Does the law enforce **morality** and should it? Should the law be used to penalise immoral behaviour?

Hart v Devlin debate

Devlin's philosophy of legal moralism takes an idealist's approach to role of law in society. Devlin's philosophy of law argued that the collective judgment of a society should guide enforcement of laws against both private and public behaviour that was deemed immoral. According to Devlin, when a behaviour reached the limits of "intolerance, indignation and disgust," legislation against it was necessary. Hart's philosophy of legal positivism is a pragmatist's approach to the role of law in society. Hart's philosophy of law held that laws should not be based only on popular moral consensus, in the absence of other harms. This is consistent with Hart's argument that one role of law was to protect individual liberty.

Homosexuality was illegal and individuals were convicted for partaking in criminal behaviour. Wolfenden Report led to the decriminalising of homosexuality, proving it was between two consenting adults and in privacy.

Lord Devlin's view was that society as what we knew it couldn't survive without morals. Morals are the standards of conduct of which reasonable people approve.
Professor Hart opposed and took the view that morality was separate from law and the law should not interfere.

Devlin's view is embodied in the following cases:

1. Shaw v. D.P.P.
   The appellant published a 'ladies directory' which listed contact details of prostitutes, the services they offered and nude pictures. He would charge the prostitutes a fee for inclusion and sell the directory for a fee. He was convicted of conspiracy to corrupt public morals, living on the earnings of prostitution and an offence under the Obscene Publications Act 1959. The appellant appealed on the grounds that no such offence of conspiracy to corrupt public morals existed. Offence known as 'conspiracy' to corrupt public morals/outrage public decency. Known only by common law, not a law made my parliament. Although technically according to law written by parliament Shaw was not guilty of anything, the judges convicted him on the basis of morality. Therefore supporting Devlin's view.
2. Knuller v. D.P.P.
   The defendant published a progressive magazine. In this magazine advertisements were placed by homosexuals seeking to meet other like minded individuals to engage in sexual practices. They were charged with conspiracy to corrupt public morals as established in Shaw v DPP. The House of Lords doubted the correctness of the decision in Shaw but declined to depart from it. Again, not committing a crime according to written law by parliament, however he was convicted on the basis of morality, known as conspiracy to corrupt public morals/outrage public decency to the Judges of the common law.
3. Whitehouse v. Lemon:
   In an edition of the newspaper 'The Gay News' there was a poem which implied that Jesus Christ was homosexual. Mary Whitehouse was a private prosecutor and was outraged by the article. She commenced proceedings against Lemon and he was convicted on the basis of blasphemy and conspiracy.

Where the victim's actions were a natural result of the defendant's actions it matters not whether the defendant could foresee the result. Only where the victim's actions were so daft or unexpected that no reasonable man could have expected it would there be a break in the chain of causation.

R v Williams & Davis [1992] Crim LR 198

The defendants picked up a hitchhiker on the way to Glastonbury festival. The hitchhiker jumped out of the car when it was travelling at 30 mph, hit his head and died. The prosecution alleged that the defendants were in the course of robbing him when he jumped out and thus their actions amounted to constructive manslaughter. The trial judge directed the jury; '... what he was frightened of was robbery that this was going to be taken from him by force, and the measure of the force can be taken from his reaction to it. The prosecution suggest that if he is prepared to get out of a moving car, then it was a very serious threat involving him in the risk of, as he saw it, serious injury.' The jury convicted and the defendant appealed

Held: Conviction was quashed as there was an almost total lack of evidence as to the nature of the threat. The prosecution invited the jury to infer the gravity of the threat from the action of the deceased. On the issue of novus actus interveniens Stuart Smith LJ stated: "The nature of the threat is of importance in considering both the foreseeability of harm to the victim from the threat and the question whether the deceased's conduct was proportionate to the threat, that is to say that it was within the ambit of reasonableness and not so daft as to make it his own voluntary act which amounted to a novus actus interveniens and consequently broke the chain of causation. It should of course be borne in mind that a victim may in the agony of the moment do the wrong thing.

c) *Medical intervention*

Where medical intervention contributes to death, the courts have been inconsistent in their approach.

R v Jordan (1956) 40 Cr. App. R. 152

The defendant stabbed the victim. The victim was taken to hospital where he was given anti-biotics after showing an allergic reaction to them. He was also given excessive amounts of intravenous liquids. He died of pneumonia 8 days after admission to hospital. At the time of death his wounds were starting to heal.

Held: The victim died of the medical treatment and not the stab wound. The defendant was not liable for his death.

R v Smith [1959] 2 QB 35

The defendant, a soldier, got in a fight at an army barracks and stabbed another soldier. The injured soldier was taken to the medics but was dropped twice on route. Once there the treatment given was described as palpably wrong. They failed to diagnose that his lung had been punctured. The soldier died. The defendant was convicted of murder and appealed contending that if the victim had received the correct medical treatment he would not have died.

Held: The stab wound was an operating cause of death and therefore the conviction was upheld.

R v Cheshire [1991] 1 WLR 844

The defendant shot a man in the stomach and thigh. The man was taken to hospital where he was operated on and developed breathing difficulties. The hospital gave him a tracheotomy (a tube inserted into the windpipe connected to a ventilator). Several weeks later his wounds were healing

burn out. In fact the burning newspapers set light to the wheelie bin and the fire spread to the Co-op shop and caused over £1m of damage.
Held: The defendants' convictions were quashed. The House of Lords overruled MPC v Caldwell [1982] AC 341. The appropriate test of recklessness for criminal damage is: "A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to -
(i) a circumstance when he is aware of a risk that it exists or will exist;
(ii) a result when he is aware of a risk that it will occur;
(iii) and it is, in the circumstances known to him, unreasonable to take the risk."

