UNIVERSITY OF OXFORD

PERMISSIBLE SELF-DEFENCE, DEMOCRATIC STATES AND ANTI-DEMOCRATIC IDEOLOGIES

D.PHIL THESIS

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Acknowledgment

On 5 November 1995 Itzhack Rabin, the Israeli Prime-minister was assassinated by a right-wing extremist who opposed the peace process led by Rabin and his government. The assassination shocked the Israeli pubic, and threw the state into a new era. Questions have been raised as to the various ways in which the state may respond to the threat posed by anti-democratic activists. This crisis did not pass over me. The moral questions that were raised were too important to be ignored and I decided to try and find them an answer that, at the very least, would guide me (and hopefully others too) as to the right and moral way criminal law ought to be used by democratic states to combat anti-democratic ideologies. The research that I embarked on was thus a very personal quest, although, unfortunately, terror attacks and global political developments over last few years have proved the questions to be of relevance to any state that counts itself as democratic. My intuitions at the beginning of the research soon fell through and, thus, I have conducted the research with an open mind and without having a defined conclusion. Indeed, over the last three years I have changed my position more than once. It was only towards the last part of the writing that I formed the conclusion of the research and felt – at last – that I have given myself the answer I was looking for.

Without the guidance of my two supervisors Prof. Andrew Ashworth and Prof. John Gardner, I would not have reached this stage. They have opened a new world to me and showed me the way. The many hours I have spent discussing and testing my ideas with them, the theoretical discussions, the detailed comments and their insistence on clarity of arguments, helped me in shaping and clarifying my position. The Vingate Foundation, Balliol College and the Law Faculty at the Hebrew University have all help me financially to enable me to

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This Doctorate Thesis is dedicated to my parents Izhack and Israela Wallerstein to whom I owe all that I am.

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Introduction

Joseph Goebbels, the Nazi minister of propaganda, once said that '... it [will] probably always remain one of the best jokes of democracy, that it provided its own mortal enemies with the means by which it was destroyed'.[1] Was Goebbels right? Does democracy provide its enemies with the means to destroy it? Is democracy defenceless against anti-democratic ideologies? The assassination of the Israeli Prime Minister, the late Yitzchak Rabin, on 4 November 1995 triggered a public debate in Israel about the ability of the state to deal with anti-democratic agents endeavouring to alter a democratic system in the service of an anti-democratic ideology. Almost everyone who took part in the debate assumed that the state has a right to defend itself against such ideologies and those acting in the name of such ideologies. The debate focused on the limitations of this right, offering various boundaries to the permission given to the state to use coercive measures, and more specifically, criminal law. In this thesis I confront Goebbels's proposition and tackle the counter-presumption that the state has a right to defend itself against anti-democratic ideologies. I seek to find a moral source for the state's right to self-defence against internal anti-democratic ideologies.

The topic thus presented is concerned only with the right of the state to defend itself from anti-democratic ideologies and anti-democratic agents arising within its own society. In this thesis I am not interested in anti-democratic threats that originate outside the state. If the state has a right to defend itself against anti-democratic ideologies in the domestic sphere, this right must be distinct from the commonly recognized right of self-defence that the state has in the international sphere. The reason for this is that the state enjoys a different status in each of

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[1] J Goebbels *Joseph Goebbels Diaries* (1935a) 61.

these spheres: in the international sphere it is a player equal in weight to others – either states or other groups of analogous status. In the domestic sphere, the state is a much more powerful player, an artificial one created by all other players – individual citizens. It has a special status and is granted special roles and prerogatives.

I have further narrowed the scope of this thesis by limiting it only to the right to use criminal law to respond to anti-democratic threats. That is, if the state has a right to self-defence against anti-democratic ideologies, I want to know the extent to which the state is permitted to use criminal law. There are of course other measures that can be used, such as education and public and administrative law, but these are beyond the scope of my current research.

Following the attacks on the United States of September 11th, 2001, a related question was debated in the United States, as well as in other democratic countries. This time the debate concentrated on the ability of the state to deal with terrorism. Based on the assumption that the state has a right, or more accurately a duty, to defend itself against terrorism, the question was, to what extent does this duty allow the state to use criminal law and what restrictions does it impose on the use of such coercive powers?[2] It might be argued that since I am concerned with the realm of criminal law, and given that the main tool used by anti-democratic ideologies to bring about their goal is terrorism (and eventually revolution), it is

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[2] See, for example the Home Secretary, Mr. David Blunkett's remark in the House of Commons in the discussion about the Anti-terrorism, Crime and Security Act (2001): '...no one would understand a position whereby we failed to take the necessary action and, having so failed, were later proved to have failed to provide the necessary protections. That is the spirit in which I intend to proceed' (*House of Commons Parliamentary Debates*, Issue No. 1909 (10-13.12,2001) p 896).

really the second question – the limitations that the state's duty to defend itself against terrorism impose on the permission to use criminal law – that should most interest me. One might argue that concentrating on anti-democratic threats is too narrow, and perhaps even uninteresting. The common characteristics of terrorism, violence directed against civilians, public officials, or their property, constitute threats to life and physical integrity, and the motivation for these acts is irrelevant in the context of the justification of state coercion. Yet, the motivation for a violent terrorist act is incorporated into the notion of terrorism even without a clear definition. This can be seen, for example, in subsection 1 of the definition of 'terrorism' in the English Terrorism Act 2000:

> (1) In the Act "terrorism" means the use of threat or action where—
> (a) the action falls within subsection (2),
> (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
> (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
>
> (2) Action falls within this subsection if it—
> (a) involves serious violence against a person,
> (b) involves serious damage to property,
> (c) endangers a person's life, other than that of the person committing the action,
> (d) creates a serious risk to the health or safety of the public or a section of the public, or
> (e) is designed seriously to interfere with or seriously disrupt an electronic system.
>
> (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

Concentrating on the terrorist act itself, as just defined, it might be true that detailed motivation for the act is not relevant. If a committed terrorist executes a violent terror attack causing harm to people or property then there is no need to look any further to justify its restriction, since these actions are at the core of the permission granted by the general principles that govern state coercion and criminal law, such as the harm principle. However, the picture changes as we move further from these core situations. Recent laws, such as the

Anti-terrorism, Crime and Security Act 2001 in the United Kingdom, and the Patriot Act 2001 in the United States provide the state with more powers, and extend the reach of the law by adding new restrictions in order to stop terrorists at earlier stages of their enterprise. These laws deal with preemptive action by the state, remote harms, and the legitimization of state use of certain powers that would not otherwise be permitted. To permit these actions, though, a justification is required to explain why terrorism is more dangerous than 'ordinary' criminal acts. That, in turn, requires a detailed analysis of the reasons and motivations for terrorism. A thorough analysis into each of the various reasons for terrorism may well prove that although the means used – terror – are the same in all cases, the ends for which it is used are different. Consequently, different individual and public interests may be at stake and different justifications for the state's protective duty may be offered according to the reasons underlying terrorism. These different parameters would be reflected in the boundaries of each justification. It may be that the boundaries of the various justifications prove to be similar to a large extent, but that of course does not deem undertaking an analysis unnecessary. Indeed, terrorism is viewed as a threat to the interest in life and physical integrity. Yet in my thesis I show that anti-democratic threats are threats not only to liberty, but also to the whole range of interests of each and every citizen.

Focusing on anti-democratic ideologies rather than terrorism both narrows and widens the scope of my thesis. It narrows it because, as I have just explained, these ideologies are only one of the ends for which terrorism may be used as a means. On the other hand, it widens it because terrorism is only one tool available to those who profess anti-democratic beliefs. There are other means available to anti-democratic agents, which are also addressed in my thesis.

Civil disobedience is another related issue that might be confused with the anti-democratic ideologies constituting the core of my research. Acts of civil disobedience, too, are deliberate violations of the law motivated by some kind of moral ideology. Yet, they differ greatly from anti-democratic ideologies. Although the motivation for acts of civil disobedience is to bring about a change in a specific law or policy by anti-democratic means – namely, by the pressure that violation of the law will cause – those who engage in an act of civil disobedience accept the general legitimacy of the established authorities. They do not intend to reject as a whole the democratic system, of which the specific condemned laws or policies are a part. On the contrary, they often argue that the specific law or policy is undemocratic in its nature, although it passed through formal democratic channels. Civil disobedience acts within the framework of established political authority, while anti-democratic acts intends to demolish exactly this framework. As such, civil disobedience does not create the same type of threat that anti-democratic ideologies do, and consequently, does not trigger the state's special right to self-defence.

So far, I have used the phrase 'the state's right to self-defence' as it is commonly used in public debates. However, talk of a *right* to self-defence against anti-democratic ideologies is misleading in two respects. The justification that I develop in this thesis establishes a *duty* of self-defence, rather than a *right* to self-defence, which is owed by the state to its citizens. It is a duty that derives from the individual's right to self-defence, a right, I would argue, that extends to include defensive responses to anti-democratic threats. As against the culpable anti-democratic agents the defensive response is also the just thing to do for reasons of desert. Since individual citizens cannot effectively defend themselves against anti-democratic ideologies, they transfer their right to the state, which acts as their agent and can effectively defend them. As in many other cases in which X transfers his or her right to another to act on

his or her behalf, the transfer makes the receiver, in this case the state, duty-bound. Given that in the case of anti-democratic ideologies this course of action also complies with principles of justice (i.e. it is the right thing to do) it provides the state with the positive reasoning which is necessary if the state is to be granted permission to use coercive measures when carrying out its duty. This reasoning also means that although we are discussing a duty of *self*-defence the state does not act to defend *itself* for the benefit of its citizens, but rather owes a special duty to defend *its citizens.* (Nevertheless, this distinction is mainly theoretical. In practice the threat to the citizens is found in the threat to the state.) Yet, throughout the thesis I will continue to use the term 'duty of self-defence against anti-democratic ideologies' to express its derivation from the individual's right to self-defence.

