable option is to adopt a strong retreat rule in relation to self-defence. This version is similar to the absolute retreat rule in that it treats the issue of retreat as

¹²³ Ashworth, 'Self-Defence and the Right to Life' at 293; Williams *Textbook of Criminal Law* at 509; and Rodin, *War and Self-Defense* at 40. Others have viewed the issue of retreat as derived partially from both necessity and proportionality considerations, see Kremnitzer, 'Proportionality and the Psychotic Aggressor' at 179; and others have suggested that retreat is a corollary of the issue of proportionality, see Sangero, *Self-Defence in Criminal Law* at 193-195. As a consequence of this approach Sangero, somewhat strangely, proposes that before using lethal self-defensive force there should be a duty to retreat imposed on the attacked person; but there is no such corresponding duty to retreat where a lesser degree of force is required to ward off the threat. For criticism of Sangero's assertion, see Leverick, 'Defending Self-Defence' at 575-578.

¹²⁴ *R v. Julien* [1969] 2 All ER 856, per Lord Widgery at 858.

¹²⁵ *Ibid.* at 858.

an independent requirement of self-defence. However, the difference lies in the fact that the strong retreat rule only requires the accused to make an attempt to retreat before using force in self-defence *if an opportunity to do so actually exists*. The obvious difficulty inherent in this approach is deciding whether the opportunities for escape which exist are 'safe', 'reasonable' or 'clear'. When faced with an immediate threat, it is submitted here that the strong retreat rule also expects too much of a defendant and does not sufficiently respect individual autonomy.

The English courts have attempted to mitigate the harshness of the above approaches by preferring what could be construed as a weak retreat rule. On this view, retreat is not considered as an independent factor but merely a deciding factor when assessing whether actions were necessary and reasonable. Although on the surface this rule appears to be similar to the stronger version articulated above, the fact that the issue of retreat is merely a consideration within the broader notion of reasonableness means that the defendant may still be acquitted on the basis of self-defence in the absence of any attempt to retreat.

One final approach should be considered for the sake of completeness. Some would advocate a 'no retreat' rule, where the possibility of retreat has no significance whatsoever to the success or otherwise of a self-defence plea. This is a particularly prevalent theme where the attack takes place in the attacked person's own dwelling, the argument being advanced on the basis that the "invasion of a person's home constitutes a severe intrusion into his living space and in itself harms his autonomy."¹²⁶ On this approach, there would be no imposing duty on the accused to escape by whatever means possible prior to using self-defensive force. The victim of an unprovoked attack, for example, in their own dwelling, has the right to stand their ground and counteract force with force.¹²⁷ The

¹²⁶ Sangero, *Self-Defence in Criminal Law* at 266; see also comments made at 202 and 266-278.

¹²⁷ In the United States of America some fifteen states have opted for a no-retreat rule, see 'Fifteen States Expand Right to Shoot in Self-Defence' *New York Times*, 7 August 2006, cited in Leverick, 'Defending Self-Defence' at 579.

validity of this approach is questionable since it appears to prioritise the right to enjoy one's property over the right to life or bodily integrity of the aggressor. If the attacked person can safely depart from their home in order to spare the life of the aggressor then this approach must surely be encouraged, although not required.¹²⁸

Debate over the significance of retreat in deciding the legitimate use of self-defensive force has permeated English law for many years. In the 18th century retreat was not required at all in cases of self-defence in its purest form, that is, an unprovoked and sudden attack by a culpable aggressor. But in cases of 'quarrel' self-defence, involving argumentative and confrontational situations, a strong retreat rule applied. By the 19th century cases of self-defence were no longer classified in this way and were decided in a more consistent manner. There is evidence that, at this time, a strong retreat rule applied in all cases.¹²⁹ In the first part of the 20th century, it seems there are no reported cases which contemplated the issue of retreat in relation to the availability of self-defence. In 1969, influential scholars Smith and Hogan advocated a version of the weak retreat rule in that retreat was considered as a mere factor to be taken into account when considering reasonableness, following the approach adopted in the Australian case of *R v. Howe*,¹³⁰ which relied on the American case *Brown v. US*.¹³¹ In *R v. Julien*,¹³² however, Widgery LJ took a comparatively strong line on retreat, and this inconsistent approach to the issue continued throughout a number of years with the courts often displaying confusion as to how retreat should affect a plea of self-defence. In *R v. McInnes*¹³³ Edmund Davies preferred the flexible approach adopted in *Howe*, that failure to retreat is only an element of the consideration of reasonableness and in *R v.*

¹²⁸ A similar approach is taken by Leverick, 'Defending Self-Defence' at 577-578.

¹²⁹ *R v. George Smith* (1837) 8 Car & P 158; *R v. Odgers* (1843) 2 M & Rob 478; *R v. Driscoll* (1841) Car & M 214; *R v. Dakin* (1828) 1 Lewin 166.

¹³⁰ *R v. Howe* (1958) 100 CLR 448.

¹³¹ *Brown v. US* 256 US 335 (1921).

¹³² *R v. Julien* [1969] 2 All ER 856 at 858.

¹³³ *R v. McInnes* [1971] 3 All ER 295.

*Field*¹³⁴ it was suggested that the question of whether it is necessary to use force should take, as a baseline, the self-defender's right to autonomy.¹³⁵ The current position in English law, however tentative, is represented by the case of *R v. Bird*,¹³⁶ in which the Court of Appeal clearly favoured the weak retreat approach developed in *Howe*. Thus, it would seem that retreat is considered simply as one facet of the broader question of whether the use of self-defensive force was necessary and reasonable in the circumstances.

This above analysis reveals that the approaches to retreat at the most extreme ends of the scale may be dispensed with relative ease. The absolute retreat rule can be rejected outright with little controversy. A rule requiring the victim to *always* retreat even when it may be unsafe to do so does not sit comfortably with the recognition of a right to self-defend and the right to make autonomous choices. This rule may only be effective in situations where the self-defender provoked the trouble in the first instance; but this is not a case of pure self-defence. Equally the no retreat rule is fairly readily dispensed with. Advocates of this rule would claim that it is highly dishonourable to require an innocent victim of attack to retreat. Yet it is difficult to see how the values of honour and self-respect can outweigh the potential value of human life or other rights to bodily integrity. This rule has the potential to deter potential aggressors, but it could operate with equal rigour in the reverse by positively encouraging an aggressive confrontation. In favour of the weak retreat rule, some say that practically speaking it is easier to instruct a jury to evaluate whether actions were reasonable, retreat being only one of a number of subsidiary considerations. However, conversely it could be said that if retreat is simply one factor in deciding whether force was reasonable, the law is effectively enabling the accused to ignore a safe opportunity to retreat and still be judged to have used reasonable self-defensive force. Arguably, the flexibility of the weak retreat rule has the

¹³⁴ *R v. Field* [1972] Crim LR 435.

¹³⁵ A conclusion also supported by *R v. Redmond-Bate* [1999] Crim LR 998; and Simester and Sullivan, *Criminal Law Theory and Doctrine* at 706-707.

¹³⁶ *R v. Bird* [1985] 2 All ER 513.

potential to allow the jury too much leeway in deciding what is reasonable in the context of self-defence.

The above considerations have resulted in a strong tendency within philosophical circles toward the operation of a strong retreat rule. It arguably promotes the maximum respect for the right to life, and two lives saved is morally preferable to one life lost.¹³⁷ There are, however, a number of problems even this approach, as it underplays important human rights and individual autonomy. The suggestion that the onus is on the self-defender to retreat given a safe opportunity to do so could be construed as a contradiction to many fundamental rights of autonomy and privacy. Indeed, criminal law is intended to “protect personal sovereignty and equal status by proscribing, preventing and punishing actions by some citizens that violate the rights and interests of others.”¹³⁸ Requiring someone to flee a potentially troublesome encounter therefore arguably dramatically understates important civil liberties.¹³⁹ There is something intrinsically uncomfortable about a principle which would require people to distance themselves, for instance, from a place where they may be confronted by an archenemy with a tendency towards uncontrollable aggression. Whilst it would appear wise to refrain from creating such a situation, it cannot be said that a person would lose any right of self-defence merely by making their presence felt.

In summary, a strong onus on retreat would deny the effective operation of many individual rights and civil liberties. Thus, whilst there is a lot to be said for resolving problems without recourse to violence and avoiding the use of unnecessary force, requiring individuals to retreat from violence can clearly do a disservice to other people's rights. For these reasons, the continuing operation of the weak retreat rule is advocated

¹³⁷ For example Rodin, *War and Self-defense* at 40-41; and the American Model Penal Code.

¹³⁸ Schopp, *Justification Defenses and Just Convictions* at 71.

¹³⁹ As decided in the following cases: *R v. Field* [1972] Crim LR 435; *State v. Bristol* 84 P 2d 475 (1938); *Beatty v. Gillbanks* (1882) 9 QBD 308. All three cases promote the value of freedom of movement above any duty to avoid conflict.

here which gives the jury some latitude in evaluating the reasonableness of the defendant's response.

4.4.1.2 The immediacy requirement

In the law of self-defence the concept of immediacy refers to the lapse of time between the threat of harm and the defensive action taken against that threat; the defensive action is only permissible where the threatened danger is immediate.¹⁴⁰ The immediacy requirement¹⁴¹ within the law of self-defence has an established history¹⁴² and is usually accepted without challenge.¹⁴³ The significance of this requirement is that in the absence of immediate danger, the use of self-defensive force is not *necessary* (or consequently reasonable) as an alternative course of non-aggressive action must have been available. Thus, immediacy is an important derivative of the necessity requirement, as acknowledged by Richard Rosen:

"In self-defence, the concept of imminence has no significance independent of the notion of necessity... Society does not require that the evil avoided be an imminent evil because it believes that an imminent evil is the only type of evil that should be avoided [or] because an imminent threatened harm is necessarily worse than a non-imminent one. Rather, imminence is required because, and only because, of the fear that without imminence there is no assurance that the defensive action is necessary to avoid the harm."¹⁴⁴

Immediacy not only safeguards the necessity of the defensive action; it also raises the additional issue of probability of harm. For defensive

¹⁴⁰ This point was confirmed by the House of Lords in *Attorney-General for Northern Ireland's Reference (No. 1 of 1975)* [1977] AC 105; and *R v. Chisam* (1963) 47 Cr App R 130.

¹⁴¹ Other commentators prefer to use the phrase 'imminence', see Leverick *Killing in Self-Defence* at 87 and chapter 5 generally, but the terms will be used interchangeably here.

¹⁴² Blackstone, *Commentaries on the Laws of England* volume IV at 184.

¹⁴³ Indeed, it is often viewed as the most central component of the necessity requirement, see Sengero, *Self-Defence in Criminal Law* at 147 and 151.

¹⁴⁴ Richard Rosen, 'On Self-Defense, Imminence and Battered Women who Kill Their Batters' (1993) 71 *North Carolina Law Review* 371 at 379.

action to be legitimate it must be neither too soon nor too late.¹⁴⁵ But how close must the danger be before self-defensive force may be legitimately invoked? Whilst requiring a threat to be immediate does not mean that the attack has to actually be in progress before self-defensive action can be taken,¹⁴⁶ an immediate threat is necessarily more likely to actually materialise than one which is not immediate. This is highlighted by the fact that a pre-emptive strike is permitted in English law, provided it is deemed to be reasonable.¹⁴⁷ It seems that the purpose of the immediacy requirement, then, is to prohibit intrusions on the interests of a perceived threat wherever the threat of danger is not present and existing; but the defendant is not required to wait until the attack is launched before utilising self-defensive force.

Despite overwhelming support for the notion of immediacy as a relevant consideration in self-defence its significance is undermined by a minority of commentators who, for a variety of reasons, insist that the principle be modified¹⁴⁸ or abandoned.¹⁴⁹ One particularly forceful criticism of the imminence limitation is that it unfairly restricts the availability of self-defence to 'battered women' who attack or kill their abusive partners. Much academic literature has been devoted to the challenge posed by the immediacy requirement within self-defence and its strained relationship with battered women.¹⁵⁰ Although the issue is not strictly

¹⁴⁵ Anticipatory violence falls outside of the scope of legitimate self-defence (although a pre-emptive strike may be permitted if it is reasonable), as does revenge violence, the former response being too soon, the latter too late to satisfy the imminence requirement.

¹⁴⁶ See Joseph H Beale, 'Homicide in Self-Defense' (1903) 3 *Columbia Law Review* 526 at 529.

¹⁴⁷ See *R v. Beckford* [1988] AC 130 at 144.

¹⁴⁸ Robinson is a proponent of the view that immediacy should be a non-decisive aspect of necessity; see Robinson *Criminal Law Defenses* volume 2 at 4 and 76-78. See also Williams *Textbook of Criminal Law* at 503-504. For further discussion, see Sangero, *Self-Defence in Criminal Law* at 157-162.

¹⁴⁹ See the detailed discussion in Leverick, *Killing in Self-Defence* at 93-108, which is relied on here.

¹⁵⁰ Important contributions include, amongst many others, Joshua Dressler, 'Battered Women Who Kill Their Sleeping Tormentors: Reflections on Maintaining Respect for Human Life while Killing Moral Monsters' in Shute and Simester, *Criminal Law Theory: Doctrines of the General Part* at 259; Jeremy Horder, 'Killing the Passive Abuser: A Theoretical Defence' in Shute and Simester, *Criminal Law Theory: Doctrines of the General Part* at 283; Victoria F Nourse, 'Self-Defense and Subjectivity' (2001) 68

relevant to the current discussion of the limits of self-defensive action which intrudes against innocent threats, the problem of battered women will be briefly considered below in order to evaluate the impact of the immediacy requirement and to determine whether this condition should be redefined to accommodate such difficult cases.

In many 'battered women' cases the conditions of self-defence will be fulfilled with relative ease; but where a woman (or man, for that matter) who has suffered serious and prolonged abuse attacks or kills their partner in a *non-confrontational* situation where there is no proximity between the last act of abuse and the self-defensive force, the immediacy requirement is difficult to satisfy. There have been many reported cases in which an abused spouse has killed their sleeping partner.¹⁵¹ Clearly the threat of harm emanating from a sleeping partner, for instance, cannot properly be described as 'immediate',¹⁵² and, on a strict construction of the requirement, the defence of self-defence is unavailable. Despite the literature being disproportionately focused on the subject of 'battered women' one must be mindful that any relaxation of the immediacy requirement to accommodate such cases may extend to other developing syndromes.¹⁵³

Some commentators have advocated an approach in which both the imminence requirement and the requirement that the action taken in self-

University of Chicago Law Review 1235; Schopp *Justification Defenses and Just Convictions* chapter 4.

¹⁵¹ Such outcomes are not uncommon in America, see *State v. Norman* 378 SE 2d 8 (1989) at 9 and *State v. Allery* 682 P 2d 312 (1984) at 313-314, where the defendants were acquitted on the grounds of self-defence. For further discussion of *Norman* see Dressler 'Battered Women Who Kill Their Sleeping Tormentors: Reflection on Maintaining Respect for Human Life while Killing Moral Monsters' at 264-269. Although similar English cases have been reported, for instance *R v. Ahluwalia* [1992] 4 All ER 889, the defendants were not acquitted on the grounds of self-defence.

¹⁵² Unless, for example, the defendant is locked in a room with the sleeping aggressor and has no alternative means of escape and cannot otherwise neutralise the threat of harm imminent upon the aggressor's waking; see Sangero, *Self-Defence in Criminal Law* at 342, footnote 1309.

¹⁵³ This warning is signalled by Cathryn J Rosen, 'The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill' (1986) 96 *American University Law Review* 11 at 15-16; and Sangero, *Self-Defence in Criminal Law* at 345.

defence is necessary are abolished altogether.¹⁵⁴ In one extreme account, Ayyildiz maintains that “by killing her batterer, the battered woman becomes a spontaneous vigilante; she apprehends a criminal that the law has failed to bring to justice and metes out the punishment he richly deserves.”¹⁵⁵ The sentiment of this radical view has been echoed by other scholars who claim that a battered woman is morally justified in killing an abusive partner regardless of the necessity of such killing.¹⁵⁶ Such an approach is, however, difficult to reconcile with the desirability of preserving human life, autonomy and bodily integrity whenever it is reasonable to do so, and is inconsistent with the law’s attempt to encourage non-aggressive alternatives. A United States court provided an adequate synopsis of the problem by acknowledging that although we may feel sympathy for the plight of the battered woman:

“...it is fundamental to our concept of law that there be no discrimination between sinner and saint on moral grounds. Any less exacting definition of imminence fails to protect every person’s right to live.”¹⁵⁷

Advocates of a less fundamental view argue that whilst the immediacy and necessity requirements should not be abandoned altogether they could, instead, be reconceptualised. For instance, it is submitted that the concept of immediacy could be expanded to include in its scope battered women who kill abusive partners because the threat of harm is always, in effect, present.¹⁵⁸ Other commentators suggest a reinterpretation of immediacy which would incorporate a threat of *future* harm in order to

¹⁵⁴ For further discussion of the literature, see Leverick, *Killing in Self-Defence* at 93-94.

¹⁵⁵ Elisabeth Ayyildiz, ‘When Battered Woman’s Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante’ (1995) 4 *American University Journal of Gender and the Law* 141 at 147-148.

¹⁵⁶ See similar accounts from Jane M Cohen, ‘Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?’ (1996) 57 *University of Pittsburgh Law Review* 757; Dressler, ‘Battered Women Who Kill Their Sleeping Tormentors: Reflections on Maintaining Respect for Human Life while Killing Moral Monsters’ at 283; and Anthony Sebok, ‘Does an Objective Theory of Self-Defense Demand Too Much?’ (1996) 57 *University of Pittsburgh Law Review* 725.

¹⁵⁷ *People v. Aris* 215 Cal App 3d 1178 (1989).

¹⁵⁸ For example Gregory A Diamond, ‘To Have But Not To Hold: Can ‘Resistance Against Kidnapping’ Justify Lethal Self-Defense against Incapacitated Batters?’ (2002) 102 *Columbia Law Review* 729; and *State v. Stewart* 763 P 2d 572 (1988), cited in Leverick, *Killing in Self-Defence* at 95.

provide a broad understanding of imminence.¹⁵⁹ Such claims have been rejected on the basis that the harm threatened by a passive abuser cannot be described as 'immediate' on a normal construction of the term.¹⁶⁰ An immediate harm is not one that might occur at some time in the future, but a harm that is about to materialise.

Other scholars have advocated that any interpretation of immediacy which requires the *danger* to be immediate, should be replaced by a somewhat weaker requirement which considers the 'immediate necessity' of making a response. Robinson is a leading proponent of this approach, and his position is concisely summarised in the following passage:

"If the concern of the limitation [of imminence] is to include threats of harm that are too remote to require a response, the problem is adequately handled by requiring simply that the response be 'necessary'. The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defence. If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defence must permit him to act earlier – as early as is required to defend himself effectively."¹⁶¹

Robinson effectively compared the plight of the battered woman to that of a hostage situation, with the victim taking any means necessary whilst the kidnapper is in a passive state to escape the predicament.¹⁶² This example has been adopted by others who support a more general test of 'necessity'¹⁶³ or 'immediate necessity'.¹⁶⁴

¹⁵⁹ Arthur Ripstein, 'Self-Defense and Equal Protection' (1996) 57 *University of Pittsburgh Law Review* 685 at 698.

¹⁶⁰ Leverick, *Killing in Self-Defence* at 96.

¹⁶¹ Robinson, *Criminal Law Defenses* at 78.

¹⁶² A similar analogy is made by Horder, 'Killing the Passive Abuser' at 291.

¹⁶³ Susan Estrich, 'Defending Women' (1990) 88 *Michigan Law Review* 1430 at 1433; Jeffrey B Murdoch, 'Is Imminence Really Necessary? Reconciling Traditional Self-Defense Doctrine with the Battered Women Syndrome' (2000) 20 *North Illinois University Law Review* 191 at 217; and Richard Rosen, 'On Self-Defense, Imminence and Women Who Kill Their Batters' (1993) 71 *North Carolina Law Review* 371 at 380.

¹⁶⁴ Stephen J Schullofer, 'The Gender Question in Criminal Law' in Ellen Frankel Paul, Fred D Miller and Jeffrey Paul (eds.) *Crime, Culpability and Remedy* (Oxford: Basil Blackwell, 1990).

But what are the perceived benefits of such an approach? Although a broader test of necessity might accommodate the battered woman more comfortably, the floodgates may be open to a wealth of self-defence claims from any person who feels they have been given inadequate protection from violence by the state.¹⁶⁵ Furthermore, any further dilution of the significance of the immediacy requirement would arguably permit the jury too much flexibility in deciding what is, and what is not, necessary in terms of defensive action. Perhaps the strongest argument put forward for retaining at least some role for the notion of immediacy of harm is this: the more distant the threat of harm is, the lower the probability that such a threat is actually going to materialise and the higher the likelihood that alternative non-violent action could have been employed and, consequently, that recourse to defensive force was not actually necessary.

It must be conceded that in English law imminence is merely an indicator of the underlying requirement in self-defence that the action taken must be necessary;¹⁶⁶ but its significance should not be underestimated. Essentially, self-defence requires the probability of harm occurring to be something approaching inevitability.¹⁶⁷ Only if this level is reached can a defendant who intrudes on the rights of another benefit from self-defence. In order to satisfy this standard, the defendant must demonstrate that the harm threatened would have inevitably occurred but for their defensive action, and the harm could not have been prevented by other means. Whether the 'battered woman' would be able to satisfy this inevitability of harm test (or the additional proportionality test for that matter) is questionable.¹⁶⁸ It is submitted here that the solution for battered women

¹⁶⁵ As recognised by Martin E Veinsreideris, 'The Prospective Effects of Modifying Existing Law to Accommodate Pre-emptive Self-Defense by Battered Women' (2000) 149 *University of Pennsylvania Law Review* 613 at 625; Rosen, 'The Excuse of Self-Defense: Correcting an Historical Accident on behalf of Battered Women Who Kill' at 54.

¹⁶⁶ *Shaw v. R* [2001] UKPC 26 per Lord Bingham at [19].

¹⁶⁷ Cf. Sebok, 'Does an Objective Theory of Self-Defense Demand Too Much?' where a lower standard of probability is suggested. For further discussion see also Gorr, 'Private Defence' at 259.

¹⁶⁸ For further discussion of this point, see Leverick *Killing in Self-Defence* at 102-108.

lies not in any modification of the prevailing conditions of self-defence,¹⁶⁹ but rather a change in the protection offered to domestic violence victims. Within the confines of the current law, battered women themselves may seek refuge in the partial excuse or lack of capacity defences,¹⁷⁰ but it is evident that to accommodate such cases within the current formulation of self-defence would result in the erosion of long-established principles.

Imminence as a requirement of self-defence has been inconsistently applied in the development of English criminal law. Some early authorities mentioned the imminence requirement¹⁷¹, but in *Palmer*¹⁷² the Privy Council declared imminence as merely one factor for the jury to consider when deciding whether defensive action was reasonably necessary. This relaxed approach to imminence was further developed

¹⁶⁹ English law has also resisted the introduction of a new partial defence of excessive force in self-defence to assist a defendant who, when confronted with a threat of violence to themselves or another, uses an excessive degree of force on an objective assessment, but nonetheless responds with such force as s/he believes to be necessary in the circumstances; see *Palmer v. R* [1971] AC 814 at 831 and Law Commission, *Partial Defences to Murder* (Law Com No 290) (London: HMSO, 2004) at paragraph [4.27]-[4.31].

¹⁷⁰ Under the present law if an abused defendant's use of lethal force is considered an overreaction, and thus not within the bounds of reasonableness required by the self-defence justification, a murder conviction may alternatively be reduced to a manslaughter charge on a successful plea of provocation. However, the current construction of the subjective and objective elements of that defence, as required by section 3 of the Homicide Act 1957, may preclude a battered woman from securing it. In particular it may be difficult to establish that at the time of the killing the abused woman had lost self-control (see *R v. Duffy* [1949] 1 All ER 932 where it is stated at 932E that the loss of self-control must be "sudden and temporary"). To circumnavigate this problem, the Law Commission has recently recommended that provocation should be available where "the defendant acted in response to: (i) gross provocation... which caused the defendant to have a justifiable sense of being seriously wronged; or (ii) fear of serious violence towards the defendant or another; or (iii) a combination of both (i) and (ii)," see Law Commission *Murder, Manslaughter and Infanticide* (Law Com No 304) (London: HMSO, 2006) at paragraph [5.11]. These proposals place less emphasis on sudden anger as the basis for a provocation plea, thereby permitting responses borne out of a combination of fear, frustration and despair to ground the defence. In addition, the recommendations also insist on the satisfaction of a requirement that "a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or in a similar way." For abused women the proposed provocation plea would arguably overcome the unpredictability and injustice inherent in the present formulation of the defence and it seems right that, in principle, provocation is available where a battered woman uses excessive force to kill her abuser in circumstances where she fears serious violence may be used against herself or another.

¹⁷¹ *R v. Rose* (1884) 15 Cox CC 540; *R v. Chisam* [1963] 47 Cr App Rep 130; *R v. Fennell* [1971] 3 All ER 215; and *Devlin v. Armstrong* [1971] NI 13.

¹⁷² *Palmer v. R* [1971] AC 814.

by a series of cases in which no mention of the requirement was made whatsoever.¹⁷³ This lack of judicial attention is indicative of a move away from the specific strictures of self-defence to the use of a more generally applicable test of reasonableness, thus permitting the jury to acquit a defender who killed to prevent a non-imminent harm provided the use of force is considered reasonable. This direction was adopted by the court in *Re A (Children)*¹⁷⁴ and *Martin*¹⁷⁵, the latter of which arguably represents the state of the current law on self-defence with regards imminence.

In summary, it is asserted here that self-defensive action is likely only to be deemed necessary when the infliction of harm is imminent. Thus, as the present law suggests, imminence is most appropriately categorised as a corollary of the general requirement of necessity; but an important corollary nonetheless. Despite demands for the imminence requirement to be diluted to accommodate 'deserving' cases which are currently on the margin of its boundaries, it is argued here that the conditions of the defence should not be modified simply to appeal to a broader range of circumstances which could be adequately handled by a different category of defence.

4.4.1.3 Mistake

The individual acting in self-defence may be vulnerable to making mistakes as to either the perception of an attack or the degree of force required to repel that attack. If a defendant mistakenly believes they are about to be subject to an attack, their use of self-defensive force is not strictly *necessary*. But to what extent is criminal responsibility avoided where a defendant is mistaken as to the need to use self-defence? It was established in section 4.3.3 above that where there is, overall, no guiding

¹⁷³ *Attorney-General for Northern Ireland's Reference (No. 1 of 1975)* [1977] AC 105; see also *Kelly v. Ministry of Defence* [1989] NI 341.

¹⁷⁴ *Re A (Children: Conjoined Twins)* [2000] 4 All ER 961.

¹⁷⁵ *R v. Martin (Anthony)* [2002] 1 Cr App Rep 27.

reason for the use of force but the defendant has a *well-grounded belief* that they must act the defendant will be excused from liability. There is some dispute as to whether the beliefs of the defendant need to be *reasonable* in order for a self-defence claim to succeed, or whether beliefs should be merely *honest*, as English law has often fluctuated between these two positions. The issue of mistaken self-defence has generated copious literature¹⁷⁶ but, given the constraints of this thesis, the account offered here is comparatively brief.

From a historical perspective, many early scholars expressed the opinion that mistakes in self-defence had to be *reasonable*.¹⁷⁷ Initially, English case law adopted a position analogous to that of the influential scholars with a succession of judgments suggesting that an unreasonable mistake in relation to a defence was insufficient to ground an acquittal.¹⁷⁸ However, the harmony was disrupted by the ruling in *DPP v. Morgan*,¹⁷⁹ where the House of Lords held that, in the context of rape, mistaken belief in consent need only be *honest*. The resulting uncertainty was settled in *R v. Williams (Gladstone)*¹⁸⁰ in which the Court of Appeal allowed a plea of self-defence on the basis of a defendant's honest but unreasonable belief that he was being attacked.¹⁸¹ This approach was subsequently echoed in a number of Court of Appeal cases,¹⁸² was confirmed by the Privy Council in *Beckford v. R*¹⁸³ and *R v. Oatridge*,¹⁸⁴

¹⁷⁶ For instance, Andrew P Simester, 'Mistakes in Defences' (1992) 12 *Oxford Journal of Legal Studies* 295.

¹⁷⁷ See William Hawkins, William, *A Treatise of the Pleas of the Crown* 3rd edition (London: E and R Nutt and R Gosling, 1739); Edward H East, *Pleas of the Crown* (Oxford: Professional Books Limited, 1987)

¹⁷⁸ For instance, *R v. Foster* (1825) 1 Lewin 187; *R v. Smith* (1837) 8 Car & P 158; *R v. Weston* (1879) 14 Cox CC 346; *R v. Rose* (1884) 15 Cox CC 540; *R v. Chisam* (1963) 47 Crim App Rep 130; *R v. Fennell* [1971] 3 All ER 215; *Palmer v. R* [1971] 1 AC 814; *Albert v. Lavin* [1981] 1 All ER 628.

¹⁷⁹ *DPP v. Morgan* [1976] AC 182.

¹⁸⁰ *R v. Williams* [1987] 3 All ER 411.

¹⁸¹ The court made reference to the approach taken by the Criminal Law Revision Committee, *Offences against the Person* (Cmd 7844) (London: Home Office, 1980) at paragraph 72(a) that "a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person."

¹⁸² *R v. Jackson* [1985] Crim LR 674; *R v. Asbury* [1986] Crim LR 258; *R v. Fisher* [1987] Crim LR 334.

¹⁸³ *Beckford v. R* [1988] AC 130.