Negligence:
Negligence is not a state of mine, it is simply a failure to comply with the standards of a reasonable person. It is accepted and applied as a fault element in some crimes. It is an objective criteria.

Manslaughter:
Gross negligence manslaughter is a form of involuntary manslaughter where the defendant is ostensibly acting lawfully. Involuntary manslaughter may arise where the defendant has caused death but neither intended to cause death nor intended to cause serious bodily harm and thus lacks the mens rea of murder. Whereas constructive manslaughter exists where the defendant commits an unlawful act which results in death, gross negligence manslaughter is not dependant on demonstrating an unlawful act has been committed. Gross negligence manslaughter can be said to apply where the defendant commits a lawful act in such a way as to render the actions criminal. Gross negligence manslaughter also differs from constructive manslaughter in that it can be committed by omission.

Manslaughter is the only common law offence of negligence – but the cases show that even here carelessness or simple negligence is not enough. The law required 'Gross Negligence'. For example the case of Adomako.

R v Adomako [1994]
The appellant was an anaesthetist in charge of a patient during an eye operation. During the operation an oxygen pipe became disconnected and the patient died. The appellant failed to notice or respond to obvious signs of disconnection. The jury convicted him of gross negligence manslaughter. The Court of Appeal dismissed his appeal but certified the following question to the House of Lords: "In cases of manslaughter by criminal negligence not involving driving but involving a breach of duty is it a sufficient direction to the jury to adopt the gross negligence test set out by the Court of Appeal in the present case following R. v. Bateman (1925) 19 Cr. App. R. 8 and Andrews v. Director of Public Prosecutions [1937] A.C. 576, without reference to the test of recklessness as defined in R. v. Lawrence (Stephen) [1982] A.C. 510 or as adapted to the circumstances of the case?"
Held: His conviction for gross negligence manslaughter was upheld. The Lords ruled that the law as stated in R v Seymour [1983] 2 A.C. 493 should no longer apply since the underlying statutory provisions on which it rested have now been repealed by the Road Traffic Act 1991. The certified question was answered thus: "In cases of manslaughter by criminal negligence involving a breach of duty, it is a sufficient direction to the jury to adopt the gross negligence test set out by the Court of Appeal in the present case following R. v. Bateman 19 Cr. App. R. 8 and Andrews v. Director of Public Prosecutions [1937] A.C. 576 and that it is not necessary to refer to the definition of recklessness in R. v. Lawrence [1982] A.C. 510, although it is perfectly open to the trial judge to use the word "reckless" in its ordinary meaning as part of his exposition of the law if he deems it appropriate in the circumstances of the particular case."

The Perpetrator of an actus reus is an innocent agent if he:

1. Lacks mens rea
2. Is of insufficient age for liability
3. Is insane or has non-insane automatism
4. Is under a reasonable or honest mistake of fact which if true would have justified his acts
5. Is forced to commit the actus reus under duress. (See R v Cogan and Leak.)

R v Cogan and Leak (1975):

Leak (D1) brought Cogan (D1) to his home and informed his wife that Cogan wanted to have sex with her. Leak took his wife upstairs, undressed her and put her on the bed. Cogan then came into the room. Leak twice asked his wife if she wanted to have sex with Cogan and she refused. Leak then had sex with his wife in front of Cogan. Afterward, Cogan had sex with Leak's wife.
Leak confessed that he intended his wife be raped by Cogan. Cogan gave evidence that he thought she had consented. The trial court instructed the jury that Cogan was guilty of rape notwithstanding that he believed she had consented if his belief was unreasonable. Both men were convicted but Cogan's conviction was quashed on the grounds that even an unreasonable belief that the victim had consented precluded a conviction for rape. Leak appealed contending that he could not be found guilty of aiding and abetting Cogan if Cogan was not guilty of the underlying offense.
Must a principle be guilty of the underlying offense in order for an accomplice to be guilty of aiding and abetting the commission of that offense?
Held: **(Lord Justice Lawton):** No. A principle need not be guilty of the underlying offense in order for an accomplice to be guilty of aiding and abetting the commission of that offence.

They are made liable because:

1. They help or encourage another (the principal offender) to commit a crime
2. Both the principal and the party (accomplice) can be liable for any offence committed by the principle.

Accessories and Abettors Act 1861 s.8

"Whoever shall aid, abet, counsel or procure the commission of any indictable offence… shall be liable to be tried, indicted or punished as a principal offender."
(Magistrates' Court Act 1989 s.44 provides a similar provision for summary offences.)

Conviction as an accessory/accomplice can only happen if the crime (that has been encouraged or assisted) has actually been committed (by the principal offender.) Both principal offender and party will be liable but for different reasons.

The 1861 Act s. 8 states that: An accessory of whatever type is liable to the same extent as the principal offender and can be punished to the same extent. Even though the accessory has not directly committed the actual crime. This consequence is graphically illustrated in the following case.

Craig and Bentley (1952)

- C and B were committing a burglary. Police arrived and apprehended B; a policeman went after C – at which point B shouted out to C "Let him have it!"

Rationale for Strict Offences

- Protectionism/Paternalism
- Raise and maintain standards in business
- Ensure guilty are convicted
- Ease of enforcement
- Strong deterrence value
- Saves Court and police time
- People who create risk and profit by it should be liable for adverse consequences and know that ignorance, mistake and accident will not excuse.

Counter Arguments:

- Liability should not be imposed on those who are not blameworthy
- Wrong to penalise those who have taken all possible care (due diligence)
- Inefficient – often simply delays analysis of fault to the sentencing stage
- No evidence that it raises standards
- May put small businesses at unfair risk

Matters to Determine Strict Liability:

1. Internal Indicators; The wording of the offence
2. External Indicators; Nature of the offence, Presumptions, and Grave social danger (public policy.)