In other words, I hold that the direct relationship between the anti-democratic threat and the state's right of self-defence, as described in Figure 1, is incorrect.

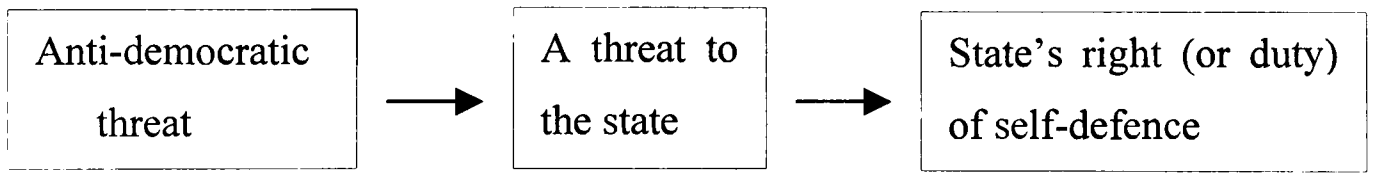

Figure 1

Instead I develop a more nuanced justification, shown schematically in Figure 2, according to which the anti-democratic threat to the state is a threat to each individual within society. This threat to individual citizens generates an individual right to self-defence against anti-democratic ideologies – a right that in the circumstances is also the right course of action – which is transferred to the state, thus creating the state's duty of self-defence against anti-democratic ideologies.

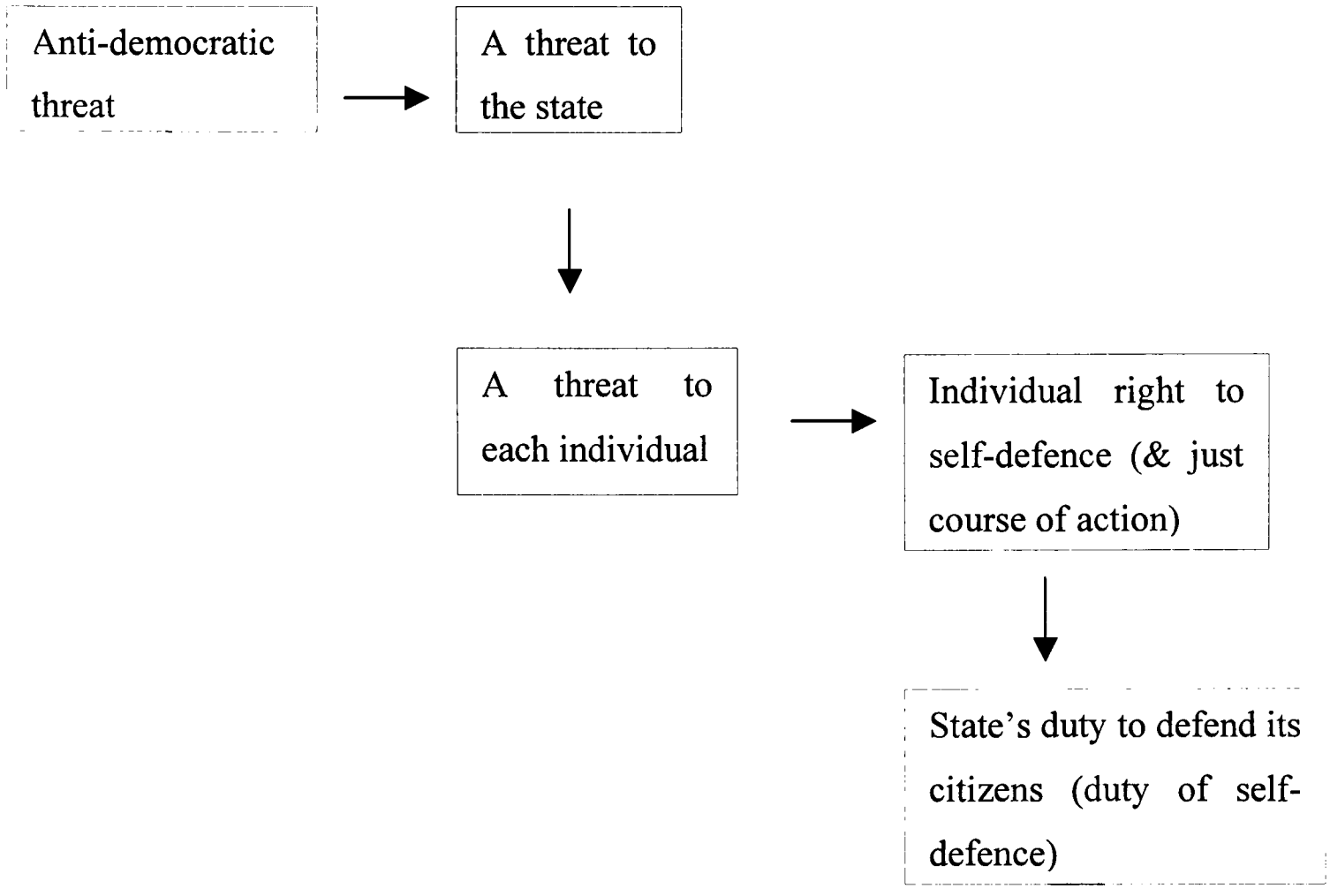

Figure 2

My thesis is organized into four chapters. In Chapter One I set out the premise for my research. I define anti-democratic ideologies and explain why anti-democratic threats deserve the special attention afforded them in this thesis. The common feature of all anti-democratic ideologies is their opposition to one or more of the three threshold conditions of democracy and their general aspiration of overthrowing the democratic regime. The latter aspiration singles out anti-democratic ideologies from among a wider category of undemocratic ideologies. This common description is the basis for five features of the anti-democratic threat that are unique, both in themselves and in their combination. It is these features that explain the need to give special attention to anti-democratic threats, as distinct from all other criminal threats.

Chapter Two is an analysis of the general principles that govern state coercion as applied in criminal law. The objective of the chapter is to examine how far anti-democratic ideologies and anti-democratic activity can be criminalized in accordance with these general principles. If these principles were able to provide a sufficient comprehensive defence against anti-democratic threats, then there would be no need to refer to any special duty, or right, of self-defence. The general principles that govern criminal law would then determine the extent to which such activity could be criminalized. However, analysis of these principles, and more specifically, analysis of the harm principle, minimalist principle, principle of imputation and principle of proportionality, proves to the contrary. As long as we deal with anti-democratic activity that causes direct harmful results, there is no special difficulty with their criminalization, though it is the direct threat to life and property, rather than the special nature of the anti-democratic threat, that justifies the prohibitions. Difficulties emerge the further we go from direct harmful acts. These difficulties – of criminalization of remote harm – have long been known and discussed. Yet, the practical implication of the impossibility of criminalizing such anti-democratic acts is that, under general principles, it would be impossible to provide the comprehensive defence necessary to counter anti-democratic threats. Since these threats pose special danger to individual citizens, it is necessary to try to locate a distinct justification that would allow for the criminalization of remote harm derived from anti-democratic activity, or else reach the inevitable conclusion that Goebbels was right after all; and indeed, democracy cannot provide a sufficient defence for its citizens against its enemies.

In the second part of my thesis, I develop a moral justification for the state's duty of self-defence, which is based on its derivation from the individual right to self-defence, where the right is also the just cause of action. In Chapter Three I examine the individual's right to self-

defence. I establish the right as a derivative right, which is both an entitlement and a right in the Hohfeldian and Razian senses; that is, a right that imposes a duty on another. I examine four possible justifications to the right, all of which can establish the basis for a derivative duty (or right) of the state. But each justification encounters some difficulty and, hence, I develop a fifth justification. Finally, I examine the content of the right and its internal limitations.

The final Chapter of this thesis, Chapter Four, concentrates on the derivation of the state's duty of self-defence against anti-democratic ideologies. I examine a number of possible connections between the individual's right to self-defence and the state's duty of self-defence and explain my preference for the explanation that the state's duty is the result of a transfer of individual rights of self-defence, a right which is extended to include threats to liberty. Since the state is bound to act only on principles of justice, I go on to explain that responding to the anti-democratic threat is not only a right but is also the right thing to do in the circumstances. Consequently, the requirements of the state's derivative duty also comply with the principles of justice. Lastly, I examine the content and the internal limitations of this derivative duty, bearing in mind the unique features of the state as a defender.

I have made a conscious choice not to discuss explicitly the specific, basic human rights with which anti-democratic ideologies may be connected, in particular the canonical freedoms of speech, association and religion. I have done so because, as I explain later on, I think such a discussion is unnecessary for my current argument. The question I pose for this thesis is, what, if any, is the moral justification for the state's duty or right of self-defence against anti-democratic ideologies, and what are the associated limitations on the permissibility of using criminal law to that end? The justification I offer bases this duty on the individual right to

self-defence, transferred to the state. As such, the objective of the duty is only to resist or ward off the anti-democratic threat. The strict limitations that the internal limitations impose already address and incorporate possible values of anti-democratic activity which are generally protected by basic human rights. Given the objective of this duty, and the nature of its internal limitation these limitations ought to be, and indeed are, exclusive. No further external limitations, in the form of basic human rights, are required.

