Over the past 50 years there have been momentous changes to the substantive criminal law and ways of thinking about the criminal law. One of the organising principles over the latter half of this period has been the distinction between justification and excuse.\(^1\) A significant development over this same period has been the emergence of a new defence of "duress of circumstances". While the contours of this defence have been largely linked to those of duress by threats, it has long been conceded that this is in reality a defence of necessity.\(^2\) Over the years the terminology has become bolder with the judgment in *Shayler* stating that "duress of circumstances" and "necessity" are "simply different labels for the same thing".\(^3\) Indeed, few now doubt that, in extreme circumstances, a defence of necessity could be utilised in English law. For example, Professor Sir John Smith, who in most editions of *Smith and Hogan* stated that there was no general defence of necessity in English law, was able to conclude in the final edition for which he was responsible, that necessity can be used as a general defence. He cited the example of the destruction of the World Trade Centre by hijacked aircraft stating that it would be lawful to shoot down the plane, killing all the innocent passengers and crew if this were the only way to prevent a much greater impending disaster: in such a scenario necessity would be a defence to murder.\(^4\)

However, alongside these developments has been an increasing realisation that clear demarcation between these defences is highly problematic and, further, distinguishing them from the defence of self-defence was equally difficult. For example, in *Symonds*\(^5\) it was held that whether a defendant pleaded self-defence or

\(^1\) This has been particularly true since the publication of George Fletcher's *Rethinking Criminal Law* (Little, Brown & Co, Boston) in 1978.

\(^2\) In one of the earliest cases on duress of circumstances, *Martin* (1989) 88 Cr.App.R.343 it was stated that: "English law does, in extreme circumstances, recognise a defence of necessity... [that] can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances'.”

\(^3\) [2001] 1 W.L.R. 2206.


duress of circumstances did not “affect the substance of the case”. In *Re A (Conjoined Twins: Surgical Operation)*⁶ part of Ward L.J.’s analysis was in terms of self-defence while Brooke L.J. treated the issue as one of necessity. In this same case Robert Walker L.J. referred to the three “category[es] of necessity”: duress by threats, duress of circumstances and self-defence. This approach was reinforced in *Saji*⁷ where duress by threats, duress of circumstances, “self defence and public and private defence” are all described as being “probably instances of the potentially wider defence of necessity”.

This article will argue that these quoted views could suggest a way forward for the future development of the law. If these defences could indeed be regarded simply as sub-species of a broader necessity defence, it might be possible to collapse the distinctions between them and introduce a new single defence: necessary action. As will be explained when the proposed new defence is outlined later in this article, this could have significant advantages in removing certain anomalies that presently exist largely because of current classifications. Further, it would resolve the controversy over the extent to which necessity can be utilised as a defence and its relationship to duress of circumstances. Ultimately, whether a defence should be afforded involves a judgment about the culpability of a defendant that in this context means an assessment of the reasons for acting. If defendants under extreme pressure, whether because of an attack, threats or circumstances, are in reality acting for the same reasons and under the same level of pressure, the case for collapsing the present defences into a single broader defence becomes strong.

**Justification and excuse**

A major problem with the above quotations and any attempt at a single defence is that it is generally thought that the existing defences do not share a common rationale. The usual approach is to regard duress by threats and duress of circumstances as excusatory defences while necessity (to the extent that this might differ from duress of circumstances) and self-defence are justificatory defences. Acceptance of such a classification would have important consequences for the development of the rules governing each defence and any attempt at a unified single offence would be doomed. However, in *Re A (Conjoined Twins: Surgical Operation)* Robert Walker L.J. dismissed this orthodoxy in a peremptory manner stating that: “I do not think it matters whether these defences are regarded as justifications or excuses”.⁸ Accordingly, a critical question is whether the excuse/justification distinction does indeed provide the key to distinguishing the defences so as to help shape the contours of the specific rules for each defence.

In essence, the distinction between justification and excuse is as follows: actors are excused; acts are justified. Excused conduct is wrong but because of the excusing condition we can understand the predicament of the person who commits a wrongful act and can conclude that a judgment of blameworthiness is inappropriate. Justification, on the other hand, involves an assessment of the value of the

⁷ [2003] EWCA Crim. 1809.
⁸ As Finkelstein (“Excuses and Dispositions in Criminal Law” (2002) 6 Buffalo Criminal Law Review 3177) puts it: these defences appear to hover between justifications and excuses.
conduct. Such conduct can be beneficial in the sense of promoting a greater good.