Grave Social Danger?
Compare two liquor cases:

Cundy v Le Cocq 1884
The appellant was convicted of unlawfully selling alcohol to an intoxicated person under s.13 Licensing Act 1872. The appellant appealed on the grounds that he unaware of the customer's drunkenness.
Held: Appeal dismissed and conviction was upheld. S.13 was silent as to *mens rea,* whereas other offences under the same Act expressly required proof of knowledge on the part of the defendant. It was therefore taken that the omission to refer to *mens rea* was deliberate and the offence was one of strict liability. Stephen J: "Here, as I have already pointed out, the object of this part of the Act is to prevent the sale of intoxicating liquor to drunken persons, and it is perfectly natural to carry that out by throwing on the publican the responsibility of determining whether the person supplied comes within that category."

Sherras v De Rutzen 1895
The defendant was convicted of selling alcohol to a police officer whilst on duty under to s.16(2) Licensing Act 1872. It was customary for police officers to wear an armlet whilst on duty but this constable had removed his. The appellant therefore believed he was off duty. The statute was silent as to the question of whether knowledge was required for the offence. He was convicted and appealed contending that knowledge that the officer was on duty was a requirement of the offence.
Held: The appeal was allowed and his conviction was quashed. Wright J: "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the

baby son. The baby suffered injuries to his boney structures of his legs and forearms due to the heavy handed way the defendant handled the baby. The defendant was not used to handling young babies and did not know that his actions would result in injuries. The trial judge directed the jury that they were to convict if the defendant should have foreseen that his handling of the child would result in some harm albeit of a minor nature. The defendant appealed contending that it was necessary to establish that the defendant appreciated the risk and it was not sufficient that he should have foreseen a risk of injury.
Held: The appeal was allowed. His convictions under s.20 were substituted with convictions for ABH under s.47.

The maximum penalty for assault is sixth months' imprisonment. (Criminal Justice Act 1988, s.39)

Battery.
Battery is a summary offence.
Definition of battery is laid out in R v Ireland. (See case summary from above.)
Lord Steyn defined battery as: "unlawful application of force by the defendant upon the victim."

Actus Reus
A. Simester and R. Sullivan defined the actus reus of battery as the infliction of violence on V by D… Violence is used in a very extended sense, reflecting the value of autonomy as well as protection from physical harm.

1. Application
   The application of force need not be direct:
   DPP v K (a minor) [1990] 1 WLR 1067
   A 15 year old school boy took some acid from a science lesson. He placed it into a hot air hand drier in the boys' toilets. Another pupil came into the toilet and used the hand drier. The nozzle was pointing upwards and acid was squirted into his face causing permanent scars. The defendant was charged under s.47 OAPA 1867.
   Held: The application of force need not be directly applied. The defendant was also convicted under Caldwell recklessness (this aspect of the case has since been overruled.)

   Fagan v MPC [1969] 1Q.B. 439
   A policeman was directing the defendant to park his car. The defendant accidentally drove onto the policeman's foot. The policeman shouted at him to get off. The defendant refused to move. The defendant argued at the time of the *actus reus*, the driving onto the foot, he lacked the *mens rea* of any offence since it was purely accidental. When he formed the *mens rea,* he lacked the *actus reus* as he did nothing.
   Held: The driving on to the foot and remaining there was part of a continuing act.

2. Unlawful
   If the defendant has a lawful excuse to use force the actions will not amount to a battery. This includes; Reasonable punishment/chastisement of a child (S.58 Children Act 2004), where the defendant acts in self-defence or prevention of a crime, and where the victim consents.

   On the issue of consent specifically related to battery, see Goff LJ's comments in the following case:

Recklessness, it is argued, is not enough; there must be intention to do the physical act the subject matter of the charge. Counsel relied on the case of R v Lamb [1967] 2 Q.B. 981 and argued that an assault is not established by proof of a deliberate act which gives rise to consequences which are not intended.
Held: Conviction upheld. There was no misdirection.

2. Being reckless as to whether such force is applied. Subjective reckless applies, for example: R v Parmenter [1991] 94 Cr App R 193
The defendant was convicted on four counts of causing GBH under s.20 in relation to injuries on his baby son . The baby suffered injuries to his boney structures of his legs and forearms due to the heavy handed way the defendant handled the baby. The defendant was not used to handling young babies and did not know that his actions would result in injuries. The trial judge directed the jury that they were to convict if the defendant should have foreseen that his handling of the child would result in some harm albeit of a minor nature. The defendant appealed contending that it was necessary to establish that the defendant appreciated the risk and it was not sufficient that he should have foreseen a risk of injury.
Held: The appeal was allowed. His convictions under s.20 were substituted with convictions for ABH under s.47.

The maximum penalty for battery is six months' imprisonment. (Criminal Justice Act 1988, s. 39.)

Assault occasioning actual bodily harm Section 47

The offence of actual bodily harm is set out in S.47 Offences Against the Person Act 1861, which provides that it is an offence to commit an assault occasioning actual bodily harm.

Actus Reus

A. Simester and R. Sullivan states 'the term assault is used here as an umbrella term to cover the discrete offence of assault in the pure sense of that term, and the offence of battery.' Actus Reus of this offence is assault or battery, which causes, actual bodily harm.

1. The hurt or injury need not be serious of permanent but must be more than trifling. Donovan [1934] 2 KB 498
The defendant was convicted of indecent assault and common assault after caning a 17 year old female complainant for the purposes of sexual gratification. The complainant suffered actual bodily harm, though the defendant was not charged with an offence under s.47. His defence was consent. The judge had directed the jury that the issue was consent or no consent, without giving any guidance on the burden of proof.
Held: A direction should have been given on consent, as in the circumstances of the case the jury might reasonably have found consent. The court rejected the argument that it was unnecessary for the prosecution to prove absence of consent and that therefore the failure to give the direction was immaterial: 'Always supposing, therefore, that the blows which he struck were likely or intended to do bodily harm, we are of opinion that he was doing an unlawful act, no evidence having been given of facts which would bring the case within any of the exceptions to the general rule. In our view, on the evidence given at the trial, the jury should have been directed that, if they were satisfied that the blows struck by the prisoner were likely or intended to do bodily harm to the prosecutrix, they ought to convict him, and that it was only if they were not so satisfied, that it became necessary to consider the further question whether the prosecution had negatived consent. For this purpose we think that 'bodily harm' has its ordinary meaning and includes any hurt or injury calculated to interfere

According to section 3(2), 'whether a belief in consent is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.'