¹⁸⁴ *R v. Oatridge* (1992) 94 Cr App Rep 367.

and has recently been endorsed by statute.¹⁸⁵ So, the current position in English law is that a genuinely held mistaken belief in the existence of an attack can ground a claim of self-defence, even if the belief is unreasonable.¹⁸⁶ The merits of this approach will be considered below.

First, it must be established why the law permits mistaken self-defence to absolve an actor of criminal responsibility.¹⁸⁷ One could argue that *any* mistake as to the existence of an attack should serve to displace the defence altogether.¹⁸⁸ This position is too demanding, however, and, although it fiercely protects the rights of the innocent victim, it does not give sufficient recognition to the lesser fault of persons who mistakenly believe in the existence of justifying circumstances.¹⁸⁹ The belief of the actor must be taken into account in considering criminal responsibility, but the mistaken belief will not render the defendant's conduct *lawful*. In this regard, mistaken self-defence is very different in substance from actual self-defence, since the rationale for self-defence is incompatible with putative self-defence. When self-defensive force is exercised against a perceived threat in the mistaken belief that they are launching an attack, the reality is that no such threat exists other than in the defendant's imagination. According to the forfeiture theory, defended earlier in the thesis as the most convincing rationale for self-defence, the perceived threat is an unfortunate victim of circumstance who has not forfeited any of their rights by their conduct and has not been injurious to the actor's autonomy. Hence, the defendant cannot be acquitted on the justificatory grounds advanced by this theory. Instead putative self-defence provides

¹⁸⁵ See s76 (particularly subsections (3) and (4)) of the Criminal Justice and Immigration Act 2008 which confirms this principle established by the common law.

¹⁸⁶ In evaluating whether the defendant's beliefs are genuinely held, a limited set of personal characteristics may be considered insofar as they affect the defendant's perception of the circumstances. For further discussion on the perceived advantages of a rigorously objective approach to the issue contrasted with a more relaxed approach which gives recognition to certain characteristics in the assessment of reasonableness, see section 76(4)-(8) of the Criminal Justice and Immigration Act 2008; *R v. Martin (Anthony)* [2002] 1 Cr App R 27; *Shaw v. R* [2002] UKPC 26; *R v. Martin (DP)* (2000) 2 Cr App R 42; and Ormerod *Smith & Hogan: Criminal Law* at 361-362.

¹⁸⁷ For a detailed and carefully considered response to this question, see the discussion by Leverick, *Killing in Self-Defence*, chapter 9.

¹⁸⁸ This position was adopted at one time by the New York Court of Appeals in *People v. Young* 183 NE 2d 319 (1962).

¹⁸⁹ Sangero, *Self-Defence in Criminal Law* at 282.

the actor with an excuse.¹⁹⁰ The excuse communicates society's understanding towards the defendant who acts on mistaken beliefs by denying the imposition of criminal responsibility; but there is certainly no acceptance that such conduct is desirable or justified, or that it would be encouraged in the future.

One question which has often troubled academics and the judiciary alike is whether, in order to excuse the defendant from responsibility, any *genuine* mistake will suffice, or whether the mistake must be *reasonable*. One view is that mistakes as to the existence of an attack should be grounded upon *reasonable* perceptions before the actor is excused.¹⁹¹ Such reasoning appears to be motivated by the desire to encourage people engaging in conduct that is usually prohibited to assess situations more carefully and exercise caution and restraint.¹⁹² Others maintain that acquitting the defendant on the basis of an unreasonably mistaken belief undermines the rights of the perceived threat, who, through no fault of their own, is mistaken for an attacker.¹⁹³ In relation to this final point, strong arguments have been advanced that the current English approach to mistaken belief in the need for self-defensive action is incompatible with the operation of the right to life enshrined in Article 2 of the European Convention on Human Rights.¹⁹⁴ Article 2 acknowledges that life may be taken only where this is 'absolutely necessary'; and the European Court of Human Rights has accepted that a defence may be provided if a person mistakenly believes in the need to use lethal self-defensive force,

¹⁹⁰ See Fletcher, *Rethinking Criminal Law* at 103-115; Sango, *Self-Defence in Criminal Law* at 283-285.

¹⁹¹ Fletcher *Rethinking Criminal Law* at 689-690. Ashworth also suggested that the rights of the innocent victim are not sufficiently protected in the absence of a reasonableness requirement, see Andrew Ashworth, 'Case Comment: *Andronicou and Constantinou v. Cyprus*' [1998] *Criminal Law Review* 823.

¹⁹² Sango, *Self-Defence in Criminal Law* at 286-287; and Simester, 'Mistakes in Defence' at 309.

¹⁹³ See Simester, 'Mistakes in Defences' at 309; Fiona Leverick, 'Is English Self-Defence Law Incompatible with Article 2 of the ECHR?' [2002] *Criminal Law Review* 347; and Leverick, *Killing in Self-Defence* at 164.

¹⁹⁴ See Leverick, 'Is English Self-Defence Law Incompatible with Article 2 of the ECHR?' 347; John C Smith, 'The Use of Force in Public or Private Defence and Article 2' [2002] *Criminal Law Review* 958; and Ashworth, 'Case Comment: *Andronicou and Constantinou v. Cyprus*' at 823.

but only if there exist 'good grounds' for that belief.¹⁹⁵ This appeal for good reasons to be provided highlights the contradiction between the European Court's jurisprudence and the current English approach, which simply requires a belief to be genuinely held. If an actor is absolved of criminal responsibility for taking life in the absence of reasonable grounds for her/his belief, it is arguable that insufficient protection is granted to the most fundamental of all rights. Where the self-defensive force used is non-lethal, this argument could be extended to other rights such as the right to bodily integrity which is so fiercely guarded in a liberal society.

If the law was to demand that belief in the existence of an attack must be reasonable, any such requirement would not necessarily be too onerous as it could be "sensitive to the fact that people may make mistakes under the pressure of circumstances."¹⁹⁶ It is possible that the moral culpability of a mistaken self-defendant whose belief was not reasonable and is therefore not entitled to exculpation on the basis of a full excuse, could be reflected in the resulting conviction¹⁹⁷ and / or the degree of punishment, which would acknowledge the pressure and urgency of the situation.

Despite potent opposition, the prevailing approach in English law is to regard the reasonableness of the actor's belief as immaterial; the mistaken belief merely has to be honest and genuine. In support of the current position it may be asserted that denying a defence for someone who makes an honest but unreasonable mistake and imposing punitive sanctions upon them seems to achieve little, as the criminal law has no

¹⁹⁵ *McCann v. UK* (1996) 21 EHRR 97; and *Andronicou and Constantinou v. Cyprus* (1998) 25 EHRR 491.

¹⁹⁶ Jeremy Horder, 'Occupying the Moral High Ground? The Law Commission on Duress' [1994] *Criminal Law Review* 334 at 341. This comment was made in relation to the element of reasonableness required for the defence of duress, but is equally pertinent here.

¹⁹⁷ Instead of being charged with murder, for instance, the unreasonably mistaken self-defendant could have the charge reduced to manslaughter; see Leverick, 'Is English Self-Defence Law Incompatible with Article 2 of the ECHR?' at 361; and Nicola Lacey, 'Partial Defences to Homicide: Questions of Power and Principle in Imperfect and Less Imperfect Worlds', chapter in Andrew Ashworth, *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000) at 124-5. South African law also implemented this rule, see *S v. De Oliveira* (1993) (2) SALR 59.

real deterrent effect on errors of judgment.¹⁹⁸ In response to these assertions, Leverick points out that there are compelling reasons for punishing this type of defendant, other than deterrence. Punishment serves an expressive function and a conduct-guiding function by virtue of expressing societal dissatisfaction with the mistaken defendant's lack of consideration for others, and guiding citizens to demonstrate more care before acting rashly.¹⁹⁹ It appears that there are strong arguments in favour of a more objective view of mistake and this approach is supported here.

Somewhat less controversial is the claim that the defendant's response to the unjust threat, or the amount of force used, is evaluated objectively, and must be *reasonable* in the circumstances that the defendant believed to exist. The court in *R v. Scarlett*²⁰⁰ advocated the extension of this principle to deny any criminal responsibility for unreasonably mistaken beliefs regarding the amount of force necessary to repel an attack. However, English law retracted this liberal extension, and the present law on self-defence is clearly articulated by Collins J in *R v. Owino*.²⁰¹

"The jury have to decide whether a defendant honestly believed that the circumstances were such as required him to use force to defend himself from an attack or a threatened attack. In this respect a defendant must be judged in accordance with his honest belief, even though that belief may have been mistaken. But the jury must then decide whether the force used was reasonable in the circumstances as he believed them to be."²⁰²

Thus, the result of years of discussion is a logically disjointed development of mistake in relation to self-defence, in that mistakes with

¹⁹⁸ Richard G Singer, 'The Resurgence of Mens Rea II: Honest but Unreasonable Mistake of Fact in Self-Defense' (1986-7) 28 *Boston College Law Review* 459 at 512, cited in Leverick, *Killing in Self-Defence* at 168.

¹⁹⁹ Leverick, *Killing in Self-Defence* at 166-167.

²⁰⁰ *R v. Scarlett* [1993] 4 All ER 629.

²⁰¹ *R v. Owino* (1996) 2 Cr App Rep 128; followed in *DPP v. Armstrong-Braun* [1999] Crim LR 416; *Shaw v. R* [2001] UKPC 26; and *R v. Martin (Anthony)* (2002) 1 Cr App Rep 27. This position is also confirmed by section 76(6) of the Criminal Justice and Immigration Act 2008.

²⁰² *R v. Owino* (1996) 2 Cr App Rep 128 at 132-133. A similar approach was more recently adopted in *R v. Tudor* (1999) 1 Cr App R 197.

regard to the existence of an attack need not be reasonable, but beliefs with regard to the amount of force necessary to repel the attack must be reasonable.

That completes the account of necessity in its function as a limiting factor on the use of self-defensive force.²⁰³ A law whose sole requirement is necessity, however, “would justify every weak lad whose hair was about to be pulled by a stronger one, in shooting the bully if he could not otherwise prevent the assault.”²⁰⁴ What follows is a discussion of the remaining limitation to which all self-defensive force is subject; that the use of force must be a proportionate response to the unjust threat.

4.4.2 The proportionality requirement

4.4.2.1 The need for a proportionality requirement

It was once said that “for every assault it is not reasonable a man should be banged with a cudgel.”²⁰⁵ Self-defence is underpinned by a requirement not only that the use of force is necessary, but also that the defensive action is a *proportionate* response to the unjust threat.²⁰⁶ Even though it may be necessary, in the sense explicated above, for such force to be exercised there may be times when the defendant should refrain from engaging in it because the cost would, quite simply, be too great.²⁰⁷ A full assessment of whether self-defensive force is within the bounds of proportionality requires an objective balance to be made between the

²⁰³ Before continuing, however, it has been suggested that Article 2 of the European Convention on Human Rights dictates that there should be a tighter test as to when defensive force is necessary. As mentioned above, the English assumption has frequently been that ‘reasonableness’ is the key issue, with a variety of issues potentially indicative of such reasonableness. Article 2 ECHR, however, maintains a somewhat sharper focus, with the result that the fundamental nature of the right to life means it can only be taken away when ‘absolutely necessary’.

²⁰⁴ *Report of the Royal Commission on the Law Relating to Indictable Offences* (1879) (C2345) note B at 44.

²⁰⁵ Per Holt LJ in *Cockcroft v. Smith* (1705) 2 Salk 642.

²⁰⁶ Leverick emphasises that the principle is a “cornerstone” of the common law, see *Killing in Self-Defence* at 131.

²⁰⁷ See Sangero, *Self-Defence in Criminal Law* at 166-167.

respective rights of the defendant and victim and relative values must be prioritised. On this premise it follows that disproportionate force may be unreasonable force which renders self-defensive action impermissible. Proportionality requirements have proved controversial as there is some disagreement between scholars regarding the degree of force which may be legitimately employed in the face of an unjust threat to one's own protected interests. The level of commitment to the proportionality requirement is underpinned by the preferred rationale, so it is not surprising that views differ with regard to whether there should be any emphasis on proportionality at all and, if so, what the content of the requirement should be.

With regard to the significance of the requirement, there is often no consensus in relation to how the respective values of the defendant and victim should take precedence. For instance, for those who ground the justification of self-defence on a 'lesser harms' consequentialist calculus, proportionality is central to the logical functioning of the theory.²⁰⁸ Conversely, for advocates of a theory that prioritises the defendant's autonomy over that of the person posing an unjust threat,²⁰⁹ it is not immediately obvious that proportionality should be respected.²¹⁰ Indeed, on the theory proffered here it would seem that the autonomy of the defendant is prioritised over that of the unjust threat, who temporarily forgoes their rights on account of the threat that they pose. Rights-based accounts, particularly those with an accompanying theory of forfeiture, are often criticised for the fact that proportionality is often assumed without further explanation. It is submitted here, however, such an account leaves scope for a principle of proportionality simply because it is required in the interests of justice. Indeed, one could say that proportionality is *especially* important to such a rights-based theory. Because it permits *lethal* self-defensive force to be used against an

²⁰⁸ Sangero, *Ibid.* at 168.

²⁰⁹ Fletcher *Rethinking Criminal Law* who suggested at 865 that "right should never yield to wrong."

²¹⁰ This point is made by Schopp, *Justification Defenses and Just Convictions* at 76; Sangero, *Self-Defence in Criminal Law* at 168-170; and Rogers 'Killing in Self-Defence: Publication Review' at 173.

innocent unjust threat the suggestion that the level of the intrusion should be carefully limited is arguably more potent. In a liberal society the law must pay equal regard to the rights of all citizens and although at the point of engagement the rights of the unjust threat are forfeited, the requirement of proportionality would limit what Schopp refers to as “tragic errors”²¹¹ when an individual assesses the reasonableness of their actions. The underlying premise of the proposed rationale does not, therefore, have to be undermined to accommodate a role for proportionality.

4.4.2.2 The content of the proportionality requirement

There is further disagreement as to the content of the requirement of proportionality, assuming it is accepted as a condition of self-defence. Proportionality is, in English law, a flexible concept.²¹² When self-defensive force is exercised it will often be equivalent to the harm threatened; but it does not *have* to be equivalent. The reason that the requirement is so accommodating is that it is part of a broader concern for the *reasonableness* of the defendant's action.²¹³

Although the thesis is not limited to considerations of *lethal* self-defence, it is within this domain that issues relating to the precise content of the proportionality requirement are particularly problematic, given the fundamental nature of the interest set back by the defendant. Where lesser proprietary or personal interests are infringed by a defendant acting in self-defence the evaluation of the reasonableness of the response may not be controversial. If, for instance, an actor inflicts minor physical injury on a victim, or damages the victim's property, in order to protect her/his home or a valuable item of property, it is likely that a jury

²¹¹ Schopp, *Justification Defenses and Just Convictions* at 86.

²¹² *Palmer v. R* [1971] 1 AC 814.

²¹³ Some have suggested that a reasonableness requirement which subsumes necessity and proportionality erodes the significance both elements (and proportionality in particular), see Robinson *Criminal Law Defenses* volume 2 at 82.

would deem the reaction reasonable.²¹⁴ The particular concerns which have preoccupied philosophical analysis of the notion of proportionality involve the use of lethal defensive force to: (1) defend property; and (2) defend serious physical attacks against the person. There is, it is submitted here, an undeniably profound moral difference between employing, for instance, lethal self-defensive force to defend oneself against a serious physical attack, and utilising similar force to defend an attack against one's own personal property. These particularly difficult issues are considered briefly below in order to undertake a full assessment of the role of proportionality in particularly difficult cases.

Lethal self-defensive force against sub-lethal physical harm

Why might it be permissible to lethally defend oneself or another against sub-lethal harms such as loss of limb, disfigurement and rape?²¹⁵ It is arguable that threats of this nature are similar, in some sense, to threats to one's life, and consequently the use of lethal self-defensive force to prevent such setbacks to one's own interests is justified.²¹⁶ Unlike threats to one's proprietary interests, serious intrusions against the person may sometimes, it is suggested here, permit one to respond with lethal self-defensive force. One particular difficulty arises where self-defensive force is engaged to prevent rape. Rape involves the kind of irremediable violation that can never be appropriately compensated and inflicts grave psychological, if not physical, scars on the victim. For this reason it is submitted here that lethal force can sometimes be justified against sub-lethal harm, if the jury deem the response reasonable.

In order for rape to be permissibly defended with lethal force, the harm inflicted by the act of rape must be, in some regard, comparable to the deprivation of life itself. Since the right to life has not been violated by the

²¹⁴ See, for example, *Workman v. Cowper* [1961] 2 QB 143 in which it was held that the defendant was justified in killing a dog that was posing a threat to others.

²¹⁵ It may be worthy of note that Article 2 of the ECHR is vague on this question.

²¹⁶ Leverick, *Killing in Self-Defence*, chapter 8.

act of rape, the basis for permission to kill to ward off a threat of rape must be grounded in the psychological trauma experienced by the victim. Endorsing what can only be described as psychological self-defence could, however, be dangerous.²¹⁷ Other commentators prefer to view the abhorrent act of rape as akin to deprivation of life itself as it involves a serious intrusion on the right of autonomy and bodily integrity of the victim.²¹⁸ The wrongness of rape rests not on the type of harm it inflicts, but on the way it effectively strips the victim of their humanity (and right to self-determination) by using them merely as an object for sexual penetration.²¹⁹

This argument, although it cannot be elaborated further given the constraints of the thesis, provides the most plausible basis for the suggestion that one may kill to prevent rape; and that, by implication, one may sometimes utilise self-defensive force which produces, superficially at least, more harm than is threatened, provided the force used can still be deemed broadly proportionate and reasonable. The lack of authoritative guidance in English law on the issue of legitimately engaging lethal self-defensive force to ward off a threat of rape²²⁰ is reflective of the philosophical disagreement as to whether a defensive killing in such

²¹⁷ The theft of a family heirloom has the potential to have huge psychological consequences for the owner, and surely it should not be permissible to kill in all such circumstances.

²¹⁸ Leverick, *Killing in Self-Defence* chapter 8; see also Don B Kates and NJ Enberg, 'Deadly Force Self-Defense against Rape' (1982) 15 *University of California Davis Law Review* 873 at 894, cited in Leverick, 'Defending Self-Defence' at 574. The former commentators further suggested, at 885, that killing to prevent rape might also be permitted on the grounds that every threat of rape entails a threat of death; but it is submitted here that the argument articulated above is more persuasive. Not all rapes involve a threat of death, so this premise would not be universally applicable, and therefore should be rejected.

²¹⁹ John Gardner and Stephen Shute, 'The Wrongness of Rape', in Jeremy Horder (ed.) *Oxford Essays in Jurisprudence* 4th edition (Oxford: Clarendon Press, 2000) at 193-217. Rogers criticises Leverick for adopting this argument in the context of self-defence. He suggests that the fact that a rapist denies the humanity of a victim explains why rape is an abhorrent crime, but not why the rapist forfeits the right to life, see Rogers 'Killing in Self-Defence: Publication Review' at 173.

²²⁰ In *R v. Wheeler* [1967] WLR 1531 (followed in *R v. Clugstone* October 1st 1987, unreported) it was assumed, without discussion, that killing in defence of rape is permissible. The case law beyond this authority is sparse, although a number of philosophers have attempted to provide theoretical explanations for the use of lethal self-defensive force to ward off sub-lethal harm, see Hawkins, *A Treatise of the Pleas of the Crown* at 71.

circumstances should ever be justified. It is submitted here that in such circumstances lethal self-defence could be justified as the response is likely to be deemed reasonable (incorporating a notion of proportionality) given the severity of the intrusion on the rights of the victim. There is, however, a clear necessity for more explicit guidance as to how such cases should be handled.²²¹ A more specific set of rules would override the current *ad hoc* approach to the issue which depends on the core values of individual jurors.²²² Particular views are likely to be influenced by an individual's commitment to the sanctity of life; and it is suggested throughout this thesis that the sanctity of life may not always be the utmost consideration in situations of great pressure, thereby rendering the use of lethal force in self-defence permissible in certain circumstances where the unjust threat consists of some sub-lethal physical harm.

Lethal self-defensive force in defence of property

It is generally accepted in English criminal law that a defendant cannot rely on the self-defence justification if s/he uses lethal force to defend property.²²³ This is so because there are established means of compensating violations of proprietary interests which do not apply to violations of personal interests. Stolen goods, for instance, could be reclaimed, or damaged property repaired. According to Rodin, attacks against property and those against persons are not just different in magnitude, but quality.²²⁴ There is a deep moral distinction between the

²²¹ As in the American Model Penal Code, which provides that deadly force is not justified "unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat" (Model Penal Code, section 3.04).

²²² Contrast Sangero who supports the flexibility of the proportionality requirement, see Sangero *Self-Defence in Criminal Law* at 168-169; see also Robinson *Criminal Law Defenses* at 89.

²²³ Although Leverick points out that the issue of whether it is legitimate to kill in defence of property has never been directly at issue in any English case, see Leverick *Killing in Self-Defence* at 133.

²²⁴ This accords with the approach taken by von Hirsch and Jareborg in their assessment of the gravity of harm, see section 2.3.1.4 above.

two, “derived from a fundamental comparative appraisal of intrinsic value and worth.”²²⁵ As a feature of our legal system, much greater value is attributed to personal integrity than property; and it follows that “[t]here is absolutely no room in a civilised society to justify the rescue of property at the price of human life, not even at the price of the aggressor’s life.”²²⁶

The current approach in English law, however, following *R v. Martin*,²²⁷ is to leave the issue of self-defence to the jury to deliberate on the basis of an overall test of reasonableness. It is not beyond the bounds of possibility that a jury may acquit a defendant who has killed in defence of property, depending on their core values. Such a development would, it is contested here, be incompatible with Article 2 of the European Convention on Human Rights and thus the argument for legitimising the use of lethal self-defensive force against property is diluted.²²⁸

4.4.3 A summary of the conditions of self-defence

Limitations on the operation of self-defence are central to its effective functioning, regardless of which philosophical standpoint is adopted. It has been established that necessity and proportionality cumulatively indicate whether the force used in self-defence was reasonable in the circumstances and this is a settled requirement in English law.

²²⁵ Rodin, *War and Self-Defense* at 43.

²²⁶ Sango, *Self-Defence in Criminal Law* at 181. This approach is also supported by Leverick *Killing in Self-Defence* at 136-137. In contrast Simester and Sullivan question whether property is necessarily less worthy of protection than human life say, for instance, if the life of a terrorist is weighed in the balance against protecting a priceless historic artefact, see Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 708.

²²⁷ *R v. Martin (Anthony)* (2002) 1 Cr App R 27; see also *DPP v. Bayer* [2003] EWHC Admin 2567.

²²⁸ According to Article 2 ECHR defence of property is not one of the legitimate circumstances in which the right to life may be violated. See also Leverick, *Killing in Self-Defence* at 133 and 181-183. Although Article 2 does not specify a proportionality requirement, the European Court of Human Rights clearly endorses strict principles of proportionality when deadly force has been utilised, see *Andronicou and Constantinou v. Cyprus* (1998) 25 EHRR 491 at paragraph 171.

In deciding whether the use of self-defensive force against an unjust threat is *necessary*, considerations of retreat, imminence and mistaken beliefs may be significant. It is submitted here that in accordance with the liberal principles advocated throughout this thesis, due weight should be attached to conflicting rights of the defendant and victim. In relation to retreat it is proposed that any suggestion that the defendant must withdraw from the confrontation must be rejected as this idealistic approach reveals a complete lack of respect for individual autonomy and the right of each person to make their own meaningful choices unhindered by others.²²⁹ The current approach of English law which considers the issue of retreat as one aspect of a broader requirement of necessity (and even broader still, reasonableness) is supported. With regard to imminence, it is submitted that there must be a high probability that the harm threatened is likely to occur before self-defensive force is engaged, but the defendant does not have to wait for the attack to be launched in order to respond, as that would undermine the primacy of her/his autonomy. With reference to the concept of mistake, it is submitted here that in order to benefit from an excuse and be absolved of criminal responsibility, the defendant must use reasonable force; and s/he must *reasonably* believe in the existence of justifying circumstances. A rule which allows a defence for someone who mistakenly and unreasonably believes in the existence of an attack arguably affords insufficient respect to the rights of the innocent non-threatening person whose interests have been wrongfully set back for no good reason.

It is suggested above that, although accounts which explain the self-defence justification in terms of protecting the fundamental rights of the defendant are not *prima facie* bound by proportionality requirements, such considerations are crucial in the interests of justice. The principles of proportionality described above are applied flexibly as part of an overall

²²⁹ A submission which might be contested by Ashworth, 'Self-Defence and the Right to Life.' A similarly proactive view is adopted by Rodin, *War and Self-Defense* at 40.

assessment of the reasonableness of the self-defender's response.²³⁰ A requirement of proportionality raises difficult questions regarding the use of lethal defensive force against sub-lethal harms and lethal force in defence of property. Deciding whether such lethal forms of self-defence are reasonable, taking into account considerations of proportionality, very much depends on the core values of individual jurors and perceptions of intrinsic worth. It is submitted here that lethal defensive force against serious injury or the threat of rape is permissible in certain circumstances. The proposition that the harm caused may be greater than the harm threatened highlights that the proportionality requirement is merely one factor that is taken into account in the overall assessment of reasonableness. However, when property is defended with lethal force there is no self-defence justification in recognition of the fundamental moral difference between personal and proprietary interests.

A relatively comprehensive account of the philosophical and practical challenges underlying the use of self-defensive force against innocent unjust threats has been provided. However, before the discussion can proceed to chapter five and a consideration of the scope of criminal responsibility for intrusions against innocent non-threatening bystanders, one final category of difficult cases must be addressed. These cases involve intrusions on the legally protected interests of what we will call *innocent incidental threats*, a category of innocent persons who do not pose a direct unjust threat but who are closely linked to the threat in that they expose it to themselves and others. Force used against such innocent persons is difficult to defend as it is unclear which ground of exculpation is most appropriate to exonerate the actor of criminal responsibility, assuming that liability should be avoided at all. Because such difficult cases lie on the borderland between self-defence and necessity they will be considered in this chapter largely for reasons of convenience.

²³⁰ See *Palmer v R* [1971] 1 AC 814; and Simester and Sullivan, *Criminal Law Theory and Doctrine* at 708.

4.5 Innocent incidental threats: self-defence or necessity?

It is established above that the self-defence justification permits the use of defensive force against culpable or innocent, active or passive, unjust threats, within appropriate parameters.²³¹ But the account would not be complete without considering a sub-set of cases which have thus far evaded simple classification²³² and have tested the limits of two related justification defences: self-defence and necessity. The exact boundaries of these defences and their application to 'hard' cases involving action which infringes the rights of a particular category of innocent persons have thus far eluded precise philosophical and legal demarcation. An attempt will be made here to establish some clear guiding principles on which these difficult cases may be resolved.

4.5.1 Defining innocent incidental threats

The cases in point involve innocent *incidental, indirect or contingent threats*,²³³ where the innocent person whose rights are infringed by the defendant poses *no direct and unjustified threat whatsoever* but is harmed as an incidental effect of warding off a more immediate direct threat. Although not a direct source of the threat itself in the same way that the dangling mountaineer or falling projectile are,²³⁴ incidental threats are nonetheless connected to the source of the threat in that they bring it closer to realisation²³⁵ or facilitate it in some way, albeit unwittingly.²³⁶

²³¹ See sections 4.1-4.4.

²³² Uniacke aptly describes these cases as "conceptually grey", see Uniacke, *Permissible Killing* at 164.

²³³ The phrase 'contingent threat' was coined by Uniacke, *Permissible Killing* at 167. See also Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship,' who uses the phrase 'indirect threat' at 152. Here the phrase 'incidental threat' is preferred.

²³⁴ See section 4.2.2.2 above.

²³⁵ Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' at 154.

²³⁶ Uniacke, *Permissible Killing* at 167.

Where a defendant intrudes on the rights of an innocent person who is associated with the direct threat to their interests, there is some debate as to whether that defendant's action should be justified on the grounds of self-defence or necessity. It seems that in these difficult cases there is "perhaps no definitive test that will mark out a bright line between the two."²³⁷ If deemed to be inextricably bound to the direct threat, then it could be argued that such innocent persons are the legitimate target of self-defensive force. But it is submitted here that the correct approach is to regard such persons as entirely non-threatening, and therefore the self-defence justification cannot be invoked to exonerate the defendant for encroaching on their rights. However, one may instinctively wish to vindicate the action of a person in these circumstances, and therefore it is argued that appeal should be made to the residual doctrine of necessity to deny the actor's criminal responsibility, subject to stringent limitations. The extent to which necessity will provide any defence to justify intrusions on the rights of innocent incidental threats is a matter which requires careful deliberation.²³⁸ But first, there must be some explanation as to why the self-defence justification is inapplicable.

4.5.2 Self-defence and innocent incidental threats

A number of modern dilemmas have sparked intense philosophical and legal debate regarding the appropriate scope of criminal responsibility for intruding on the rights of an innocent incidental threat. Some of these thought provoking examples warrant deliberation here not least because they challenge us to clarify some of our moral thinking and to consciously and mechanically formulate our responses.²³⁹ One example is the sinking of the ship, the *Herald of Free Enterprise*. At the inquest following this disaster, a witness (an army corporal) gave evidence that he and numerous other passengers were trapped in the stricken ferry and in

²³⁷ Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' at 154.

²³⁸ See section 4.5.3 below for further discussion.