There are, however, major problems with the excuse/justification distinction in its application to the defences under consideration. The assertion that the focus is different (on actors for excuses, on actions for justifications) is ultimately an obfuscation of the issue. Let us first consider excuses. There are several rationales explaining why excuses should exempt defendants from liability. Some theorists claim that a defendant's actions in such circumstances are “out of character” and therefore no manifestation of their normal character. Others argue that the defendant actually lived up to our expectations in showing as much resilience as could be expected of ordinary people in the circumstances. Such views have found little favour with the judiciary who consistently articulate the view that the excused actor had no real choice because her actions were morally involuntary. Applying this to duress by threats and circumstances it is commonly stated that we can understand the “appalling plight” of a person faced with threats of death or grievous bodily harm unless they commit a lesser crime. Such a defendant’s actions are morally involuntary in that they “had no ‘real’ choice but to commit the offence”. The defence is a “concession to human frailty”.

This judicially endorsed claim is ultimately unhelpful in understanding the essence of excuses and their relationship to justifications. First, acceptance of such a view would have serious implications for the shape of the law relating to, say, duress. A focus on moral involuntariness would need to be entirely subjective. We would need to excuse the coward who gave in instantly to a minor threat. Given his psychological makeup, he would have had no “real choice” but to give in to the threat. The well-established requirements for duress as a defence (e.g. threat of death or grievous bodily harm, discounting certain characteristics, reasonable steadfastness) could have no place in a completely subjectively oriented defence where the only concern was whether the defendant’s actions were “morally involuntary”. Despite repeated references to this notion of moral involuntariness in the literature and in leading dicta, it is clear that such a requirement does not form part of English law and nor should it. In many of the leading duress by threats cases where the defendant was coerced into committing robbery or burglary and duress of circumstances cases where the defendants hijacked an aeroplane, the defendants were hardly acting instinctively and were certainly not in “some form of

10 J. Gardner, ibid.
12 Ruzic (2001) S.C.C. 24 (Supreme Court of Canada).
14 It is possible that such an approach could be acceptable when dealing with partial defences, as the increasing subjectivisation of the law of provocation demonstrates.
17 Abdul-Hussain [1999] Crim.L.R. 570; Safi [2003] E.W.C.A. Crim. 1809. In this latter case it was stated that references to the defendant’s will being overborne could be helpful in some cases “whereas in other cases it would be inappropriate”.

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disturbed condition at the time." They were seemingly acting rationally and exercising choices, albeit subject to great pressure. If a defendant were threatened with death unless she steals a book it would make no difference whether the theft was committed while she was in an extreme state of panic or whether she was acting perfectly calmly. The true test in all these cases is whether the defendant committed the crime because of pressure or danger.

Secondly, this rhetoric of "moral involuntariness" provides no basis for distinguishing excuse from justification. Paradigmatic justificatory actions, such as in self-defence, can be equally described as "morally involuntary"—in this loose sense of being pressurised. A person acting in self-defence when faced with a violent attack has as much or as little opportunity to make free choices as one acting under duress. Equally, in necessity situations the person shooting down the hijacked plane in the World Trade Centre scenario is subject to pressures just as great (or greater) as those acting under duress or in self-defence. In all these cases there is a threat to the autonomy interests of the defendant or others, which enables us to accept the defendant's reasons for acting. Viewed in this way one can similarly accept that doctors who act in situations of medical necessity, such as the doctors who sought to end the life of one of the conjoined twins in Re A (Conjoined Twins: Surgical Operation), are, because of their role and their Hippocratic oath, under pressure to act to save life.

Finally, the traditional assertion that the focus for excuses is on the actor and for justification is on the actions is unhelpful in that it implies that the focus for excuses is only on the actor, which is incorrect. One does not excuse actors in a vacuum. One excuses them for what they have done. A threat to kill a defendant enables us to understand and not blame her for the commission of certain crimes but would not lead to the same judgment if the identical threat caused her to blow up an aeroplane killing many people. The truth is that the focus in all such cases is on both the actor and the actions. Given the threat faced by the defendant the issue is whether we can forgive the "personal sacrifice" that the defendant has been forced to make in committing the particular actions.