Chapter 1 - The nature of the threat posed by anti-democratic ideologies

In this chapter I will argue that the threat posed by anti-democratic ideologies is of a special kind. Anti-democratic ideologies are those *undemocratic* ideologies that aim to alter the social and political institutions of the democratic order. Undemocratic ideologies vary greatly and include ideologies from both the left and the right ends of the political spectrum. Nevertheless, the threat they pose is of the same nature. Given their diversity, it is useful to define such ideologies negatively; namely, as those having a common opposition to basic democratic principles. As the concepts of democracy, and democratic values, are controversial, I will stick to a 'thin' account of democracy. This is one that includes only necessary and minimally sufficient principles, as recognized by the various theories. I will argue that the threat posed by anti-democratic ideologies is a threat to each citizen of the democratic state. Last, I will examine the features of the anti-democratic threat, comparing it with threats posed by 'ordinary' criminal acts. This comparison will show the existence of five pertinent differences. These differences establish the unique nature of the anti-democratic threat and must be addressed in any attempt to provide an effective and comprehensive defence against it.

A. Defining anti-democratic ideologies

Anti-democratic ideologies are a sub-category of undemocratic ideologies. Like all other undemocratic ideologies that oppose democracy, their distinct feature is a shared objective to

alter the democratic order with an undemocratic one. Hence, in order to define this category, and given the diversity of undemocratic ideologies, it is essential to define democracy. Defining democracy, however, is a complex and controversial task that has exercised many political theorists. For the purpose of this thesis, I will present a 'thin' account of democracy that can be used as a selective criterion. This account will provide the threshold conditions required for a system of government to be counted as democratic. I do not intend to canvass the full range of available theories of democracy. Furthermore, I will not offer any justifications for these conditions, as they differ from one theory to another; and this would require fuller discussion than I can give here. For my purposes, it is sufficient that these conditions are commonly recognized by the various democratic theories. It is important to note that any democratic theory must consist of *all* the requirements that I present. A theory that does not see *all* the requirements as necessary elements is *not* a democratic theory but, rather, an undemocratic one, even if the word 'democracy' is part of its name (e.g. the Schumpeterian democracy). One may object to the democratic account I will present by arguing that no existing democracy measures up to even its minimum manifestation. Thus, the argument might go, in practice there is no democratic state, and the distinction I am trying to make is an artificial one. Although this objection points to the inevitable gap between theory and practice, it does not negate the fact that undemocratic ideologies (and respectively, anti-democratic ideologies) can be defined as opposing democracy for exactly this reason. I compare theories – in this case, a democratic theory to an undemocratic one. In practice, the actual 'democratic' state tries to live up to the ideal standards I describe, while members of undemocratic groups try to live up to a different, contrasting ideal. When they are inclined to give effect to their ideology at state level, they threaten the social and political institutions of democracy. Lastly, the reader is asked to note that, although the concept of democracy is used

widely, for the purposes of this thesis I refer only to the democratic *state* (in its Aristotelian meaning).

1. Three threshold conditions of democracy

Literally, democracy means rule by the people. Yet, as Beetham wrote: 'Democracy as a method of government is not whatever the people at a given moment may happen to decide, but a set of arrangements for securing their control over the public decision-making process on an ongoing basis'.[1] At the minimal stage, the concept of democracy involves three basic principles: (1) democratic participation including a universal suffrage; (2) non-discriminating rights; and (3) freedoms of thought and expression.[2]

(a) Democratic participation

Any concept of democracy must, in my view, assume *self-government*. That is, *a system in which the citizens themselves are the ones to decide on the rules that will bind them*. This description contains two elements: The first is the idea that the decisions reached must be binding. Though there may be disagreement about the content of a democratic state's decision, once a decision has been reached, even dissenters are required to comply. The second element is the notion that decisions should only be taken by those who are subject to

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[1] D Beetham 'The Limits of Democratization' in D Held (ed) *Prospects for Democracy* (Oxford Polity Press 1993) 55, 58.

[2] My definition of democracy is based largely on Dahl's definition in RA Dahl *Democracy and its Critics* (New Haven Yale University Press 1989) chap 8.

them. Furthermore, no lawmaker should be exempt from the state's rules: no one is 'above the law'.

First and foremost, the concept of democratic participation entails democratic election. By 'democratic election', I mean *periodic free and fair elections among competing leaders and ideologies. The suffrage must be universal.* Any adult member of the society must have a right to vote, both men and women, and any exception to this rule must be regarded as suspicious and justified separately.[3] At elections themselves (as well as in the process of any collective decision-making), *citizens must be assured an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by any other citizen. In determining outcomes at the decision-making stage, these choices, and only these choices, must be taken into account.*[4] A prior *adequate and equal opportunity for citizens to express their preferences, which in part involves forming or joining organisations*, must accompany any elections. As Dahl points out,[5] it is important to note that these requirements do not specify a particular election structure. Different methods might all comply with these requirements. However, it is the method that conforms to these requirements best (in each society) that should be the one finally selected.

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[3] Two possible exceptions to this rule are mentally disabled people and convicted criminals. The exclusion of the mentally disabled might be justified, because such citizens are incapable of taking responsibility for their own major life decisions. Convicted criminals are, arguably, excluded from suffrage, because their criminal actions show lack of respect for the laws enacted by their community and therefore should not participate in the next choice of government and parliament. Cf. the definition of existing democratic governments given by A Weale *Democracy* (USA Macmillian Press 1999) 14.

[4] This criterion is taken from Dahl *Democracy and its Critics*, *supra* note 2, p 109. See also the definition of democracy offered by Beetham, *supra* note 1, p 58.

[5] Dahl *Democracy and its Critics*, s*upra* note 2, p 110.

In defining this first principle as democratic *participation,* I did not wish to associate myself with the theory of deliberative democracy, in particular. In using the term 'participation' I mean that there is more to the principle than democratic elections in themselves. Democratic participation requires that *citizens have control, directly or indirectly, over public decisions*. Furthermore, *citizens are the ones who decide, directly or indirectly, which issues should be decided by them.* This last requirement is necessary, so as to prevent members of a given society, as well as outsiders, from taking away from citizens issues that ought to be decided collectively, e.g. such matters as security, foreign affairs, and education. This last requirement is met even in a system in which certain decisions are taken by officials only. This is the case as long as citizens are the ones who decide which issues should be delegated to officials (and on which terms). Moreover, such delegated authority must be capable of being recovered, if necessary.[6]

(b) Non-discriminating rights

By referring to non-discriminating rights, I do not mean to require a general right of equality (though some would find it an important right), but rather, a narrower right necessary for the concept of democracy. The democratic principle of non-discriminating rights demands that all citizens[7] are politically equal. Political equality requires that every citizen should have all the rights, obligations and opportunities involved in democratic participation. Political equality has two relevant aspects. The first is equality in the sense that all citizens can design their own

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[6] Dahl *Democracy and its Critics*, *supra* note 2, pp 112-114.

[7] I am using the term 'citizen' loosely, to refer to members of a given society. I wish to avoid a discussion on various difficulties raised by the term 'citizenship', such as its acquisition, exact meaning and possible alternative terms, and the special treatment of specific groups, such as criminal convicts, since this goes beyond the scope of my thesis.

preferences and accordingly can participate, directly or indirectly, in public decision-making.[8] This aspect is reflected in the principle of democratic participation discussed above (equal voting and equal opportunities to participate effectively in the process of decision-making). A second aspect of political equality is the requirement that the interests of all citizens should be considered equally.[9] However, giving equal consideration does not mean that the result will not harm the interests of any particular citizen. Given a diversity of interests, it is impossible to avoid harm to the interests of some citizens in any collective decision.

I am aware that the definition I have offered is partial. Questions about the nature of citizens' 'interests'[10] and the way in which these interests can be 'weighted equally' remain open. The purpose of this somewhat vague definition is to establish the basic position shared by democratic theories offering different answers to the above questions. Furthermore, the account I offer does not address the inequality that can result from a majority decision. Once again, this problem is beyond the scope of this thesis.

(c) Freedom of thought and freedom of expression

The third and final democratic principle is the requirement of freedom of thought and freedom of expression. These freedoms are a pre-condition for implementing the principle of democratic participation. They are essential first, for consolidating citizens' positions on the

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[8] R Harrison *Democracy* (London Routledge 1993) 184; RA Dahl *Polyarchy: Participation and Opposition* (New Haven Yale University Press 1971) 2.

[9] J Locke *Two Treatises of Government – The Second Treatise* P Laslett (ed) (Cambridge CUP 1988) chap 6, para 54 p 322; Dahl *Democracy and its Critics*, *supra* note 2, pp 85, 167-8; Harrison, *supra* note 8, p 183.

[10] Such as maximising freedom, developing capacities and potentialities as human beings, satisfaction or perhaps a particular collective, social good.

range of topics that are subject to collective decision-making. Discussing an issue and listening to other views helps one to understand the problems involved and the different opinions at hand, and to form a personal view on the topic. Once a citizen has made up his or her opinion, freedom of expression is essential for advocating that opinion, and persuading others to support it. Reflecting on the reasoning for freedom of expression, clearly, freedom must be interpreted widely, so as to include freedom of assembly and freedom to form or join associations that will help to promote the citizen's opinion. Furthermore, it must be understood as demanding the establishment of institutions necessary to provide free and full information on the whole range of public topics, as a means of supporting this democratic principle.