²³⁹ Jonathan Bennett, *The Act Itself* (Oxford: Oxford Clarendon Press, 1995) at 165.

grave danger of drowning. A possible way of escape up a rope ladder was barred by a man, petrified by cold or fear, who could move neither up nor down. After fruitless attempts to persuade him to move the corporal ordered those nearby to push him off the ladder. They did so; he fell into the water and was not seen again. The trapped passengers were then able to climb up the ladder to safety. The coroner expressed the opinion that a reasonable act of self-preservation, or the preservation of others, is 'not necessarily murder'. So far as is known, no legal proceedings against the corporal were ever contemplated. The rights of the innocent man on the ladder, caught up in a crisis created by circumstances, were infringed in order to save a number of others. It is accepted that the man on the ladder was preventing the passengers from going where they had a right and a most urgent need to go and he was endangering lives. Yet he was essentially doing no 'wrong'. It is difficult to rationalise why the frozen man's autonomy was disregarded, especially since that right is so fundamental to the functioning of English law. Should such a case ever reach the courtroom would the accused, who took decisive action in circumstances of emergency, be absolved of criminal liability? If so, what is the appropriate ground of exculpation?

Let us primarily appeal to the doctrine of self-defence. The man on the ladder is clearly a potential violator of the rights of the other desperate passengers; he is 'unwittingly imperilling'²⁴⁰ their lives. On one view, the frozen man, though absent of fault, constitutes an immediate *unjust threat* to the protected interests of the other passengers. Horder rightly claims, however, that this is a much more complex example than the roped mountaineer case, which, on the principles stated above, is a clear cut case of self-defence, due to the dangling mountaineer being a direct source of the threat which was posed for no objectively justified moral reason. The normative status of the man on the ladder, it is advanced here, is different. Arguably, the man is not the actual *direct source* of the threat, as this can be attributed to the rising water. This interpretation

²⁴⁰ Ormerod, *Smith and Hogan: Criminal Law* at 350.

was originally developed by Uniacke,²⁴¹ who states the importance of distinguishing between human agents who are the *direct source* of the threat (against whom self-defensive force can legitimately be used) and *circumstances* constituting the direct source of the threat (where the violation of another's rights does not fall within the purview of self-defence). Her account proceeds with the claim that the frozen man, although not the *direct* source of the threat, has inadvertently become linked to it. For Uniacke, if viewed as an *exacerbation* of the direct threat, the man on the ladder would be a legitimate target for self-defensive force.²⁴² However, she goes on to draw a distinction between the innocent person who aggravates the threat and the innocent person who merely *exposes* another to an independent threat; the latter case she describes as a *contingent threat*. For her, this difference is determinative of the legitimacy of self-defensive force being used to permit an intrusion on the rights of an innocent person. The frozen man falls within this latter category as he is a contingent threat and is thus not a legitimate target of self-defensive force.²⁴³

Horder, not entirely convinced by Uniacke's distinction between exacerbation of and exposure to a threat,²⁴⁴ attempts to further elucidate the position. For him, the man on the ladder increases the chances that

²⁴¹ Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* at 164-177.

²⁴² An example of an *exacerbation* of a threat would be someone who rocks a sinking rowing boat, which Uniacke classifies as the type of threat which might be "resisted, repelled or warded off," see Uniacke, *Permissible Killing* at 167.

²⁴³ Other examples of a contingent threat include Foot's fat pot-holer who becomes stuck in the exit, impeding the passage to safety of his fellow pot-holer's from a rapidly rising tide, see Philippa Foot *Virtues and Vices, and Other Essays in Moral Philosophy* (Oxford: Blackwell, 1978), chapter 2. In this example, the threat exists independent of the pot-holer, who merely exposes others to an independent threat. Another example arises in the case where X fires an arrow at D, who cannot move out of its path. The path is currently blocked by V. If V bends down to tie his shoelace, V exposes D to the threat, but is not the source or an exacerbation of the threat (or, for Horder, V does not increase the threat in and of itself). This type of contingent threat is not the legitimate target of self-defensive force. This example is adapted from Uniacke, *Permissible Killing* at 167. Horder points out that the self-defensive action may be warranted if V deliberately bends down *in order that D is hit* by the missile, as the exposure to the threat would be free, deliberate and informed; see Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' at 152, using the phrase articulated by Herbert LA Hart and Tony Honore, *Causation in the Law* 2nd edition (Oxford: Clarendon Press, 1985) at 361.

²⁴⁴ He suggests that the distinction is, notionally, a difficult one to draw, see Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' (1998) at 153.

the threat will turn into reality for the desperate passengers; but the threat is still operative independent of the man's actions. The man does *not* affect the threat in itself but simply brings it closer to being realised for the passengers.²⁴⁵ The innocent man is, in this sense, *indirectly* connected to the threat; and because of his passivity and the fact that he does not pose any unjust threat, nor affect the independent threat in itself, he cannot be the legitimate target of self-defensive force. He is, effectively, an innocent non-threatening subject who is simply caught up in an unfortunate set of circumstances.

The difficulty of distinguishing unjust threats, against whom self-defensive force may be exercised and incidental or contingent threats, who are not a legitimate target of self-defensive force, is further highlighted by *Re A (Children)*²⁴⁶ in which the Court of Appeal was given the unenviable task of deciding whether to authorise an operation to separate conjoined twins, Mary and Jodie.²⁴⁷ The dilemma facing the judges was formidable; they were asked to determine whether it would be lawful for surgeons to separate the siblings, even though it was a certainty that Mary, the weaker twin, would die as a result. If nature was left to run its course, however, both twins were destined to suffer untimely deaths. If the operation proved to be a success, as indeed it did, Mary's life would, in effect, be sacrificed for the continued existence of her sister.

In a landmark judgment the Court of Appeal held that, in the special circumstances of the case, it was lawful for the surgeons to override the right to life of the weaker twin, Mary, in order to save the life of the stronger sister, Jodie.²⁴⁸ The decision left the criminal law in "total disarray"²⁴⁹ by "throw[ing] away years of legal precedent, itself based on

²⁴⁵ Horder, *Ibid.* at 154.

²⁴⁶ *Re A (Children: Conjoined Twins)* [2000] 4 All ER 961.

²⁴⁷ The twins were allocated these names throughout the court process, but their real names were later disclosed as Rosie and Grace Attard.

²⁴⁸ It was accepted by both Ward LJ, at 1012, and Brooke LJ, at 1029, that, absent any defence, the surgeons would intentionally kill Mary, the *actus reus* and *mens rea* for murder both being present.

²⁴⁹ Jenny McEwan, 'Murder by Design: The 'Feel-Good Factor' and the Criminal Law' (2001) 9 *Medical Law Review* 246.

moral arguments which were not addressed.”²⁵⁰ Although the decision was unanimous in respect of the outcome, the judges offered disparate reasons for reaching it. It seemed that the court was “searching hopefully for a defence which could be formulated; they were not looking in an uncommitted way to decide whether such a defence already exists;”²⁵¹ but in the end the court resorted to established defences to absolve the doctors of criminal responsibility. Concentrating solely on the two relevant judgments for present purposes,²⁵² Brooke LJ controversially declared that the case was one of necessity.²⁵³ The action taken by the doctors encroached on the most fundamental right of a human being and unlike the medical cases discussed in chapter three where treatment is considered necessary in the patient’s ‘best interests’, the doctrine of necessity did not, until this case, concern situations of life or death.²⁵⁴ Conversely, Ward LJ used the language of self-defence as one possible justification for permitting the operation.²⁵⁵ The merits of each approach are considered below.

This section is concerned with the merits of the self-defence plea. Ward LJ asserted that in order to deny the culpability of the doctors the solution was to regard them as having a legal permission to intervene on Jodie’s behalf to protect her from Mary who posed an *unjust threat* to her life. An illustrative analogy was drawn with the case of a six year-old boy shooting indiscriminately at other children in a school playground. Although the action of the young boy would not be unlawful,²⁵⁶ Ward claimed that:

²⁵⁰ McEwan, *Ibid.* at 247.

²⁵¹ Jonathan Rogers, ‘Necessity, Private Defence and the Killing of Mary’ [2001] *Criminal Law Review* 515 at 519.

²⁵² Thereby largely disregarding the judgment of Walker LJ, whose reasoning is not pertinent to the present discussion.

²⁵³ *Re A (Children: Conjoined Twins)* [2000] 4 All ER 961, per Brooke LJ at 1032-1052. All three judges ultimately concurred that the surgeons involved would have at their disposal a defence of necessity. It is nonetheless essential to examine the alternative approaches explored within the case in order to investigate the limits of self-defence and necessity.

²⁵⁴ Andrew Phang, ‘Conjoined Twins: The Limits of Reason and the Transcendent Hope – Part II’ (2001) 147 *Law and Justice* 89 at 99.

²⁵⁵ *Re A (Children)* [2000] 4 All ER 961 per Ward LJ at 1017.

²⁵⁶ Given that the age of criminal liability in England and Wales is 10 years.

“...in law killing that six year old boy in self-defence of others would be fully justified...I can see no difference in essence between that resort to legitimate self-defence and the doctors coming to Jodie’s defence and removing the threat of fatal harm to her presented by Mary’s draining her life-blood. The availability of such a plea of quasi self-defence, modified to meet the quite exceptional circumstances nature has inflicted on the twins, makes intervention by the doctors lawful.”²⁵⁷

Thus, on Ward’s analysis, the reality was that Mary was ‘attacking’ Jodie, albeit innocently, and permission must be granted to remove the threat of fatal harm presented by Mary’s draining of her sister’s life blood. As discussed in section 4.3 above, the proposed philosophical account of self-defence maintains that utilising defensive force against someone who poses an *unjust threat* to another is justified notwithstanding the fact that the threat is not acting offensively or that s/he does not intend to harm the other.²⁵⁸ Though *prima facie* the submission that self-defence could ground a justification for the killing is acceptable, it masks a number of conceptual difficulties which arguably render its application in such circumstances unsatisfactory.

Some commentators would concur with Ward’s submission that the private defence of Jodie against the bodily intrusion of Mary could have justified the operation.²⁵⁹ One of the difficulties of providing a justification on the basis of self-defence in such circumstances is the unacceptable labelling of Mary as an *attacker*. Ward’s comparison of Mary’s status to that of the six year-old gunman is surely flawed as the boy is clearly an

²⁵⁷ *Re A (Children)* [2000] 4 All ER 961 per Ward LJ at 1017.

²⁵⁸ See section 4.3.9 above. See also Uniacke, *Permissible Killing* at 172-177.

²⁵⁹ Leverick has suggested that the conjoined twins situation is comparable with roped mountaineer case in that Mary is the direct source of the threat to Jodie, see Leverick *Killing in Self-Defence* at 9. Kadish also draws this analogy and highlights the similarity of this case and the falling projectile considered by Nozick, see Sanford Kadish, ‘Respect for Life and Regard for Rights in Criminal Law’ (1976) 64 *California Law Review* 871 at 889. In support of this view, Rabbanic law treated both the foetus ‘threatening’ the mother’s life and the refugee ‘threatening’ his host city as aggressors who could be permissibly destroyed in self-defence, see ‘Justification and Excuse in the Judaic and Common Law’ (1977) 52 *New York University Law Review* 624. Fletcher attributes a similarly libertarian strategy relating to aggression to Thomson in her defence of abortion, see *Rethinking Criminal Law* at 863. See also the comment in Smith & Hogan that “[Mary] was imperilling [Jodie’s] life and the private defence solution avoids the argument, valid or not, that necessity can never justify killing,” see Ormerod, *Smith & Hogan: Criminal Law* at 351.

active and direct source of the threat and, despite an absence of fault, is positively attacking his schoolmates. Mary may be similarly innocent but she is not, it is submitted here, an *attacker* in any sense of the word.

Yet self-defence may still be applicable since the dominant philosophical account outlined in section 4.3.9 above does not demand the requirement of an attack. Self-defensive force is justified against an innocent person who poses a *passive unjust threat*. To constitute an unjust threat (active or passive) there must be no objective moral justification for threat Mary poses to Jodie. The difficulty with this case is that the twins have been born into a terrible situation for which neither is responsible. They have become linked to a threat which was essentially created by circumstances. Mary is not, on this approach, a *direct source* of the threat at all and it is difficult to see how she exacerbates it. To label Mary an unjust threat we would have to find some independent right of Jodie's that Mary was threatening; but since they were born conjoined and neither had an independent existence, "there was never any invasive act by Mary that caused the state of affairs."²⁶⁰ Her continued existence might increase the chances of the threat turning into a reality (or in Uniacke's terms, she may *expose* the threat to her sister) but the threat exists independent of anything Mary now does. It is therefore submitted that on this account the self-defence justification is unsuitable in these circumstances.²⁶¹

²⁶⁰ Sabine Michalowski, 'Sanctity of Life: Are Some Lives More Sacred Than Others?' (2002) 22 *Legal Studies* 377 at 395. Uniacke also denies the availability of a self-defence justification in such circumstances, see Suzanne Uniacke, 'Was Mary's Death Murder?' (2001) 9 *Medical Law Review* 208 at 213.

²⁶¹ There are other reasons, less significant to the current discussion, which could be used to deny self-defence. The appropriateness of the doctors choosing who shall live between two innocent parties who are equally faultless could be called into question. One could say that the third party has a legal permission (on the grounds of self-defence) to intervene in order to protect the rights of (as Jodie is in this case) the 'victim', given that both were destined to die if no action was taken. This was not a case of choosing between lives, as Mary was destined to die regardless. A contrasting view is offered in Davis, 'Abortion and Self-Defense' at 175, where the author submits that third parties lack the agent-relative permission to kill an innocent threat which makes it permissible for the actual victim to kill another in order to save themselves. If agent-relativity was crucial, however, it would surely be applicable across the board, meaning that we may always have permission to or be justified in killing others to save our own lives by virtue of being agent-relative. In this sense, it could be submitted that the killing of Mary to save Jodie is more appropriately justified by virtue of pure necessity, rather

4.5.3 Necessity and innocent incidental threats

For some we will have reached the boundary between liability and non-liability for intrusions against innocent persons. There are those who adhere to the absolutist view that it could never be right to commit the atrocious act of killing an innocent person who is essentially non-threatening, such as the man on the ladder and the conjoined twin, even to prevent a greater wrong.²⁶² The wrongness of this action is, for some, basic and axiomatic. According to a lesser form of absolutism, however, the usual wrongness of killing an innocent may have to yield in extreme circumstances. Thus, killing an innocent non-threatening person is not right in all times of pressure, but rather the usual categories of judgment in terms of 'rightness' and 'wrongness' do not apply in cases of extraordinary pressure.²⁶³ But if the occurrence of a crisis results in the ultimate breakdown of the concepts of right and wrong, how should we behave? In a situation of forced choice, whether the force emanates from a human agent or from circumstances, if a setback to the fundamental rights of a non-threatening person is to be permitted, the alternative must be a calamity of the kind we would normally be required to avoid. The only possible means by which the criminal law can justify serious infringements on the rights of another where the victim poses no unjust threat to the defendant is via a strictly defined defence of necessity.

than unnecessarily stretching the boundaries of self-defence. The necessity defence might also be preferred because in *Re A* the death of both twins was not an immediate, or even imminent, prospect; they could well have lived for many more months. The account of self-defence offered here maintains the importance of an imminence requirement, see section 4.4 above. This was not a typically urgent case of self-defence in the sense that there was adequate time to seek guidance from the court. In relation to necessity it has been stressed that the operative principle should be "one of necessity, not emergency," per Lord Goff in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 75.

²⁶² See Gertrude EM Anscombe, 'War and Murder' in Gertrude EM Anscombe, *Ethics, Religion and Politics, Collected Philosophical Papers* (Minneapolis: University of Minnesota Press, 1981); and John Finnis, Joseph Boyle and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (Oxford: Clarendon Press, 1987).

²⁶³ This view was proposed by Charles Fried, *Right and Wrong* (Cambridge, Mass: Harvard University Press, 1978) at 10.

The doctrine of necessity, the conditions of which are described above in section 3.4, is traditionally labelled a “lesser-of-two-evils”²⁶⁴ defence, requiring that the harm avoided be significantly greater than the harm inflicted.²⁶⁵ It was submitted that in deceptively simple terms, the defence “applies to cases in which a person breaks the letter of the law but where in so doing they act in accordance with a value judgement that the law endorses.”²⁶⁶ This value judgement is based on an all things considered objective evaluation of the reasons for and against acting. It was suggested that for necessity to justify a rights intrusion, there must be some overwhelming moral compulsion²⁶⁷ for the defendant to act. Because necessity implies that the victim has been wronged, in that their rights have been infringed, there must be a *strong justification* for choosing the course of action on the basis of some overriding reason, weighing competing priorities in the balance. Overriding reasons for action outweigh other competing priorities and this explains why the rights of others can be infringed without criminal responsibility, even though this may set back their interests. According to Horder, a particular action may be deemed necessary if, objectively, it “accords with the best moral conception of persons, their lives, goals, and so on, in the society in question.”²⁶⁸

In situations of necessity, the danger or harm sought to be avoided invariably does not stem from an unlawful assault upon the defendant. The source of the danger lies in a set of circumstances for which no one may be to blame and it is arguably a central facet of necessity cases that the victim poses no unjust threat to the defendant claiming the defence²⁶⁹ and that circumstances create the dilemma as opposed to a human agent. Where the defendant sets back the personal or proprietary

²⁶⁴ Uniacke, ‘Was Mary’s Death Murder?’ at 215.

²⁶⁵ Or perhaps a more convincing account of necessity would maintain that there need only be a ‘balance of harms’.

²⁶⁶ Uniacke, ‘Was Mary’s Death Murder?’ at 215.

²⁶⁷ Horder defines this as a *moral imperative* to act, see Horder, ‘Self-Defence, Necessity and Duress: Understanding the Relationship’ at 143.

²⁶⁸ *Ibid.* at 156.

²⁶⁹ *Ibid.* at 150.

interests of an innocent person who poses no threat, unjustifiable or otherwise, the victim is therefore *prima facie* wronged on account of the intrusion on their legally protected interests. If, however, there is some overwhelming moral imperative for the defendant to act then the rights invasion may be justified and the actor exonerated.

The necessity defence may be used in cases where, for instance, the defendant is compelled to encroach on the victim's property rights in order to secure rights of a higher order, such as rights of personhood. Necessity would, therefore, justify the action of someone who breaks into an empty house in order to telephone for help in a dire emergency.²⁷⁰ An intrinsic limitation on the defence of necessity is, however, that it should not be used to violate rights of personal integrity. For instance, the necessity defence, as currently defined, would not justify the taking of one innocent life to save one's own in circumstances where such a choice has to be made.²⁷¹ It is clear that self-defence is capable of logical justification in a lethal context, but because of the limits on the defence and the fact that necessity cases *exclusively* involve the infringing the rights of innocents it is much more difficult to justify killing by virtue of necessity than it is to justify self-defensive killing. One significant practical obstacle to the recognition of necessity as a defence to intentional killing is the infamous authority of *Dudley and Stephens*²⁷² which has, rightly or wrongly, restricted the use of the defence in murder cases for over a century. Significantly, in *Re A* the Court circumnavigated the principle by distinguishing *Dudley* on the grounds that Mary was chosen by fate as the victim and was *destined to die*, unlike the cabin boy in *Dudley* who was an innocent bystander *selected for death* by his fellow sailors. The authority of *Dudley* was consequently retained, so as to prevent the potential misuse of the defence. But *Re A (Children)* demonstrates that *Dudley* does not ultimately pose an impenetrable

²⁷⁰ Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 718.

²⁷¹ David Wasserman, 'Justifying Self-Defense' (1987) 16 *Philosophy and Public Affairs* 356 at 356. See also section 5.6 below.

²⁷² *R v. Dudley and Stephens* (1884) 14 QBD 273. For a more detailed discussion of the case see section 5.6 below.

barrier to the recognition of necessity as a defence to intentional killing in limited circumstances.

In philosophical terms, the necessity principle has also been restricted in cases involving a choice between innocent lives. Examples often cited to illustrate the limits of the necessity principle include the instance of two drowning men fighting for a plank large enough to support one only;²⁷³ or that of shipwrecked persons climbing into a lifeboat unable to carry them all.²⁷⁴ When natural events imperil two innocent lives equally, neither has any obvious justification for deflecting the loss to the other.²⁷⁵ Is it legally permissible to push the other person from the plank or to remove passengers from the lifeboat? This query is particularly troubling because it involves competing personal interests, such as one person's right to life conflicting with another's. Absent any moral reason for one life to be favoured over another, or a fair selection procedure, such action cannot be justified on an objective evaluation. Indeed, Williams submits that "where it is merely a case of life for life, the doctrine of necessity must generally be silent, because the two lives must be accounted equal in the eye of the law and there is nothing to choose between them."²⁷⁶ There is no 'lesser evil', nothing to tip the scales on a balance of harms, and no moral imperative to act.

Despite all of this, it would be premature to discard the necessity doctrine altogether in cases such as the *Herald of Free Enterprise* and *Re A (Children)*. These cases could be distinguished on the basis that neither was a straightforward 'life for life' case such as those contemplated by Williams. The problem to be resolved is whether the right to life of the man on the ladder or the conjoined twin should be *honoured* regardless of the consequences (which would involve the loss of life of other passengers, or the death of both twins); or whether that right is capable of

²⁷³ See Immanuel Kant *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1991) at 60; also Uniacke *Permissible Killing* at 149-150.

²⁷⁴ Stephen, *History of the Criminal Law of England* volume II at 109-110.

²⁷⁵ Schopp, *Justification Defenses and Just Convictions* at 78.

²⁷⁶ Williams, *Textbook of Criminal Law* at 607.

being *overridden* by other considerations. Horder provides an illuminating response to this question which satisfies the intuition that intruding on the rights of innocent incidental threats is justifiable without undermining the rights of the innocent party. The key to resolving the matter is this: the man on the ladder was already *designated for death* himself; he was not only exposing the other passengers to the threat of death, but also himself.²⁷⁷ Similarly, Mary was *destined to die* regardless of the operation and it was on this basis that Brooke LJ justified the killing on the principle of necessity.²⁷⁸ It follows that this consideration may well be crucial if such a serious violation of personal rights is ever to be permitted under the rubric of necessity.²⁷⁹

This argument invites the criticism that it is a mask for unbounded consequentialism,²⁸⁰ but the reasoning may be defended on the grounds that necessity is, in essence, concerned with a balancing of evils and harms and sensitivity to this basic principle does not necessarily signal descent into unrestrained consequentialist calculations.²⁸¹ The logical corollary of this view is that the rights of the innocent incidental threat could not be legitimately invaded on the basis of necessity if that innocent person's rights could, in fact, be *honoured* in some way, even at the expense of other individual rights. For instance, if the man on the ladder was sufficiently highly perched that his own life was completely safe, or if Mary had a normal life expectancy and was not *destined for death* then

²⁷⁷ Wicks disputes this proposition, maintaining that even in cases like *Re A (Children: Conjoined Twins)* where the victim is designated for death the courts had to accept that killing the child violated her fundamental right to life and encroached on her individual autonomy in the same way as the cabin boy in *Dudley*; see Elizabeth Wicks, 'The Greater Good? Issues of Proportionality and Democracy in the Doctrine of Necessity as applied in *Re A*' (2003) 15 *Common Law World Review* 32. However, *Dudley* is distinguished from *Re A* on the account advanced in section 5.6 below.

²⁷⁸ Brooke LJ based his decision on such a principle of necessity, giving intuitive preference to this defence as opposed to private defence because within the realms of necessity there is no requirement of unjust aggression or threats. Thus, the counterintuitive linguistic problems encountered by the self-defence doctrine are avoided; see *Re A (Children: Conjoined Twins)* [2000] 4 All ER 961 at 1032.

²⁷⁹ Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 720.

²⁸⁰ Horder acknowledges that this approach could be criticised for weighing the value of one human life against the value of others or encouraging a "consequentialist weighing of relative outcomes," see Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' at 158.

²⁸¹ Horder, *Ibid.* at 158.

innocent life could be honoured, even if that meant other individual interests were sacrificed. In those circumstances the right to life of the innocent incidental threat could not be justifiably infringed on the grounds of necessity as there is no longer an overriding reason to act. So, adapting the reasoning offered by Horder, drawing on the work of Uniacke, for the necessity defence to justify intrusions on the personal integrity of innocent persons the decisive factor is whether the innocent incidental threat is exposing her/himself as well as others to the threat. Alternatively, if the rights of the contingent threat can be honoured despite the fact that they are exposing others to a threat, then the necessity justification is inapplicable.²⁸²

4.5.4 Justifying intrusions on the rights of innocent incidental threats: a summary

The cases discussed in this section are fraught with moral and legal complexities of the highest order. The innocents whose interests are infringed are not comfortably classified as unjust threats, nor are they wholly innocent bystanders. They occupy a peripheral position between self-defence and necessity, in that they are *closely connected* to threat to the defendant's interests, but they are not the *direct source* of it. It is submitted here, for the reasons outlined in section 4.5.2 above, that incidental threats are not the legitimate target of self-defensive force. Rather, appeal should be made to the residual doctrine of necessity to justify otherwise criminal intrusions on the rights of such persons who cannot be construed as an independent source of the threat to the

²⁸² Horder suggests that there may be a broader basis on which the removal of frozen man on the ladder (and the fat pot-holer by analogy) may be justified on the basis of necessity. He proposes an argument to distinguish these cases, suggesting that the frozen man is 'in the way' of the route to safety of other passengers, and therefore can be justifiably removed. See Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' at 159. It is submitted here that this argument shows too little respect for the rights of an essentially non-threatening innocent person; one cannot justifiably intrude on the rights of an autonomous individual simply on the basis that they are 'in one's way' (but see the argument in 5.6.2 below that such conduct may alternatively be excused).

defendant's interests. But the circumstances within which the defence is available are strictly confined in order that the interests of autonomous persons are not undermined.

Two illustrative examples have been used to highlight the challenges presented by innocent incidental threats. The *Herald of Free Enterprise* disaster was a one-off emergency of the most horrendous proportions, requiring direct action to be taken without the luxury of deliberation and recourse to the courts. In the urgency of the situation, the actor's conduct was at least permissible, if not praiseworthy. On balance, given that he was *destined to die* anyway, the man on the ladder's rights were overridden by more pressing considerations. It has been suggested that in one-off situations,²⁸³ it may therefore be permissible, on the basis of necessity, to override even the right to life of an innocent incidental threat caught up in a crisis.²⁸⁴

In *Re A* the court effectively authorised, for the first time in legal history, the killing of a human being who was not directly threatening, and was entirely innocent.²⁸⁵ Given that there is an absence of philosophical consensus in such cases, a presumption against killing might have been expected, but we must remind ourselves that if nature had been left to run its course the death of both twins would have been the irrevocable consequence. Whilst cases involving such terrible dilemmas are rare, there must be some principled and consistent way of deciding the appropriate limits of criminal responsibility. On the account advanced here, the decisive factor in the cases discussed is that the incidental threats were exposing themselves as well as others to the threat, and

²⁸³ As distinct from other types of emergency which may be repeated. According to Horder, confining the necessity justification in this way will prevent any "argument by analogy that would force such overridings onto a wider moral and political agenda," see Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' at 157.

²⁸⁴ James Griffin, *Value Judgement: Improving Our Ethical Beliefs* (Oxford: Oxford University Press, 1996) at 98-102. Cf. Brudner, whose theory of necessity falls short of justifying the taking of innocent life, see Brudner, 'A Theory of Necessity.'

²⁸⁵ It has been suggested that the decision would be of limited legal significance and was only intended as authority for the unique circumstances of the twins; but it is clear from the discussion above that the decision has much wider implications.

they were *designated for death* regardless. It is on this narrowly confined basis that necessity may provide a justification for any intrusion on the personal interests of the innocent incidental threat.

4.6 Conclusion to chapter four

It is apparent that general societal protection cannot be afforded at all times when the individual is subject to a sudden attack; but the criminal law “cannot respect the autonomy of the individual if it does not provide for this dire situation.”²⁸⁶ In a liberal society a violation of an individual's protected domain wrongfully sets back their interests and causes harm; the individual is therefore permitted to ward off any unjust threat, by the use of reasonable force, to protect their own autonomy. This permission extends to the use of defensive force against *innocent* threatening persons. Threatening persons who are not culpable for their actions, for reasons of insanity for instance, but who nonetheless *actively* attack the self-defender pose a direct unjust threat comparable to that of a culpable aggressor, at least from the defendant's perspective. Innocent persons who *passively* threaten the defendant's interests, such as the fallen mountaineer, also represent a direct unjust threat to the defendant's interests and therefore, it is argued here, may be legitimate targets of self-defensive force.

In order to appreciate the full extent of criminal responsibility for intrusions on the rights of innocent persons, the chapter has responded to the philosophical and practical challenges presented by the self-defence justification. The account offered here advances a plausible rationale for self-defence which accommodates force used against innocent threats and establishes appropriate limitations on the defence. Self-defence in its purest form has been categorised as a justification, on account of the fact that there are, all things considered, good reasons for defendant to

²⁸⁶ Ashworth, *Principles of Criminal Law* at 138.

repel a threat to their interests, since the threat is posed for no objectively justified reason. However, putative self-defence is distinguished since, contrary to the defendant's perception, there are no justifying circumstances to vindicate the defensive action. Therefore the defendant's intrusion on the interests of an innocent person is merely excused; and it is recommended here that the excuse should be subject to the condition that s/he acted on a reasonable belief, in order for the criminal law to show sufficient respect for the rights of the innocent party.

It is important to rationalise the self-defence justification and explain *why* it exculpates an actor who would otherwise have violated an offence definition. This philosophical clarification is particularly important in explicating cases where defensive force has been exercised to repel an *innocent* threat. It is suggested above that a rights-based philosophy, grounded on forfeiture principles, represents the most convincing justification for the use of self-defensive force in cases of culpable *and* non-culpable (active and passive) threats. This explanation supports the intuition that defensive force may be used against a person who innocently but unjustly threatens one's autonomy, since the absence of an objective justification for the threat renders the innocent person's rights temporarily forfeited. This account rightly excludes the use of force against innocent non-threatening bystanders and sets appropriate philosophical limits to the defence.