With justifications, on the other hand, the traditional focus has been on the actions and their value. For example, most analyses of self-defence invoke forfeiture theory. An aggressor, by initiating the attack, forfeits certain rights; the interests of the person attacked are greater than those of the culpable attacker and so defensive action is legally permitted. It used to be thought that justified conduct involved conduct that could be regarded, in the circumstances, as positively "right" or "good": "the actor has done something that society approves of". It was perhaps because of this view that English courts were unwilling to allow necessity as a defence to killing in Dudley and Stephens. It is clear from some of the dicta in this case that Lord Coleridge felt he was dealing with a justificatory defence and, of

22 (1884) 14 Q.B.D. 273.
23 e.g. the view that necessity would alter the "legal definition of the crime" is a common statement when describing a justificatory defence.
course, it could never have been a "right" or "good" thing to have killed the cabinboy.24

However, the more modern view is that justified conduct is not necessarily "right" or "good", but rather it is permissible in the circumstances25; it is "at least tolerated"26 in that the defendant is regarded as having a right to protect or promote recognised values or interests. A judgment is made that the actor has a "sufficient reason to perform the unlawful act".27 For example, if a defendant uses defensive force on a young child about to fire a gun at her, such injury or death to the child is not right or good—but it is permissible in the circumstances. Such an approach involves a shift in focus to the actor's perspective. From that viewpoint, there is an "unjust threat"28; the defendant's right to autonomy has been violated; "self-preference",29 in the form of self-defence, is permitted. With all such claims one not only assesses the actions (was it reasonable to kill in self-defence?) but one also evaluates the predicament of the defendant in terms of the pressure being faced and the bearing that has on her blameworthiness. This can include taking account of the fact that the other party initiated the attack and can also involve taking some of the defendant's characteristics into account30 in assessing whether she should have stood her ground and killed. In such cases, as with excuses, the focus is on the actor and their reasons for acting as much as on the actions themselves: were their actions a response to pressure and/or danger? Did the defendant have sufficient reason to perform the unlawful act?

Once it is accepted that the focus for both justification and excuse is on both the actor and the actions, the distinction between justification and excuse becomes blurred. In reality there is a continuum of pressurised conduct with it being impossible to distinguish clearly between understanding the predicament of the actor who, in the situation, lives up to our expectations and "the standards to which our characters should minimally conform"31 (excuse) and "tolerating" or "permitting" the actions because there were sufficient reasons to perform them (justification). It becomes a question of judgment as to when understandable reasons become sufficient reasons. If a defendant is threatened with death unless she steals a book (currently duress, an excuse), it seems inappropriate to assert that we merely understand her plight. Given the enormity of that threat, there are surely sufficient reasons to justify this theft. On a utilitarian calculus of balancing competing interests there is a net benefit to society (a classic justificatory claim) in that the theft of a book has resulted in the saving of a life.

When the law exculpates a defendant by allowing one of the defences under discussion, that law effectively "endorses the content of the reasons on which they

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24 It can be argued that this thinking also underlay the decision in Heteric [1987] 1 A.C. 417 that duress is not a defence to murder. Lord Mackay seemed to treat duress as a justificatory defence that would involve the defendant having a "right" to commit a crime.
28 J. Horder n.19.
31 J. Gardner, n.9.
act"32 and exempts the defendant from liability for what he did. One can only judge whether he "lived up to our expectations" or had "sufficient reasons" to perform the wrongful action by focussing on both the actor and the wrongful action. Such an examination necessarily involves (or, at least, should involve) a consideration of the broader picture. The focus for the defences under discussion should be on the actual situation or context within which the wrong was committed. Assessing this context/situation necessarily includes taking account of the actor's perspective (their particular situation, characteristics, and reasons for acting and so on). Only in the light of this whole picture can moral claims for a defence be assessed. The factors that should shape the strength of such claims will be discussed shortly. The point being made here is that, in agreement with Robert Walker L.J., classifying the conduct as excused or justified takes one no further in shaping the precise contours of the defences.