As explained above, *undemocratic* ideologies are those ideologies that reject one or more democratic principles. Yet, not all undemocratic ideologies pose a threat to democracy. Some undemocratic ideologies are not interested in the democratic political order, but concentrate instead on the lives led by their adherents. Jehovah's Witnesses exemplify this principle. Other undemocratic ideologies aim to replace the democratic order with another (undemocratic) political order. These are not just undemocratic but, essentially, *anti-*democratic ideologies. Thus, they pose a threat to the democratic state and its citizens (even if due to their relative insignificance or to the stability of a given society, it is not an imminent serious danger). Several present-day political theories illustrate the nature of an anti-democratic ideology well. In an attempt to keep my discussion as cogent as possible, I have used the descriptions of these theories contained in the *Routledge Encyclopaedia of Philosophy*. Whilst I am aware that the exact definitions of political theories are, at times, controversial, the frame of reference enjoyed by this thesis prevents me from engaging in a more wide-ranging discussion.

2. Some examples of anti-democratic ideologies

(a) Italian and German Fascism

'Fascism' is a term referring to both political ideology and a concrete set of political movements and orders. The Italian and German fascism of the 1930s are classic examples of this[11] (hereafter referred to as Italian or German Fascism or classical Fascism). In my example, I will refer to the political ideology of these movements that will be contrasted with the democratic principles defined above. The *Routledge Encyclopaedia* defines classical fascism as follows:

> Fascist ideology is sometimes portrayed as merely a mantle for political movements in search of power, but in reality it set forth a new vision of society, drawing on both left and right-wing ideas. Fascists stressed the need for social cohesion and for strong leadership. They were more concerned to revitalize nations by cultural change than to propose institutional changes, but they saw themselves offering a third way between capitalism and communism.
>
> ... The starting point was a view of human nature: fascists ... believed that 'man' was a savage until given a purpose by *strong leader*. The need for a new fascist man was linked to a cyclical view of history, which saw conflict as inherent in the world [i.e. that violence is the motive force of history – S.W.]: Hitler argued that it was necessary to ensure that the nation was sufficiently revitalized to withstand challenges from outside. Social cohesion required the destruction of deleterious humanistic or individualistic influences... The main focus was on changing culture and on propaganda that was seen as necessary to do this, for fascism held that people were essentially swayed by myths and symbols rather than by rational argument.

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[11] However, even this statement is controversial. According to one view, Nazism should not be considered as fascism, even though both ideologies had common characteristics. The distinction is said to lie in the additional element of biological determination contained in Nazi ideology (Z Sternhell *The Birth of Fascist Ideology* (Princeton Princeton University Press 1994) 5). However, the common view among scholars does regard Nazism as a separate, but nonetheless connected, strand of Fascism.

> ... There were important differences between specific manifestations of fascism. Nazism... saw the basis of the community as lying in 'blood' [hence Hitler's racist ideology – S.W.] whereas Italian fascism saw nationalism more in terms of culture. Most Nazis also placed far less emphasis on the role of the state than Italian fascists, seeing the state as a repository for reactionary elements and a source of division between people and its leader. [12]

Italian (and later on German) Fascists referred to their theory as 'totalitarian', since '[f]or the fascist all is in the state and nothing human or spiritual exists, or much less has value, outside the state. In this sense, Fascism is totalitarian'.[13] Their emphasis was on unity, social solidarity and a sense of duty and sacrifice negated anything that constituted diversity.

Does the Fascist theory, at least in its classical versions, comply with democratic principles? The Fascist ideology offered a new way, opposing liberalism, including liberal-democracy, and Marxism, including social-democracy. Yet, the question is not whether fascism negates one specific type of democracy or another, but whether fascism opposes the fundamental concept of democracy itself, as defined above. The answer to this question is affirmative. The fundamental principles of fascism do not comply with the basic principles of democracy. Fascism calls for strong leadership that, though based on mass support, is actually quasi-dictatorship, since the leader ultimately controls the agenda of matters to be decided by

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[12] E Craig (ed) *Routledge Encyclopedia of Philosophy* (vol 3 Oxford Routledge 1998) 562. The emphasis is mine – S.W.

[13] AJ Gregor *The Ideology of Fascism: The Rationale of Totalitarianism* (NY Free Press 1969) 223, cited in E Craig (ed) *Routledge Encyclopedia of Philosophy* (vol 9 Oxford Routledge 1998) 443. Later on the term 'totalitarian' transformed to describe the modern dictatorships of Hitler and Stalin which were based not only on terror but also on mass support mobilized behind an ideology prescribing radical social change (*Routledge Encyclopedia* vol 9 p 442).

the citizens (that is, if citizens are permitted to make any decisions at all).[14] Moreover, democracy is based on notions of rationalism. The principle of self-government is founded, among other things, on citizens' ability to form views based on rational arguments in the presence of free and full information; whereas fascism is an anti-rational ideology founded on the belief that public opinion is, and should be, formed by feelings, myths and symbols. Thus, it opposes self-government. A third distinction can be found in the fascist concept of unity and the rejection of anything that advances diversity. This concept, in essence, opposes the basic idea of democracy, which promotes pluralism of ideas by encouraging individuals to form their own opinions.

German Fascism also rejects the third democratic principle of non-discriminatory rights. Determining the collective, or the nation, biologically, German Fascism denies universal suffrage and political equality to all citizens. Instead, it endorses the superiority of some citizens over others. Finally, the followers of all forms of fascism are interested in altering the democratic order and thus fall within the scope of anti-democratic ideologies.

(b) Islamic Fundamentalism

A second example of an anti-democratic ideology can be found in Islamic fundamentalism. Without delving too deeply into Islamic fundamentalist ideology, it can be said to represent an attempt to revive the theoretical relevance of Islam in the modern world. It is postulated as

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[14] The reason is that 'all members of the nation shared a common myth, a common soul, [hence] their participation in government need only to be symbolized by the leader who has activated their shared human natures through his own activism, his "heroic will"'. GL Mosse 'The Genesis of Fascism' in N Greene (ed) *Fascism – An Anthologe* (Illinois Harlan Davidson Inc. 1968) 3, 9.

a qualitative opposition to the western world and its disparate political ideologies. 'The emphasis on Islam as a *sui generis* and transcendental set of beliefs excludes the validity of all other values and concepts. It also marks the differences between the doctrinal foundations of Islam and modern philosophical currents'.[15] Fundamentalist ideology is based on the assumption that the Islamic religion and the cosmic order reflect god's will.

> The human nature and the cosmos are substances, which retain their identities while undergoing change. A substance generates properties and assigns them a function peculiar to their qualities. Properties inhere in substances and are dependent for their existence and persistence on them... These properties are not transferable, in that once transferred they lose their function and significance... The essential nature of the human being is religious [i.e. religion understood to be Islam itself. The religion has its own constant, immutable and clearly defined nature. Its underlying aim is to change the process of history and to create a new human being unfettered by subservience to other human beings or institutions... Islam forms an organic unity... Once a [constituent] part is detached and treated on its own it loses its significance, depriving the harmonious totality of its beauty and truth].
>
> Throughout human history there have been only two methods of organizing human life: one that declares God to be the sole sovereign and source of legislation and another that rejects God, either as a force in the universe or as the lord and administrator of society... Once human beings accept legislation to be dependent on the will of an individual, a minority or a majority, and not as a prerogative of God alone, they lapse into a type of paganism [the generic designation given to all systems of thought other than Islam (though these thoughts might differ from age to age)]...[16]

Islamic fundamentalism declares itself as an opposition and alternative to any Western political theory, including democratic theory. It opposes the idea that people, as individuals, can determine the nature of the society in which they desire to live. It rejects the core idea of self-government and the assumptions that are at its heart; and constantly attempts to overthrow democratic regimes. Thus, Islamic fundamentalist ideology fairly gains the title 'anti-democratic'.

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[15] E Craig (ed) *Routledge Encyclopedia of Philosophy* (vol 5 Oxford Routledge 1998) 9.

[16] *Routledge Encyclopedia* (vol 5), *supra* note 15, pp 10-11.

Before I continue, I wish to draw attention to two other groups of ideologies that are excluded from the set of 'anti-democratic ideologies' defined here. The first consists of ideologies that wish to maintain a democratic order that is different to the existing one. This is the case with certain groups in the United States that call for a democratic regime not based on a written constitution. Such ideologies raise different concerns. Although they threaten the existing democratic order, they do not threaten the basic liberty, freedom and autonomy of its citizens. Thus, they do not give rise to the same duty of protection owed by the state (or at least, the same justification for the state's duty of protection). Similarly, ideologies that lead to, or more accurately motivate, acts of civil disobedience are also excluded from this discussion. As explained in the Introduction, though acts of civil disobedience are morally motivated and constitute deliberate violation of the law in order to change the law (whether that same law that was violated or some other law) or a particular policy, they differ greatly from anti-democratic acts. Civil disobedience accepts the general legitimacy of established authority. They do not intend to reject as a whole the democratic system underlying the particular law or policy objected to. Civil disobedience operates within the framework of established political authority, whereas anti-democratic acts aim to demolish that framework.[17]

B. UNIQUE CHARACTERISTICS OF ANTI-DEMOCRATIC THREATS

Identifying the existence of an anti-democratic threat does not justify, in itself, the need for the special attention, and perhaps special treatment, paid to anti-democratic ideologies in this

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[17] See for example C Cohen *Civil Disobedience* (NY Columbia University Press 1971) 42-48.

thesis. It is necessary to elucidate further exactly why this threat is unique compared to 'ordinary', criminal threats, and hence worthy of attention. I argue that five features distinguish anti-democratic threats from 'ordinary', criminal threats. These unique features form the basis for a justified invocation of the state's special duty to defend itself against anti-democratic ideologies, which will be discussed in the following chapters. It should be stressed that the invocation of the state's special duty of self-defence does not lead to one set of measures that must be taken by the state to comply with its obligation. Instead, as shall be seen in Chapter Four, the implementation of this duty is flexible, and the decision which measures should be employed must be sensitive to the stability, or the volatility, of a given society in a given time.