The account is concluded by an examination of the parameters of self-defence, with a particular focus on the role of the necessity and proportionality conditions. With regard to necessity of action, it is established that the defendant's autonomy would be unacceptably undermined if s/he was required to retreat from a threat, even if withdrawal is the morally preferable option. In order that the rights of the innocent unjust threat are sufficiently protected, the defendant must not engage in anticipatory violence but must instead not respond until the threatened harm is imminent. An actor who responds defensively to what s/he mistakenly perceives to be an unjust threat will fall outside the scope

of criminal liability by claiming an excusatory defence, provided the belief is well grounded. It is argued here that the acceptance of honest but unreasonable mistakes as the basis for an excusatory defence discounts the autonomy and rights of an innocent non-threatening victim mistaken for an attacker. Although at first blush it may not be immediately obvious, the proposed rationale allows a role for the principle of proportionality. It is argued that any requirement that the force used should be proportionate to the harm prevented should be interpreted flexibly, but perhaps more guidance could be given in difficult cases involving *lethal* self-defensive force against sub-lethal harms and, more controversially, defence of property.

It is more challenging to construct a defensible explanation of cases involving innocent incidental threats, who do not directly threaten but merely expose a threat, since there is little concurrence as to how such cases should be resolved. Even if instinct dictates that an actor should not be held responsible for impinging on the autonomy of an innocent incidental threat, such cases do not fit comfortably within any established category of defence. When the innocent person ceases to be an unjust threat to the defendant in any way, it is argued in section 4.5.2 that this marks the end of the effective functioning of self-defence; and, for many, any further intrusion on the rights of an essentially non-threatening person is impermissible. It is suggested here, however, that a justificatory defence of necessity, which was discussed at length in chapter three, can be invoked. This residual justification may be available if the intrusion on the rights of the innocent person violates an offence definition in circumstances that “render it more acceptable than the available alternatives but do not qualify for any [other] specific justification defense.”²⁸⁷ Some difficult examples were analysed in order to address the assimilation between self-defence and necessity, and outline the limits of the criminal law in relation to violating the rights of innocents. It is argued that in one-off situations where the victim exposes

²⁸⁷ Schopp, *Justification Defenses and Just Convictions* at 2.

the threat to the defendant and is *designated for death* by the circumstances, the necessity justification may deny the criminal responsibility of the actor.

In the case of innocent autonomous bystanders caught up in an unfortunate and tragic chain of events, however, the primary issue is whether such interference with the rights of wholly autonomous and blameless individuals who are not the source of the threat, and have not exposed another to the threat, can be carried out *at all*. It is submitted here that in order to respect basic liberal ideals and to protect fundamental human rights, the necessity justification is inapplicable. It is, however, arguable that a defendant who seriously intrudes upon the autonomy of an innocent bystander may alternatively be *excused* by the criminal law in recognition of the pressure under which they acted. Clear guiding principles need to be developed in respect of defences which excuse the invasion of the rights of an innocent non-threatening person. This discussion is elaborated in chapter five, where the limits of the law of duress by threats, duress of circumstances and necessity in relation to innocent non-threats will be investigated further.

Chapter Five:

Intruding on the rights of innocent bystanders

5.1 Introduction to chapter five

A central theme of this thesis is the paramount importance of individual autonomy and fundamental human rights when considering the legitimacy of intrusions against innocent persons. Thus far it has been established that criminal responsibility for interfering with the rights of an innocent person may be avoided if the intrusion is necessary in the best interest of an incompetent patient incapable of making meaningful decisions regarding their own welfare. Similarly, an actor has a right to defend themselves against any unjust threat to their interests (or those of another) since the rights of the threatening person, culpable or non-culpable, are temporarily forfeited for the duration of the threat. Infringements on the autonomy of innocent persons who are not the direct source of the threat, but who expose it to themselves and others, may be justified by necessity in one-off situations if the rights of the innocent incidental threat cannot be honoured regardless of the actor's conduct as their fate has already been decided. One final, and formidable, challenge remains: to what extent should the criminal law permit interference with the protected interests of autonomous *innocent bystanders*, who pose no threat, direct or indirect, but are merely caught up in a conflict of rights created by circumstances or human agency?

Innocent bystanders are those people who merely occupy "a position in the causal structure such that killing her [him] will be instrumental in averting a threat to the agent."¹ They are non-threatening persons who do not in any way exacerbate a threat, expose a threat, or bring it any closer to being real; they are simply victims of circumstance. Where a

¹ McMahan, 'Self-Defense and the Innocent Attacker' at 267.

defendant deliberately and knowingly intrudes on the rights of an innocent bystander it is, at first blush, difficult to imagine how the attribution of criminal responsibility could be avoided. However, if the infringement is perpetrated in order to stave off an external threat to the defendant or a third party, the conduct may fall within the ambit of the defence of duress. A duress plea enables an accused person to avoid blame for violating a prohibitory norm by claiming that they were compelled to act because of threats made by a third party. The criminal responsibility of an actor may equally be challenged where the threat emanates from circumstances as opposed to human agent. In this situation the appropriate defence plea would be duress of circumstances, a comparatively novel judicial expansion which has developed by analogy with duress by threats.

Before any conclusions may be reached regarding the scope of criminal responsibility for offences committed against innocent non-threatening bystanders, a more complete account of the defence of duress will be offered. The exact scope of this exculpatory defence is somewhat vague,² and a brief historical analysis is offered in section 5.2. In section 5.3 a plausible rationale for the defence will be advanced, which categorises duress as an excusatory defence. The excuse communicates the wrongfulness of the actor's conduct but denies the attribution of blame on the basis that the serious and compelling threats encountered by the actor left minimal opportunity to do anything but comply with the threat. Section 5.4 considers the particularly contentious debate surrounding the extent to which the defence should be available to excuse a *lethal* violation of the rights of an innocent non-threatening person. Section 5.5 outlines appropriate parameters for the defence, which are compatible with the proposed rationale, by examining the qualifying and evaluative conditions which restrict its availability. Section 5.6 considers whether there is any residual role for the justification of necessity when the rights of innocent bystanders are infringed and the

² The operation of the defence has been described as "replete with vagaries, inconsistencies and anomalies," see Alan Reed, 'The Need for a New Anglo-American Approach to Duress' (1997) 61 *Journal of Criminal Law* 209 at 209.

threat is created by circumstances as opposed to human agent. It is suggested that in the absence of a moral imperative to act in response to a natural threat, the excusatory duress of circumstances defence may still, subject to the fulfilment of strict conditions, allow the actor to avoid criminal responsibility for any intrusion on the protected domain of the innocent bystander. Finally section 5.7 concludes that in limited circumstances intrusions on the rights of an innocent bystander may be excused by appeal to either manifestation of the duress defence; and that the necessity justification will not generally exonerate an actor for such intrusion, only in the exceptional circumstances defined in chapter four.

5.2 The doctrine of duress

The defence of *duress per minas*³ was acknowledged at the time of the ancient Hebrews when it was accepted that no one was required to risk death by slavish obedience to the law, an inference purportedly drawn from the scriptural text that man shall *live* through observance of the law.⁴ According to Mendelsohn, the ancient Hebrews conceded that, “[t]he fear of death, threatened in the event of non-compliance with an order to commit a crime, is an excuse for the commission.”⁵ The basic rationale behind the duress defence was given credence by influential philosophers including Blackstone, who reasoned that, “[a]s punishments are...only inflicted for the abuse of...free will...it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.”⁶ Hence the defence of compulsion as an excuse for otherwise criminal acts has been acknowledged in one form or another since ancient times and was

³ Duress *by threats*, as distinguished from the closely related defence of duress of *circumstances*, which is discussed further in section 5.6 below.

⁴ Peter Rosenthal, ‘Duress in the Criminal Law’ (1989) 32 *Criminal Law Quarterly* 199 at 200.

⁵ Samuel Mendelsohn, *The Criminal Jurisprudence of the Ancient Hebrews*, 2nd edition (New York: Hermon, 1968) at 30, cited in Rosenthal, ‘Duress in the Criminal Law’ at 200.

⁶ Blackstone, *Commentaries on the Laws of England* volume IV at 107-108, cited in Rosenthal, ‘Duress in the Criminal Law’ at 200-201.

generally accepted as a common law defence to certain categories of crime more than two hundred years ago.

Significantly, however, none of the aforementioned scholars were disposed to extend the compulsion excuse to the intentional *killing* of an innocent subject, and this contentious issue will be addressed in detail in section 5.4 below. The common law has been heavily influenced in this regard by Hale, who stated his position regarding duress and intentional killing in unequivocal terms:

“If a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant’s fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the act; for he ought rather to die himself than kill an innocent.”⁷

The subsequent judicial denial of a defence of duress to murder⁸ is reflective of an unfettered tradition, which can be traced back to the institutional writers, that serious personal intrusions against non-threatening, autonomous, innocent persons will not be tolerated.⁹ Yet duress is recognised as a defence to most other crimes and, with the exception of violations of the right to life, it is generally accepted that compulsion absolves the actor of criminal responsibility for violating the rights of an innocent bystander. Why does duress exculpate a defendant even though an offence definition is fulfilled? This question must be addressed before any meaningful decisions regarding the scope of the duress defence in relation to intrusions on the rights of innocent autonomous bystanders can be made.

⁷ Matthew Hale, *Pleas of the Crown* (1736) (London: Professional Books Ltd., 1971) volume I at 51 and 434.

⁸ The defence was firmly denied in *R v. Tyler and Price* (1838) 8 C & P 616; similarly in *R v. Dudley and Stephens* (1884) 14 QBD 273, the defence of necessity was denied to the intentional killing of the cabin boy. Both of these decisions were subsequently confirmed in *R v. Howe* [1987] AC 417, which is discussed further in section 5.4 below.

⁹ This point was emphasised by M Sornarajah, ‘Duress and Murder in Commonwealth Criminal Law’ (1981) 30 *International and Comparative Law Quarterly* 660 at 664.

5.3 Theoretical foundations of duress

Although most commentators have accepted the need for a defence of duress, there is significant indecision regarding its rationale. One view that is considered, and rejected, below is that duress should not be regarded as a true defence at all, but rather that it consists of a denial of one the elements of the offence definition. Most commentators regard duress as an exculpatory defence but there is further disagreement as to whether it provides a justification for action or merely an excuse. The predominant view, which is supported here, is that duress *excuses* the actor from criminal liability, yet still there is tension regarding the rationale which grounds the excuse. These issues are considered in greater detail below.

5.3.1 A negation of *actus reus*, *mens rea* or an exculpatory defence?

It has frequently been stated that in situations of duress the serious threat to the interests of the defendant renders the conduct of the accused *involuntary*, and thereby negates the *actus reus* of the offence. Some senior members of the judiciary have sanctioned this view, Lord Widgery asserting the 'established' proposition that:

"duress provides a defence...if the will of the accused has been overborne by threats of death or serious personal injury so that the commission of the alleged offence was no longer the voluntary act of the accused."¹⁰

An act can surely only be regarded as wholly involuntary if the defendant does not, in fact, have *any* choice whatsoever in the fulfilment or otherwise of the *actus reus* of the crime. Hale offers the following example: "[i]f there be an actual forcing of a man, as if A by force takes the arm of B and the weapon in his hand and therewith stabs C whereof

¹⁰ Per Widgery LJ in *R v. Hudson* [1971] 2 QB 202 at 206.

he dies, this is murder in A but B is not guilty.”¹¹ In this context, the action of the accused is *physically* involuntary¹² and s/he is no more than an innocent agent in the crimes committed by the agent issuing the threat. In such a situation there would be no need to afford the actor a *defence* at all, since no crime has been carried out through her/his own volition in the first instance.¹³ Horder confirms that if an actor’s will truly has been broken or overborne this equates to a complete denial of responsibility in which there is no need to resort to the duress defence.¹⁴ In the typical case of duress, however, a conscious and real (albeit constrained) choice has to be made between the commission of an offence and the suffering of some serious harm or death to oneself or one’s family.¹⁵

There is some academic debate surrounding the relationship between duress and *mens rea*, and it has been proposed alternatively that duress operates as a negation of this element of the offence definition. There is some support for this view in the case of *Steane*,¹⁶ and other commentators do not rule out the possibility of duress operating as a negation of *mens rea*:

“In most cases, duress will not negative the *mens rea*; in fact, evidence of duress would often provide the motive for the accused to intend to bring about certain consequences. However, this is no reason to deny the finder of fact in any given case the possibility of

¹¹ Hale, *Pleas of the Crown* (1736) volume I at 534, cited in Ormerod, *Smith & Hogan: Criminal Law* at 297.

¹² If the action of the accused was deemed *physically* involuntary, there would be a negation of the *actus reus* of the offence; conversely, a claim of *moral* involuntariness relates to the existence of a defence. For further analysis see Stanley Yeo, ‘Challenging Moral Involuntariness as a Principle of Fundamental Justice’, (2002) 28 *Queen’s Law Journal* 335 at 342, who provides a critique of the ‘tentative’, ‘amorphous’ and ‘ambiguous’ concept of moral involuntariness as a basis for determining criminal responsibility.

¹³ This assertion supports the suggestion that defence pleas such as automatism and insanity are not general defences at all, but instead constitute exemptions from criminal liability. This point is discussed in section 3.3.1 above.

¹⁴ Horder, *Excusing Crime* at 95-96.

¹⁵ Rupert Cross suggests that even in the most abhorrent cases where instantaneous action is required by the defendant, there is still an element of choice (coupled with intention), see Rupert Cross, ‘Murder Under Duress’ (1978) 28 *University of Toronto Law Journal* 369 at 373.

¹⁶ *R v. Steane* [1947] 1 KB 997.

determining that evidence of compulsion has cast a reasonable doubt on the existence of the required *mens rea*.”¹⁷

However, there is general judicial reluctance to accept the view that duress is incompatible with a finding of *mens rea*. According to Lord Kilbrandon in *Lynch*, the decision of the threatened person whose “constancy is overborne so that [s]he yields to the threat, is a calculated decision to do what [s]he knows to be wrong, and is therefore that of a [person] with, perhaps to some exceptionally limited extent, a ‘guilty mind’”.¹⁸ This view was approved by Lord Hailsham in *Howe*,¹⁹ supported by numerous academic writers,²⁰ and is accepted here.

By far the most common view, then, is that duress will only be relevant to liability once the prosecution has established the necessary *actus reus* and *mens rea* elements of the offence.²¹ This approach was adopted by Lord Wilberforce in *Lynch*, who submitted that duress is something which is:

“...superimposed on the other ingredients which by themselves would make up an offence, i.e. on the act and intention. *Coactus volui* sums up the combination: the victim completes the act and

¹⁷ Rosenthal, ‘Duress in the Criminal Law’ at 208.

¹⁸ Per Lord Kilbrandon in *Lynch v. DPP for Northern Ireland* [1975] 1 All ER 913 at 945.

¹⁹ Per Lord Hailsham in *R v. Howe* [1987] AC 417 at 428.

²⁰ See, for example, Martin Wasik, ‘Duress and Criminal Responsibility’ [1977] *Criminal Law Review* 453, who submits, at 455, that considering *mens rea* in the context of duress “cramp[s] our thinking here.” See also Anthony Duff, ‘Rule-Violations and Wrongdoings’ in Shute and Simester (eds.) *Criminal Law Theory* at 64. Following the Supreme Court decision in *Perka v. R* [1984] 2 SCR 232 the Canadian courts have “tended not to consider how extreme emotion affects *mens rea*, preferring to move considerations of emotion into the developing jurisprudence of defences of excuse,” see Alexander Reilly and Rudolf Mikus, ‘*R v. Hibbert*: The Theoretical Foundations of Duress’ (1996) 30 *University of British Columbia Law Review* 181 at 183.

²¹ See Williams, *Textbook of Criminal Law* who, at 578, describes this formulation as “plainly right.” See also Reed, ‘The Need for a New Anglo-American Approach to Duress’ at 210; and Yeo, ‘Challenging Moral Involuntariness as a Principle of Fundamental Justice’ who suggests, at 338, that the question for the duress defence is whether the coerced actor should be excused or justified once fault has already been established. On the other hand, Brudner contends that, “the concept of law cannot rationally admit as a ground of exculpation the fact that a choice was coerced, for if the law is contradicted by an unlawful consequence that is desired by the agent, it must also be contradicted by an unlawful consequence that is intended by the agent because necessary for the satisfaction of another desire,” see Brudner, ‘A Theory of Necessity’ at 349.

knows that he is doing so; but the addition of the element of duress prevents the law from treating what he has done as a crime.”²²

So, it is clear that the majority opinion accepts duress as an exculpatory defence independent of *actus reus* and *mens rea* requirements.²³ But what is the underlying rationale of the defence, how can it be reconciled with the other defences, and on what grounds do we allow it to exculpate the defendant? A relatively brief assessment of some of the main theoretical explanations of the duress defence is presented below, which should illuminate the reasons why we are prepared to excuse an actor who is compelled by circumstances or threats to intrude on the interests of an innocent bystander.

5.3.2 Duress: justification or excuse?

As noted previously in section 3.3.1 above, much academic literature has been dedicated to classifying defences as either justifications, whereby the conduct is permissible if not praiseworthy, or excuses, whereby the actor wrongfully intrudes on the legally protected interests of the another person but there are reasons to negate the responsibility of the actor whilst maintaining the wrongfulness of the act. Although some would prefer to avoid the language of justification and excuse altogether, such analysis has been adopted as the preferred mode of classifying defences throughout this thesis. Consequently, it must be established how the duress defence fits into this classification: is it a justification for setting back the interests of an innocent bystander or an excuse?²⁴ The defence

²² Per Lord Wilberforce in *Lynch v. DPP for Northern Ireland* [1975] 1 All ER 913 at 926.

²³ *R v. Fisher* [2004] Crim LR 938 and *R v. Hasan* [2005] UKHL 22, per Lord Bingham at [18], cited in Ormerod, *Smith & Hogan: Criminal Law* at 326.

²⁴ Schopp asserts that duress is neither a justification nor an excuse, but accepts that punishment in some difficult cases is not warranted. He suggests that the presence of duress should operate as a ‘purely vindicating condition’ for which there is no consequent punishment, see Schopp, *Justification Defenses and Just Convictions* at 152. This approach is criticised by Simester and Sullivan who assert that Schopp underestimates the stigma inherent in conviction for a serious criminal offence, see *Criminal Law: Theory and Doctrine* at 677.

appears to contain elements of both and for that reason there is some debate regarding its conceptual basis.²⁵

Contrary to the mainstream view, some commentators contend that duress is a justification defence.²⁶ For instance, Simester and Sullivan suggest that *sometimes* duress appears to be justificatory at least in cases where there is great disparity between the criminal act required of the defendant and the harm threatened.²⁷ If an aggressor threatens a defendant with death unless they steal an inexpensive item from a shop, there appears to be some merit in the claim that the defendant's action is justified if they are compliant with the threat. S/he has chosen the lesser of two evils by opting to violate a minor property right to safeguard the more fundamental right to life.²⁸

But invading an innocent and autonomous third party's personal or proprietary rights merely to negate a threat to one's own interests is surely not the kind of behaviour the criminal law wishes to encourage.²⁹ Although there does appear to be *some* element of justification embodied by crimes committed in the circumstances described above, it is arguably merely a personal, agent-specific form of justification.³⁰ There is no objective value to be served in the defendant's compliance with the threat, even if the crime is trivial, and all things considered the action is

²⁵ Schopp, *Justification Defenses and Just Convictions* at 10 and 138.

²⁶ Peter Westen and James Mangiafico, 'The Criminal Defense of Duress: A Justification, not an Excuse – and Why it Matters' (2003) 6 *Buffalo Criminal Law Review* 833. Westen and Mangiafico's submission which regards duress as a justificatory defence is subjected to detailed criticism and is, rightly, rejected, by Mitchell N Berman, 'Justification and Excuse, Law and Morality' (2003) 53 *Duke Law Journal* 1 at 27-29.

²⁷ The authors do suggest that the defence does also operate as an excuse, see Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 665-666.

²⁸ This reasoning is also supported by Westen and Mangiafico, 'The Criminal Defense of Duress: A Justification, not an Excuse – and Why it Matters' at 835, but the authors do *not* accept that duress may sometimes also have an excusatory basis, unlike Simester and Sullivan. Hart also commented that where such disparity exists between the harm threatened and the offence committed, "there would be no absurdity on treating A's threat as a justification for B's conduct, although few legal systems overtly do this," see Hart, *Punishment and Responsibility* at 16.

²⁹ Horder, *Excusing Crime* at 59.

³⁰ Horder refers to subjective reasons for action as 'agent-specific', drawing on the work of Uniacke, see Horder, 'Self-Defence, Duress and Necessity: Understanding the Relationship' at 160-161; and Uniacke *Permissible Killing*, chapter two.

not socially permissible. The accused should rather be *excused* on the basis that they had personal reasons for the action because they personally set a value on their own life.³¹ The action is grounded in excuse because "...the experience of the threat as coercive is intrinsic to the excusatory basis of [the defendant's] personal (agent specific) justification for complying with the...demand."³² Hence the argument that sometimes duress operates as a justification where there is disparity between the minor interest breached and the threatened harm is defeated.

A further dispute relates to the requirement in English law that a person must have acted *reasonably* before they are permitted a defence of duress.³³ For Westen and Mangiafico if a defendant has *reasonably* given in to a threat then their conduct must surely be tolerated by the law, and therefore justified rather than excused.³⁴ But the point remains that even if an actor gives in to a threat, as any other reasonable person would, there is still an all things considered violation of the rights of an innocent bystander. There is no good reason for the intrusion from society's point of view and hence no justification for the action. The fact that the defendant is morally and legally excused when the response is reasonable demonstrates that society understands the defendant's response,³⁵ but the provision of an excuse as opposed to a justification conveys a clear message that the action is not encouraged by the criminal law.

A similar tension regarding the distinction between objective and subjective elements of the duress defence is seen in the work of Wertheimer and Honore. Wertheimer has constructed a moralised rights-based theory of coercion to exempt the coerced actor from responsibility,

³¹ This argument is advanced by Horder, in 'Self-Defence, Duress and Necessity: Understanding the Relationship' at 162-163.

³² *Ibid.* at 163.

³³ See section 5.5 below for further discussion of the conditions of the defence.

³⁴ Westen and Mangiafico, 'The Criminal Defense of Duress: A Justification, not an Excuse – and Why it Matters' at 906-912.

³⁵ Berman, 'Justification and Excuse, Law and Morality' at 29.

which may be applicable to cases of duress, and which purports to appeal to both law and morals.³⁶ The theory operates on the fulfilment of two conditions: first, that the party issuing the threat (X) threatens the coerced actor (D) *wrongfully* (that is, without moral justification) and D will be in a worse position than he is entitled to expect unless the threat is complied with; and, secondly, that D is morally justified in complying (and does comply) with the threat.³⁷ In duress cases, Wertheimer thus contends that a defendant will only be absolved of responsibility if there is some moral *justification* for succumbing to the threat.³⁸ This proposition is criticised by Honore³⁹ who contends that if a coerced defendant complies with a threat to avoid serious harm to themselves or another, the exculpation from liability must surely be couched in the language of excuse; to deem it justified conduct is to say that the defendant has some entitlement, permission, or imperative, to commit the unlawful act. Honore accepts the merit in Wertheimer's explanation that the coerced defendant has an agent-relative reason for succumbing to the threat, but contends that the actor does not have an agent-neutral reason. It is submitted here that having agent-relative reasons for criminal conduct renders that behaviour excused rather than justified. As Honore suggests the logical conclusion is that, "justification will not do all the work,"⁴⁰ and consequently that duress is an excuse for any wrongful violation of the rights of an innocent bystander.

³⁶ The theory has been developed with regard to coercion generally, but expressly covers the defence of duress in criminal law; see Alan Wertheimer, *Coercion* (Princeton: Princeton University Press, 1987).

³⁷ This synopsis of the theory is proffered by Tony Honore, 'A Theory of Coercion' (1990) 10 *Oxford Journal of Legal Studies* 94 at 94-95.

³⁸ Wertheimer, *Coercion* at 165-169.

³⁹ Honore, 'A Theory of Coercion' at 100, where he submits that "it is simplistic to say flatly that duress in criminal law provides a justification."

⁴⁰ *Ibid.* at 100.

5.3.3 Duress as an excuse

It is submitted here that duress is considered to be the “quintessential excuse,”⁴¹ requiring as it does a concession to human frailty. Where a defendant submits to pressure and seeks the duress defence to exculpate their actions, a successful plea does not, as it would in necessity cases, imply that any objective value has been served in complying with the threat. Rather, it acknowledges that any reasonable person would have succumbed to the extraordinary pressure, and that the actor had good subjective reasons for their reaction. Having determined that duress is an excuse, a subsequent problem arises in respect of the appropriate formulation of a theory of excuses which appeals to the wide variety of excusing conditions which absolve criminal liability.⁴² Because the debate is well rehearsed, the following section does not intend to provide an exhaustive analysis of the various excusatory schemes, but merely presents an overview of some of the predominant theories in an attempt to formulate a coherent explanation of the excusatory force of the duress defence.

5.3.3.1 Duress and character

One popular rationale for excuse defences is that they provide the context which prompted the accused to act contrary to their established character.⁴³ This theory operates on the premise that if a defendant

⁴¹ See Fletcher, ‘The Individualisation of Excusing Conditions’; Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 665; and *R v. Hasan* [2005] UKHL 22 at paragraph [18]; and Berman, ‘Justification and Excuse, Law and Morality’ at 27.

⁴² Brudner highlights the disparity between duress (or necessity) as an excuse and other excusatory defences such as mistake, insanity and intoxication. The former category of defences involves the wilful and conscious infringement of a right; the latter negates the intentional commission of the act. In this regard, for Brudner, the challenge of formulating an overarching theory of excuse is insurmountable. See Brudner, ‘A Theory of Necessity’ at 345; see also Wilson, ‘The Structure of Criminal Defences’ [2005] *Criminal Law Review* 371. The analysis here does not purport to advance a general theory applicable to all excuses, but merely considers a rationale for the defence of duress.

⁴³ See Nicola Lacey, *State Punishment* (London: Routledge, 1988) at 65-68; and Norvin Richards, ‘Acting Under Duress’ (1987) 37 *Philosophical Quarterly* 21.

violates a legal prohibition this is not determinative of the enduring moral character of the accused; nothing can be inferred about that person's general respect for the rights of others.⁴⁴ In relation to duress, a coerced defendant may be excused because their conduct, though wrongful, is not reflective of a vicious character and therefore it would be unjust to inflict any punishment.⁴⁵ The coerced actor is, on this approach, not acting as her/his true self.⁴⁶

This theoretical approach to excuses has been viewed with scepticism by many,⁴⁷ Brudner providing a particularly penetrating critique in which he condemns the character theory for advancing unsupportable assertions.⁴⁸ Horder also comments that the character theory is not completely consistent with the liberal values underpinning the harm principle, which does not support the punishment of wrongful acts simply because the defendant has a bad character.⁴⁹ The fact that a wrongful violation of the rights of an innocent third party was out of character could legitimately count towards mitigation of punishment, but should not negate conviction.⁵⁰ Further, any useful evaluation of whether an actor behaved 'out of character' rests on a presupposition that the defendant has a settled character in the first instance.⁵¹ Horder suggests that this claim is simply not defensible bearing in mind that criminal responsibility in English law may be imposed on a defendant from the age of ten. Any

⁴⁴ See Fletcher, *Rethinking Criminal Law* at 800.

⁴⁵ Fletcher considers the theory in greater detail in, 'The Individualisation of Excusing Conditions' at 1271.

⁴⁶ See Michael D Bayles, 'Character, Purpose and Criminal Responsibility' (1982) 1 *Law and Philosophy* 1 for further discussion of the merits of this rationale for excuse defences generally.

⁴⁷ Wilson, 'The Structure of Criminal Law Defences'; John Gardner, 'The Gist of Excuses' (1998) 1 *Buffalo Criminal Law Review* 575; Victor Tadros 'The Characters of Excuse' (2001) 21 *Oxford Journal of Legal Studies* 495.

⁴⁸ For instance, the basic premise that vicious character is the determinant of criminal desert, see Brudner, 'A Theory of Necessity' at 345-347.

⁴⁹ Horder, *Excusing Crime* at 118-119.

⁵⁰ Gardner, 'The Gist of Excuses' at 578. Tadros accepts that some 'ordinary' claims that an action is out of character will only count towards mitigation; he distinguishes ordinary claims from claims that an actor's character is 'destabilized', which he asserts do provide a legitimate excuse, see Tadros, 'The Characters of Excuse' at 502-503.

⁵¹ Sullivan's articulation of the theory supposes that certain "core values" are attributable to the defendant, see Robert Sullivan, 'Making Excuses', in Simester and Smith (eds.) *Harm and Culpability* at 137.

suggestion that one's character is established or settled at such a young age seems implausible.⁵² In view of the deficiencies of the character theory highlighted by the substantive arguments above, it is suggested that the rationale for the duress excuse should be located elsewhere. The most plausible explanation appears to be one which accepts that the defendant's choice to commit the crime is constrained by the threat, but holds the actor to an objective standard of reasonableness.