However, even if one were to accept the above argument that the justification/excuse classification does not provide an adequate theoretical basis for distinguishing the defences under discussion, there remains the argument that such a distinction is still necessary because certain consequences flow from it. While there are several (perhaps speculative) reasons for distinguishing justification from excuse generally,33 the most commonly cited ones and certainly the ones most relevant to the defences under discussion are as follows. A victim is permitted to defend herself against an excused attack but not a justified attack. For example, if a defendant is threatened with death unless she steals my book, I am permitted to use reasonable force to protect my property. On the other hand, it is claimed that I may not resist or defend my interests against a justified attack. For example, "the owner of a field should not be allowed to resist one who would burn it to stop a spreading fire".34 Further, it is claimed that one may assist a person's justified conduct (e.g. others may help the defendant in burning my field) but one may not assist excused conduct (others may not help the defendant to steal my book).35

This analysis, which presupposes a clear distinction between justified and excused conduct, is, however, problematic. Take for example, the much-discussed situation that arose during the sinking of the Herald of Free Enterprise. Passengers were climbing a ladder to safety. One of them was so petrified that he "froze" on the ladder blocking the exit-route of the others. He could not be persuaded to move so he was pushed from the ladder and died.36 When the other passengers were trying to throw the man from the ladder, would he be permitted to defend himself? The above orthodoxy would result in the following conclusion. If the actions of the other passengers were regarded as excused (duress of circumstances) he could defend himself. If their actions were regarded as justified (necessity or self-defence) he could not. Such a conclusion is patently unacceptable. Whether the actions of the passengers can be categorised as being understandable/forgivable (excuse) or as a

35 J. C. Smith, n.21, p.8.
36 The Times, June 13, 1988, discussed in Re A (Conjoined Twins: Surgical Operation) [2001] Fam. 147.
net benefit/tolerated/done for good reasons (justification) should not affect the moral status of the man on the ladder. By not being culpable in any way, he is an innocent and like the innocent victim who is attacked by a defendant acting under duress he may protect his own autonomy interests by defending himself. One needs to separate the two perspectives. From the passengers’ perspective, his presence on the ladder poses an unjust threat—like an attack by an innocent—and so from their perspective necessary force may be used. However from the man on the ladder’s perspective, he is faced with what he regards as an unjust threat and may defend himself. A possible objection to this approach is that if A has a right to kill B, B cannot have a right to kill A as this would amount to anarchy. For this reason, notions of “rights” here are inappropriate. The law is permitting—in the sense of forgiving or regarding as having acceptable reasons—the passengers to eject him from the ladder. The judgment is about their normative position and the moral quality of their actions. Assuming their beliefs and actions were reasonable (of which more later), the judgment with regard to them should not be affected by the normative position or moral status of the man on the ladder. Equally, from his perspective, judgments about his ability to defend himself should not be determined by the normative position of the passengers.

Let us assume, alternatively that the man on the ladder was not petrified and unaware of the implications of his actions, but was deliberately blocking the passengers’ exit-route because, say, he was the moral equivalent of a “suicide-bomber” and wanted to kill all the passengers and was prepared to die himself to achieve that objective. In this latter scenario, nothing has actually changed from the passengers’ perspective; the man on the ladder is posing the same unjust threat and necessary action is permitted. However, from the ladder-man’s perspective much has changed. His normative position is radically different. He is effectively attacking the passengers. He is now not permitted to defend himself: not because their actions are “justified” but because any defensive action on his part would simply be regarded as further action in pursuance of his original “attack”. Moving to a more mundane example of street fighting, this explains why the aggressor who attacks a person who then responds with reasonable self-defensive force will not be legally permitted to defend himself. It has nothing to do with whether the response is justified or excused. It is simply that any defensive action by the initial aggressor will be regarded as part and parcel of the initial attack.

The other supposedly important practical consequence of the distinction between justification and excuse is that one may lawfully assist justified conduct but one cannot assist excused conduct. Such an approach can no longer be regarded as tenable. In Martin, one of the leading duress of circumstances (excuse) cases, the defendant drove a car whilst disqualified because his wife threatened to commit suicide unless the defendant drove her son to work. Suppose the defendant had no car and his neighbour, appraised of all the relevant facts including the defendant’s disqualification, lent him a car (a classic example of aiding and abetting). Whether one regards the defendant’s defence as one of duress of circumstances (an excuse) or necessity (a justification) does not alter the moral or legal position of the defence.