At the outset of this discussion, clarification regarding the nature of the group threatened by anti-democratic ideologies is required. The term 'group' implies that more than one entity would be affected by such a threat, if implemented. Whatever democratic theory one upholds, at the very least, the danger posed to the democratic order by anti-democratic ideologies must be understood as equally hazardous to the interests of every individual citizen. All democracies are based on equal concern and respect for the autonomy of each one of its members, and also on the value which each individual *qua* individual has. A democratic order exists in order to permit its citizens to live together and to pursue their own goals for their own personal benefit, as well as for the future prosperity of society as a whole. Democrats hold that people are generally the best judges of their own interests and that equal citizenship rights are necessary to protect these interests. Democracy expresses and encourages the autonomy of individuals under conditions of social interdependence, where many important

matters must be decided collectively.[18] A major role of democratic institutions is to protect the liberties and basic interests of all its members. Anti-democratic ideologies do not accept the concept of 'rule by the people' either by directly rejecting the first principle of democratic participation, or by rejecting the second and / or third supporting principles, which allow democratic participation. Thus, they claim that not all people can and should decide rationally for themselves how to live their private and collective lives. The ability to decide for oneself is a necessary condition for recognising the value of individual autonomy. Hence, anti-democratic ideologies, by their essence, do not respect the equal autonomy and liberties of all the members of a given society. Their intention is to replace the democratic order with some other ideology that will not equally protect the autonomy, liberties and basic interests of all citizens. As such, this is a threat to each individual who lives in that democratic order, inasmuch as it is a threat to the democratic order itself.

Some might argue that even if we accept that danger to the democratic order is also a danger to its citizens, a separate threat to democratic authority still exists, because of the special roles and prerogatives that these authorities possess. In terms of a liberal democracy, the protection and promotion of the freedoms and liberties of the individual, whether or not this includes promotion of the individual's welfare, is the *only role of democratic authority*. It is for this reason that democratic authority (i.e. government) was created and granted its powers and duties. Democratic institutions have no other purpose. It is true that in other political theories, such as communitarianism, government has a special status that exposes it to a separate threat. However, these theories do not oppose or ignore the state's major role in protecting its citizens' liberties and autonomy. Thus, even if there is a separate threat to

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[18] A Gutmann 'Democracy' in R Goodin & P Pettit (ed) *A Companion to Contemporary Political Philosophy* (Oxford Blackwell Publishers 1993) 411.

democratic authority, this is an *additional* threat to the derivative threat to which I am referring. At most, this could generate additional grounds justifying the state's duty of self-defence, although that alone does not remove justification based on the presence of an individual-directed threat, which I will offer below.

Note, that the discussion in this Chapter focuses on the nature of the threat – which is similar in all cases of anti-democratic ideologies, and not on the stability and volatility of society which may change from one society to another and from time to time. The nature of the threat (and it being a serious one) triggers the state's duty of self-defence against anti-democratic ideologies. However, the stability, or volatility, of a given society is also an important factor as it shapes the likelihood that the threat will actualise, and the level of risk that that society can withstand. As will be seen in Chapter Four, the state's duty of self-defence is flexible and sensitive, and the stability (or volatility) of society, governs the specific obligations that must be met by the state and the subsequent measures that may be employed by it.

1. The first characteristic – the difference in the targets of the threat: a threat to the whole society

I argue that anti-democratic ideology threatens the interests of each individual, rather than the interests of democratic authorities. The question then is whether there is any difference between an anti-democratic threat and any other 'ordinary threat' posed to the interests of individuals (e.g. murder, theft, rape, fraud). I will define the first characteristic in terms of the difference in the targets of the threat. This preliminary definition will be subject to modifications later on: *While most of the threats posed by 'ordinary' wrongful acts are*

directed against the interests of a specific person (though there might not be an apparent reason for the person chosen), anti-democratic threats are aimed at the individual interests of all citizens.

The difference between these types of threats invites three distinct, but connected, critiques. The first objection is based on a common view regarding the controversial definitions of 'crime' and 'criminal law'. According to this view, the very essence of criminal law and the transference of wrong from private law (i.e. torts or contract) to public law is in the social harm that results from wrongful conduct.[19] *A Dictionary of Modern Legal Usage*, for example, defines 'crime' as 'any *social harm* that the law defines and makes punishable...'.[20] Hence, it is inaccurate to say that a threat posed by an 'ordinary' wrongful act is not directed against the whole society. Any crime must be understood to consist of a social harm to the whole community. However, we usually refer to social harm in terms of the 'costs' to society, and refer to the harm caused to a specific victim (damage and/or suffering)

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[19] The question of the definition of criminal law (also referred as to the question of the definition of a 'crime') and the distinction between criminal law and private law requires fuller discussion than I can give here. However 1 do wish to point to some other views: for the view that a crime is a moral wrong (while civil wrong is not a moral wrong), see G Williams 'The Definition of Crime' (1955) 8 Current Legal Problems 107, 117, and the references in footnote 17; the view that a crime is defined only by special procedures, see Williams's view in the article above; the view that criminal law can be distinguished by its function – the censuring of wrongdoing, see A Ashworth 'Is The Criminal Law A Lost Cause?' (2000) 116 LQR 225, 232; and the view that crime is wrongdoing that takes unfair advantage of law abiding citizens, see W Sadurski 'Distributive Justice and The Theory of Punishment' (1985) 5 OJLS 47, especially p 52-54.

[20] BA Garner *A Dictionary of Modern Legal Usage* (2nd ed NY OUP 1995). The emphasis is mine – S.W.

as a relevant and important factor in deciding which wrongs are to be criminalized.[21] Social harm does not eradicate the distinction between a direct threat posed to a few individuals and one that is posed to a whole society.

A second possible criticism is that, although an 'ordinary' wrongful act is directed against a specific person, it may have an indirect effect on the whole of society. Consider a series of rapes in one locale causing all the people in that area to fear for their well-being. However, although the fear of harm may affect members of society other than the direct victims of such acts, the threat is only, and will only be actualized for a small minority. An anti-democratic threat, on the other hand, will, if realised, affect the interests and liberties of the overwhelming majority of the citizens. Following Lawrence Becker, one might argue that the 'indirect effect of fear' cannot be dismissed so easily. Becker argues that the only social harm to which we can refer as a justification for criminalizing a wrongful act is what he defines as 'the social volatility consequent to the *process* of doing the major sorts of conduct we punish criminally'.[22] By 'social volatility' he means that '... insofar as I do not possess [an assurance

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[21] See SE Marshall & RA Duff 'Criminalization and Sharing Wrongs' (1998) 11 Canadian J of Law and Jurisprudence 7, 9 as for the growing demand for a more prominent role for victims in criminal procedures; Cf. O Ben-Shahar & A Harel 'The Economics of The Criminal Attempts: A Victim-Centered Perspective' (1996) 145(2) U of Pennsylvania L Rev 299.

[22] L Becker 'Criminal Attempt and The Theory of The Law of Crimes' (1973) 3 Philosophy and Public Affairs 262, 273. Cf. Nozick's view in R Nozick *Anarchy, State and Utopia* (Oxford Basil Blackwell 1974) chap. 4, especially p 67. He refers to the fear, of the victims and of the non-victims, (and which cannot be compensated) as the social harm. But for examples of other interpretations of social harm see Marshall & Duff, *supra* note 21. According to this view 'we [the community] share *in* the very wrong that [the victim] suffered: it is not 'our' wrong *instead of* hers; it is 'our' wrong *because* it is a wrong done to her, as one of us – as a fellow member of our community whose identity and whose good is found within that community' (p 21).

that my person and activities will not be unjustifiably interfered with by others], my own criteria for decision-making will (only rationally) include the prospect of abandoning my own social stable behavior in self-defense'.[23] Thus, social volatility is to be treated as a disvalue of itself. The 'social volatility' is what I referred to as the 'indirect effect of fear'. If one is to accept Becker's argument that the criminalization of a wrongful act is founded on the threat it poses to social volatility, the distinction between 'ordinary' and anti-democratic threats would seem to be blurred. In both cases the harm done is to society as a whole. However, the nature of the threat to the whole society is different in each case. The harm caused to society by the 'ordinary' crime is a second-order harm. Social volatility is the result of the *process* of a criminal act: that is, the volatility caused by the knowledge that there are people who are willing to act in harmful ways to others. This second-order harm is in addition to the first-order harm that results from the act itself, i.e., the natural consequences of the wrongful act – the harm caused to health or to property, etc. On the other hand, if a specific anti-democratic threat were to be realized, the harm caused to society would be a first-order harm. The autonomy of each and every person in society would be diminished or destroyed as a direct and natural consequence of this act. Equally, other propositions that justify criminalization by alluding to some further social harm, as is distinct from the first-order harm caused to the victim, do not undermine this unique characteristic of an anti-democratic threat: it being a first-order threat to the whole society.[24]

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[23] Marshall 7 Duff, s*upra* note 21.