5.3.3.2 Duress and lack of choice

A contemporary scheme familiar in current criminal law theory, is what may broadly be termed the *capacity* theory of excuse. It was established in section 5.3.1 above that the rationale for excuses does not rest on the premise that the defendant had *no choice* to commit an act, because in cases of duress the actor did have some degree of choice regarding the intrusion on the innocent bystander's rights, albeit constrained by the threat of serious harm. A coerced defendant may claim that s/he 'had no real choice' but to engage in criminal conduct, but this statement reveals that the conduct is *morally*, as opposed to physically, involuntary.⁵³ The concept of moral involuntariness requires the exoneration of those actors who had 'no *realistic* choice', not 'no choice *at all*'. Embracing this notion of moral involuntariness leads to difficult questions regarding what constitutes a realistic choice. In the words of the Supreme Court of Canada:

⁵² Horder, *Excusing Crime* at 122-123.

⁵³ See Fletcher, *Rethinking Criminal Law* at 802-807. Reed suggests that in a typical duress scenario "there is no real choice, and the actions involve moral involuntariness," see Reed, 'The Need for a New Anglo-American Approach to Duress' at 218. This reasoning was also adopted in the Canadian case *Perka v. The Queen* (1985) 13 DLR (4th) 1 where the choice facing a coerced defendant is described, at 14-15, as "not a 'voluntary' one. [The defendants] 'choice' to break the law is no true choice at all; it is remorselessly compelled by normal human instincts." In another Canadian case, *R v Ruzic* [2001] 1 SCR 687, the Supreme Court of Canada defined moral involuntariness as applying to persons who had conscious control over physical movements, but whose actions were "not, in any realistic way, freely chosen," at paragraph [44]. For further discussion of the case see Yeo, 'Challenging Moral Involuntariness as a Principle of Fundamental Justice'.

“Depriving a person of liberty and branding her with the stigma of criminal liability would infringe the principles of fundamental justice if the accused did not have any realistic choice...It risks jeopardising the liberty and security interests [of the actor, and]...it has the potential of convicting persons who have not acted voluntarily.”⁵⁴

Hence, it is important not to impose criminal responsibility on an undeserving defendant but the determination of whether the accused had no real choice is arguably value-laden and imprecise.⁵⁵ This is why when faced with such a choice, the defence of duress measures moral involuntariness against the standard of the person of reasonable fortitude, and concedes that sometimes even the ordinary person would succumb to threats and commit crime to avoid serious harm or death being caused to themselves or another.

The notion of constrained choice has led to the development of a number of theories which purport to explain excuses in terms of the defendant's lack of capacity to withstand the threat. A chief proponent of one capacity-based theory of excuses is Hart, who contends that criminal responsibility is denied where the accused possessed neither the capacity to conform to relevant standards of behaviour⁵⁶ or a fair opportunity to do so.⁵⁷

“[A] primary vindication of the principle of responsibility could rest on the simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him.”⁵⁸

⁵⁴ *R v Ruzic* [2001] 1 SCR 687 at paragraph [47] and [90]. Note also the criticism of the case by Yeo, who submits that defences play a secondary role when determining criminal liability (the offence elements taking the primary role), and thus any principle of moral involuntariness is also consequently subsidiary, see Yeo, ‘Challenging Moral Involuntariness as a Principle of Fundamental Justice’ at 337-338.

⁵⁵ Yeo, ‘Challenging Moral Involuntariness as a Principle of Fundamental Justice’ at 346.

⁵⁶ For example, in cases of insanity. This point presupposes that insanity is an excuse for criminal conduct, however. It is suggested here that insanity is perhaps more appropriately considered as an exemption from liability, see section 3.3.1 above.

⁵⁷ For instance, in cases of duress.

⁵⁸ Hart, *Punishment and Responsibility* at 181.

On this theory, a coerced defendant does not possess a fair opportunity to avoid violating the rights of an innocent third party due to the gravity of threat weighing on her/his mind. Similarly, in Dressler's terms the provision of an excuse depends on whether the actor "possesses and had a fair chance to apply a critical attribute of personhood, namely free choice."⁵⁹ The actor's liberty should not be restrained by the imposition of criminal responsibility unless they had the capacity and fair opportunity to conform to the law.

Horder has helpfully distinguished various capacity-based accounts into *subjective* and *objective* versions.⁶⁰ The subjective capacity theory in relation to duress would allow the coerced actor an excuse if it can be shown that s/he *personally* should have been more resistant to the threat. It is submitted here that to excuse the coerced actor's violation of the rights of an innocent bystander on the basis that they met an agent-specific, as opposed to agent-neutral, standard makes little moral sense as no meaningful measure of behaviour has been set. Conversely, the objective version, which is supported here, furnishes the defendant with an excuse if their compliance with the threat lived up to the standards expected of *reasonable* people confronted by serious threats to their interests.⁶¹ According to Duff, the reasonable person is "someone with a reasonable or proper regard for the law and the values it protects."⁶² It follows that if the defendant is expected to live up to an objective standard, the fundamental values guarded by a liberal society will be promoted; whereas allowing the coerced defendant to set their own subjective standard only serves to undermine these protected values.⁶³ It

⁵⁹ Dressler, 'Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code' at 675.

⁶⁰ For a fuller discussion of the two versions, see Horder, *Excusing Crime* at 125-128.

⁶¹ This approach was adopted in *Perka v. The Queen* (1984) 13 DLR (4th) 1 where it was suggested that the involuntariness must be, "measured on the basis of society's expectation of appropriate and normal resistance to pressure," see Ormerod, *Smith & Hogan: Criminal Law* at 326.

⁶² Anthony Duff, 'Choice, Character and Criminal Liability' (1993) 12 *Law and Philosophy* 345 at 358.

⁶³ A counter-argument is presented by Wilson, who claims that the objective version of the capacity theory is too demanding as it punishes rule-breakers without taking into account their real capacities and opportunities to conform, see Wilson, *Central Issues in*

is submitted, therefore, that reasonableness is “a consistent requirement for any excuse based upon non-pathological absence of moral restraint,”⁶⁴ which demands that the defendant must respect the protected values and interests of innocent persons, but also recognises that pressure can impair the capacity for rational thought. So, the actor cannot avoid liability solely on the basis of subjective reasons for their action since the standard of reasonableness plays a normative role in evaluating the defendant’s conduct and in the decision to absolve the actor from blame.

When a defendant wrongfully violates the personal or proprietary interests of an innocent non-threatening bystander, they have violated a criminal law prohibition by causing the type of harm the criminal law in a liberal society seeks to prevent. The only plausible way, then, to exonerate the defendant in such circumstances is via the mechanism of excuse, based on an objective evaluation of the defendant’s capacity which accounts for the subjective reasons on which the defendant acted. This acknowledges that in a choice between personal sacrifice and violating the rights of an innocent non-threat, there was an agent-specific reason for the response which, if displaying an appropriate level of steadfastness, will exculpate the defendant. The rationale proposed here would, in principle, permit the duress excuse as a defence to any crime as long as the conditions highlighted above are satisfied. Yet the defence does not currently operate as an excuse to murder, even if the defendant had good personal reasons for the action which would have been accepted as reasonable on a normative evaluation of the conduct. The reasons for this approach are considered, and challenged, below.

Criminal Theory at 339. However, although the theory is essentially objective, it is not suggested that individual capacities are dismissed outright, merely that the actor’s ability to resist a threat is judged by a standard of reasonableness.

⁶⁴ KJM Smith and William Wilson, ‘Impaired Voluntariness and Criminal Responsibility: Reworking Hart’s Theory of Excuses – The English Judicial Response’ (1993) 13 *Oxford Journal of Legal Studies* 69 at 95.

5.4 Duress and violating the right to life of an innocent bystander

5.4.1 The scope of duress

It was suggested in section 5.2 above that duress provides a defence to many crimes, except murder. Indeed, there has been judicial acceptance that threats of immediate death or serious personal injury are sufficient to overwhelm ordinary powers of resistance to criminal conduct, where the crime comprises, for example, manslaughter,⁶⁵ damage to property,⁶⁶ arson,⁶⁷ theft,⁶⁸ perjury,⁶⁹ offences under the Official Secrets Acts,⁷⁰ drug offences⁷¹ and even some forms of treason.⁷² The recent formulation of the defence of duress of circumstances has resulted in exculpation for defendants charged with, for instance, various road traffic offences and hi-jacking.⁷³ However, the availability of duress as a defence has always been restricted⁷⁴ and, in particular, the inapplicability of the defence to a charge of murder (and attempted murder) has caused much contention.⁷⁵ In respect of the excluded offences, the courts have made a clear social

⁶⁵ *R v. Evans and Gardiner* [1976] VR 517 and *R v. Evans and Gardiner (No. 2)* [1976] VR 523.

⁶⁶ *R v. Crutchley* (1831) 5 C & P 133.

⁶⁷ *R v. Shartos* (1961) unreported.

⁶⁸ *R v. Gill* [1963] 2 All ER 688.

⁶⁹ *R v. Hudson* [1971] 2 QB 202; *R v. K* (1983) 78 Cr App R 82; *R v. Lewis* (1992) 96 Cr App R 412.

⁷⁰ *R v. Shayler* [2001] Crim LR 986.

⁷¹ *R v. Valderrama-Vega* [1985] Crim LR 220; *R v. Ortiz* (1986) 83 Cr App R 173.

⁷² *Oldcastle's case* (1419) Hale I PC 50; *Stratton* (1779) 21 State Tr 1045; and more recently *R v. Purdy* (1946) 10 J Cr L 182. However, the offence of treason takes many different forms and it would be presumptuous to say that threats (even of death) will always furnish the accused with a defence.

⁷³ *R v. Abdul-Hussain* [1999] Crim LR 570. See section 5.6 for further discussion of the duress of circumstances defence.

⁷⁴ Even in the law of the ancient Hebrews, the defence was not available to murder, sexual offences or certain charges of idolatry, see Mendelsohn, *The Criminal Jurisprudence of the Ancient Hebrews* at 30-31, cited in Rosenthal, 'Duress in the Criminal Law' at 211. Similar restrictions on the defence are provided in legislative form in Canada, several Australian jurisdictions, New Zealand and significant parts of South Asia and Africa, see Gamini Laksman Peiris, 'Duress, Volition and Criminal Responsibility: Current Problems in English and Commonwealth Law' (1988) 17 *Anglo-American Law Review* 182 at 182.

⁷⁵ In *R v. Wilson (Ashlea)* [2007] EWCA Crim 1251, the Court of Appeal reluctantly confirmed the restriction of the defence by denying it to a thirteen year old boy charged with murder, acting under coercion from his father.

and moral judgment that the level of fault pertaining to the accused is too great to render them deserving of any defence.

The inapplicability of the defence to intentional killing is underscored by the unforgiving notion that “no man, from a fear of consequences to himself, has a right to make himself party to committing mischief on mankind,”⁷⁶ especially the taking of life. The persuasive authority commanded by Hale’s views on the common law of England, set down in his institutional text, has permeated (critics might say stultified)⁷⁷ subsequent judicial pronouncements on the matter. Indeed, in three seminal cases, *Lynch*, *Abbott* and *Howe*⁷⁸, the applicability of duress to murder was fiercely debated.⁷⁹ In *Lynch* the House of Lords held, by a narrow majority of three to two, that the defence of duress was available to an aider or abettor of murder, in the instant case the driver of the getaway vehicle. A careful analysis of relevant previous authority⁸⁰ enabled Lord Wilberforce to establish that, although it would be problematic to deny the weight of authority rejecting a defence of duress to a *principal* murderer in the first degree, the defence could be permitted for lesser degrees of participation.⁸¹ In *Abbott*, the Privy Council ruled,

⁷⁶ *R v. Tyler* (1838) 8 C & P 616.

⁷⁷ Peiris comments that the very essence of the common law doctrine is innovation, and the ability to adapt to the needs of the modern age, “without unimaginative commitment to obsolete values and assumptions”, see Peiris, ‘Duress, Volition and Criminal Responsibility: Current Problems in English and Commonwealth Law’ at 188. It is also noteworthy that Hale originally denied the defence to crimes of robbery and treason, yet English common law has since retracted from this position in recent years. So, any argument that the restrictions on duress cannot be removed because of loyalty to tradition is easily defeated.

⁷⁸ *Lynch v. DPP for Northern Ireland* [1975] 1 All ER 913; *Abbott v. R* [1976] 3 All ER 140; and *R v. Howe* [1987] AC 417.

⁷⁹ See also *R v. Gotts* [1992] 1 All ER 832 which denies the duress defence to attempted murder.

⁸⁰ Including the Court of Appeal authority *R v. Kray (Ronald)* (1969) 53 Cr App R 569. However, Peiris offers a note of caution when drawing any decisive inferences from older authorities because case law governing the availability of the duress defence to murder is sparse due to the practical limitations on the giving of evidence prior to the enactment of the Criminal Evidence Act 1898. Until this point, an accused person could not give evidence on her/his own behalf, and therefore lacked the opportunity to explain why s/he acted as s/he did under the circumstances, see Peiris, ‘Duress, Volition and Criminal Responsibility: Current Problems in English and Commonwealth Law’ at 188.

⁸¹ Interestingly, a close reading of the *Lynch* judgment reveals that Lord Wilberforce and Lord Edmund-Davies saw no principled reason for denying the defence of duress to a principal in the first degree, although they were not asked to rule on the matter; see the comments of Lord Wilberforce in *Lynch* [1975] 1 All ER 913 at 924, and by Lord

again by a three to two majority, that the duress defence does not extend to a principal actor, distinguishing *Lynch*. Lord Salmon displayed unstinting loyalty to tradition, declaring, “[f]rom time immemorial it has been accepted by the common law of England that duress is no defence to murder.”⁸² He also adhered to the view that it would be a dangerous relaxation in the law if concession was made to exculpate a defendant who has deliberately killed innocent people, even taking into account that the accused feared for his own life or that of his family.⁸³ The contours of the defence were consequently to be developed by reference to the degree of participation of the defendant in the killing. The diametrically opposed decisions in *Lynch* and *Abbott* are based entirely upon the tenuous distinction between principals in the first and second degree⁸⁴ but, arguably, “[t]his is not a distinction which should receive practical effect in the law.”⁸⁵ There is, morally speaking, often no comprehensible rationale for distinguishing between the blameworthiness of a defendant who is forced to drive a perpetrator to the scene of the crime, and one who is forced to partake in that crime on arrival.

The anomaly of attributing different degrees of culpability to defendants who were often perceived as equally blameworthy required resolution and the courts were under pressure to make a clear policy choice to either accept the defence in relation principal actors in the first *and* second degree, or reject it outright. In *Howe*, the House of Lords clarified the current state of the law by the categorical assertion that duress is not available to a defendant charged with murder, whether as principal or

Edmund-Davies at 946. This point is highlighted by Helen P Milgate ‘Duress and the Criminal Law: Another About Turn by the House of Lords’ (1988) 47 *Cambridge Law Journal* 61 at 65.

⁸² Per Lord Salmon in *Abbott v. R* [1976] 3 All ER 140 at 145. Lord Wilberforce and Lord Edmund-Davies, dissenting, expressed discontent with the majority’s acceptance of the flat declaration that actual killers could not be absolved of liability by a plea of duress. At 151 Lord Wilberforce was critical of the assumption that such an approach “makes for sounder law and better ethics. In truth, the contrary is the case.”

⁸³ Per Lord Salmon in *Abbott v. R* [1976] 3 All ER 140 at 146.

⁸⁴ A distinction denounced by the dissenting judges in *Abbott*, Lord Wilberforce and Lord Edmund-Davies, and described in *Smith and Hogan* as “technical and absurd,” see Ormerod, *Smith & Hogan: Criminal Law* at 340.

⁸⁵ Per Lord Mackay in *R v. Howe* [1987] AC 417 at 542.

accessory.⁸⁶ This remains the current position to date; despite serious compulsion, the person coerced into intentionally violating the right to life of an innocent autonomous bystander must demonstrate unwavering resistance to the threat regardless of the personal sacrifice to their own interests. It is argued here that this limitation on the defence is unreasonable, and incorrectly assumes that when faced with serious threats to one's own interests no one but a coward would succumb.

5.4.2 A rationale for the decision in *Howe*?

The rationale for the decision in *Howe* is purportedly borne out of concern for the autonomy of the innocent bystander and respect for the sanctity of human life. It is based upon the ideal that a person of reasonable fortitude is expected to sacrifice their own life rather than take that of an innocent unoffending third party, fortified by the pronouncements of prominent scholars such as Blackstone, who have suggested that an actor under duress, "ought rather to die himself than escape by the murder of an innocent."⁸⁷ This demand is underscored by the idea that the highest duty of the law is to protect the freedom and fundamental rights of those that live under it. The House of Lords have suggested that "[t]he sanctity of human life lies at the root of this ideal..."⁸⁸ and the expectation is that the ordinary person of reasonable fortitude should be

⁸⁶ Thereby the House of Lords overruled *Lynch*, one of its own previous decisions, a process permitted by the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234. Interestingly, Lord Griffiths was the only judge to explicitly deny the defence to attempted murder also, see *R v. Howe* [1987] AC 417 at 445. The House of Lords subsequently confirmed this position, by a narrow majority of three to two (Lord Keith and Lord Lowry dissenting), in *R v. Gotts* [1992] 1 All ER 832, thereby perpetuating the anomaly that the defence is not available for attempted murder, but is applicable to a charge under section 18 of the Offences Against the Person Act 1861 (causing grievous bodily harm with intent). For further discussion see Simon Gardner, 'Duress in Attempted Murder' (1991) 107 *Law Quarterly Review* 389.

⁸⁷ Blackstone, *Commentaries on the Laws of England* volume IV at 28. Other influential academics also support this approach, for instance JW Cecil Turner, *Kenny's Outlines of Criminal Law* 19th edition (Cambridge: Cambridge University Press, 1966) at 84 and *Russell on Crime* 12th edition (London: Stevens, 1964) at 90.

⁸⁸ Per Lord Griffiths in *R v. Howe* [1987] AC 417 at 443-444.

"capable of heroism"⁸⁹ if asked to take an innocent life rather than sacrifice their own. Lord Hailsham justified this approach by asserting:

"I have known...too many acts of heroism by ordinary human beings of no more than ordinary fortitude to regard a law as either 'just or humane' which withdraws the protection of the criminal law from the innocent victim and casts the cloak of its protection upon the coward and poltroon in the name of a 'concession to human frailty'."⁹⁰

Whilst he was prepared to accept that in respect of lesser crimes the law could make concession to human frailty, Lord Hailsham suggested that different considerations arise when innocent life is taken to avoid the threat of death or serious harm:

"In such case, a reasonable man might reflect that one innocent human life is at least as valuable as his own or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils. Instead, he is embracing the cognate, but morally disreputable principle that the end justifies the means."⁹¹

Further, Lord Hailsham, Lord Bridge and Lord Griffiths were conscious of the lack of legislative activity regarding the duress defence, despite pressure in the past from the Law Commission⁹² to extend its scope to encompass murder.⁹³ It is also evident from their respective speeches that the judges were convinced that cases which yielded particularly harsh results for the coerced defendant could be dealt with either by not prosecuting in the first instance,⁹⁴ or by exercising sentencing discretion

⁸⁹ Per Lord Hailsham in *R v. Howe* [1987] AC 417 at 432.

⁹⁰ *Ibid.*

⁹¹ *Ibid.* at 433.

⁹² See Law Commission, *Report on the Defences of General Application* (Law Com No 83) (London: HMSO, 1977) the central recommendation of which was that duress should be a defence to all crimes. This suggestion has recently been reiterated in Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304) (London: HMSO, 2006), in particular part 6.

⁹³ Per Lord Hailsham, Lord Bridge and Lord Griffiths in *R v. Howe* [1987] AC 417 at 430, 437 and 443 respectively. This point was also raised by Lord Jauncey in *R v. Gotts* [1992] 1 All ER 832 at 839.

⁹⁴ Per Lord Griffiths in *R v. Howe* [1987] AC 417 at 445.

for a convicted person who would otherwise have secured the defence of duress.⁹⁵

The arguments advanced in *Howe* have, however, been subject to vehement criticism⁹⁶ and many remain unconvinced by the reasoning offered which is deplored by one commentator as “utterly fallacious.”⁹⁷ The judgment has been described as “weak and one-sided”⁹⁸, apt to cause “extraordinary injustice,”⁹⁹ leaving “grotesque anomalies in its wake”¹⁰⁰ and resulting in a lack of internal coherence and consistency. It is contended that, “by this decision [the House of Lords] set it’s face against gradations typifying the spirit of more cautious approaches and

⁹⁵ Per Lord Hailsham in *R v. Howe* [1987] AC 417 at 433; and per Lord Griffiths at 445-446.

⁹⁶ Powerful criticism was even expressed at the time of the decision, see John C Smith, ‘Case Comment: *R v. Howe*’ [1987] *Criminal Law Review* 480; Connor Gearty, ‘*Howe* to be a Hero’ (1987) 46 *Cambridge Law Journal* 203; Milgate ‘Duress and the Criminal Law: Another About Turn by the House of Lords’; Lynden Walters, ‘Murder Under Duress and Judicial Decision-Making in the House of Lords’ (1988) 8 *Legal Studies* 61.

⁹⁷ Reed, ‘The Need for a New Anglo-American Approach to Duress’ at 213. The reasoning has even been treated with scepticism in the international context, see the dissenting opinions of Judge Stephen and Judge Cassese in the Appeals Chamber of the International Tribunal for the Prosecution of Persons for Serious Violations of International Humanitarian Law in the Former Yugoslavia, in the case *ICTY Prosecutor v. Drazen Erdemovic* (Case No IT-96-22-A). Erdemovic, a soldier, claimed that he was acting under immense duress, as his commanding officer threatened to kill him too if he did not participate in the execution of seventy Bosnian Muslims. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held (by a majority of three to two) that duress does not afford a complete defence to a soldier charged with a crime against humanity and involving the killing of innocent human beings. The dissenting judges were vociferous in their criticism of the majority decision, claiming the result was marred by the Court’s preoccupation with “‘policy considerations’ substantially based on English law;” see Judge Cassese’s Separate and Dissenting Opinion, at [11].

⁹⁸ Milgate, ‘Duress and the Criminal Law: Another About-Turn by the House of Lords’ at 75.

⁹⁹ Rosenthal, ‘Duress in the Criminal Law’ at 213.

¹⁰⁰ GJ Bennett and Brian Hogan, ‘Criminal Law, Criminal Procedure and Sentencing’ (1987) *All ER Annual Review* 75 at 75. The authors suggest that an anomaly arises because a person charged with a serious assault, say wounding with intent by virtue of section 18 of the Offences Against the Person Act 1861, would be entitled to a defence of duress, but if the victim subsequently died prior to trial, the defendant would be given a mandatory life sentence with no exoneration. Such anomaly was acknowledged by the House of Lords, Lord Griffiths explaining that the justification for the approach flows from the “special regard the law has for human life. It may not be logical but it is real and it has to be accepted,” per Lord Griffiths in *R v. Howe* [1987] AC 417 at 445. Commenting on the anomaly, Reed asserts that it could cause gross injustice and “provides example of the need for urgent reform of this sorry area of the law,” see Reed, ‘The Need for a New Anglo-American Approach to Duress’ at 219. For further insightful criticism see also Milgate ‘Duress and the Criminal Law: Another About Turn by the House of Lords’ at 74.

opted instead for a drastic solution.”¹⁰¹ Yet despite spirited attempts to revise the position adopted in *Howe*,¹⁰² the principle in English law that duress is no defence to an intentional killing has long held sway. The decision is disapproved of by the vast majority of lawyers, academics and philosophers and some of the predominant criticisms are considered below.

5.4.3 Criticisms of the decision in *Howe*

The intrinsically heinous nature of the crime of murder may provide some justification for its exclusion from a plea of duress. But the circumstances within which an intentional killing may be carried out are so varied that it is arguably wrong to entirely rule out the availability of duress. The defence would reflect the degree of blameworthiness attributable to the perpetrator, meaning that the more morally repugnant the circumstances of the killing, the less accessible the defence. Denying the defence of duress to the killing of an innocent when faced with overwhelming coercion surely undermines the purpose of criminal law, which is to punish only conduct which merits condemnation. The purpose is not to condemn conduct which is the product of truly irresistible pressure. In further support of this assertion, the American Law Institute, rephrasing a quote from Hart,¹⁰³ affirm:

“Law is ineffective in the deepest sense, indeed...it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to

¹⁰¹ Peiris, ‘Duress, Volition and Criminal Responsibility’ at 183.

¹⁰² The Law Commission have recommended that duress be a full defence to murder in Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles* (Law Com No 218) (London: HMSO, 1993) and most recently in Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304) (London: HMSO, 2006). This approach has seemingly filtered through to the courts, as the House of Lords recognised the logic of the Law Commission’s earlier approach in *R v. Hasan* [2005] UKHL 22 at [21].

¹⁰³ Henry Melvin Hart, ‘The Aims of the Criminal Law’ (1958) 23 *Law and Contemporary Problems* 401 at 404.

affirm that they should and could comply with if their turn to face the problem should arise.”¹⁰⁴

In order to avoid such hypocrisy it is submitted here that the defence of duress should be available to excuse the actor for a lethal violation of the rights of an innocent third party in appropriately limited and clearly defined circumstances.

5.4.3.1 The demands of heroism argument

Pragmatists would argue that by denying duress as a defence to intentional killing in circumstances of overwhelming compulsion, the level of fortitude expected of ordinary citizens is unrealistic. The need for a change in the law is, it is suggested here, undeniably “irresistible”.¹⁰⁵ In situations of exceptional pressure arising from grave threats to one’s interests (or those of another), the level of steadfastness demanded by the present law in relation to murder is simply too great and contrary to basic human instinct.¹⁰⁶ There is a general consensus that in certain dilemmas no moral code would fault a defendant for committing an offence against person or property in response to serious threats; and in many other areas of criminal law the accused is judged by a standard of the *reasonable person*, not the *reasonable hero*.¹⁰⁷ Although it is right that the law must protect the interests of autonomous unoffending innocent victims,¹⁰⁸ there is little evidence that by denying the defence to

¹⁰⁴ American Law Institute, *Model Penal Code and Commentaries* Part I (Philadelphia, 1985).

¹⁰⁵ Per Lord Bingham in *R v. Hasan* [2005] UKHL at [21]. See also Reed, ‘The Need for a New Anglo American Approach to Duress’ at 212 and 217, where the author strongly denounces the law’s demand for heroism as “the apotheosis of absurdity” which sets down a “fundamentally false standard.”

¹⁰⁶ Simester and Sullivan describe the exclusion of murder and attempted murder from the defence of duress as “too rigid,” see Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 670.

¹⁰⁷ For instance, for a successful plea of provocation the defendant must show that they reacted as a reasonable person would have in response to the provocative incident; see *Attorney-General for Jersey v. Holley* [2005] UKPC 23.

¹⁰⁸ This basic principle is rigorously defended by Jerome Hall, *General Principles of the Criminal Law* 2nd edition (Indianapolis: New York, 1960) at 444-448; and James

murder the incidence of coerced defendants taking innocent lives has decreased.¹⁰⁹ Further, if the self-sacrifice required by the current law is driven by the ideal of protecting the lives of innocent persons at all costs, there is an implicit presumption that "...a person unlucky enough to be subjected to threats is less innocent than the intended victim."¹¹⁰

In *Lynch* Lord Morris acknowledged the austerity of denying the defence to murder in the following summary:

"If someone is threatened with death or serious injury unless [s]he does what [s]he is told to do, is the law to pay no heed to the miserable, agonising plight of such a person? For the law to understand not only how the timid but also the stalwart may in a moment of crisis behave is not to make the law weak but to make it just. In the calm of the courtroom measures of fortitude or of heroic behaviour are surely not to be demanded when they could not in moments for decisions reasonably have been expected even of the resolute and the well-disposed."¹¹¹

Hence, even senior members of the judiciary concede that there are strong arguments that the criminal law should not make heroism a 'requirement' by imposing liability on ordinary people who fail to live up to this standard. Gearty emphasises the point, contesting that, "...heroism by definition requires extraordinary acts of courage. The law is setting a standard that it knows most cannot match – and calling those who fail murderers (and cowards and poltroons, as well, for good measure)."¹¹²

Fitzjames Stephen, *A History of the Criminal Law of England* volume I (London: Macmillan & Co., 1883) at 107.

¹⁰⁹ One author offers a more intuitive response: "[t]he instinct of self-preservation in the face of an immediate threat will nearly always take precedence over the threat of legal punishment at some future time – unless, of course, the individual possesses heroic qualities in which case the deterrent effect of the criminal law is superfluous," see Walters, 'Murder Under Duress and Judicial Decision-Making in the House of Lords' at 69. See also Peter Alldridge, 'Duress, Murder and the House of Lords' (1988) 52 *Journal of Criminal Law* 186 at 189, who refers to the decision as 'naïve' in this regard; Williams, *Textbook of Criminal Law* who, at 755, suggests that there are limits to the efficacy of threats of punishment to deter criminal conduct; and M Sornarajah, 'Duress and Murder in Commonwealth Criminal Law' (1981) 30 *International and Comparative Law Quarterly* 660 at 668, who asserts that self-preservation is a much more potent consideration than the threat of punishment when faced with the threat of death or serious harm.

¹¹⁰ Gearty, 'Howe to be a Hero' at 205.

¹¹¹ Per Lord Morris in *Lynch v. DPP for Northern Ireland* [1975] 1 All ER 913 at 917.

¹¹² Gearty, 'Howe to be a Hero' at 205.

No doubt heroism in such circumstances should be encouraged and praised, but an actor who succumbs to the pressure is not an appropriate target of criminal punishment.