37 The position would be different, of course, if the person attacked responded excessively. Defensive action by the initial aggressor would now be permitted because this new defensive action would not be part of the original attack, but would be a fresh response to the excessive force being used by the original victim of the attack.

neighbour. Apart from the absence of a *nexus* between the neighbour and the defendant's wife (which cannot be material: one may be afforded a defence of duress or self-defence when acting to avert a threat to "some other person"), the neighbour is acting for the same reasons as the defendant and would almost certainly be exempted from liability irrespective of whether the defendant's conduct was regarded as excused or justified.

Viewing any scenario in this way—from each actor's perspective—renders the highly complex moral arguments relating to justification/excuse redundant in relation to the defences under discussion and enables the criminal law to focus on the essential question of whether the defendant's actions were, in the circumstances, culpable and deserving of condemnation and punishment.

**Necessary action: the proportionality principle**

If the justification/excuse distinction is not adequate as an organising principle separating the defences, the comments cited at the beginning of this article begin to look more sustainable. However, if they are all species of a broader genus relating to necessary action, what is their uniting theme or common underlying rationale?

At first sight, particularly if viewed from the normative position of the defendant, it might seem that there are important differences between the defences. In the paradigmatic instances of duress by threats the defendant is giving in to, and complying with, threats whereas with self-defence the defendant is warding off a threat posed by a situation. However, what unites these actions is more important than what separates them. In all of them a defendant is committing a *prima facie* wrong to avoid some sort of crisis. To protect herself and/or other persons the defendant is committing what would otherwise be a crime and the true issue is how the law should respond to these actions and in what circumstances it should afford a defence. It is probably safe to generalise that the true issue with general defences is the ascertainment of culpability. Is the defendant to be adjudged culpable for what she did? In making this judgment the law has long, and rightly, been driven by the overarching requirement that all "necessary responses" be reasonable and proportionate. Such a proportionality requirement is intrinsic to the law's function "which is the advancement of collective interests". The principle of welfare or community requires the minimisation of overall harm. It follows that the law should only recognise a reasonable and proportionate response as good enough reasons for the action to exempt the defendant from liability. When an actor acts reasonably and proportionately to avert a danger or disaster, a judgment of culpability and legal condemnation is inappropriate.

Of course, an assessment whether a response is reasonable and proportionate must incorporate society's moral and political judgments about what sort of

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39 *Conway* [1988] 3 All E.R. 1025; *Martin* [1989] 1 All E.R. 652. In *Shayler* [2001] 1 W.L.R. 2206, a duress of circumstances case, it was stated that the defendant may act to protect persons for whom he "reasonably regards himself as being responsible" provided they can be identified in a general way: the wife in *Martin* would qualify as someone who can be so identified.


41 J. Horder, n.19.

42 W. Wilson, n.40, p.299.

43 A. Ashworth, n.18, p.153.
emergencies or threats can be averted. For example, in our present society it would not be regarded as politically acceptable (and so it would be unreasonable) for a hungry person to steal food from a shop whereas it could (depending on the circumstances) be regarded as acceptable and reasonable for a starving person on a lifeboat at sea to steal food from another. All such judgments are context-dependent. What is important in distinguishing the thefts in the above example is not only the degree of the present emergency (the person stealing the food from the shop could be on his “last legs”), but the broader context: the possibility of getting food from other legitimate sources such as shelters for the homeless; the “one-off” nature of the emergency in the lifeboat where tolerating the theft would not have the same social implications as allowing the hungry to steal from shops and so on. The context can also be affected by the role of the person involved. For example, members of the police force and the armed services could have the reasonableness and proportionality of their actions judged by standards different to those of other people. Because of their training and experience we could insist on a higher standard of reasonableness and proportionality in any response to an emergency. The same is true of medical personnel. Their training and their clinical obligations to their patients, coupled with the fact that in certain cases doctors have an opportunity to seek declarations of legality from courts in difficult cases should strongly influence judgments of reasonableness and proportionality.

Applying the proportionality principle to necessary action

If one were to apply the principle of reasonableness and proportionality to the territory presently covered by the defences under discussion and embrace them all within the scope of a single defence of necessary action, in some respects the law would not look that different. However, collapsing them all into a single defence would result in some significant changes to the current law as is demonstrated by the following outline of how a new general defence would operate.