The maximum sentence for sexual assault is 10 year's imprisonment, according to the SOA 2003, section 3(4).

Causing a person to engage in sexual activity without consent.
Section 4 of the SOA 2003 provides a person (A) commits an offence if;
a) he intentionally causes another person (B) to engage in an activity,
b) the activity is sexual,
c) B does not consent to engaging in the activity, and
d) A does not reasonably believe that B consents.

Actus Reus
The actus reus is the actual act of causing a person to engage in sexual activity without their consent.
Section 74 of the SOA 2003 provides the definition of consent.
Section 78 of the SOA 2003 provides the definition of 'sexual.'

Mens Rea
Section 4 of the SOA 2003 requires an intention to cause another person to engage in an activity.
According to section 4(2), 'whether a belief in consent is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.'

According to section 74 of the SOA 2003, 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice.'

R v Jheeta [2007] EWCA Crim 1699
The facts of this case are quite extraordinary and resulted in the conviction of the appellant on several counts of rape and procuring sexual intercourse by false pretences in addition to blackmail. The appellant had a relationship with a student which began in 2002 and continued until 2006. During the relationship the complainant (C) started receiving anonymous threatening text messages. Unknown to her, the messages were in fact sent by her boyfriend, the appellant. C confided in her boyfriend and he would comfort her and promise to keep her safe. Eventually C became anxious about the messages and wished to go to the police. The appellant told her not to worry he would go to the police and report it. He then sent her text messages from a fictitious policeman asking for her to send her statement via text. The malicious text messages continued. The appellant sent a message to C from the fictitious policeman offering a protection service whereby her home would be kept under surveillance for a fee of £1,000 pa. C gave money to the appellant in the belief that he was taking it to the police to pay for the protection service.
Held: His conviction was upheld. The appellant was responsible for the 'menacing pressures' which led the complainant to part with her money

R v McNally [2013]
X, when a 13-year-old girl, had met another girl (Y), who was a year younger, on a social networking website. X claimed to be a boy. The relationship developed over the next three-and-a-half years; Y considered X to be her boyfriend. X, dressed as a boy, visited Y on four occasions when X was aged 17 and Y 16. On those visits, there were numerous occasions of oral and digital penetration of Y. Y subsequently discovered that X was a girl. X was prosecuted. Following a conference with counsel, she pleaded guilty. She was of previous good character. A pre-sentence report described a history of self-harm and confusion surrounding her gender identity and sexuality. The sentencing judge held that X's

defence. The hyperglycaemic state was caused by the disease of diabetes itself and not an outside factor of injection of insulin.

Where the defect of reason is caused by an outside source, this will not lead to a finding of insanity, but may give rise to the defence of non-insane automatism. This has led to an unfortunate consequence in relation to diabetics since if a diabetic commits an offence whilst suffering from hyperglycaemia, a state arising from too much blood sugar as a result of not taking insulin, they will be classed as insane. However, if the diabetic takes too much insulin resulting in a hypoglycaemia state, this will be classed as an outside source resulting in finding a non-insane automatism. Non-insane automatism is a complete defence leading to the acquittal of a defendant with no hospital order attachments:

R v Quick [1973] 3 WLR 26

The appellant was a charge nurse in a hospital. He attacked one of his patients whilst on duty. The patient was a paraplegic and suffered a fractured nose, black eyes and bruising. The appellant was charged with assault occasioning ABH under s.47 OAPA 1861. The appellant sought to raise the defence of automatism as at the time of the attack he was hypoglycaemic, in that he had taken too much insulin and eaten very little on the day in question. In addition he had consumed alcohol before the attack. The trial judge ruled that this gave rise not to automatism but insanity. The defendant then changed his plea to guilty and appealed.
Held: The appeal was allowed and the conviction was quashed. His hypoglycaemia was caused not by his diabetes but by the external factor of insulin.
"In this case Quick's alleged mental condition, if it ever existed, was not caused by his diabetes but by his use of the insulin prescribed by his doctor. Such malfunctioning of his mind as there was, was caused by an external factor and not by a bodily disorder in the nature of a disease which disturbed the working of his mind. It follows in our judgment that Quick was entitled to have his defence of automatism left to the jury and that Mr. Justice Bridge's ruling as to the effect of the medical evidence called by him was wrong. Had the defence of automatism been left to the jury, a number of questions of fact would have had to be answered. If he was in a confused mental condition, was it due to a hypoglycaemic episode or to too much alcohol? If the former, to what extent had he brought about his condition by not following his doctor's instructions about taking regular meals? Did he know that he was getting into a hypoglycaemic episode? If yes, why did he not use the antidote of eating a lump of sugar as he had been advised to do? On the evidence which was before the jury Quick might have had difficulty in answering these questions in a manner which would have relieved him of responsibility for his acts. We cannot say, however, with the requisite degree of confidence, that the jury would have convicted him. It follows that his conviction must be quashed on the ground that the verdict was unsatisfactory."