The current demands of the law in relation to killing an innocent bystander are ignorant of natural human impulses, and have been described by one commentator as “ludicrous”¹¹³ and by the Law Commission as “futile.”¹¹⁴ The Commission categorically assert that, “[t]he attainment of a heroic standard of behaviour will always count for great merit; but failure to achieve that standard should not be met with punishment by the State.”¹¹⁵ Ordinary people show a natural preference for their own lives (or that of family members) over others and only those who possess the extraordinary qualities of heroism will intentionally lay down their life for another person. By not permitting any defence where a defendant intentionally kills under compulsion, the law insists on higher standards than the average person can realistically achieve. Dressler advances the persuasive argument that such a rule:

“...has the imprint of self-righteousness, which the law should avoid. The rule asks us to be virtuous; more accurately, it demands our virtual saintliness, which the law has no right to require. It is precisely in the case of kill-or-be-killed threats that the criminal law ought to be prepared in some cases to attempt to assuage the guilt feelings of the homicidal wrongdoer by excusing him.”¹¹⁶

One of the outstanding features of the decision in *Howe* is their Lordships slavish loyalty to the sanctity of life principle, presented as a reason for restricting the scope of duress. Although idealistic, in reality the sanctity

¹¹³ Reed, ‘The Need for a New Anglo-American Approach to Duress’ at 217.

¹¹⁴ Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304) (London: HMSO, 2006).

¹¹⁵ Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles* (Law Com No 218) (London: HMSO, 1993) at [30.11].

¹¹⁶ Joshua Dressler, ‘Exegesis of the Law of Duress: Justifying the Excuse and Searching For Its Proper Limits’ (1989) 62 *Southern California Law Review* 1331 at 1373.

of human life is not absolute and is qualified by other considerations.¹¹⁷ The discussion in chapter four supports this assertion, since it establishes that the self-defence and necessity justifications should render it permissible to kill an innocent unjust threat and, in limited circumstances, an innocent incidental threat respectively.¹¹⁸ *Howe* also overlooks the point that if the coerced defendant is threatened with death to her/himself *and* their family unless serious harm is inflicted on an innocent third party, succumbing to the threat might well be encouraged as the choice may be one which constitutes the lesser of two evils.¹¹⁹ If the accused was, as an alternative, threatened with the death of his wife, or of his wife and child, does the sanctity of life argument still have such potent force?¹²⁰ If human life is held in such high esteem, why is it that the current law would demand that the accused not respond to such threats, with the result that two innocent people die as opposed to one?¹²¹ The decision in *Howe* seems to generate more questions than answers; it is argued here that the demands of heroism are impracticable and the sanctity of life argument unsustainable when a defendant is faced with extraordinarily coercive threats.

5.4.3.2 The inefficacy of punishment argument

Many believe that where a defendant is compelled (by another or by circumstances) to violate the right of an innocent bystander under duress, the deterrent strength of criminal sanctions is futile when in competition

¹¹⁷ It was submitted in section 2.3.1 above that rights are not absolute and can be infringed without being violated and violated without criminal responsibility ensuing.

¹¹⁸ See also Walters, 'Murder Under Duress and Judicial Decision-Making in the House of Lords' at 68.

¹¹⁹ The decision in *Howe* is challenged on this point by Ormerod, *Smith and Hogan: Criminal Law* at 341.

¹²⁰ It has been contended that "...when a third person's life is also at stake even the path of heroism is obscure", see Herbert Weschler and Jerome Michael, 'A Rationale of the Law of Homicide' (1937) 37 *Columbia Law Review* 738.

¹²¹ Sornarajah formulates a similar argument that the 'higher morality' on which the current position is based is undermined when the action of the coerced defendant results in a net saving of lives, see Sornarajah, 'Duress and Murder in Commonwealth Criminal Law' at 666. See further discussion on this point in Milgate 'Duress and the Criminal Law: Another About Turn by the House of Lords' at 68.

with countervailing threats of either imminent death or serious injury.¹²²

Peiris comments that the imposition of criminal liability on a defendant who kills under duress is somewhat misplaced as criminal sanctions can have no conceivable impact on the will of the accused. He opines:

“... The price of submission to the dictates of the penal system is the infliction of instantaneous harm, of equivalent or greater degree, by the party from whom the illicit threat proceeds. The potency of the latter threat must perforce overwhelm, in immediacy, any countervailing threat which the penal law can hold out, so that the scope for any productive role to be assigned to the criminal law in this area is plainly marginal.”¹²³

It is arguable, on a utilitarian view of punishment at least, that imposing criminal liability upon the accused who acted because of unyielding imminent and serious threats is unnecessary and achieves no overall good.¹²⁴ Conversely, it could be said that the punitive force of the criminal law should be at its most uncompromising when innocent life is taken. There is an internal conflict relating to the general and individual deterrent effect of the criminal law at play here; as Simester and Sullivan contend, it is “possible to subscribe to general deterrence as a justifying principle for state punishment, while insisting that the infliction of a sanction on a particular individual should satisfy the requirements of justice.”¹²⁵ There are few who would suggest that individual justice would be achieved by punishing persons who have engaged in criminal conduct to avoid grave harm to themselves or another.¹²⁶

¹²² Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 665.

¹²³ Peiris, ‘Duress, Volition and Criminal Responsibility’ at 184-185.

¹²⁴ This is the general view of Thomas Hobbes, *Leviathan* (London: Pelican, 1968).

¹²⁵ Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 665, citing the authority of Hart, *Punishment and Responsibility* chapter vii.

¹²⁶ Although Schopp recommends that the accused should be convicted, but not punished, see *Justification Defenses and Just Convictions* at 142-152.

5.4.3.3 The legislative activity argument

A further argument advanced in *Howe* was that there had been little legislative activity with regard to extending the duress defence to murder, despite opportunities to do so. It is indeed true that the Law Commission had recommended that duress should be permitted as a defence to all crimes, including murder, some ten years prior to the decision in *Howe*.¹²⁷ The absence of subsequent corresponding legislation led their Lordships to the somewhat illogical conclusion that there was neither public demand for, nor legislative will to secure a defence of duress to intentional killing.¹²⁸ Echoing the sentiments of many other critics,¹²⁹ Ormerod is robust in his assertion that the lack of legislative activity regarding the extension of the duress defence to murder “proves nothing.”¹³⁰ It is wrong to assume that simply because parliamentary time has not been devoted to such pursuits any inference can be drawn with respect to the need for reform.¹³¹ In support of this argument, Alldridge contends that nothing can be reasonably inferred from legislative inaction, “and finding... Parliamentary intention in a blank statute book is ludicrous.”¹³² The fact that much time has been, and continues to be, devoted to discussing the unacceptable restriction on the duress defence undermines any argument that there is no public pressure to reform the current position.

¹²⁷ See Law Commission, *Report on the Defences of General Application* (Law Com No 83) (London: HMSO, 1977).

¹²⁸ See the comments of Lord Bridge in *R v. Howe* [1987] AC 417 at 437 and Lord Griffiths at 443.

¹²⁹ Including many who were critical of the decision at the time of its conception, such as Milgate ‘Duress and the Criminal Law: Another About Turn by the House of Lords’ at 70; Smith ‘Case Comment: *R v. Howe*’ at 482.

¹³⁰ Ormerod, *Smith and Hogan: Criminal Law* at 341.

¹³¹ Ada Kewley, ‘Murder and the Availability of the Defence of Duress in the Criminal Law’ (1993) 57 *Journal of Criminal Law* 298 at 302.

¹³² Alldridge, ‘Duress, Murder and the House of Lords’ at 196.

5.4.3.4 The mitigation and prosecutorial discretion argument

It was further suggested in *Howe* that any harsh result produced by the denial of duress as a defence to murder could, in the most agonising cases, be mitigated by the exercise of executive clemency in recognition that a plea of duress is something other than a general defence.

Prosecutorial discretion might be exercised, for instance, or the resulting sentence mitigated in cases where the defendant acted under extreme pressure.¹³³ Lord Griffiths was confident that through this machinery “the respective culpability of those involved in a murder case can be fairly weighted and reflected in the time they are to serve in custody.”¹³⁴ Their Lordships’ view may have been motivated by the reluctance of influential scholars to accept the defence of duress as a substantive defence at all, to any crime. In the late nineteenth century Stephen was a chief proponent of the view that compulsion by threats should be considered merely in mitigation as opposed to providing exoneration for criminal conduct. His antipathy to the defence is manifest in the following remarks:

“Criminal law is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty, and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? ... Surely it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary.”¹³⁵

¹³³ In *Howe*, their Lordships also investigated, and subsequently rejected, the possibility of duress reducing a murder charge to one of manslaughter, see *R v. Howe* [1987] AC 417, per Lord Hailsham at 435, Lord Mackay at 455, and Lord Griffiths at 446. The Law Commission recently revived this discussion, suggesting that duress should reduce a charge of first degree murder to second degree murder, in *Law Commission A New Homicide Act for England and Wales?* (Law Com CP No 177) (London: HMSO, 2005) at paragraph 7.32 onwards. In their final report, however, the Commission retracted from their original position and recommended that duress should be a full defence to first degree, second degree and attempted murder, see Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304) (London: HMSO, 2006) particularly paragraphs 6.21-6.72.

¹³⁴ Per Lord Griffiths in *R v. Howe* [1987] AC 417 at 445-446.

¹³⁵ Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (London: Macmillan & Co. 1883) at 107-108, cited in Rosenthal, ‘Duress in the Criminal Law’ at 200 and also in *R v Abbott* [1976] 3 All ER 140 per Lord Salmon at 147. For an equivalent view in respect of the necessity defence, see DW Elliott, ‘Necessity, Duress and Self-Defence’ [1989] *Criminal Law Review* 610 at 610; and Law Commission,

Other commentators have shown support for the proposition that duress should not exonerate the accused, but merely mitigate the punishment received. Schopp contends that if the requisite elements of an offence are established a conviction should ensue, despite the existence of serious threats which compelled the defendant to act.¹³⁶ For him, the criminal law should convey a clear message that the action is wrongful by convicting a coerced defendant, although he concedes that duress could have significant mitigating force to the extent that in some cases no punishment whatsoever should ensue.¹³⁷ Similarly, Wasik asserts that it makes sense for duress only to be taken into account at the sentencing stage because, "it would provide a better solution for cases where it may be thought the defence is too wide."¹³⁸ For Peiris, the merit in accepting duress as a mitigating factor is derived from the inescapable fact that the accused acts voluntarily despite the presence of duress. The idea of duress offering mitigation as opposed to exculpation may therefore be appealing. In spite of this, Peiris also admits that the countervailing criticism of this approach, based on the stigma of criminal conviction, is "by no means answerable."¹³⁹

It may be admitted that although there is value in the suggestion that the pressure of threats could be reflected by mitigation rather than exoneration, none of the arguments presented are sufficiently persuasive for the simple reason that the stigma of criminality would still be present even in the absence of punishment. With respect, a criminal law system which only affords a defence to those who show the same degree of steadfastness as a person of reasonable fortitude is demanding enough; one which apportions blame to a defendant who acted as any other reasonable person would in the circumstances is simply too severe.

Report on the Defences of General Application (Law Com No 83) (London: HMSO, 1977) at paragraph 4.33.

¹³⁶ Schopp, *Justification Defenses and Just Convictions* chapter 5.

¹³⁷ To this end Schopp proposes the imposition of a special verdict, "a purely vindicating conviction" which reflects societal disappointment with the criminal behaviour, but acknowledges the difficult choice facing the defendant, see 144-145 in particular.

¹³⁸ Wasik, 'Duress and Criminal Responsibility' at 457.

¹³⁹ Peiris, 'Duress, Volition and Criminal Responsibility: Current Problems in English and Commonwealth Law' at 208.

Those who call for duress to be merely a factor in mitigation do not appear to attach great weight to the stigma inherent in a criminal conviction, and it is submitted here that this approach should not be adopted. Through mitigation of sentence, the injustice of punishing a coerced actor would not be extinguished altogether, but merely reduced as conviction may be seen as a form of punishment in itself.¹⁴⁰

Further arguments have been advanced that in the most extreme cases of coercion, rather than extend the defence of duress to exonerate the actor, prosecutorial discretion may be exercised. Although it may be “inconceivable,”¹⁴¹ in the words of Lord Griffiths, that actors faced with the most abhorrent choices in the wake of duress would ever be brought to prosecution, this attitude is dangerously optimistic. For many commentators, leaving the plight of the defendant to the discretion of the prosecutor is simply unacceptable.¹⁴² It is a fact that difficult cases do reach the courtroom and it is, with respect, irresponsible of the senior judiciary to rely on prosecutorial discretion in order to circumvent the problems of extending the duress defence to murder cases. Indeed, it seems incongruous that Lord Hailsham and Lord Griffiths are, on the one hand, insistent that coerced actors who kill should not be exempt from criminal sanctions, yet on the other extol the virtues of other administrative remedies available.¹⁴³ The Law Commission has voiced its concern on the matter:

“Reliance on executive discretion is not adequate in principle or in practice. Even if a prosecutor knows of a plea of duress, he may not be able or think it proper to judge its merits; and apart from any other consideration, those responsible for considering a prisoner’s release would have to judge his claim without the benefit of a trial on the issue.”¹⁴⁴

¹⁴⁰ Cross, ‘Murder Under Duress’ at 378.

¹⁴¹ Per Lord Griffiths in *R v. Howe* [1987] AC 417, at 445.

¹⁴² Milgate ‘Duress and the Criminal Law: Another About Turn by the House of Lords’ at 71.

¹⁴³ This point is raised by Alldridge, ‘Duress, Murder and the House of Lords’ at 199-200.

¹⁴⁴ Law Commission *A New Homicide Act for England and Wales?* (Law Com CP No 177) (London: HMSO, 2005) at [7.19].

Ormerod has added his weight to the Law Commission stance, commenting that “even if [s]he were not prosecuted, the ‘duressee’ would be, in law, a murderer [and] a morally innocent person should not be left at the mercy of administrative discretion on a murder charge.”¹⁴⁵

It would be unfortunate if, in an attempt to maintain the supremacy of higher morality by demanding the conviction of the coerced actor,¹⁴⁶ the onus rested entirely on administrative prerogative to secure a just and fair outcome. Aside from the inherent uncertainty, there is an acute danger that when this discretion is exercised, considerations which have no bearing on the culpability of the accused (for example broader policy considerations) may permeate the decision.¹⁴⁷ At base, the pronouncement in *Howe* seems ignorant of the significant conceptual disparity between mitigation and excuses in respect of their role in determining responsibility.¹⁴⁸ For these reasons the prosecutorial and mitigation arguments are vehemently rejected.

5.4.3.5 The precedent argument

According to the long-established authority of *Dudley and Stephens*,¹⁴⁹ if circumstances place a defendant in a position where s/he must make a choice between taking the life of a non-threatening, innocent person in order to preserve their own, then the natural instinct for self-preservation must be resisted in order to avoid the imposition of criminal liability. This point is reiterated throughout the thesis. The defence of necessity seems to expire at the point where the lives of innocent bystanders are taken as a means to an end simply because the actor prefers her/his own life and

¹⁴⁵ Ormerod, *Smith & Hogan: Criminal Law* at 341.

¹⁴⁶ Williams, *Textbook on Criminal Law* at 626.

¹⁴⁷ Walters, ‘Murder Under Duress and Judicial Decision-Making in the House of Lords’ at 70.

¹⁴⁸ *Ibid.* at 71.

¹⁴⁹ *R v. Dudley and Stephens* (1884) 14 QBD 273. The case is discussed in more detail in section 5.6 below.

there are cogent reasons for the restriction placed upon the defence.¹⁵⁰

Lord Coleridge outlined his reservations on extending the necessity defence to justify the intentional killing of innocent autonomous people:

"Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured?...It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own."¹⁵¹

The obdurate approach taken by English courts to the taking of innocent life where threats to one's own life emerge from a natural calamity has perhaps tempered any enthusiasm towards the availability of an excusatory defence of duress where the threat emanates from a human agent.¹⁵² Indeed, it would surely be contradictory to accept a defence to the intentional killing of an innocent bystander where threats to one's own life were brought to bear by another being, yet simultaneously deny the existence of any defence where the threat is a product of nature. On what basis could this distinction be drawn? Preoccupied by such considerations, the House of Lords in *Howe* sought to use *Dudley* to justify the restriction on the availability of duress in murder cases.¹⁵³

The authoritative force of *Dudley* has been subject to numerous challenges¹⁵⁴ and the blunt acceptance that the crux of the decision is that necessity can never operate as a defence to murder is

¹⁵⁰ For further discussion, see section 5.6 below.

¹⁵¹ Per Lord Coleridge CJ in *R v. Dudley and Stephens* (1884) 14 QBD 273 at 286.

¹⁵² But see section 5.6 below where it is proposed that duress of circumstances should be extended to excuse an actor who intentionally kills when faced with extraordinary pressure from a circumstantial threat.

¹⁵³ Lord Mackay suggested that the dilemma in duress cases was the same as that experienced in *Dudley*, and thus the defence should be similarly limited, see *R v. Howe* [1987] AC 417 at 453. Lord Hailsham submitted at 429 that the previous decision in *Lynch* could not be "justified on authority," presumably a reference to the restrictions on the necessity defence emanating from *Dudley*. The limitations imposed by *Dudley* have been acknowledged by some as "the strongest argument advanced in *Howe*"; see Milgate 'Duress and the Criminal Law: Another About Turn by the House of Lords' at 69. However, given the comparative weakness of the other arguments advanced in the case this assertion does not cause great concern.

¹⁵⁴ See, for example, Peter R Glazebrook, 'The Necessity Plea in English Criminal Law' (1972) 30 *Cambridge Law Journal* 87 at 112-115; Glanville Williams, 'A Commentary on *R v. Dudley and Stephens*' (1978) 9 *Cambrian Law Review* 94; and Walters, 'Murder Under Duress and Judicial Decision-Making in the House of Lords' at 63-64.

unsatisfactory.¹⁵⁵ It is significant that the decision in *Dudley* was couched almost entirely in the language of justification, and was therefore unconcerned with any excusatory defence which may absolve a defendant from intentionally killing when threatened by circumstances. This is perhaps forgivable given the undeveloped dialogue of justification and excuse at the time of the decision; but the same allowance cannot be made for the decision in *Howe* over a century later. Hence, although the necessity defence was denied *on the facts* in *Dudley* since the intrusion on the rights of an innocent autonomous non-threatening individual who is simply used as a means to an end can never be *justified*, no further inferences should be drawn from the case regarding the scope of the excusatory defence of duress.

It seems that on the logic presented above there is scope for a defence of duress to operate as a complete defence to intentional killing in exceptional circumstances, despite the fact that such action wrongfully violates the right to life of an innocent bystander. It is not, however, suggested that duress should *always* be a defence to intentional killing; there are other stringent limitations on the availability of the defence and the jury should always have the option of convicting those who do not display a reasonable level of steadfastness when faced with immediate and serious threats. The requisite qualifying and evaluative conditions are considered in brief below.

5.5 The conditions of duress

Despite duress becoming a more popular defence plea in recent times,¹⁵⁶ the defence has been described as nebulous and ill-defined.¹⁵⁷ The

¹⁵⁵ See section 5.6 below for further discussion of *Dudley*.

¹⁵⁶ This assertion was made in Ian Dennis, 'Duress, Murder and Criminal Responsibility' (1980) 106 *Law Quarterly Review* 208 and confirmed in 2005 by Lord Bingham in *R v. Hasan* [2005] UKHL 22 at [22].

¹⁵⁷ One commentator observed in 1988 that, despite significant judicial pronouncements at the time, the defence was "no better charted that it was a decade ago," see Peiris,

position has perhaps improved somewhat recently, with an authoritative summary of the constituent elements of the defence provided by Lord Bingham in *Hasan*:¹⁵⁸ there must be a threat of death or serious injury made to the defendant, an immediate family member or someone for whom D regards her/himself as responsible; D's perception of the threat and his subsequent conduct is to be judged according to an objective assessment; the criminal conduct must be directly induced by the threat; there must be no opportunity for evasive action on D's part; the defence will not be available where D has voluntarily exposed her/himself to the threat; and, reluctantly, the defence is not applicable where the crime chosen is murder, attempted murder or some forms of treason. Even if duress was to be made available in murder cases, as recommended here, the defence is, rightly, still subject to strict rules that should prevent the potential for misuse which has troubled the courts in the past. The defendant is required to fulfil both qualifying and evaluative conditions for a successful plea, and the scope of these limitations will be now be examined.

5.5.1 The qualifying conditions

5.5.1.1 Proportionality

It is generally accepted that there must be a degree of proportionality between the threat and the offence as a prerequisite of the defence in order that the harm caused does not outweigh the harm threatened. To quote an illustrative example provided by Lord Hailsham in *Howe*:

“Few would resist threats to the life of a loved one if the alternative were driving across the red lights or in excess of 70 mph on the motorway. But...it would take rather more than the threat of a slap

‘Duress, Volition and Criminal Responsibility: Current Problems in English and Commonwealth Law’ at 182.

¹⁵⁸ *R v. Hasan* [2005] UKHL 22, summarised at [21] by Lord Bingham.

on the wrist...to discharge the evidential burden even in the case of a fairly serious assault.”¹⁵⁹

Lord Hailsham went on to assert, “I am entitled...to believe that some degree of proportionality between the threat and the offence must, at least to some extent, be a prerequisite of the defence under existing law.”¹⁶⁰ This statement is further supported by Lord Wilberforce’s suggestion in *Lynch* that “[n]obody would dispute that the greater the degree of heinousness of the crime, the greater and less resistible must be the degree of pressure, if pressure is to exist.”¹⁶¹ Hence it seems that there must be some nexus between the resulting harm and that which is threatened. This requirement may not be too onerous since one may only claim duress if the threat is one of serious harm or death.

5.5.1.2 The nature of the threat

There has been some debate as to what type of threat grounds a claim of duress, but the current law now seems relatively settled as the courts have set a minimum threshold of threats which will suffice. It is well established that the minimum level of threat required is that of death or serious bodily harm:¹⁶² no lesser threat will suffice as a basis for the

¹⁵⁹ Per Lord Hailsham in *R v. Howe* [1987] AC 417 at 433.

¹⁶⁰ *Ibid.* at 432-433.

¹⁶¹ Per Lord Wilberforce in *Lynch v. DPP for Northern Ireland* [1975] 1 All ER 913 at 927.

¹⁶² This view was given credence by Blackstone, *Commentaries on the Laws of England* volume IV at 30, whose views have permeated judicial pronouncements on duress for many years: see, for example, *Attorney-General v. Whelan* [1934] IR 518; *R v. Hudson* [1971] 2 QB 202; *R v. Graham* [1982] 1 All ER 801; *R v. Howe* [1987] AC 417; *R v. Conway* [1989] QB 290; *R v. Aikens* [2003] EWCA Crim 1573; and *R v. Radford* [2004] EWCA Crim 2878. The Law Commission also endorsed this limitation on the applicability of the defence, see Law Commission, *Codification of the Criminal Law* (Law Com No 143) (London: HMSO, 1985) and the Draft Criminal Code (clause 42 and 43). In a number of relatively recent duress of circumstances cases, the courts have strictly construed the requirement of a threat of serious personal injury, asserting that cannabis use could not be excused on the grounds that there was a serious threat of ‘injury’, where that injury constituted a greater degree of pain, see *R v. Brown* [2003] EWCA Crim 2637 and *R v. Quayle* [2005] EWCA Crim 1415. In *Valderrama-Vega* [1985] Crim LR 220, financial pressures and sexual blackmail were insufficient to find a defence of duress. The Law Commission have recently recommended that if the duress defence is extended to intentional killing the threat must be one of death or life-threatening harm, see Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304) (London: HMSO, 2006) at paragraph [6.73]

defence,¹⁶³ even where the defendant has committed a relatively minor crime. There is some argument that a similar concession should be made for threats to cherished property, since “the causative potency of the threats...may not be materially different in these cases.”¹⁶⁴ But the challenge presented by other threats with the potential to undermine resistance was succinctly articulated by Lord Simon in *Lynch*:

“...the threat may be to burn down [the accused's] house unless the householder merely keeps watch against interruption while a crime is committed. Or a fugitive from justice might say, “I have it in my power to make your son bankrupt. You can avoid that merely by driving me to the airport.” Would not many ordinary people yield to such threats, and act contrary to their wish not to perform an action prohibited by law?”¹⁶⁵

Although recognising that non-physical threats may be compelling in the same way that threats against the person are, Lord Simon also acknowledged that, as a matter of policy, permitting such threats would render the defence unacceptably broad. He concedes that a line must be drawn somewhere and, “as a result of experience and human valuation, the law draws it between threats to property and threats to the person.”¹⁶⁶ There is some inconsistency here with the general law relating to offences against the person. For a successful plea of duress, physical harm is a pre-requisite,¹⁶⁷ yet the courts have generously interpreted ‘harm’ as including psychiatric injury in the general law.¹⁶⁸ Although duress demands a threat to be imminent, and the paradigm example will be of the imminent infliction of *physical* harm, it is certainly conceivable that the initiator of the pressure may threaten to inflict serious psychological injury on the accused. Yet the recent declaration of the

¹⁶³ In *R v. Steane* [1947] 1 KB 997, the Court of Appeal suggested that a threat of false imprisonment would be sufficient to ground a defence of duress, but this decision has not been followed in subsequent cases; see, for example, *DPP v. Hicks* [2002] All ER 285, in which the Queen's Bench Division denied the defence to a defendant who drove while intoxicated in order to source a pain killer for his sick daughter.

¹⁶⁴ Peiris, ‘Duress, Volition and Criminal Responsibility: Current Problems in English and Commonwealth Law’ at 197.

¹⁶⁵ Per Lord Simon in *R v. Lynch* [1975] 1 All ER 771 at 932.

¹⁶⁶ *Ibid.*

¹⁶⁷ This was confirmed by the Court of Appeal in *R v. Baker and Wilkins* [1997] Crim LR 497.

¹⁶⁸ *R v. Burstow* [1998] AC 147.

conditions of duress in *Hasan* suggests a more explicit policy to interpret the limitations restrictively, so it is unlikely that anything less than a threat of physical harm will suffice.¹⁶⁹ This general trend of restrictive interpretation is encouraged here in light of the proposal that duress should be extended to intentional killing.

5.5.1.3 Threats to a third party

In English law, threats waged against a third party may also substantiate a defence.¹⁷⁰ Indeed, there would be no plausible basis for restricting the defence to threats made to the accused since it is certainly conceivable that threats made to one's own family may overpower one's will, perhaps to an even greater extent than had the threats been directed at the accused personally, and that sentiment has long been accepted by the courts.¹⁷¹ There is now also judicial recognition of the fact that threats made to a complete stranger may, in certain circumstances, also bear on the accused's ability to avoid criminal conduct. In *Shayler*, it was noted, "the evil must be directed towards the defendant or a person or persons for whom he has responsibility or...persons for whom the situation makes him responsible."¹⁷² The following example is offered: a threat is issued against the defendant that unless s/he commits the unlawful act, a bomb will be detonated with potentially lethal consequences. Although the potential victims may be unknown to the defendant, the circumstances have imposed some kind of responsibility on the accused to act. It seems

¹⁶⁹ Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 667.

¹⁷⁰ *R v. Hurley and Murray* [1967] VR 526 (threats to the defendant's de facto wife); *R v. Conway* [1989] QB 290, [1988] 3 All ER 1025 (threats against the defendant's passenger); *R v. Martin* [1989] 1 All ER 652 (defendant's wife threatened to commit suicide); and *R v. Ortiz* (1986) 83 Cr App R 173 (threats to the defendant's wife and daughter were sufficient).

¹⁷¹ This was exemplified in the case of *R v. Steane* [1947] 1 KB 997, whereby the defendant made broadcasts for Germany during the war, having succumbed to threats to the safety of his wife and children. It is important to note, however, that duress was held not to be in issue in that case. In *R v. Ortiz* (1986) 83 Cr App R 173, it was suggested that one of the limiting conditions on the defence was that the threat must be aimed at either the defendant or a close family member.

¹⁷² *R v. Shayler* [2001] 1 WLR 2206 at paragraph [49], approving a statement made by Rose LJ in *R v. Abdul-Hussain* [1999] Crim LR 570. This assertion was also received with approval more recently in *R v. Hasan* [2005] UKHL 22, per Lord Bingham at [19].

appropriate, therefore, for threats to another to be included within the remit of the defence of duress, and this approach is supported here.¹⁷³

5.5.1.4 Immediacy

There is a further significant limitation on the availability of the duress defence in English law; that the threat must be 'immediate'.¹⁷⁴ In the past, the courts have interpreted this requirement flexibly, the Court of Appeal in *Hudson*¹⁷⁵ submitting that "the threatened injury may not follow instantly, but after an interval."¹⁷⁶ Subsequently, the courts began to favour the term 'imminent' as opposed to 'immediate',¹⁷⁷ but there were still fears that the defence would become unmanageable if the requisite elements were relaxed any further.¹⁷⁸ Contemporary judicial pronouncements on the issue have cautiously reverted to a narrow construction of this requirement, Lord Bingham in *Hasan* reaffirming the importance of a more restrictively defined notion of immediacy within the defence.¹⁷⁹

Connected to the immediacy requirement is the contention that for the defence to be effective, the threat must have been operative at the time of the commission of the offence and unavoidable. Lord Lane CJ

¹⁷³ The Draft Criminal Code, clause 42, expressly provided for threats "to cause death or serious personal harm to himself or another," see Law Commission, *Codification of the Criminal Law* (Law Com No 143) (London: HMSO, 1985).

¹⁷⁴ The Court of Appeal affirmed that "the accused must know or believe that the threat is one which will be carried out immediately or before the accused or the other person threatened, can obtain official protection," see *R v. Hurst* (1995) 1 Cr App R 82 at 93; and also *R v. Flatt* [1996] Crim LR 576.

¹⁷⁵ *R v. Hudson* [1971] 2 QB 202.

¹⁷⁶ Per Lord Parker CJ *Ibid.* at 207.

¹⁷⁷ Indeed, more recently in the case of *R v. Abdul Hussain* [1999] Crim LR 570, the court preferred the term 'imminent' to 'immediate', thus broadening the scope of the defence.