Proportionality

Central to the new broad defence would be the over-arching requirement that the force used be proportionate to the danger faced. This is already explicit in the law of self-defence where one may use reasonable and proportionate force to protect oneself against any unjust threat whether the threat be to one’s physical integrity or property. Further, assuming the proportionality test is met, self-defence is a defence to all crimes, including murder. To the extent that necessity exists as a defence it is again driven by the requirements of proportionality and it can be argued that, within tightly defined circumstances, necessity could also be a defence to murder.

A limited form of proportionality is also implicit in the present law on duress in that the defence is only available to one threatened with death or grievous bodily harm and the crime committed must be one other than murder, attempted murder and treason. Under the proposed new defence application of the principle of reasonableness and proportionality would mean that any threat could suffice in all

44 W. Wilson, n.40, p.299
45 Clarkson & Keating, n.33, p.362.
46 This rule is clearly linked to the notion that duress is an excuse involving actions that are “morally involuntary”.
cases of necessary action. For example, even minor threats to the person or property could suffice because the focus would be shifted to the reasonableness and proportionality of the response to that threat. It would also mean that the new defence would be available to any crime, including murder. For example, if a terrorist threatened the defendant that she would detonate a bomb destroying the Houses of Parliament and killing everyone in them unless the defendant shot and killed a politician walking nearby, there would be no defence of duress under the present law but under the new defence such a killing would be regarded as reasonable and proportionate (if the other conditions to be discussed were satisfied). Such an outcome would be widely supported.48

Of course, as already argued, any assessment of reasonableness and proportionality must take into account all the circumstances. Such judgments will include an assessment of the moral status of the victim. For example, killing an aggressor to save one’s own life could well satisfy the test of reasonableness and proportionality while killing an innocent under duress would not. In duress situations where an innocent is killed, it is only likely to be in clear-cut, extreme cases, such as the above Houses of Parliament example, that the new defence would be available.

**Imminence of threat**

Under the present law on duress by threats and circumstances, the older requirement that there be an immediate threat with no “safe avenue of escape”49 has been relaxed somewhat so that there now need only be an imminent threat in the sense of “impending threateningly, hanging over one’s head”50. This allows all the circumstances of the peril (the immediacy of the threat, the strength of the threat, the opportunities to avoid the threat) to be taken into account. With self-defence the central test is whether the use of force was reasonable. There is no “duty to retreat” but a failure to retreat is one of the factors to be taken into account in determining the reasonableness of the defendant’s conduct.51 With necessity (to the extent that this exists in present English law beyond the bounds of duress of circumstances) it was stated in ReA (Conjoined Twins: Surgical Operation) that the principle is “one of necessity, not emergency”.

Under the proposed new broad defence of necessary action, the imminence of the threat would simply become one aspect of the reasonableness and proportionality requirement. This would, in practical terms, involve no change to the present law where, with all the current specific defences, the true issue is the reasonableness of the response in the circumstances. However, a move away from the language of immediacy and a more open recognition that reasonableness and proportionality is context-dependent could have important implications in cases where battered women kill or injure their abusive partners. In many of these cases, where the woman has resorted to pre-emptive action,52 the imminence requirement has foreclosed any possibility of a successful plea of self-defence. Under the proposed

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48 This has long been the view of the Law Commission: see Law Commission, Partial Defences to Murder, Consultation Paper No.173 (Summary) (2003), p.47, n.103.
51 See Nourse, “Self-Defence and Subjectivity” (2001) 68 U.Chi.L.Rev.1235 who argues that the imminence requirement in many jurisdictions operates as a disguised duty to retreat rule.

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new broad defence this issue would become rephrased: given her situation, was it reasonable for her to take pre-emptive action and, given that situation, was the force used proportionate to the "danger"—with "danger" being given a broader time-frame than under the present law.

Mistaken belief

Until fairly recently the law adopted the view that in self-defence cases the defendant should be judged according to the facts as she believed them to be while in duress cases there would only be a defence if the defendant reasonably believed she had been threatened with death or serious injury. This divergence in approach could be rationalised on the ground that mistake as to justification (such as self-defence) need only be honest, while mistakes as to excuses (such as duress) should have to be reasonable as well. However, in Martin (D. P.) it was ruled that an analogy should be drawn between self-defence and duress and that the Williams (Gladstone) approach should be applied in duress cases. Although it was not necessary to decide the point, the most recent duress of circumstances/necessity decision, Saji, approved the view that the defendant's belief in the threat had to be reasonable.