External factors such as drink or drugs also may lead to a finding of non-insane automatism:

R v Burns 58 Crim App R 364

The appellant was an alcoholic and suffered periods of amnesia caused by brain damage. His amnesia was not only an inability to recall past events but also at times things did not register at the time of experiencing because his brain function was impaired. On the day of the offence the appellant had taken alcohol and a prescribed drug, Mandrax. The trial judge ruled that the defence of automatism could not be put before the jury being of the view that the doctor's evidence showed that, if automatism had occurred, it must have been due to disease of the mind. The appellant appealed
Held: The trial Judge was in error because he did not leave the issue of automatism to the jury

since then. Often the defence of mistake is complicated by being combined with other defences such as intoxication or self-defence (or both.)

Initially a defence would be allowed if the mistake was both honest and reasonably held:
R v Tolson [1889] 23 QBD 168
The appellant married in Sept 1880. In Dec 1881 her husband went missing. She was told that he had been on a ship that was lost at sea. Six years later, believing her husband to be dead, she married another. 11 months later her husband turned up. She was charged with the offence of bigamy.
Held: She was afforded the defence of mistake as it was reasonable in the circumstances to believe that her husband was dead.

A mistake as to law will not generally suffice, for the defence of mistake, since ignorance of the law is no excuse. (*Ignorantia juris non excusat.*):
R v Lee [2000] EWCA Crim 53
The appellant had failed a breath test. He looked at the test result and saw an air bubble which pushed the test over the limit. When the officer tried to arrest him for drink driving the appellant punched him. He was convicted of assaulting a police officer with intent to resist arrest under s.38 Offence Against the Person Act 1861. He appealed contending that he had a genuine belief that the arrest was unlawful.
Held: The mistake was one of law and therefore was of no defence

Although a mistake of civil law may be sufficient to find the defence of mistake:
R v Smith [1974] QB 354
The appellant was a tenant in a ground floor flat. With consent of the land lord, he purchased some electrical wiring, roofing equipment, wall panels and flooring and installed them into the conservatory. By installing these items, in law they become the property of the land lord. as they form part of the flat. When the tenancy came to an end, the appellant removed the wiring which involved damaging the wall panels. He was convicted of criminal damage and appealed contending he lacked the *mens rea* of the offence as he believed that since he had paid for the panels he had a right to damage them.
Held: His conviction was quashed. He lacked the *mens rea of* criminal damage as he believed the property he damaged belonged to him. It was irrelevant that the mistake was one of law rather than fact as it related to a mistake of civil law rather than criminal law and there was no need to demonstrate a reasonable belief, it being sufficient that it was honestly held.

A mistake of fact will suffice provided the mistake was such as to prevent the defendant forming the mens rea of the offence. Whilst initially the mistake was required to be both honest and reasonably held, in DPP v Morgan the House of Lords held that the mistake need only be honest. There was no requirement that it was a reasonable mistake for the defendant to make:

DPP v Morgan [1976] A.C. 182
The three appellants were convicted of rape following a violent attack. They had been out drinking for the night with a fellow officer in the RAF who invited them back to his house to have sexual intercourse with his wife while he watched. According to the appellants, he had told them that his wife would be consenting, although she would protest in order to enhance her sexual arousal. The circumstances were such that the wife had made it quite clear she was not consenting and she sustained physical injuries requiring hospital treatment. The trial judge had directed the jury that the defendants' belief in consent had to be reasonably held. The jury found them guilty. They appealed contending there was no requirement that the belief need be reasonably held.
Held: The belief must be genuine and honest. There was no requirement that the belief was reasonable. The convictions were upheld, however, as the House of Lords was of the opinion that no

was struck by the appellant when he was being driven to the police station. The next morning he attacked a police inspector in his cell. He was charged with four counts of occasioning actual bodily harm and three counts of assaulting a police constable in the execution of his duty. The appellant claimed he had no recollection of the events due to his intoxication. He was found guilty on all counts and appealed contending that he could not be convicted when he lacked the *mens rea* of the offences due to his intoxicated state.
Held: Appeal dismissed. Conviction upheld. The crime was one of basic intent and therefore his intoxication could not be relied on as a defence.

The use of the terms basic intent and specific intent has caused confusion as there has been conflicting dicta as to the meaning of these terms:

MPC v Caldwell [1982] AC 341
The appellant had been working at a hotel and had a grudge against his employer. One night after consuming a large quantity of alcohol he went to the hotel and started a fire. The hotel had 10 guests sleeping in the hotel at the time. Fortunately the fire was discovered and distinguished early and no people were actually harmed. The appellant was convicted of aggravated criminal damage under s.1(2) Criminal Damage Act 1971 and appealed in relation to the required level of recklessness. The defendant argued that he had given no thought as to the possible endangerment of life due to his intoxicated state.
On the issue of intoxication:
Lord Diplock: "The speech of Lord Elwyn-Jones LC in Reg v Majewski…is authority that self-induced intoxication is no defence to a crime in which recklessness is enough to constitute the necessary mens rea...Reducing oneself by drink or drugs to a condition in which the restraints of reason and conscience are cast off was held to be a reckless course of conduct and an integral part of the crime."
Lord Edmund-Davies and Lord Wilberforce disagreed. Their view was that arson being reckless as to the endangering of life is an offence of specific not of basic, intent, because the state of mind went to an ulterior or purposive element of the offence, rather than to the basic element of causing damage by fire.

No explanation of the terms is entirely satisfactory and do not accurately cover the offences which have been categorised as either basic intent crimes or specific intent crimes. This was most noticeable in:

R v Heard [2007] 3 WLR 475
The police were called to the appellant's house where he was heavily intoxicated and in a depressive state and had been self-harming. The police took him to hospital. He was making a disturbance in the waiting room so the officers took him outside. The appellant then took out his penis and started rubbing it against the officer's thigh. He was charged with sexual assault contrary to S.3 of the Sexual Offences Act 2003. He did not dispute that the offence occurred but claimed to have no recollection of the events due to his intoxication. The judge ruled that the offence was one of basic intent and such his intoxication could not be relied on in his defence. He was convicted and appealed on the grounds that the judge was in error in ruling that sexual assault was a crime of basic intent since it requires an intention to touch.
Held: Appeal dismissed. The appellant's conviction was upheld. Parliament in passing the Sexual Offences Act 2003 cannot be taken to have changed the previous law which denied a defendant from relying on voluntary intoxication as a defence.