[24] For an example of such a suggestion see J Kleinig 'Criminally Harming Others' (1985) 5 Criminal Justice Ethics 3, 8-9. Kleining suggests that criminal harms are 'those harms that are destructive of the trust that people must be able to put in each other and in the institutions on which their welfare depends if they are to have the means for making or keeping for themselves satisfactory lives.' (p. 8)

The third line of criticism attacks the generalisation of 'ordinary' harmful acts. From what I have said so far, it seems as if this is a homogeneous group; as if all 'ordinary' wrongful acts resemble murder or theft, in that these forms of conduct are injurious (or potentially so) to individual members of the society. This stance overlooks wrongful conduct, recognized by criminal law, which is injurious to the society as a whole, to the state itself, and to its institutions. Among the crimes in these latter categories are environmental offences, as well as offences against the security of the state, such as treason and espionage (though not for ideological reasons), offences that are concerned with public disorder (even when excluding ideological acts) and offences against the administration of justice (e.g. perjury). In these cases, it seems that the threat is not only to a few individuals, but to the society as a whole. Moreover, these kinds of wrongful acts generate threats that seem to resemble an anti-democratic threat, especially with regard to acts that threaten the security (and hence the existence) of the state. Here, too, it can be argued that the threat to the communal interests of the state is really a threat to the interests of each and every individual within it.

To answer this critique best it is necessary to refer to the concept, or concepts, of 'public interest'. In *Harm To Others* Feinberg refers to a distinction between wrongful acts that harm 'individual interests' and those that harm 'public interests', and accordingly between 'private' (or 'individual') and 'public' harms. By 'public interests' Feinberg means interests 'of a widely shared character, belonging to large groups, institutions and corporate entities'.[25] He goes on to explain that there are two closely connected conceptions of 'public interest':

> According to one, a "public interest" is a collection of specific interests of the same kind possessed by a large and indefinite number of private individuals. The interests in the collection do not necessarily belong to everyone, but they could belong to *anyone*, without further specification. These interests are not all based on the same goal X, but rather on distinct objectives that are all of the same X-ish kind...

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[25] J Feinberg *Harm to Others* (NY OUP 1984) 63.

> Public harms, on this conception, are those produced by generally dangerous activity that threatens no specific persons nameable in advance, but almost anyone who happens to be in a position to be affected. These activities produce some common danger to all the members of the community…
>
> According to the second conception, a public interest is a "common", or widely shared interest. Common interests are interests that all, or most persons in a community have in one and precisely the same thing, not an interest that each had in his own X, but an interest that each has in one and the same X.[26]

(a) First conception of 'public interests' – threat to a large number of people

Although according to Feinberg's first conception an anti-democratic threat is considered a 'public threat', it does not undermine the first characteristic argued for here. The first conception of 'public interest' emphasises a somewhat different aspect from the one emphasised by the first characteristic. However, it is important to examine this conception as it explains the difference between anti-democratic threats and some of the other threats, which are considered 'public'. According to the first account, the interest is 'public' in the sense of the number of people who possess the same type of individual *endangered* interest. Accordingly, the threat is 'public' if it causes a 'common danger' to all. It is *not* necessarily the case that everyone would be injured. As Feinberg explains: 'Poison dropped in a city's water supply would cause public harm in this sense, not necessarily causing injury to everyone in the city, but causing "common danger" to all, and actual injury to large indefinite number of persons, unidentifiable in advance'.[27] In other words, a public harm (or threat) is one that causes first-order harm to a large indefinite group and, at most, a second-order harm to everyone. On the other hand, the first characteristic I argue for emphasises both the number of people threatened and the number of people that would be first-order harmed. An anti-

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[26] Feinberg *Harm to Others, supra* note 25, pp 222-223.

[27] Feinberg *Harm to Others, supra* note 25.

democratic threat would cause, if actualized, a first-order harm to everyone, or at least to the overwhelming majority of people. Moreover, this conception of 'public' includes offences that endanger the interests of much smaller groups than the whole society provided they are large enough and indefinite in numbers. An example of 'ordinary' offences regarded as public according to the first conception can be found in the Criminal Justice and Public Order Act 1994. An affray or a riot may be confined to one locale. It may take place in a public place (and thus endanger a large indefinite number of people), yet the first-order harm is restricted to only some of the residences of that locale. The same is true, for example, with regard to the Football (Offences) Act 1991. In these cases, the harm that is inflicted on the whole society is a second-order one. According to this concept, the notion of 'public order' refers to the social, moral or political system that the act infringes upon but not necessarily to a first-order harm inflicted on the 'public' as a whole.[28]

(b) Second conception of public interests – interests of a public nature

The second conception of 'public interest' (according to which it is a widely shared interest) introduces a more problematic case. Earlier I argued that the threat posed by anti-democratic ideologies to social and political democratic institutions is a threat to each and every citizen of that society. By that I meant that it is not only a threat to an interest shared by all citizens the interest in maintaining democracy. More precisely, it is the personal interests of all citizens (though of the same approximate type) that are endangered. Logically, it looks as if this should result in the exclusion of anti-democratic threats from the 'public' domain. However, this would not be an accurate description of my argument. I do not argue that the shared

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[28] For the meaning of 'public order' see N Lacey C Wells & O Quick *Reconstructing Criminal Law* (3rd ed London Butterworths 2003) 114-115, 136.

interest does not exist. Obviously, anti-democratic ideologies threaten a shared interest in democracy. My claim is that this shared interest is not the whole picture. Rather, this shared interest is an interest derived from more fundamental personal interests; namely, the welfare interests of equal respect (or liberty[29]), life, health, etc. These personal interests provide the justification for any shared interest in democracy. They are the answer to the question: why do we have an interest in democracy? Thus, by the second account, anti-democratic threats are to be considered 'public'. Consequently, this conception should be understood to consist of two groups of interests. *Group A* includes widespread, shared interests that are so important to the individuals in the community that they amount to elements of their individual welfare and thus to 'personal' interests.[30] *Group B* consists of interests that are 'those normally ascribed to the government rather than to the community. Governmental interests are "those generated in the very activities of governing", [Hyman Gross, *A Theory Of Criminal Justice* (NY OUP 1979) 120] such as collecting taxes,... conducting trials and court hearings...These are the interests violated in such "impersonal crimes" as tax fraud,... perjury...'. Feinberg goes on to explain that '[l]ike community interests, governmental interests in the last analysis belong to individual citizens. But, the maintenance or advancement of the specific government interest may be highly diluted in any given citizen's personal hierarchy'.[31]

Going back to the criticism against the first characteristic, it is true that anti-democratic threats are not unique in the sense that other threats aimed at *Group A* interests also endanger

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[29] The existence of a general interest in liberty is controversial. For further discussion see the second characteristic, below p 37.

[30] But see Feinberg's definition of the first group of interests, which is more compatible with the first conception of public discussed above. Feinberg *Harm to Others, supra* note 25, p 63.

[31] Feinberg *Harm to Others, supra* note 25, p 63.

shared interests, especially those aimed at an interest in security. They too refer to a shared interest that, in turn, is justified by a fundamental interest in the welfare of the individual. However, these other public threats (i.e. threats to *Group A* interests) do not consist of the four additional attributes that characterize the anti-democratic threat. As for *Group B* interests, such as perjury, or tax evasion, though they too, are public and therefore threaten the whole community, they are distinct from anti-democratic threats in the sense explained above.[32]

In order to accommodate and sharpen the distinctions between an anti-democratic threat and either the first conception of public interest or *Group B* interests (of the second conception of public interests) the definition of the first characteristic should be modified. While stressing that the harm is inflicted on the whole society (and not on any large and indefinite group of people), the emphasis needs to be transferred from the number of people threatened to the number of people that would suffer first-order harm in the following way: *while most of the threats posed by 'ordinary' wrongful acts, if actualized will cause direct harm only to the interests of a specific person or persons (though there might not be an apparent reason for the person chosen), the actualized anti-democratic threat would cause first-order harm to the individual interests of all citizens (or at least the overwhelming majority).* The fact that the emphasis is on the number of people who would suffer first-order harm does not exclude the importance of the number of people who are threatened. Since obviously every person who would suffer first-order harm is also threatened.

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[32] However, if an act of perjury, or tax evasion is done as part of an anti-democratic ideology then the overriding threat becomes the anti-democratic threat rather than the specific threat. For a wider discussion on the extra threat and the anti-democratic motivation see Characteristics four and five below.

Lastly, I wish to point out that there are other instances of threats which are posed to the individual interests of the overwhelming majority of society by actions carried out by an ideological group, or party, within that society. Nevertheless, those threats differ greatly from the threats posed by an anti-democratic ideology. An example of such a threat could be that of Britain's Conservative government in the early 1990's. Many people argue that the actions of this government were harmful to all, or at least most, of the citizens. That government's decision to impose a Poll Tax,[33] for example, resulted in higher taxation for the overwhelming majority of citizens. The difference between this kind of harm and the harm caused by anti-democratic acts is located in the democratic procedure of choosing an ideology (or a party) and the democratic procedures, followed by those chosen, of deciding on specific harmful acts. The use of democratic procedures indicates that democracy is part of the ideology and that there is no intention to change the democratic order. Both elements are essential, and both are lacking in the ideological threats and actions on which I am focusing.

2. The second characteristic – a direct threat to the entire range of interests

The second, and more important attribute that characterizes anti-democratic threats is to be found in the nature of the threats. The threats posed by 'ordinary' wrongful acts usually focus on one or two interests: namely, theft is a threat to the interest in property, fraud is a threat to the interest in property, perjury is a threat to the ability to arrive at a just judgement, etc.[34] Accordingly, any criminal prohibition is primarily designed to protect an endangered interest

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[33] Instead of the previous rates system which was based on taxing per household.

[34] If we are to accept Becker's view, we would also be referring to the interest of assurance that one's person and activities will not be unjustifiably interfered with by others, that is, the violation of liberty caused by fear.

and protects liberty only incidentally. The restrictions can be fully justified in terms of the harm principle as they protect a specific interest, though some justification can be found in their net enlargement of liberty.[35] Meanwhile, an anti-democratic threat is a direct threat to liberty[36] and through this to an entire range of interests. Furthermore, any direct threat to liberty is a threat to the value of autonomy itself, and as such, as I explained earlier, it is also a direct threat to life. Thus, it may be more accurate to speak of two unique features rather than one: *the first is the direct threat to liberty, and the second is the threat to the entire range of endangered interests, including a threat to life*. It should also be stressed that these features distinguish between anti-democratic threats and 'ordinary' criminal threats including those 'public' threats discussed above.