¹⁷⁸ In *R v. Cole* [1994] Crim LR 582, this fear was dispelled as the Court of Appeal rejected the defence of duress to a charge of robbery on the grounds that the threat was not sufficiently imminent to justify the excuse. Similarly in *R v. Shayler* [2001] 1 WLR 2206, the Court of Appeal confirmed that an uncertain future emergency (here, the possible covert action by members of the security services) did not provide sufficient grounds for a plea of duress.

¹⁷⁹ *R v. Hasan* [2005] UKHL 22 per Lord Bingham at [21].

emphasised this point, asserting that, “[n]o one could question that if a person can avoid the effect of duress by escaping from the threats, without damage to [her or] himself, [s]he must do so.”¹⁸⁰ This constraint has been described as one of the ‘cardinal features’ of the defence,¹⁸¹ and as a consequence if the defendant has a safe avenue of escape or a reasonable opportunity to resort to protection of the law, they are required to take it in order to benefit from the defence.¹⁸² On a similar note it is contended that the defence will not be available to those defendants who would have carried out the unlawful act regardless of the threat.¹⁸³ In other words, even if the sober person of reasonable firmness would have responded to the serious threat, it must also be shown that the defendant’s will was overborne by the threat to the extent that they were impelled to commit the crime. Conversely, the particular threat does not have to be the sole, or even the main, reason for the defendant’s action, as long as it is a substantive reason.¹⁸⁴

5.5.1.5 Nomination of the crime

The particular criminal offence committed by the accused under duress is typically nominated by the party issuing the threat. In *Cole*¹⁸⁵ the defendant was denied the defence on the grounds that he had chosen the crime himself, which in the instant case was robbing a building society. Perhaps a more plausible explanation for the decision in *Cole* is not that the crime was self-elected, but that the threat was not sufficiently imminent. Indeed, the mere fact of nomination does not seem to have

¹⁸⁰ Per Lord Lane CJ in *R v. Sharp* [1987] QB 853 at 857. This submission was further endorsed in *R v. Gill* [1963] 2 All ER 688; and *R v. Hurley and Murray* [1967] VR 526.

¹⁸¹ Per Lord Bingham in *R v. Hasan* [2005] UKHL 22 at [25]-[26].

¹⁸² *R v. Hudson* [1971] 2 QB 202; *R v. Baker and Ward* (1999) 2 Cr App R 335.

¹⁸³ This point was discussed in *DPP v. Bell (Derek)* [1992] Crim LR 176, where the defendant drove with excess alcohol to escape the threat of an aggressor; the defence of duress of circumstances was available since had it not been for the threat the defendant might have changed his mind or been dissuaded from driving his vehicle.

¹⁸⁴ See *R v. Valderrama Vega* [1985] Crim LR 220, where the threatened harm consisted of exposure of the defendant’s homosexuality, financial loss, and physical violence; only the latter threat would be legally relevant to a plea of duress.

¹⁸⁵ *R v. Cole* [1994] Crim LR 582.

stifled the courts in their development of the analogous defence of duress of circumstances, where the crime is invariably elected by the accused.¹⁸⁶ Therefore, in view of this expansion of the duress defence and in the interests of consistency, any requirement of nomination is now defunct.

5.5.1.6 Voluntary exposure

The general undercurrent of the decision in *Howe* was that the social climate of the day was not apt to cope with any relaxation of the law regarding murder¹⁸⁷ and the House of Lords expressed particular concern that terrorists may exploit the defence by claiming that their actions were motivated by fear of fellow members of their organisation. The fear that the defence might amount to some kind of 'terrorists charter' had also emerged in earlier cases.¹⁸⁸ The Law Commission has since noted that, "the absence of a strict rule of voluntary exposure at the time of the decision in *Howe* may well have influenced the decision."¹⁸⁹ However, it is now accepted beyond doubt, on the House of Lords authority offered in *Hasan*, that those who have knowingly¹⁹⁰ and voluntarily¹⁹¹ exposed

¹⁸⁶ With the exception, perhaps of *R v. Martin (Colin)* [1989] 1 All ER 652, where the defendant attempted to avert a threat of suicide by his wife by driving his son to work whilst disqualified; see section 5.6 below.

¹⁸⁷ Kewley, 'Murder and the Availability of the Defence of Duress in the Criminal Law' at 302. Lord Jauncey also commented in *R v. Gotts* [1992] 1 All ER 832 at 839, that "...given the climate of violence and terrorism which ordinary law-abiding citizens have now to face Parliament might well do well to consider whether the defence should continue to be available in the case of all very serious crimes." However, many academic commentators at the time suggested that there was no basis for this assumption, see Alldridge, 'Murder Under Duress – Awaiting the Final Word' at 262.

¹⁸⁸ Per Lord Simon in *Lynch v. DPP for Northern Ireland* [1975] 1 All ER 913 at 933; per Lord Salmon in *Abbott v. R* [1976] 3 All ER 140 at 146.

¹⁸⁹ Law Commission *A New Homicide Act for England and Wales?* (Law Com CP No 177) (London: HMSO, 2005) at [7.67]-[7.70].

¹⁹⁰ For the defence to be denied, the accused must have had *actual knowledge* of the risk of being coerced into the commission of crime, see *R v. Sharp* [1987] QB 853 at 861.

¹⁹¹ It has been confirmed by the English courts in *R v. Hasan* [2005] UKHL 22 at [21] and [29]-[37]; *R v. Sharp* [1987] QB 853; *R v. Lynch* [1975] 1 All ER 913 (per Lord Morris, Wilberforce and Simon); and by the Court of Criminal Appeal in Northern Ireland in *R v. Fitzpatrick* [1977] NI 20, that the defendant's voluntary involvement with a criminal enterprise (without reasonable excuse) would deny her/him the defence of duress. It should be noted, however, that the defence is not automatically negated if the defendant is compelled to join the criminal gang because of threats of death or serious

themselves to a risk of being threatened¹⁹² by involvement with a violent criminal enterprise¹⁹³ which uses violence as one of its organising principles cannot rely on the defence. Thus the protests of their Lordships in *Howe* have lost much of their force.¹⁹⁴ Their Lordship's recent assertion is undoubtedly underscored by the idea that those with some level of prior culpability should not be permitted to exploit the defence, which it was noted was becoming too readily available because of a relaxation of the restrictive requirements.¹⁹⁵

This brief synopsis of the conditions which must be satisfied before a duress plea will qualify for consideration illustrate that the defence is strictly construed in order to prevent it from becoming unmanageable. Since it is recommended here that the defence should logically be extended to defendants who intentionally kill an innocent bystander, the recent tightening of the requirements is to be welcomed. The excuse must be strictly construed so as not to allow a defence to an actor who makes a disingenuous claim and to protect the rights of the innocent

bodily harm (although it is unclear whether any lesser threat would suffice, see Ormerod, *Smith & Hogan: Criminal Law* at 337).

¹⁹² There has been some controversy surrounding the threat to which D exposed himself. The courts have questioned whether the defence should be denied to the defendant who has put her/himself in a position where s/he was aware of the risk that there would be pressure to commit offences of the type alleged, or whether the defence would be unavailable where the defendant knew that s/he would be subjected to threats to commit any crime, more generally. In *R v. Baker and Ward* [1999] 2 Cr App R 355, the Court of Appeal adopted the former, less restrictive approach, which was more favourable to the defendant. However, following *R v. Heath* [2000] Crim LR 109 and *R v. Harmer* [2002] Crim LR 401, the House of Lords in *R v. Hasan* [2005] UKHL 22, declared at [37] that *Baker* had been wrongly decided. Lord Bingham confirmed that, "The defendant is, *ex hypothesi*, a person who has voluntarily surrendered his will to the domination of another. Nothing should turn on foresight of the manner in which, in the event, the dominant party chooses to exploit the defendant's subservience." Hence, the defence is denied to a defendant who exposes her/himself to a risk of pressure to commit *any* crime, where the defendant knows or ought to have known of the risk of compulsion (on this latter point, see Lord Bingham in *R v. Hasan* [2005] UKHL 22 at [38]).

¹⁹³ What constitutes a criminal organisation is not clear, but the defence has been denied where the defendant is voluntarily associated with, for example, gangs of armed robbers (*R v. Sharp* [1987] QB 853) and paramilitary organisations (*R v. Fitzpatrick* [1977] NI 20). In *R v. Lewis* (1992) 96 Cr App Rep 412 it was noted that voluntary membership of "a paramilitary or gangster-tyrant style of organization" would preclude reliance on the defence.

¹⁹⁴ Milgate 'Duress and the Criminal Law: Another About Turn by the House of Lords' at 73.

¹⁹⁵ See in particular Lord Bingham's speech in *R v. Hasan* [2005] UK HL 22 at [22].

autonomous bystander. Should the actor satisfy the qualifying conditions of the defence, their conduct is then subject to a normative evaluation, the substance of which is considered in greater detail below.

5.5.2 The evaluative condition

In addition to the qualifying conditions considered above, the duress plea is further limited by an evaluative test laid down by the Court of Appeal in *Graham*, which permits the jury to reject the defence if in the circumstances a person of ordinary firmness would not have taken part in the crime as demanded.¹⁹⁶ The following direction, taken from the speech of Lord Lane CJ in *Graham*, has been subsequently approved by the House of Lords:

“(1) Was [the defendant], or may he have been, impelled to act as he did because, as a result of what he reasonably believed [E] had said or done, he had good cause to fear that if he did not so act [E] would kill him or...cause him serious physical injury? (2) If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of [the defendant], would not have responded to whatever he reasonably believed [E] said or did by taking part in the killing?”¹⁹⁷

When faced with extreme pressure to act emanating from a serious threat, personal circumstances might affect the capacity of a person to either form reasonable beliefs, or to act reasonably on the basis of those beliefs. On the authority provided, it would seem that, first, the defendant must have reasonably believed in the circumstances giving rise to the threat and have good cause to fear that they would be subjected to serious injury or death; and, second, the defendant's subsequent reaction must be one which would have been expected of a sober person of reasonable firmness, sharing the defendant's characteristics.

¹⁹⁶ *R v. Graham (Paul)* [1982] 1 All ER 801.

¹⁹⁷ Per Lord Lane CJ in *R v. Graham (Paul)* [1982] 1 All ER 801 at 806; approved by the House of Lords in *R v. Howe* [1987] AC 417 and *R v. Hasan* [2005] UKHL 22. This approach is also endorsed in Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304) (London: HMSO, 2006) at paragraph [6.77]-[6.80].

In relation to the first issue a relatively strict standard is set by the direction in *Graham* by requiring that the defendant has a *reasonable* belief in the circumstances of the threat. Some have argued that this standard is too rigorous; according to Smith and Hogan a defendant should be judged on the basis of an *honest and genuine* belief in the existence of the threat by analogy with self-defence and provocation.¹⁹⁸ The suggestion is that a person may be deemed credulous or even stupid for believing in the circumstances of the threat, but that does not make her/him any more blameworthy than the defendant whose fear is founded upon reasonable grounds.¹⁹⁹ It is submitted here, however, that the objective approach to mistaken belief is more tenable because it encourages the defendant to carefully consider the circumstances of the threat before responding to it, and this restriction must surely help to safeguard the rights of the innocent bystander.²⁰⁰ Although no explicit declaration was offered on the matter, Lord Bingham's speech in *Hasan* indicates that the objective formulation of the first part of the direction is to

¹⁹⁸ See Ormerod, *Smith & Hogan: Criminal Law* at 331, citing William Wilson, 'The Structure of Defences' [2005] *Criminal Law Review* 108 at 115-116 in support. Indeed, in *DPP v. Rogers* [1998] Crim LR 202, the Divisional Court appear to have (incorrectly) assumed a more subjective approach to the issue; similarly, the Court of Appeal in *R v. Martin (DP)* (2002) 2 Cr App R 42 permitted the defendant's characteristics to be taken into account as his schizoid affective disorder made him more likely to believe in the existence of threats and that they would be carried out; and the Court of Appeal in *R v. M* [2003] EWCA Crim 1170 also appears to endorse a subjective approach when considering the defendant's belief in the threats. The subjective approach is criticised in Jeremy Horder, 'Occupying the Moral High Ground' [1994] *Criminal Law Review* 334 at 341, and the objectivity of this part of the test was restored (albeit implicitly in the first case) in *R v. Safi and others* [2003] Crim LR 721; *R v. Blake* [2004] EWCA Crim 1238 at [18]; and *R v. Bronson* [2004] EWCA Crim 903 at [23]. It is worth noting that in self-defence and the provocation beliefs need only be honest and genuine, and are not required to be based on reasonable grounds (see *R v. Gladstone (Williams)* (1984) 78 Cr App R 276) although it is suggested in section 4.4.1.3 that belief in the need to use force in self-defence *should* be reasonable. Clarification is needed as to why there is a divergence of approach where some defences require beliefs to be reasonably held, and others merely require a subjective, honest belief to ground a defence. As Jeremy Horder emphasises, there may be plausible reasons for this discordance, see 'Occupying the Moral High Ground' [1994] *Criminal Law Review* 334. For instance, self-defence is a justificatory defence and duress excusatory; and in cases of duress the actor has a more considered choice to comply with the threat than a defendant acting in defence of a threat to their interests, see Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304) (London: HMSO, 2006) at paragraph [6.78].

¹⁹⁹ Ormerod, *Smith & Hogan: Criminal Law* at 331.

²⁰⁰ See the discussion in section 4.4.1.3 above, where it is suggested that beliefs in the need to use self-defensive force should similarly be objective.

be preferred; the defendant must, therefore, have *reasonably* believed in the circumstances of the threat.

In relation to the second part of the test, it has long been acknowledged that duress is a "concession to human frailty,"²⁰¹ yet the exoneration provided by the defence is restricted to those defendants displaying the "steadfastness reasonably to be expected of the ordinary citizen in his situation."²⁰² The courts have strictly determined the standard of conduct to be expected of a defendant when faced with extreme pressure to violate the personal or proprietary rights of an innocent third party,²⁰³ an approach which is echoed throughout the rest of the criminal law.²⁰⁴ The law is indisputably driven by a sound motive; that the more intrusive the crime committed against the innocent bystander, the stronger and more irresistible the threat must be before criminal responsibility is avoided.²⁰⁵

The *Graham* direction does, however, permit some latitude for the characteristics of the defendant to be considered when evaluating the conduct. In *Bowen*²⁰⁶ the Court of Appeal determined that a defined set of characteristics could be pertinent to the assessment of whether a person of reasonable fortitude would be able to resist threats. Age and sex are identified as relevant, as are pregnancy and serious physical disability. The court also suggested that "recognized mental illness or psychiatric condition, such as post traumatic stress disorder leading to learned helplessness" may be taken into account.²⁰⁷ Whilst careful not to

²⁰¹ Per Lord Hailsham in *R v. Howe* [1987] AC 417 at 432.

²⁰² *R v. Graham (Paul)* [1982] 1 All ER 801 at 806.

²⁰³ The objective approach was confirmed most recently in *R v. Hasan* [2005] UKHL 22.

²⁰⁴ In self-defence, the degree of force used by the accused must be reasonable; similarly in provocation, the defendant must show that the provocative incident was "enough to make a reasonable man do as he did", Homicide Act 1957, section 3. Indeed, Lord Lane CJ expressly drew a direct analogy with the provocation defence, in *R v. Graham* [1982] 1 All ER 801 at 806.

²⁰⁵ See comments made by Lord Wilberforce and Lord Edmund-Davies (dissenting) in the Privy Council case *Abbott v. R* [1976] 3 All ER 140 at 152.

²⁰⁶ *R v. Bowen* [1996] 4 All ER 837

²⁰⁷ The court cautiously ruled out a low intelligence quotient, emotional instability, unusually pliability, or vulnerability to pressure as relevant considerations: "[the] mere fact that the accused is more pliable, vulnerable, timid or susceptible to threats than a normal person are not characteristics [sic] with which it is legitimate to invest the reasonable or ordinary person for the purpose of considering the objective test," see *R v.*

undermine the yardstick of reasonableness by permitting the evaluation of a vast array of individual peculiarities which might affect the defendant's ability to withstand pressure, the admission of recognized mental illness as a relevant consideration suggests a more subjective approach in determining the reasonableness or otherwise of the defendant's response to threats.²⁰⁸ So, the current position in relation to the second objective limb of the test is that the courts are required to differentiate between recognised conditions and unusual vulnerabilities, only the former being relevant to the assessment of reasonableness.

Basic human frailties are permitted by the current formulation of the duress defence, but only to the extent that "the law demands that the human frailty be a personal reason why, in the circumstances, the actor could not act reasonably."²⁰⁹ There is some divergence of opinion as to whether the defence deserves the label of 'concession to human frailty', when in fact the current interpretation does not generally permit individual peculiarities, other than age and sex and recognised psychiatric conditions, to be considered. The concept of human frailty is an uncertain one: it may refer to a lack of ability, an inability to cope with extreme pressure and emotional conditions, or pre-existing mental illness or physical disability.²¹⁰ In the objective judgement of whether a person subject to serious threats responded with reasonable fortitude, to what extent *should* these human frailties infiltrate the evaluation?

Bowen [1996] 4 All ER 837 at 844. In *R v. Emery* (1992) 14 Cr App R 394, the Court of Appeal somewhat controversially affirmed, *obiter*, that a recognised psychiatric syndrome or mental illness could be relevant to the assessment of reasonableness. In the instant case, the defendant was a woman suffering from post-traumatic stress disorder leading to a condition of learned helplessness. Many commentators have questioned the validity of an objective test which permits such considerations, see Keith JM Smith, 'Duress, and Steadfastness: In Pursuit of the Unintelligible' [1999] *Criminal Law Review* 363.

²⁰⁸ The Court of Appeal have, however, excluded characteristics such as a grossly elevated neurotic state (*R v. Hegarty* [1994] Crim LR 353), unusual vulnerability to pressure (*R v. Horne* [1994] Crim LR 584), and lack of firmness arising from sexual abuse (*R v. Hirst* (1995) 1 Cr App R 82). These cases are cited in Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 671.

²⁰⁹ Reilly and Mikus, '*R v. Hibbert: The Theoretical Foundations of Duress*' at 184.

²¹⁰ These ideas are adapted from Reilly and Mikus, *Ibid.* at 184.

On one view, the question of individual characteristics should be excluded from deliberation altogether. On this approach, the objective standard is strictly construed and makes no allowance for any human infirmity, no matter how significantly it might affect an actor's capacity to make alternative choices.²¹¹ According to Reilly and Mikus, on this approach, "[i]f objectively there was a safe avenue of escape, [the defendant] will be expected to take it regardless of her stupidity, illiteracy or inability to function effectively under extreme fear."²¹² An alternative view is that this strict approach should be tempered somewhat by allowing more extensive scrutiny of the notion of capacity in duress, thereby permitting certain frailties to filter into the objective test. On this approach, the jury should be permitted to take into account a broader range of characteristics of the defendant so the evaluation of the reasonableness of the defendant's response is more individualised.²¹³ There may be some merit in Lord Simon's belief expounded in *Lynch*, that "the standard should be purely subjective," and that it is contrary to principle to require defendant's to attain a standard which is beyond their reach.²¹⁴ If an actor cannot display the same degree of steadfastness as an 'ordinary' person because of some recognised incapacity, then they should be judged by the standards of a person with the same incapacity. Reilly and Mikus extol the merits of this approach by acknowledging that, when subject to duress, the "fortitude, courage, intelligence and cunning of the actor might all be tested. Any predisposition to fear or to cowardice is likely to be fatal to the actor's ability to avoid the unlawful conduct."²¹⁵

²¹¹ This appears to be similar to the approach adopted by the Law Commission, who suggest that the defendant's age and all other circumstances *other than* those which bear on the defendant's capacity to withstand duress will be relevant to the objective test, see Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304) (London: HMSO, 2006) at paragraph [7.38]-[7.44]. This diverges from the approach in *Bowen* as recognised psychiatric conditions would be excluded, apparently motivated by the need to be consistent with analogous defences such as provocation, see *Attorney-General for Jersey v. Holley* [2005] UKPC 23.

²¹² Reilly and Mikus, 'R v. *Hibbert*: The Theoretical Foundations of Duress' at 185.

²¹³ See Reed, 'The Need for a New Anglo-American Approach to Duress' who contends, at 214 that by "adopting a subjectivist approach focusing on the peculiarities of the individual more logical and humane principles can be adopted." See also Law Commission *Legislating the Criminal Code: Offences against the Person and General Principles* (Law Com No 218) (London: HMSO, 1993) at 52.

²¹⁴ Per Lord Simon in *Lynch v. DPP for Northern Ireland* [1975] 1 All ER 913 at 931.

²¹⁵ Reilly and Mikus, 'R v. *Hibbert*: The Theoretical Foundations of Duress' at 186.

Rather than expressly identifying individual human frailties when calculating the objective test, perhaps frailties should be considered within the broader contextual circumstances, so that considerations of whether the action of the accused is reasonable do not hinge entirely on some identifiable condition or syndrome to excuse the defendant. Instead, weight can be attached to a broader range of surrounding circumstances which may help to explain why the reaction is deemed reasonable in that context.

The extent to which human frailties can be taken into account within the objective test in duress is a question that remains unresolved in academic discussion, but it is clear that the law as stated in *Bowen* is the preferred judicial approach at the present time. It is acknowledged here that judgements about the reasonableness (or otherwise) of the defendants criminal conduct committed under duress can fluctuate depending on the frailty displayed by the person under duress. Reilly and Mikus explain:

“At one extreme [the actor] might be temporarily incapacitated to the extent that they are compelled, in their emotional condition, to act illegally....Alternatively, actors might be temporarily incapable of correctly perceiving their options. For example, if preoccupied with the threat that is faced, an actor might simply not consider the available option of phoning the police. Finally, actors might be temporarily incapacitated to the extent that they are incapable of exercising an option that they do in fact perceive. For example, an actor might not be physically capable of dialling a telephone number to seek help because her hands are shaking in extreme fear.”²¹⁶

If the objective test remains pure in the sense that it is unwilling to excuse criminal conduct despite the presence of some incapacity which falls short of a recognised syndrome, then it undoubtedly offers uniformity and increased protection for the innocent bystander whose personal or proprietary interests are threatened. But there is one significant negative aspect of this approach: some defendants are held to a standard which they could never realistically achieve. A purely objective test would

²¹⁶ *Ibid.* at 189-190.

discriminate against defendants who lack a fair opportunity to resist the coercive threats.²¹⁷ If the test is individualised by making broader concessions to human frailty, greater support is offered to the defendant subjected to the threat. Importing an element of subjectivity into what remains essentially an objective test permits the jury more latitude in considering the personal circumstances of the accused in their evaluation of reasonableness and this approach is supported here. In the interests of consistency, however, the law must be clear about which individual incapacities can be taken into consideration, as the current distinction between recognised psychiatric conditions and non-relevant characteristics is a very difficult one to draw.

The above summary of the qualifying and evaluative conditions of the duress plea serves to highlight the appropriately restricted scope of the defence. It is established that duress by threats should, subject to the fulfilment of these strict conditions, be available to excuse an actor for wrongfully violating the rights of an innocent bystander when threatened with death or serious injury by another agent. It is proposed that the actor should even avoid the attribution of criminal responsibility where the right to *life* of a non-threatening autonomous bystander is violated by their action, provided the prescribed requirements are satisfied. The final substantive issue to be addressed in this chapter is the scope of criminal responsibility of a defendant who sets back the interests of an innocent bystander in order to deflect a threat which emanates from *circumstances* rather than human agent. When compelled to intrude on the rights of an innocent bystander by virtue of a naturally occurring external threat the criminal law can absolve the actor of blame for the intrusion by appeal to one of two potential defences: necessity or duress of circumstances. The limits of each defence in relation to invasions on the protected domain of innocent non-threatening bystanders are considered in the following section.

²¹⁷ This point is emphasised by Wilson, *Criminal Law Doctrine and Theory* at 242.

5.6 Necessity, duress of circumstances and innocent bystanders

If compelled to encroach on the protected domain of an innocent bystander as a consequence of a naturally occurring threat, one may empathise with the pressure experienced by the defendant. Despite the compassion we may feel for the actor who commits a criminal offence under extreme circumstantial pressure, it would appear that “common-law judges have reacted...sternly and...discriminatingly to pleas of this kind.”²¹⁸ The courts are prepared to offer a defence for the infringement, but are, rightly, reluctant to extend the justification of necessity to exonerate the actor, instead developing the excuse of duress by circumstances which, it will be argued here, provides a more suitable ground of exculpation.

5.6.1 Necessity and innocent bystanders

The scope of the necessity defence has already been outlined in some detail in chapters three and four, but a recapitulation of the limitations of the defence may be useful for the present inquiry. Necessity has been acknowledged as a defence where the defendant is compelled by a moral imperative to commit what would ordinarily constitute a crime. Although the actor's conduct may impinge on the protected interests of an innocent bystander who is non-threatening, the necessity principle acknowledges that, all things considered, some objective value will be served by the intrusion. In this regard necessity offers a *justification* for the infringement which conveys the message that the actor is free from blame as the conduct is not morally wrongful; from an objective perspective there is no violation of the rights of the innocent person. It was established in section 4.5.3 above that necessity may, in very rare circumstances, exculpate an actor who *lethally* intrudes on the rights of an innocent person. The availability of the defence in these circumstances is dependent on the

²¹⁸ Brudner, 'A Theory of Necessity' at 339.

innocent person being indirectly connected (or incidental) to the direct threat to the defendant's interests. Crucially, the defence will only be available in one-off crisis situations where the victim's interests *cannot be honoured* regardless of the action taken. This proposition should not have wider ramifications and it is strongly submitted here that necessity will not, *as a general rule*, justify interference with the rights of an innocent autonomous non-threatening bystander. Indeed, Simester and Sullivan suggest that, "[t]he most important constraint on the necessity plea is that it cannot be invoked in circumstances where D overrides a legal right of a non-consenting person whose conduct constitutes no threat to the person or property of others."²¹⁹ But this general rule is sometimes challenged.²²⁰ In order to complete the account on the limits of necessity initiated in previous chapters, this final section will consider whether the defence can ever be extended beyond its narrow application in chapter three, to justify medical intervention in the best interest of the incompetent patient, and chapter four, to justify intrusions on the rights of innocent incidental threats in one-off crises where the innocent person's fate is already mapped out.

It is suggested in chapter three that it might sometimes be acceptable to trump the personal or proprietary rights of innocent non-threatening bystanders in limited circumstances, where there is a moral imperative to act. For instance, if an emergency vehicle requires immediate access to a burning building and the only way to access it is to cross private property, the usurpation of the property interests of the owner (who is a non-threatening innocent bystander) is surely justified. Consider another example: two mountaineers embark on a climb and one suddenly falls and is seriously injured. It becomes clear that injured party is in desperate need of helicopter rescue. A fellow mountaineer passes by

²¹⁹ Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 718.

²²⁰ As illustrated by the case of the Speluncean Explorers, Lon Fuller's moral and legal dilemma in which five men trapped in a cave killed one of their party in order that the remaining four survive until rescued. All five judges wrestled to find an adequate solution, and all five suggested different reasons for determining a justification for the otherwise illegal conduct. See Lon L Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616.

with a mobile phone but refuses to hand it over. Can the passer-by be legitimately restrained in order to acquire use of the mobile? It would be unpalatable if the conduct of the defendant in such a case warranted the imposition of criminal liability. There are sound objective reasons for the action and the defendant acts on those reasons; consequently the action is not wrongful. Thus, there is arguably *some* scope for necessitous intervention where the minor proprietary and personal interests of innocent bystanders can be justifiably infringed, as it is uncontroversial to regard these minor intrusions as permissible on a balance of interests.²²¹ The concrete rights vindicated clearly outweigh those infringed.

In relation to rights of personhood, however, and in particular lethal intrusions on the right to life of the innocent bystander, the position is more contentious. One modern example which may help to clarify our thinking on the scope of the necessity defence is the destruction of the World Trade Centre in New York by hijacked aircraft. It now appears to be recognised by authoritative commentators if not yet by the courts,²²² that it would be *lawful* to shoot down a hijacked plane, killing all of the innocent passengers and crew if this were the only way to prevent a much greater impending disaster. Yet the passengers on board are innocent non-threatening bystanders who are by no means causally connected to the production of the existing threat that consists of thousands of lives being at risk. Nor do they expose the threat to others and as bystanders they have a right not to be killed by the shooter.²²³ Ordinarily the necessity justification would not permit such a serious violation of rights, regardless of the overall net saving of lives that would be achieved by the action. The special circumstances of this case do, however, allow an appeal to the necessity justification: the passengers are *destined to die* irrespective of the defendant's intrusion. It was proposed in section 4.5.3 that this factor is immensely significant if necessity is ever to justify an infringement on the closely guarded

²²¹ Alexander, 'Lesser Evils: A Closer Look at the Paradigmatic Justification' at 613.

²²² See Ormerod, *Smith & Hogan Criminal Law* at 351-352.