The confusion surrounding these terms has attracted criticism from the Law Commission who have recommended the terms should be discarded and replaced with an integral fault element.

adopted in Australia in the case of *The Queen v Howe*, but was subsequently abandoned. Such an approach was rejected by the Privy Council in *R v Palmer*.

R v Clegg [1995] 1 AC 482

The defendant was a soldier serving in Northern Ireland. He was manning a vehicle check point along with four other soldiers. Other soldiers were stationed along the road before and after the place where the defendant was stationed. A car approached the first checkpoint and slowed down. It then accelerated at great speed with its headlights on full beam. Another soldier ordered the car to stop to no avail. All four soldiers at the checkpoint open fired on the car. The defendant fired three bullets as the car was approaching and a final bullet as the car was driving away. The final shot proved to be fatal, hitting a passenger who was in the back seat of the car. The car had been stolen and contained young 'joy riders' not terrorists. The defendant was convicted of murder and appealed to the Court of Appeal. His appeal was rejected on the grounds that in firing the last shot after the danger had passed, he had used excessive force in the circumstances. However, the Court of Appeal made the following observations: "There is one obvious and striking difference between Private Clegg and other persons found guilty of murder. The great majority of persons found guilty of murder, whether they are terrorist or domestic murders, kill from an evil and wicked motive. But when Private Clegg set out on patrol on the night of 30 September 1990 he did so to assist in the maintenance of law and order and we have no doubt that as he commenced the patrol he had no intention of unlawfully killing or wounding anyone. However, he was suddenly faced with a car driving through an army checkpoint and, being armed with a high velocity rifle to enable him to combat the threat of terrorism, he decided to fire the fourth shot from his rifle in circumstances which cannot be justified and the firing of his fourth shot was found to be unlawful. It is right that Private Clegg should be convicted in respect of the unlawful killing of Karen Reilly and that he should receive a just punishment for committing that offence which ended a young life and caused great sorrow to her parents and relatives and friends. But this court considers, and we believe that many other fair-minded citizens would share this view, that the law would be much fairer if it had been open to the trial judge to have convicted Private Clegg of the lesser crime of manslaughter on the ground that he did not kill Karen Reilly from an evil motive but because, his duties as a soldier having placed him on the Glen Road armed with a high velocity rifle, he reacted wrongly to a situation which suddenly confronted him in the course of his duties. Whilst it is right that he should be convicted for the unlawful killing of Karen Reilly, we consider that a law which would permit a conviction for manslaughter would reflect more clearly the nature of the offence which he had committed."

The Court of Appeal for Northern Ireland certified the following point of law to the House of Lords "Where a soldier or police officer in the course of his duty kills a person by firing a shot with the intention of killing or seriously wounding that person and the firing is in self-defence or in defence of another person, or 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, but constitutes force which is excessive and unreasonable in the circumstances, is he guilty of manslaughter and not murder?"

House of Lords held: In dismissing the appeal the House of Lords declined the opportunity to extend the defence available under s.3 Criminal Law Act 1967 to allow those who use excessive force which results in death to have manslaughter convictions substituted for a murder conviction. Whilst their Lordships were persuaded with the merits of such a change, any change must come from Parliament.

The Queen v Howe 100 C.L.R. 448

Howe had killed a man named Millard. He did so after a bout of drinking at the end of which Millard made an alleged indecent assault upon Howe which Howe repelled. They had driven to the scene of these events in a car. After the alleged indecent assault and its repulse, there was some slight scuffle

R v Hasan [2005] 2 WLR 709

3. Threat of death or serious injury

Threats to reveal sensitive information alone are insufficient to raise the defence, but may be taken into account if accompanied by threats of death or serious personal violence:

R v Valderamma-Vega [1985] Crim LR 220

The appellant had been convicted for importing drugs. He had done so because he had received threats of serious violence against him and his family if he did not comply. There were also threats to reveal his homosexual activities to his wife. He also received financial rewards for his action. The trial judge refused to allow the defence of duress to be put before the jury.

Held: The appeal was allowed. Threats to reveal his homosexuality alone would be insufficient to find the defence but could be taken into account when coupled with threats of serious personal violence.

4. Threat of violence must be to the defendant or a person for whom he has responsibility

The threat of violence must be to the defendant or a person for whom he has responsibility or persons for whom the situation makes him responsible:

R v Shayler [2001] EWCA Crim 1977

Shayler was a member of MI5 and had signed a declaration under the Official Secrets Act. In breach of this he had provided journalists with 30 documents which he had obtained through his position and which related to national intelligence and security issues. During a case management hearing the judge ruled that the defence of duress of circumstances was not available to Shayler. He appealed against this ruling contending that the disclosure was necessary to safeguard members of the public.

Held: Appeal dismissed. Whilst the defence of duress could be raised in offences under the Official Secrets Act, there was insufficient precision in Shayler's claims. He could not identify the action that was going to create imminent threats to life, nor could he identify the potential victims or establish that he had responsibility for them.

This includes threats against family members:

R v Martin [1989] 88 Cr App R 343

The appellant had driven whilst disqualified from driving. He claimed he did so because his wife threatened to commit suicide if he did not drive their son to work. His wife had attempted suicide on previous occasions and the son was late for work and she feared he would lose his job if her husband did not get him to work. The appellant pleaded guilty to driving whilst disqualified following a ruling by the trial judge that the defence of necessity was not available to him. He appealed the ruling.