Stating that there is a direct threat to liberty assumes that we have an interest in liberty, or in political freedom, as it is sometimes referred to. In our current context, this means that promoting liberty is good for a person in any circumstance (and does not depend on what people want). It also implies that liberty is considered an indispensable means to the advancement of more ulterior interests.[37] As such the state has to protect it. However, the existence of such an interest is very contentious among political theorists. Even within the liberal tradition views vary. Some argue that we have an interest in liberty while disagreeing about whether it has an intrinsic value or only an instrumental one, grounded (among other things) in the value of (equal) respect to human beings. That is to say, human beings who are capable of forming intelligent conceptions of how they should live their lives and acting on

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[35] Feinberg *Harm to Others*, *supra* note 25, pp 213-214.

[36] I use 'liberty' here in the sense Isaiah Berlin called 'negative', that is, the degree in which a person is free from social and legal constraints to do what he or she might wish to do.

[37] Feinberg *Harm to Others*, *supra* note 25, pp 38-45.

them.[38] On the other hand, referring to *a right* to liberty, Dworkin, for example, does not accept that such a right exists. Rather, he argues, we ought to refer directly to the value of, and interest in, equal concern and respect.[39] In the context of criminal law, having *an interest* that deserves protecting means being entitled to the legal enforcement of a valid claim. The idea of interest involves a sense of entitlement, although not in the sense that the state needs a special justification to override this interest. Thus, Dworkin's position might be relevant to our discussion. However, for current purposes it is unnecessary to choose between these various views. It does not matter whether we refer to an interest in liberty as the direct interest at stake, or whether it is the interest in equal concern and respect. However, for reasons of convenience I will refer to it as the 'interest in liberty'.

The threat to the interest in liberty has two distinct aspects. The first is a threat to the (future) ability to choose. If an anti-democratic regime were to come into power, people might not be permitted to make their own decisions about the lives they wish to lead. This is a threat to the possibility of making new choices in the future. The second aspect is that of the threat posed to the liberty of being able to continue living the life one has already chosen. It is a threat to the possibility of carrying out choices made by people in the past. As such it is a threat posed to the stability of an individual's way of life.[40]

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[38] For examples see J Raz *The Morality of Freedom* (Oxford Clarendon Press 1986) 7; J Feinberg *Social Philosophy* (NJ Prentice-Hall Inc 1973) 20-22 JS Mill *On Liberty* (Oxford OUP 1991) ch 1, esp. p 15-19 and the interpretation of Mill in SI Benn & RS Peters *Social Principles and The Democratic State* (London George Allan & Unwin Ltd 1959) 220-221; FA Hayek *The Constitution of Liberty* (Oxford Routledge 1960) for example ch 6, p 85.

[39] R Dworkin *Taking Rights Seriously* (London Duckworth 1977) ch 12, p 266-278. Cf. SI Benn *A Theory of Freedom* (NY CUP 1988) ch. 6-7, esp. p 112-117.

[40] I wish to thank John Gardner for pointing out this distinction between the two aspects.

3. The third characteristic – the conclusiveness of a realised anti-democratic threat

Criminal law is based on the assumption that, although some offensive acts will be successful, society as a whole will survive and will be able to respond, and attempt to prevent future harmful acts from reoccurring, even when harm has been done. Though this assumption is true with regard to all 'ordinary' criminal acts, when it comes to anti-democratic threats it collapses. If anti-democratic threats are realised, social and political democratic institutions will no longer exist. There will no longer be an option to respond, repair the damage, restore democratic institutions, and prevent harm from re-occurring. As will be seen in the following Chapters, this characteristic of anti-democratic threats will have a crucial effect on any criminal law theory that is to be adapted in an attempt to deal with such threats.

4. The fourth characteristic – the extra threat of an anti-democratic agent

The first three characteristics, which focus on the unique quality of the threat posed by *anti-democratic ideologies*, are the grounds for the fourth characteristic, which focuses on a comparison between the threat of a *wrongful act* done in the name of an anti-democratic ideology (an anti-democratic act or conduct) and the threat of an 'ordinary' wrongful act. The argument is that anti-democratic conduct, whether wrongful or not, consists of a unique political threat: to change the democratic order. Hence, while the 'ordinary' wrongful act is only a visible, direct threat to the object it is aimed at, the *wrongful* anti-democratic act

consists of this same 'ordinary' direct threat in addition the extra special threat that characterizes the anti-democratic ideological motivation of the agent.[41]

A plausible objection might be that recognising this fourth characteristic would enable the issue of motivation to enter into criminal law. Traditional criminal law refuses to differentiate between offences on grounds of motive (as opposed to intention).[42] The extra special threat is the underlying commitment of the agent to a cause. Thus, it is the motivation to act, which differs from 'ordinary' personal and anti-social motivations in its moral aspect, (although this distinction is not unique to anti-democratic ideologies[43]). An anti-democratic agent acts on the

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[41] It is true that the anti-democratic harmful act might also include an immediate further goal to cast fear and terror in order to attain the desired final end. However, this might also be true of an 'ordinary' harmful act that might include an immediate further goal of creating fear as a means to attain the desired final end (e.g. the money in a bank robbery, silencing a witness, etc). Therefore it is the unique final end that separates the two instances.

[42] E.g. the law differentiate between killings with and without intention – murder and manslaughter – but refuses to differentiate between killings for different motivations such as personal and anti-social motives vs. civil disobedience. For the irrelevance of motivation, see for example the statement made by Erwin Griswold (previous solicitor general of the United States and Dean of Harvard Law School): 'it is the essence of law that it is equally applied to all, that it binds all alike, ***irrespective of personal motive***...' quoted in R Dworkin 'Civil Disobedience' *Taking Rights Seriously* (London Gerald Duckworth & Co 1978) 206. The emphasis is mine – S.W. Also see *Chandler* v *DPP* [1964] AC 763. In this case Mr. Chandler and his friends organised a demonstration in an army air base that was a 'prohibited place' as part of their campaign against nuclear arms. They were accused of 'breaching section 1 of the Official Secrets Act, 1911, namely for the purpose prejudicial to the safety and the interests of the state'. The court rejected as irrelevant the defence that the motivation for their act was not to cause harm to the state but to benefit it by their acts of civil disobedience (p 790). But see D Husak 'Motive and Criminal Liability' (1989) 8 Criminal Justice Ethics 3 for the opposite view.

[43] For example, civil disobedience is another motivation of the same kind.

belief that his or her actions are moral,[44] whereas 'ordinary' offenders act with the knowledge that their actions, and their motivation to act, are morally wrong. According to traditional criminal law, since the extra special threat is the motivation to act, it should not be a relevant factor. It is true that recognition of the special threat would *de facto* be the recognition of motivation as a relevant factor. However, that alone does not persuade me that this threat should not be recognized. If the differences that I have enumerated indicate that there is a reason to treat anti-democratic ideologies and anti-democratic acts differently, then the mere fact that one treatment involves de facto recognition of the relevance of motivation means there is no reason to avoid it.[45]

Some scholars do claim that motives are a relevant factor in establishing the basic element of fault.[46] But then the question is whether motives can do more work than that – can motives be aggregative factors, beyond the minimal threshold of criminalization? I see no reason to a priori limit the effect of motivation. If motivation can be shown to make a substantial

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[44] Both the anti-democratic agent and the civil disobedient believe that their acts are moral. However, the content of their moral beliefs differs greatly. Accepting the broader system the civil disobedient, recognizes that in an important sense the law (including the specific law he or she opposes) claims obedience and that his or her defiance requires some special, moral, justification. Meanwhile, the anti-democratic agent, based on his or her belief in an anti-democratic ideology, does not believe in the legitimacy of the laws he or she breaks and does not think he or she ought to obey the law in any sense. See Cohen, *supra* note 17, p 45.

[45] See A Duff 'Principle and Contradiction in The Criminal Law – Motives and Criminal Liability' in A Duff (ed) *Philosophy and The Criminal Law* (Cambridge CUP 1998) 157, 174. He argues that the doctrine of the irrelevance of motives applies to courts (at the stage of sentencing) and not to the legislatures (at the stage of defining the crimes). However, the doctrine does have some relevance to the legislator's task 'as warning legislators not to require the law to take too intrusive an interest in agents' deeper motives' (fn 24, p 200).

[46] See for example Duff, *supra* note 45, p 177; A Norrie *Crime, Reason and History* (2nd ed London Butterworths 2001) 36-45.

difference to the moral character of the action or to the blameworthiness of the agent then it ought to be relevant.

Current English law has, in specific circumstances, recognized the question of motivation as a relevant factor in an offence.[47] For example, the Crime and Disorder Act 1998 recognizes racially aggravated offences as worthy of more severe treatment. In section 28 the law defines a racially aggravated offence as follows:

> (1) An offence is racially aggravated ... if -
>
> (a) ...
>
> (b) the offence is ***motivated*** (wholly or partly) by hostility towards members of racial group based on their membership of that group.[48]

The following three reasons provide the justification for a separate category of racial offences: '[f]irst, the violence or harassment is directed against the victim not as an individual but as a member of a specific community or group... Second, there is a political dimension to racially motivated attack or harassment... Third, racial attacks arise from racism. Racism is the enemy of the values of liberal democracy and of equal citizenship.'[49]. Interestingly, the reasons given refer to factors that are similar to the ones shown above as characterizing anti-democratic ideologies. Needless to say, all three reasons can be put forward in support of a justification for treating motivation as a relevant and important factor in the case of anti-democratic ideologies and ideological acts.