Under the proposed defence of necessary action a consistent approach would need to be adopted across the board. Applying the subjective approach would not necessarily be inconsistent with the above suggestions for the proposed defence as arguments about when mistakes exculpate raise different issues from those presently under consideration. Indeed, given the strong subjectivist stance currently adopted by the House of Lords, this would be the approach likely to be adopted. However, although not central to the argument in this article, it can be strongly suggested that the more objective Graham approach should be adopted here. This need not be inconsistent with current House of Lords thinking. All their recent decisions have concerned mistakes as to actus reus elements. None of the defendants thought they were committing the charged crime. For example, when one has sex with a girl one believes is over the age of 16, as in K, one does not think one is doing anything wrong. However, with defences the defendant knows that he is causing a harm (say, injuring someone or committing a robbery). In such cases extra caution is required: the belief in the need for necessary action should have to be reasonable. In assessing the reasonableness of this belief it might be necessary to take into account certain characteristics of the defendant. This matter is considered below.

55 Clarkson & Keating, n.33, p.335.
57 n.7.
59 These arguments cannot be pursued here. See Clarkson & Keating, n.33, p.306.
60 This is the reasoning adopted by the House of Lords. The present author does not subscribe to this view but this raises issues beyond the scope of this article. While accepting that there are immense difficulties with the offence/defence distinction, the only point being made here is that it is logically possible to adopt a differential approach to mens rea and to defences.
The response: steadfastness

Much has been made in leading duress cases of the requirement that the defendant display reasonable steadfastness or bravery. Under the present law, this is an odd rule. Given that, currently, duress can only be pleaded if there has been a threat of death or serious injury and that it is not a defence to murder, it is hard to imagine a situation when it would be unreasonable to give in to such a threat. In reality this steadfastness test is simply rhetoric emphasising the requirement, already discussed, that the threat must be imminent and that a failure to retreat or escape will affect judgments as to whether the use of force was reasonable in the circumstances. While the law of self-defence does not use this same rhetoric, the position is the same in that the attack must be "imminent" and a failure to retreat or display steadfastness is one of the factors to be taken into account in determining the reasonableness of the defendant's conduct. Under the proposed defence this same approach would be applied and would be subsumed under the requirement that the necessary action be reasonable in the circumstances.

In assessing whether the defendant has displayed reasonable steadfastness duress cases have permitted certain of the defendant's characteristics to be taken into account. The test is whether the threat was such that a person with reasonable firmness sharing the characteristics of the defendant would have given in to the threats. In addition to taking account of physical characteristics such as age, pregnancy and serious physical disability, these cases have also permitted recognised mental illness or psychiatric conditions to be admitted as evidence of greater susceptibility to pressure and threats. Self-defence cases have been more cautious in this regard. In deciding whether excessive force has been used it was ruled in Martin that physical characteristics could be taken into account but that it was not appropriate "except in exceptional circumstances which would make the evidence especially probative" to take into account whether the defendant was suffering from some psychiatric condition. While (perhaps) this divergence of approach can be explained on grounds that self-defence is regarded as a justificatory defence with higher hurdles to overcome, the truth is that the present position is difficult to rationalise and would be untenable under the proposed single defence.

The approach currently adopted in duress cases is perhaps explicable on the ground that the law views duress as an excuse and the rhetoric focuses on the morally involuntary response of the defendant. With that emphasis it is not surprising that a wide array of characteristics should be taken into account. However, under a new broader defence with an emphasis on a "moral scrutiny" of the defendant's actions through the requirements of reasonableness and proportionality the more objective approach of the law on self-defence should be applied across the board.

Link between threat and crime

In the case of Cole it was held that duress was only a defence if there was a nexus between the threat and the offence committed. In this case the defendant committed robbery to pay a debt to moneylenders who had threatened him. As they

64 [1994] Crim.L.R. 582.
necessary action: a new defence

had not stipulated that he commit robbery, the defence was not available. Such an approach has little to commend it. It is difficult to see why the fact that the moneylenders failed to mention a specific crime should have any bearing on the moral evaluation of the defendant’s actions. Even with the closely related defence of duress of circumstances it seems that there is no such requirement that there be a link between the threat and the crime committed. Under the proposed defence the only enquiry would be as to the reasonableness and proportionality of the response to the threat or crisis. Whether the threat in a duress situation specified a particular crime to be committed could possibly have some bearing on the assessment of reasonableness. For example, the fact that the defendant has herself unilaterally decided on the crime to be committed, as in Cole, could affect the moral assessment of the action but equally there could be other situations where this fact would have no bearing on the issue of reasonableness. The focus would be on the strength of the threat or pressure and the reasonableness and proportionality of the response.