Held: Appeal allowed. The defence of duress of circumstances should have been available to him following the decisions in R v Conway and R v Willer. No distinction was to be drawn between driving whilst disqualified and reckless driving. It did not matter that the threat of death arose through suicide rather than murder.

And passengers in a car:

R v Conway [1989] QB 290

The appellant was driving with a passenger, Mr Tonna, in his car. Tonna had been in a vehicle a few weeks earlier, when another man was shot and severely injured and Tonna was chased and narrowly escaped. Tonna had been the intended victim of the shooting. The appellant

crime they would be expected to take that action rather than commit the crime. The defence of duress is therefore denied in these situations. This matter was discussed in:

R v Hudson & Taylor [1971] 2 QB 202
The two appellants, aged 17 and 19, were witnesses of a fight which occurred in a pub. They were called to give evidence in criminal proceedings against one of those involved in the fight. They had been threatened with violence if they gave evidence against the defendant. The threat had been repeated on several occasions leading up to the trial and on the day of the trial the person making the threats was in the public gallery in the court room and staring menacingly at the appellants. The appellants lied in court so as not to implicate the defendant and they were later charged with perjury. The trial judge held that the defence of duress was not open to the jury as the threat was not of immediate violence as the threat was made in a court room and thus could not be carried out immediately. The jury convicted and the young women appealed.
Held: The appeal was allowed and the convictions were quashed.
Lord Justice Widgery: "The threat must be a 'present' threat in the sense that it is effective to neutralise the will of the accused at that time. When, however, there is no opportunity for delaying tactics, and the person threatened must make up his mind whether he is to commit the criminal act or not, the existence at that moment of threats sufficient to destroy his will ought to provide him with a defence even though the threatened injury may not follow instantly, but after an interval. In the present case the threats of Farrell were likely to be no less compelling, because their execution could not be effected in the court room, if they could be carried out in the streets of Salford the same night."

Duress of circumstances
Duress of circumstances differs from duress by threat in that the circumstances dictate the crime rather than a person. The defence of duress of circumstances grew out of the inflexibility afforded in the defence of necessity. This defence will often allow a defence where the defence of necessity would deny one. The defence of duress of circumstances came about in the case of R v Willer.

The Law Commission, Law Commission Report No 304, paragraph 6.7; 'duress of circumstances is where a person commits an offence in response to a threat of death or serious harm that is not the result of being told "commit it or else"… In cases of duress of circumstances, the threat may, but need not, emanate from another person.'

The Law Commission, Law Commission Report No 304, paragraph 6.8, 'the general principles that govern duress of circumstances are substantially the same, as those that govern duress by threats.'

R v Willer [1986] 83 Cr App R 225
The appellant had been convicted of reckless driving. As he drove up a narrow road he was confronted with a gang of shouting and brawling youths. He heard one of them shouting, "I'll kill you Willer" and another threatening to kill his passenger. He stopped and tried to turn the car around. The youths surrounded him. They banged on the car. The appellant mounted the pavement in order to escape. The trial judge ruled that the defence of necessity was not applicable and the appellant was convicted of reckless driving. He appealed against the judge's ruling.
Held: Conviction quashed. The Court of Appeal held that the defence of duress should have been available.

This then set a precedent which was followed in R v Conway where the Court of Appeal noted that there was no threat in R v Willer but recognised the existence of the new defence and named it duress of circumstances:

R v Conway [1989] QB 290
The appellant was driving with a passenger, Mr Tonna, in his car. Tonna had been in a vehicle a few weeks earlier, when another man was shot and severely injured and Tonna was chased and narrowly escaped. Tonna had been the intended victim of the shooting. The appellant noticed that a car was following him and fearing that it was the person responsible for the shooting, drove off at great speed and recklessly. In fact the car was driven by two plain clothed policemen. The trial judge ruled that the defence of necessity could not be raised. The appellant was convicted of reckless driving and appealed.
Held: Conviction quashed. The defence of duress of circumstances should have been put to the jury.

The later case of R v Martin affirmed the defence and held that it was governed by the same rules as duress by threat.

R v Martin [1989] 88 Cr App R 343
The appellant had driven whilst disqualified from driving. He claimed he did so because his wife threatened to commit suicide if he did not drive their son to work. His wife had attempted suicide on previous occasions and the son was late for work and she feared he would lose his job if her husband did not get him to work. The appellant pleaded guilty to driving whilst disqualified following a ruling by the trial judge that the defence of necessity was not available to him. He appealed the ruling.
Held: Appeal allowed. The defence of duress of circumstances should have been available to him following the decisions in R v Conway and R v Willer. No distinction was to be drawn between driving whilst disqualified and reckless driving. It did not matter that the threat of death arose through suicide rather than murder.
Simon Brown J: "The principles may be summarised thus: First, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly the defence arises as duress, that is pressure upon the accused's will from the wrongful threats or violence of another. Equally however it can arise from other objective dangers threatening the accused or others, arising thus it is conveniently called "duress of circumstances".
Secondly, 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.
Third, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted, if the answer to both those questions was yes, then the jury would acquit: the defence of necessity would have been established."

R v Pommell established that it is available to all crimes except murder, attempted murder and those who assist murder.

The circumstances are judged as the defendant believed them to be as illustrated in the case of R v Cairns [1999] EWCA Crim 468.