²²³ See the account offered by Thompson in 'Self-Defense' at 299.

personal interests of an innocent bystander. In the one-off emergency where the lives of the innocent passengers cannot be honoured whatever course of action is taken, it seems, therefore, that a necessity plea is at least a possibility.²²⁴

A slightly altered version of the facts may change our view of the criminal responsibility of the actor. Imagine that an air traffic controller diverts a much greater catastrophe in terms of net lives lost by directing a plane full of entirely innocent non-threatening passengers to crash into a terrorist plane in order to prevent an impending crash into the tower. The passengers on the non-terrorist plane are innocent, non-threatening subjects who are not causally linked to the threat in any way and, crucially, who are *not otherwise destined for death*. If, in order for the real source of the threat to be eliminated, a number of innocents must be sacrificed to yield a net saving of lives, then some would argue that it is permissible for these innocents to be killed on the basis of pure consequentialism.²²⁵ On this view when it comes to crises situations where a choice is forced it is better to kill one innocent than several and this intrusion must be regarded as the 'lesser evil'. It is submitted here, however, that whatever welfare or greater good might be promoted in terms of lives saved, the rights and interests of non-threatening autonomous bystanders whose lives *can* be honoured if the defendant

²²⁴ Other examples include the Trolley Problem, where I can switch my trolley onto one side of the track, and this will definitely kill one person who is trapped there; or I can switch it onto the other side where several innocent people, also trapped, will definitely be killed. Innocent life cannot be honoured whatever I do so I may be entitled to a necessity justification if I save five lives in a situation where innocent life cannot be honoured. See Judith J Thomson, 'Killing, Letting Die and the Trolley Problem' (1975-1976) 59 *The Monist* 204. This is not a concession to unbridled consequentialism; it is merely that where innocent life cannot be honoured, numbers may take on a different significance than they ordinarily would in a situation where I have used another person as a means to an end. For further discussion see Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship'; Michael Bohlander, 'In Extremis – Hijacked Airplanes, 'Collateral Damage' and the Limits of the Criminal Law' [2006] *Criminal Law Review* 579. Bohlander suggests a different approach to the example cited in the text, claiming at 580 that "the outwardly cynical but logically proper approach is that necessity does not enter into it at all because there is no balancing exercise" in cases where the innocents are destined to die.

²²⁵ Philippa Foot in 'The Problem of Abortion and the Doctrine of the Double Effect', reprinted in *Virtues and Vices* (Oxford: Basil Blackwell, 1978) at 19-32; see also Bohlander, 'In Extremis – Hijacked Airplanes, 'Collateral Damage' and the Limits of the Criminal Law'.

refrains from action, would be significantly undermined if such an intrusion was justified by necessity. If numbers were the only concern of a balance of harms calculation the logical, and wholly unacceptable, extension of this premise is that a surgeon would be justified in forcing an autonomous patient into having a blood transfusion simply because there is an emergency whereby five dying patients require blood. It is asserted here that the necessity defence should never justify such a serious intrusion upon the rights of an innocent non-threatening person, who is merely being *used* as a means to an end, a resource.²²⁶ On the facts described above, absent any other convincing reasons to the contrary, the necessity justification has no force, and any violation of the rights of innocent bystanders who are not otherwise designated for death would seriously undermine the principle of autonomy.

The familiar case of *Dudley and Stephens* provides us with a further opportunity to test the hypothesis set out in the previous paragraph that the necessity justification cannot be extended any further than the limited circumstances already defined. A group of sailors were shipwrecked in the South Atlantic Ocean; there was real hope of rescue within days but none of the sailors would survive to that point without food. They took the decision to kill the youngest and weakest member of the crew, a cabin boy, to provide them with necessary sustenance for the days ahead. In their subsequent trial, the defendant and his companions raised a defence of necessity, but the defence was famously and categorically rejected. Lord Coleridge noted that the victim was a “weak and unoffending boy,” an autonomous individual constituting *no threat* to anyone. For that reason, necessity was not permitted as a defence to the murder of the cabin boy.

The reasons for the denial of the defence are not entirely clear from the judgment. Commonly, the decision has been interpreted to deny the

²²⁶ For a similar view see Alexander, 'Lesser Evils: A Closer Look at the Paradigmatic Justification' at 615. See also John Taurek, 'Should the Numbers Count? (1977) 6 *Philosophy and Public Affairs* 299; and Weyma Lubbe, 'Taurek's No Worse Claim' (2008) 36 *Philosophy and Public Affairs* 69.

availability of the necessity justification to murder.²²⁷ But the reasoning in the case can be interpreted much more narrowly than this.²²⁸ It is suggested here that the defence was withheld not because necessity should *never* be a defence to intentional killing, but because the cabin boy was effectively an autonomous innocent bystander. He constituted no threat to the other sailors; nor did he exacerbate, expose, or trigger the threat, or bring it closer to being a reality. The cabin boy was simply used as a *resource*, a means to an end, and his death was simply a product of the sailors preferring their own lives over his. If the defendants were claiming that their action was justified on the basis that they were under pressure from the circumstances then it is understandable that the necessity defence was rejected. In accordance with the principles established here, the law would not permit a defendant to sacrifice the life of another wholly innocent bystander who was not otherwise designated for death merely to save their own. There would be no objective justification for the action and the intrusion on the protected domain of the innocent person would be wrongful. Equally, the necessity justification is denied if the killing of one innocent person would save the lives of many others in peril as this value judgment is arguably not for the defendant to make. So the necessity justification was rightly denied in *Dudley*. Ashworth has suggested that allowing a legal justification where the victim has been *chosen*, as the cabin was, as opposed to pre-designated, “would be to regard the victim’s rights as morally and politically less worthy than the rights of those protected by the action taken, which represents a clear violation of the principle of individual autonomy.”²²⁹ It is submitted here that such manifest disregard for the rights and freedoms of another human being cannot be justified on the basis of necessity.

It does not necessarily follow from the above analysis, however, that defendants such as the sailors in *Dudley* will always be held criminally

²²⁷ *R v. Howe* [1987] AC 417.

²²⁸ Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 719-721.

²²⁹ Ashworth, *Principles of Criminal Law* at 153-154.

responsible for intruding on the rights of an innocent bystander. Despite the denial of a justification it is acknowledged below that we may sometimes be prepared to *excuse* a defendant who acts in circumstances of compulsion to deflect the harm onto an autonomous bystander by appealing to the defence of duress of circumstances.²³⁰ The limits of this novel excusatory defence will be discussed in the following section.

5.6.2 Duress of circumstances and innocent bystanders

In recent years, the courts have acknowledged a defence of duress of circumstances, a sub-division of the traditional duress by threats defence where a defendant is compelled to commit an offence, of their own nomination, by threats of death or serious injury which emanate from *circumstances*.²³¹ By paralleling these two defences, duress of circumstances adheres to ready-made jurisprudence²³² in the form of long-established rules and principles that have emerged from cases of duress by threats.²³³ Prior to the development of the defence over two decades ago, if a defendant committed a crime of his own selection in order to avoid harm, the most appropriate plea was that of necessity, not duress.²³⁴ The duress of circumstances defence “advances the law of excuse-based defences”²³⁵ in the sense that if a defendant commits a crime of their own selection and the necessity defence is unavailable due

²³⁰ Indeed the Law Commission suggest that *Dudley* is, properly analysed, a duress of circumstances case and not one of necessity at all, see Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304) (London: HMSO, 2006) at paragraph [6.7].

²³¹ See, for instance, *R v. Cole* [1994] Crim LR 582; and *R v. Ali* [1995] Crim LR 303. See also Simon Gardner ‘Necessity’s Newest Inventions’ (1991) 11 *Oxford Journal of Legal Studies* 125. The only apparent difference between the two defences is the source of the danger: if the threat emanates from another person, then duress by threats is the most appropriate defence; if the threat comes from any other source, the defence to be invoked is duress of circumstances. Otherwise the defences are analogous.

²³² Gardner, ‘Necessity’s Newest Inventions’ at 126.

²³³ See section 5.5 above for further consideration of the qualifying and evaluative conditions pertaining to the duress by threats defence; see also *R v. Hasan* [2005] UKHL 22 at [21].

²³⁴ Horder, ‘Self-Defence, Necessity and Duress: Understanding the Relationship’ at 143.

²³⁵ Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 674.

to the absence of an objective justification, the defendant may be alternatively excused where previously no defence would have been accessible.²³⁶ Of course, the defence is only available subject to the stringent limitations imposed on the traditional version of duress.

The defence made its first tenuous appearance in the Court of Appeal in *Willer*,²³⁷ a reckless driving case where the accused mounted a pavement in order to avoid a threatening situation. The defendant's conviction was quashed on the basis that the duress defence had not been left to the jury's consideration. Although no explicit reference was made to a new defence, exculpating the actor on the grounds of duress involved a departure from the traditional formulation of the defence in that there was no nomination of the crime by another agent in the paradigm 'do this or else' scenario. Subsequent cases have recognised this defence expressly as 'duress of circumstances', an expansion of the conventional duress by threats defence.²³⁸ In *Martin* the Court of Appeal confirmed that, the defence can arise from:

"other objective dangers threatening the accused or others... the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury."²³⁹

²³⁶ The introduction of a statutory defence of duress of circumstances has been mooted in the past by the Law Commission, see *Legislating the Criminal Code: Offences against the Person and General Principles* (Law Com No 218) (London: HMSO, 1993) and the Draft Criminal Law Bill, clause 26. Necessity is also recognised in this excusatory form in the German Penal Code, section 35.

²³⁷ *R v. Willer* (1986) 83 Cr App R 225.

²³⁸ *R v. Conway* [1989] QB 290; and *R v. Martin (Colin)* [1989] 1 All ER 652. More recently in the case of *R v. Jones* [2005] Crim LR 122 the Court of Appeal held that the defence of duress of circumstances was not available where the defendants had intentionally caused damage to an air-force base in an effort to prevent the 'illegal' war waged to the detriment of Iraqi civilians.

²³⁹ Per Simon Brown J in *R v. Martin (Colin)* [1989] 1 All ER 652 at 653. Although purporting to be an example of duress of circumstances, the decision in *Martin* could, however, be explained with reference to the established duress by threats defence. Serious physical harm was threatened, the threat was directed against the defendant's wife, and the crime was effectively chosen by the threat. It is at this juncture that *Willer* and *Conway* part company with *Martin*, in the sense that the defendants in the former cases responded to the threat by committing a crime of their own selection. Although there is no acknowledgement in the cases that the law is being extended, there is a clear extension of the classic excuse of duress. Previously, if a defendant selected the crime to commit the justification defence of necessity would be invoked (or self-defence,

This confirms that the defence is, rightly, limited by the rules pertaining to the duress by threats defence. The original cases, however, all involved victimless crimes in which “no-one’s rights or interests were overridden.”²⁴⁰ But it is submitted here that the duress of circumstances defence may be equally applicable where the actor violates the personal or proprietary rights of an innocent autonomous person when threatened by circumstances; and by analogy with duress by threats it is proposed that the defence should also be extended to intentional killing.

Although duress of circumstances is often thought to be a subset of necessity, or an excusatory form of the defence,²⁴¹ it arguably does not reflect the true spirit of necessity which entails a *moral imperative* to act. Necessity has been defended here as a strongly justificatory defence to action which, all things considered, serves some objective value.

Necessity cannot provide a justification for the type of violation in *Dudley*, or in the case of diverting a passenger plane which is otherwise safe from danger, as there is no objective value to be served by interfering with the rights of the innocent autonomous victims. A traditional example often used to highlight the limits of justification is that of two stranded sailors grappling over a plank of wood which will prevent only one of them from drowning.²⁴² If one sailor snatches the plank from the other in order to save their own life at the expense of the other sailor who will now certainly die, there is no objective justification for such a serious violation of the rights of another.²⁴³ There may, however, in this example and in all of those in which the necessity justification has been denied, be an

where relevant). But the conduct is not justified or ‘right’ in these circumstances; it is conduct which should be excused and, for this reason, the extension of the excuse-based defence seems fitting. For further consideration of the distinction between necessity and duress of circumstances, see *R v. Pommell* [1995] 2 Cr App R 607; Simester and Sullivan, *Criminal Law: Theory and Doctrine* at 673-675; DW Elliot, ‘Necessity, Duress and Self-Defence’ [1989] *Criminal Law Review* 611; and Horder, ‘Self-Defence, Necessity and Duress: Understanding the Relationship’.

²⁴⁰ Simester and Sullivan, *Criminal law: Theory and Doctrine* at 717.

²⁴¹ Reed suggests that duress of circumstances is an excusatory form of necessity which the judges have allowed “in through the back-door by judicial sleight of hand,” see Reed, ‘The Need for a New Anglo-American Approach to Duress’ at 221.

²⁴² Immanuel Kant, *Metaphysics of Morals* (Cambridge: Cambridge University Press, 1991) at 235.

²⁴³ Horder, *Excusing Crime* at 134.

excusatory defence of duress of circumstances available in the alternative. Duress of circumstances, like duress by threats, is “granted because of the strong fear and mental pressure out of which the actor acted. In the circumstances, his will was overborne by the fear, and he did not have a fair opportunity to avoid acting as he did.”²⁴⁴ Since duress of circumstances, by analogy with duress by threats, operates as an excuse rather than a justification the defendant may be exculpated for intruding on the rights of an innocent bystander if the action was taken to avoid some grave personal sacrifice.²⁴⁵ The action continues to be deemed wrongful but the actor is not criminally responsible on the basis that the compulsion to act stems from fear which may provide the actor with sound agent-specific reasons for the violation. Therefore, where the fear is created by circumstances and the intrusion cannot be justified by necessity, it may be excused by duress of circumstances, subject to the same strict conditions which limit the scope of duress by threats.

In summary, the duress of circumstances defence is currently, in principle at least, available as a defence to all crimes other than murder so it could excuse violations of the personal and proprietary rights of innocent autonomous persons provided that the actor had good personal reasons for so acting. By excluding murder from the ambit of the excuse, a defendant is required by law to make a personal sacrifice which involves a serious set back to his/her interests. It is suggested here, therefore, that the defence should logically be extended to lethal violations of the right to life of innocent bystanders. Such expansion would enable an actor to avoid criminal responsibility for conduct which is not morally blameworthy, but fails to satisfy the requirements of a justification defence as the action itself is objectively wrongful. For instance, if an aircraft full of innocent passengers is diverted to wipe out the threat of a terrorist aircraft in order to avert a greater disaster, although the intrusion on the rights of the innocent persons on board is not justifiable, it may be

²⁴⁴ Kugler, ‘Necessity as a justification in *Re A (Children)*’ at 442.

²⁴⁵ This point is emphasised by Horder, ‘Self-Defence, Necessity and Duress: Understanding the Relationship’ at 161.

excusable if we accept that the defendant acted under extreme pressure and that any reasonable person would have acted in the same way. There may also be an excuse for the stranded sailor who violates the rights of another in circumstances which would have otherwise involved overwhelming personal sacrifice. The availability of the defence in such circumstances is sufficiently restricted by the stringent requirements equally applicable to duress by threats cases to avoid unmeritorious claims, which will be excluded by the qualifying and evaluative conditions and the good sense of the jury.

5.7 Conclusion to chapter five

English law acknowledges that sometimes one can succumb to a threat, even if compliance wrongfully sets back the interests of an unoffending, autonomous bystander, without incurring criminal responsibility in respect of that violation. It is argued in this chapter that in the absence of objectively sound reasons for deflecting the harm onto an innocent person, the only plausible rationale for a defence is located within the bounds of excuse. The criminal law is prepared to excuse the actor because their capacity to make the right choice was impaired by the pressure exerted upon them. The excuse concedes that there is a wrongful violation of an innocent person's protected interests and that the conduct is harmful; but criminal responsibility is avoided on a moral evaluation of the defendant's capacity which takes into account the subjective reasons for the violation. The excuse acknowledges that when confronted by a choice between personal surrender and violating the rights of an innocent non-threatening bystander, there is an agent-specific reason for choosing the latter option. If the actor displays an appropriate level of steadfastness, s/he will be exculpated. In cases where there is a violation of a right of minor significance to the innocent bystander, for instance a minor violation of property rights, the excuse may be underpinned by strong personal justifications for the action. In cases where more fundamental rights of personhood are violated, such as the

right to life, the personal reasons offered by the defendant are inevitably vulnerable to challenge.

Where an innocent bystander's right to life is violated the defence of duress is currently excluded, regardless of the degree of pressure faced by the defendant. As discussed above, the decision in *Howe* has prevented the extension of duress on the basis of a purported respect for the sanctity of life of innocent autonomous bystanders. This cautionary approach to the defence is perhaps understandable since arguably the most formidable challenge to the limits of criminal responsibility arises when the life of an innocent, non-threatening third party is at stake. However, an important corollary of the decision is that defendants are expected to withstand serious threats and sacrifice their own protected interests to spare the rights of another innocent person. The current law unreasonably demands heroism by maintaining that anyone who succumbs to a threat by encroaching on the domain of an innocent autonomous person will be criminally responsible, despite the absence of moral blameworthiness. The decision in *Howe*, which arguably consists of a superficial examination of the principles underpinning duress with no clear grounding in either policy or principle,²⁴⁶ has severely inhibited the appropriate development of the duress defence. It is submitted here that the unrealistic demands of the decision, which have permeated English criminal law ever since, should now be abandoned.

Although the restriction on the availability of the defence in *Howe* is unsustainable, the defence is underpinned by numerous other conditions relating to, for instance, the immediacy and seriousness of the threat and the reasonableness of the defendant's belief and response. This strict set of limitations is defensible as a mechanism for weeding out fallacious claims in which more could reasonably have been expected of a defendant. In this moral evaluation of the defendant's conduct certain characteristics which affect the capacity to withstand threats may be

²⁴⁶ Similar comments are made by Walters, 'Murder Under Duress and Judicial Decision-Making in the House of Lords' at 62.

considered, but otherwise the defendant is, rightly, held to the standard of the reasonable person. If the test was subjectivised further it would enable defendants to set their own standards of behaviour as a measure; and that would set no meaningful yardstick at all.

It is suggested above that there is little scope to extend the necessity justification to intrusions on the rights of innocent bystanders where the threat occurs naturally, since the defence demands that there are good objective reasons for conduct. Necessity only provides a justification in the narrow circumstances explained in chapters three and four; that is, where an actor intrudes on the rights of an incapacitated person in their best interests; or where there is some compulsion to act created by a one-off crisis in which the innocent person's interests cannot be honoured. If an innocent person's rights *can* be honoured, however, there is little scope for a necessity defence in the form defended here. Alternatively, appeal may be made to the duress of circumstances defence which parallels the traditional version of duress and which would effectively excuse an actor who intrudes on the rights of an innocent bystander even in the absence of good moral reasons for acting. As long as the defendant can offer sound *personal* reasons for the violation, and their conduct satisfies an objective moral evaluation, criminal responsibility for the violation may be excused. By allowing both duress by threats and duress of circumstances to excuse violations of the personal and proprietary rights of an autonomous non-threatening person, the criminal law acknowledges the overwhelming coercion faced by the accused, whilst maintaining the wrongfulness of the response. As long as the defence continues to be limited by strict rules which demand a certain degree of steadfastness, there is little chance of it being used to excuse undeserving rights violations even if the defence was extended to murder.

Chapter Six:

Conclusion

6.1 Introduction to chapter six

The overarching aim of this thesis, as outlined in chapter one, was to explore the boundaries of criminal responsibility for intentional infringements of the legally protected interests of innocent persons, where the defendant acted in circumstances of self-defence, necessity or duress. The scope of these defences was challenged with reference to intrusions on the rights of specific categories of innocent persons: first, innocent incompetent patients; next, innocent persons who pose a threat, unjust or incidental, to the interests of the defendant; and finally, innocent non-threatening bystanders caught up in a conflict of interests created by another human agent or by circumstances. It was suggested that in English law the precise scope of liability for deliberate setbacks to the interests of innocent persons is unclear and an attempt was made to provide a more consistent set of principles to govern the limits of criminal responsibility in this difficult area. This final section offers a synopsis of the findings of each chapter and concludes with some final remarks on the scope of criminal responsibility for intrusions on the rights of innocent persons.

6.2 Principles of criminalisation

It was established at the outset of the thesis that no meaningful decisions could be made regarding the criminality of actors who encroach on the rights and protected interests of innocent parties without reference to the broader moral limits of the criminal law. A general theme underpinning this thesis is the paramount importance of individual autonomy and human rights and in chapter two a commitment was made to a liberal

philosophy to guide the subsequent analysis. It was submitted that in a liberal society which promotes the primacy of individual autonomy and dictates minimal state interference, citizens should be free to make their own choices, wise or foolish. However, it was also conceded that autonomy cannot be boundless and that the criminal justice system may intervene to prohibit conduct which causes harm to others. It was suggested that criminal liability should not be imposed on an individual for immoral conduct or for acting in a way which the state views as detrimental to the individual's own welfare interests as these reasons are not, *per se*, sufficient to justify criminal law intervention. Moralistic and paternalistic approaches to criminalisation were, therefore, considered briefly and rejected as governing principles since they have the potential to significantly undermine individual autonomy.

It was also established in chapter two that criminal responsibility should be reserved for those who cause harm to others and Feinberg's influential analysis of harm was considered. It was contended that, on this analysis, only conduct which wrongfully sets back or violates the rights of another autonomous person should be construed as harmful (and thus criminal) behaviour. It was suggested that the harm principle leaves considerable latitude for the operation of criminal law defences and that conduct which encroaches on the rights of another person is not harmful if the infringement can be justified or excused. Justification defences leave the prohibitory norm intact as there is no objectively wrongful setback to the interests of another. Excuse defences also affect criminal responsibility, as they dictate that although an actor wrongfully violates the rights of another, they will not be held liable for their conduct. This is compatible with the harm principle which suggests that not all wrongful harm should necessarily be criminalised. It was contended that the seriousness of the harm should be weighed against the blameworthiness of the defendant and the consequences of criminalisation. Thus, the liberal philosophy and the harm principle provided a useful framework for the analysis of the role played by the defences of self-defence, necessity and duress in exculpating defendants of criminal liability.

6.3 Intruding on the rights of innocent persons in their 'best interests'

Criminal responsibility for intrusions on the rights of innocent persons in their best interests was considered in chapter three. It was argued at the outset that any encroachment on the rights of an autonomous individual who is non-threatening and competent will, on the harm principle articulated in chapter two, constitute a wrongful violation of rights. Each competent individual is the guardian of their own body and any intrusion upon it without consent will constitute a criminal offence. However, it was acknowledged that in medical cases the necessity principle is relatively well established to exculpate a doctor who administers medical treatment to an incompetent patient, where that intervention would otherwise constitute a very serious intrusion.

Necessity was located in the broader theory of criminal defences in which justifications for action are distinguished from excuses. This classification was adopted in chapter two as a convenient scheme for analysing the defences under consideration, and the potential ramifications of the distinction were addressed. Necessity was classified as a strong justification for interfering with the rights of an innocent incompetent person, provided the intrusion is necessary to secure the best interests of the patient. It was further contended that the defence operates as a rights-based justification for action taken as a matter of necessity to preserve the life, health or well being of another who is unable to give valid consent. Provided the defendant acts to vindicate a superior right (or best interest) of the patient they will avoid criminal responsibility on the basis that their action did not cause a wrongful setback to interests and was consequently not harmful. The evaluation of best interests has been the source of much controversy, with very broad considerations beyond the physical health of the patient being weighed in the balance. The potential for the best interests test to be influenced by paternalistic motivations was noted with reference to some particularly troubling cases involving organ donation, non-therapeutic sterilisation and detention. It

was argued that in order for cases involving a best interests evaluation to remain free from human rights challenges, a more careful consideration of the concrete rights of the innocent person is required. It was suggested that the courtroom is the most appropriate forum in which the hierarchy of rights should be deliberated in a more principled and consistent manner.

6.4 Intruding on the rights of innocent threats

The scope of criminal responsibility for intruding on the rights of innocent unjust threats was considered in chapter four. It was argued that if an innocent person poses an unjust threat to the protected interests of the actor, that threat can be justifiably repelled or warded off by encroaching on the (otherwise) protected domain of the threatening person. The innocent threats considered fell into two distinct categories: *innocent unjust threats* and *innocent incidental threats*.

The first category accommodates morally innocent but *active unjust threats*, such as the insane, the automaton, the child and the mistaken attacker. It also comprises unoffending *passive unjust threats*, such as the dangling mountaineer who directly threatens the interests of the defendant but is not positively aggressing at all. It was submitted that the defendant has a legal permission to exercise self-defensive force to protect their own interests or those of another, whether the threat is culpable or innocent, active or passive. Self-defence was categorised as a justificatory defence on account of the fact that the threat to the defendant's interests is objectively *unjust*, providing the actor with a good agent-neutral reason for forcibly warding off the threat. In searching for a defensible philosophical explanation of the self-defence justification it was observed that many accounts are too restrictive. Numerous theories, including those appealing to consequentialist principles, the personal partiality of the actor and the doctrine of double effect, were considered and rejected for arbitrarily limiting the defence to either culpable threats or

culpable and innocent active threats. A rights-based philosophy was defended as the most plausible account, since it permits the use of defensive force to be used against innocent passive threats, as well as culpable and innocent active threats. The permission derives its justificatory force from the fact that any unjust threat, culpable or innocent, active or passive, forfeits their rights for the duration of the threat. The defendant has a legal permission to intrude on the protected domain of the aggressor to secure her/his own autonomy and the conduct cannot be construed as harmful since there is no wrongful setback to the interests of the threatening person. Despite the defence having a broad philosophical base, it was acknowledged that in order to benefit from it a number of stringent conditions must be fulfilled. The use of force in self-defence is limited by a broad, flexible test of reasonableness which, in the interests of justice, incorporates considerations of necessity and proportionality, and the scope of these conditions was considered in some detail.

Also considered in chapter four was the scope of criminal responsibility where an actor encroaches on the protected domain of an *innocent incidental (contingent) threat*. This category of innocent person is not the direct source of a threat but exposes a threat to themselves and others. Examples included the frozen man on the ladder blocking the route to safety of his fellow passengers. An intrusion on the rights of the innocent contingent threat is intuitively beyond the scope of criminalisation as it does not cause a wrongful setback to the interests of the innocent person. However, it was established that the self-defence justification is inapplicable since the innocent person is not, in themselves, a direct unjust threat to the defendant's interests. Alternatively, it was proposed that the necessity justification may exonerate the actor if, all things considered, there is an overriding reason, a strong justification, for the infringement. The moral imperative to act derives from the fact that the interests of the innocent person could not be honoured since they were not only exposing the threat to others, but also to themselves. For instance, the frozen man on the ladder was destined to die whatever the

actor did so there was an overriding reason to encroach on his autonomy. Had the man been perched sufficiently high on the ladder that his life would have been saved, the necessity principle could not justify the interference with his protected interests. So it was suggested that the necessity justification could, in principle, even be a defence to intentional killing in these carefully limited circumstances.

6.5 Intruding on the rights of innocent bystanders

The scope of criminal responsibility for intrusions on the rights of innocent bystanders was considered in chapter five. A defendant may claim they are not criminally responsible for intruding on the personal or proprietary rights of an innocent bystander when they are faced with a threat of death or serious bodily harm to themselves or someone with whom they are connected. Where the threats emanate from a human agent, it was established that the deflection of the harm onto an innocent bystander could not be justified, even where the harm caused was far less than that threatened, as there is no objectively justified reason for the action. Instead, it was established that the presence of duress provides an excusatory defence which concedes that the shifting of harm onto an innocent bystander is wrongful, but allows the personal reasons of the actor to be evaluated. The provision of an excuse suggests that we do not blame the actor because they lacked a fair opportunity to resist the criminal intrusion on account of the serious threats endured. The exclusion of the duress defence to intentional killing was criticised as too demanding and based on insubstantial arguments, and it was proposed that the duress excuse should logically be extended to murder charges. Mindful that caution must be exercised to protect the autonomy of the innocent bystander, it was established that the defence is restricted by appropriately rigorous qualifying and evaluative conditions. Significantly, the threats must be of immediate harm and perhaps most importantly the defendant must have reasonably believed in the existence of the threatening circumstances and must have responded as a reasonable

person would in the circumstances. Although some characteristics of the accused may be considered when evaluating the reasonableness of the response, the defendant is held to an objective standard so the potential for unmeritorious claims is minimal.

Chapter five also assessed the scope of criminal responsibility for intrusions on the interests of innocent autonomous bystanders where threats arise from circumstances. It was argued that the necessity defence could not justify such violations because any serious setback to an innocent non-threatening competent individual's interests would be wrongful, in accordance with liberal principles which fiercely guard autonomy. Necessity will only operate as a residual defence in the carefully defined circumstances described in chapters three and four: where infringements are in the best interests of an innocent incompetent person; and where an innocent person's interests cannot be honoured regardless of the defendant's action. If, however, the circumstances dictate that any reasonable person would have been compelled to protect their own autonomy (or that of another person) by violating the rights of an unoffending person, the actor may still avoid criminal responsibility for the intrusion. Duress of circumstances, an excusatory defence governed by the strict rules dictating duress, could exculpate an accountable agent who committed an unjustified offence under extraordinarily coercive circumstances. Subject to the fulfilment of the limiting conditions, such a defendant would not merit conviction or punishment.

6.6 Criminal responsibility for intrusions on the rights of innocent persons

An exhaustive analysis of the scope of criminal liability for intrusions on the rights of innocent persons has been undertaken. It is hoped that the thesis illuminates some guiding principles regarding the scope of the related defences of self-defence, necessity and duress which show appropriate respect for the individual autonomy of both defendant and

victim. Individuals should be free to define their lives, subject to criminal laws that prohibit conduct which is harmful and causes wrongful setbacks to the interests of others. However, there may sometimes be morally relevant reasons for blame and punishment to be avoided. It is hoped that this thesis has identified which reasons are, and which are not, sufficient to avoid the attribution of blame for infringing the rights of innocent persons. To summarise, criminal responsibility may be justifiably avoided for intrusions on the rights of innocent incompetent persons in their best interests, innocent unjust threats (active and passive) and innocent incidental threats where the rights of the individual cannot be honoured regardless of the defendant's action. Irrespective of the degree of coercion, legal permission is not extended to interference with the rights of innocent autonomous persons who are competent and non-threatening. However, criminal responsibility for such intrusion may still be avoided if the pressure bearing down on the defendant is so great that any reasonable person would have acted likewise.

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