Deliberate exposure to threats

Another distinctive feature of duress cases under the present law is the rule that if the defendant joins a criminal group or associates with criminals knowing that she is likely to be subjected to threats of serious violence, the defence will not be available. The policy reasons behind this rule are understandable. What is perhaps surprising is the fact that this rule does not have its counterpart in the law of self-defence. Most of the rules on self-defence have been developed within the context of inter-male violence where, particularly with drunken fighting in pubs and clubs, it is often difficult to ascertain who initiated the violence. It is clear that self-defence is often pleaded in such cases by persons who deliberately placed themselves in situations where violence was occurring or about to occur. Equally, self-defence can be available to defendants who deliberately engage in criminal activities, such as the defendant in Palmer who, armed with a gun, went with others to buy drugs. There is no hint in the self-defence cases that preceding fault could be a basis for denying the defence.

Under the proposed defence, the emphasis would be on the reasonableness of the response bearing in mind the context in which the danger or crisis arose. This context would include a consideration of the defendant’s situation. In particular, if a defendant knowingly associates with violent criminals or voluntarily joins in activities where violence is likely, claims that it was reasonable to resort to force or commit a crime become less plausible. Although not empirically established, one suspects that threats of death or serious injury are not often directed at complete strangers. It is more likely that such threats will be made to someone known to the threatener. Taking this prior association into account could have a significant effect in practice in limiting the extent to which the new defence could be successfully pleaded. Further, under the new defence these considerations would be

70 My thanks to Mark Thompson for suggesting this point.

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equally applicable irrespective of whether the issue would currently be classified as self-defence or duress.

**Fair labelling**

A possible objection to the introduction of a new broad defence is that it would violate the principle of fair labelling under which offences should be categorised and labelled to capture the essence of the wrongdoing involved. The criminal law is a communicative enterprise and offences should be labelled and structured in a manner that assists “the law’s educative or declaratory function in maintaining and reinforcing social standards”. Under this view, *e.g.* theft and obtaining property by deception should be retained as quite separate offences and crimes such as robbery which are at present absurdly broad should be subdivided with greater specificity.

These fair labelling arguments are, however, primarily directed at the structure of offences—and not at defences. Some writers have argued that the criminal law should distinguish between rules of conduct (addressed to the general public, declaring that certain conduct is prohibited) and rules of adjudication (addressed to the personnel of the criminal justice system which would specify the precise boundaries of criminal liability). While there are problems with this approach and controversy as to how various matters should be classified, it can be argued that the role of defences relates to matters of adjudication in the ascertainment of liability. The principle of fair labelling is primarily concerned with messages to the public in relation to rules of conduct. It is here that offence clarity and reasonable specificity is important. At the adjudication stage the communicative role of the criminal law is less important. Of course, it is part of the function of the law to communicate with wrongdoers themselves so that they can understand the allegations against them and be in a position to respond to them, and, more importantly here, so that they can know what they can lawfully do. Such knowledge should inform the practical reasoning process of the person contemplating committing a harm. However, at this second stage, labels and specificity are less important. What matters to a person facing a threat/danger/crisis is not the specifics of duress or self-defence, but rather the broader picture that necessary action is permitted provided the test of reasonableness and proportionality is met. Viewed in this way, the proposed defence does not violate the principle of fair labelling.

**Conclusion**

It has not been the purpose of this article to deny that there is any validity in the distinction between justification and excuse. What has been sought to be demonstrated is that the distinction is not helpful when considering the relationship

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71 A. Ashworth, n.18, p.90.
between self-defence, duress by threats and circumstances and necessity. The present separate classification of these defences has meant that they have developed differently—but the differences in the rules are not necessarily rational or sustainable. A new defence of necessary action would have the advantage of simplicity and, most importantly, would enable the focus to be on the true issue that unites the present defences: whether, given the pressure/crisis, etc., facing the defendant, the response, taking into account the context and all the circumstances, was a reasonable and proportionate reaction to that danger.