Necessity
A. Simester and R. Sullivan, Criminal Law; Theory and Doctrine (2010), 787: "this defence must be distinguished carefully from the newly emerged defence of duress of circumstances. Under the latter head, the primary focus is on the pressure that D was under, an excusatory claim premised on a threat of death or serious bodily harm. In the case of a necessity plea, attention is paid foremost to

Whilst the defence of necessity is often used to protect medical professionals perceived to be acting in the best interest of their patients, the defence of necessity has been denied in self-medication cases involving cannabis:

R v Quayle [2005] 1 WLR 3642
Five appeals were jointly heard with one Attorney General reference. Each case was concerned with the applicability of the defence of necessity in relation to offences involving, possession, cultivation, production and importation of cannabis. In all the appeals the appellants argued that the cannabis was for medical purposes for the relief of pain for various medical ailments including HIV, Multiple sclerosis and severe back pain.
Held: Neither the defence of necessity nor duress of circumstances was applicable in such circumstances.
Mance LJ: "Its starting point is that the Secretary of State shall exercise his power to enable doctors (among other qualified professionals) to have, prescribe and supply controlled drugs (see section 7(3) of the 1971 Act and the consequential provisions of Misuse of Drugs Regulations 2001 dealing with importation set out in paragraph 11 above). But, under s 7(4), the Secretary of State may exclude the operation of s 7(3) in relation to a drug, if of the opinion that it is in the public interest that its production, supply and possession should be wholly or partly unlawful or unlawful except for purposes of research or other special purposes or except under a licence or other authority issued by him. Cannabis, cannabis resin and most cannabinoids are, under SI 2001 No. 3998 and SI 2001 No. 3997, designated as drugs which may only be used for medical or scientific research and as drugs to which s 7(4) of the 1971 Act applies. The effect of that designation is that, whatever benefits might be perceived or suggested for any individual patients, if these particular drugs were available for medical prescription and use (other than research), such individual benefits would and are in the legislator's view outweighed by disbenefits of strength sufficient in the national interest to require a general prohibition."

R v Altham [2006] 1 WLR 3257
The appellant had been in a serious car accident 17 years before he was charged. The accident left him with severe injuries to his leg and he experienced chronic pain ever since. He tried a number of forms of pain relief prescribed by his doctor which either proved ineffective or had intolerable side effects. He eventually found that cannabis was the most effective form of pain relief and used it on a regular basis. He was charged on a single count of possession of 5 grams of cannabis resin. He pleaded guilty as the judge had ruled that the defence of necessity could not be raised following the decision in R v Quayle & ors. He appealed against the judge's ruling arguing that denial of the defence amounted to a breach of Art 3 of the European Convention of Human Rights in that his medical symptoms amounted to inhuman or degrading treatment and if the only way to avoid the symptoms is to break the criminal law and risk prison, then the state is subjecting him to inhuman or degrading treatment.
Held: The appeal was dismissed and his conviction upheld.
Scott Baker LJ: "In our judgment the state has done nothing to subject the appellant to either inhuman or degrading treatment and thereby engage the absolute prohibition in Article 3. …The defence of necessity on an individual basis as advocated by this appellant, as it was by the appellants in Quayle, is in conflict with the purpose and effect of the legislative scheme."

Thus it can be seen that the defence of necessity is generally only successfully applied in medical cases. Outside of this the defence of duress of circumstances has largely taken over many cases which traditionally would have come under necessity. The defence of duress is still quite restrictive but is perhaps more amenable than the defence of necessity.

guaranteeing appropriate use of these formidable new weapons in the prosecutors' armoury will be no easy feat."

Human Rights and Criminal Law

Human rights arguments are relevant to English Criminal Law. Human Right Act 1998, sections 2,3&4.

D. Ormerod, *Smith & Hogan's Criminal Law [2011], 25*; "many of the ECHR rights as specified in the Human Rights Act 1998, Sch 1, are important in determining the appropriate scope and application of offences."

Human rights may also be important in determining the appropriate scope of defences.

Article 2 – The Right to life

Does the right to life confer a right to die?

Pretty v United Kingdom [2002]

Diane Pretty was suffering from motor neurone disease and was paralysed from the neck down, had little decipherable speech and was fed by a tube. It is not a crime to commit suicide under English law, but the applicant was prevented by her disease from taking such a step without assistance. It is however a crime to assist another to commit suicide (section 2(1) of the Suicide Act 1961). Pretty wanted her husband to provide her with assistance in suicide. Because giving this assistance would expose the husband to liability, the Director of Public Prosecutions was asked to agree not to prosecute her husband. This request was refused, as was Pretty's appeal before the Law Lords.
Held: In a unanimous judgment, the Court, composed of seven judges, has found Pretty's application under articles 2, 3, 8, 9 and 14 of the European Convention on Human Rights admissible, but found no violation of the Convention. Significant conclusions include that *no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention*. As concerns Pretty's right to respect for private life under Article 8, the Court considered that the interference in this case might be justified as "necessary in a democratic society" for the protection of the rights of others.

There are now special statutory provisions regarding 'householder cases'.
Criminal Justice and Immigration Act 2008, s. 76(5a) and 76(8a)-76(8f).

Giuliani and Gaggio v Italy [2012] 54 E.H.R.R 10

The applicants, husband and wife and their daughter, are Italian nationals who were born in 1938, 1944 and 1972 respectively and live in Genoa and Milan (Italy). The application concerns the death of the applicants' son and brother, Carlo Giuliani, while he was taking part in clashes during the G8 summit in Genoa from 19 to 21 July 2001. On 20 July, during an authorised demonstration, there were extremely violent clashes between anti-globalisation militants and law-enforcement officers. At around 5 p.m., under pressure from the demonstrators, a group of about 50 carabinieri withdrew on foot, leaving two vehicles exposed. One of them, with three carabinieri inside, remained stuck on Piazza Alimonda. It was surrounded and violently attacked by a group of demonstrators, some of whom were armed with iron bars, pickaxes, stones and other blunt implements. One of the carabinieri, who had been injured, drew his firearm and, after giving a warning, fired two shots outside the vehicle. Carlo Giuliani, who was wearing a balaclava and playing an active part in the attack, was fatally wounded by a bullet in his face. In an attempt to move the vehicle away, the driver twice drove over the young man's unconscious body. When the demonstrators had been dispersed, a doctor arrived at the scene and pronounced Carlo Giuliani dead.