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[47] Also see J Horder 'On The Irrelevance of Motive In Criminal Law' in J Horder (ed) *Oxford Essays In Jurisprudence* (4th series Oxford OUP 2000) 173.

[48] Crime and Disorder Act 1998, s 28 (emphasis added).

[49] R Card & R Ward *The Crime and Disorder Act 1998 A Practitioner's Guide* (Bristol Jordans 1998) 248, s 8.2.

It is important to stress that all I have argued thus far is that special motivation is a pertinent feature of anti-democratic ideologies. As such, it may have some weight when establishing a justification for the special treatment given to an anti-democratic threat by criminal law. At this point, I do not take a stance on the implementation of this feature within criminal law; namely whether specific offences that respond to anti-democratic threats and action should incorporate an element of the special motive; what extra powers ought to be granted to the security and investigation authorities, and so on.

The additional special threat – of changing a regime – points to another feature of the anti-democratic threat: the fact that fulfilling this goal is a *process*, a series of actions, and not an individual act. This feature is not unique to the anti-democratic threat and can be found in most threats that are addressed to the whole society. Often, there is a need for a series of acts before any harm occurs. For example: one act of perjury will not bring the collapse of judicial institutions; only an ongoing norm of perjury can do that. This is not to say that some harm might not be inflicted by the individual act of perjury on one or more citizens, but this is not harm to the social interest at stake. Society has the time to respond before the final act that will bring the threat to its realisation. This characteristic will affect the discussion in the following chapters.

5. The fifth characteristic – the support of the public

A fifth characteristic is found in public support for anti-democratic ideologies, and consequently, in anti-democratic acts. 'Ordinary' wrongful acts do not generate public support. At most, they are supported by very small groups of individuals. On the other hand, anti-democratic agents and associations wish to convert as many people as possible to believe

in their ideals, and to draw on public support. As with conspiracy, the danger in group support lies in the public pressure, which can be brought to bear on any one of a group's individuals. Firstly, it is more difficult, psychologically, for an individual to resist a wrongful act that is supported by his or her fellow citizens. Secondly, the fact that there is a whole group of people supporting an action may assist in persuading the individual that the chances of generally achieving their goal and of the success of a specific wrongful act are higher than the chances of failure and being caught. Furthermore, the group may reduce an individual's feeling of personal responsibility (if he or she is not one of the leaders of the group). If this is a true description of the danger of any criminal group, then the claim becomes even stronger, and the danger becomes even greater with regard to anti-democratic ideologies given that they may enjoy more widespread support than a criminal group. On a superficial level, the more people support these ideologies, the more people will volunteer to act or assist the agents with equipment or hiding places, or simply with moral support. But on a higher level, although democracy is an independent political ideology that does not rely on public support to justify it,[50] practically or realistically speaking, the existence of a democratic order within a given society is dependent upon its citizens' support. Therefore, the more people want to replace it with some other system, the weaker the democratic order will become and the harder it will be to defend it. Obviously, even should the majority of the population believe in an anti-democratic ideology, it would not follow that the democratic state would lose its moral justification to defend itself.[51] For this to be true, the democratic ideal would have to be

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[50] Though its intrinsic justifications (according to utilitarian accounts) - as a way to bring utility or welfare – might be objected to as a kind of paternalism if the public believes there is a different, better, way to bring about these results. Cf. Harrison *Democracy*, *supra* note 8, chap. 8.

[51] I have already stressed that democracy is not anything that the majority decides on but a set of arrangements for securing their control over the public decision-making process on an ongoing basis. As Dahl explains: 'If a

completely dependent on public support. In practical terms this would mean that the only thing required to defeat democracy would be good demagogy on behalf of an anti-democratic ideology. Nevertheless, the strength of any democratic order is drawn from the people and if the majority of the people do not support it then the regime may be forced, if justified, to take certain undemocratic measures (such as suspending elections) in its defence.

Although this feature is embedded in any anti-democratic ideology unlike the other four features it is also affected by the stability or volatility of society. In volatile societies the chances of regaining public support increase whereas in stable societies these chances are reduced (though they will never be completely eliminated). Therefore, to some extent, this feature brings in some subjective elements which may change from place to place and from time to time. Nevertheless, I think that the core of this threat remains regardless of the subjective circumstance of a given society.

SUMMARY

In this chapter I set out the premise for the discussion that will follow. I have identified the group of anti-democratic ideologies that will be addressed in the thesis. Anti-democratic ideologies is a sub-category of undemocratic ideologies. Undemocratic ideologies are those ideologies that oppose one or more of the following threshold conditions of democracy: (1)

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majority were to deprive a minority or even itself, of any of its primary political rights, then in the very act of doing so it would violate the democratic process'. The majority does not have authority to destroy democracy, though in practice it can do it (Dahl *Democracy and Its Critics*, *supra* note 2, pp 170-172).

democratic participation, meaning self government, free and fair elections, universal suffrage, control over all public decision-making, and an opportunity for the citizens to form and express their views; (2) non-discriminating rights which call for political equality among all citizens both at the opinion-forming stage and at the stage of deciding on the issues, as well as giving equal consideration to the interests of all citizens; and (3) freedoms of thought and expression to allow the citizen to form his or her own opinions and to express them to others. Anti-democratic ideologies are those undemocratic ideologies that aim to substitute the democratic order with an undemocratic one. To clarify the definition of anti-democratic ideologies I gave two classical examples of ideologies that do not comply with one or more of the democratic principles and therefore are to be regarded as anti-democratic: Italian and German Fascism and Islamic Fundamentalism.

I went on to argue that the threat posed by anti-democratic ideologies has five unique characteristics: firstly, it is a threat posed to the whole of the society; secondly, a threat to the whole range of human interests; thirdly, anti-democratic actions incorporate an extra 'special' threat in addition to the 'ordinary' threat that is hidden in any (parallel) 'ordinary' criminal act; fourthly, the realized anti-democratic threat is conclusive in its nature; and finally, I pointed to the threat that is incorporated in the public support that the anti-democratic ideology may attract. If we are to provide a comprehensive defence against an anti-democratic threat, it is necessary to address these five characteristics, which constitute a unique threat; one that requires the special attention that will be given to it in this thesis.

Chapter 2 - The defence offered by the general principles governing state coercion

All types of state coercion are governed and limited by general principles. However, issues related to the justification of these powers, and the limitations on their use commonly come within the realm of criminal law.[1] Criminal law is usually used to respond to threats to the vital welfare interests of both individual and public.[2] Its unique features as one of the most coercive measures – (often involving prison sentences, which are one of the most severe deprivations of freedom) – and its stigmatising and condemnatory character make it one of the most straightforward manifestations of state coercion. Criminal law also includes a set of secondary rules: these are the obligatory procedures that the state has to abide by in its quest to find the truth as well as through the criminal process: the investigation, the trial and the carrying out of the sentence.[3] These procedural rules (hereafter: criminal procedures) also

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[1] I will refrain from discussing the hotly debated question of the nature of coercion since it is accepted by all that the measures used in criminal law are at the core of any definition of it. J Raz *The Morality of Freedom* (Oxford Clarendon Press 1986) 13-14, 148-149.

[2] Welfare interests are characterized by Feinberg as 'bare minimality, stability and durability'. These are 'instrumental interests' in the sense that they are a necessary condition to achieving any further ulterior goal. See J Feinberg *Harm to Others* (NY OUP 1984) 57-59. As Feinberg points out, ulterior interests are usually not protected directly by law, with the exception of ulterior interests that 'simply extend elements of welfare beyond minimal levels' (pp 62-63).

Criminal law is by no means an exclusive discipline for dealing with threats. Other realms may include, among other things, education, constitutional law as well as private laws (torts). For the purposes of this thesis I will limit myself to the criminal aspects of ideological threats.

[3] For current purposes I would include the rules that govern the realm of evidence (the way they are to be acquired, their presentation during the trial, their submission etc.).

involve the practice of coercive powers by the state. However, these powers are of a different kind. Some of these powers are directed at innocent people, while others are directed at suspects as part of the criminal process (the investigation, the trial, etc.). These powers are governed (mainly) by human rights. Procedural rules are directed to secure the minimum human rights any person, *qua person* has, in order to govern and to restrict the powers directed at innocent people.[4] Furthermore, they are intended to guarantee that only those who are guilty are punished.[5] Questions regarding the use of coercive powers by the state are raised in both aspects mentioned: with respect to the types of actions that ought to be prohibited, and with respect to the powers the state should be permitted to use in the search for offenders and their apprehension. However, these questions are distinct and are subject to different principles.[6] In this study I will focus on substantive criminal law (hereafter: criminal law).

If criminal law can offer satisfactory protection from anti-democratic threats then there is no need to look any further. Any justification of the state's duty of self-defence (at least with regard to substantive law) would then be founded on, and restricted by, the application of the general principles of state coercion within criminal law.

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[4] According to the assumption that a person is innocent until proven guilty, even if coercion is directed against the wrongdoer, he is considered innocent until proven guilty.

[5] This is not an exhaustive list, though it does provide the major tasks of criminal procedures.

[6] It would be possible to conclude that substantive offences are satisfying but the problem is in finding and bringing the anti-democratic agents to trial. Namely, the problem is that the state's permission to use coercive powers is unsatisfactory because it is too restrictive.

Since criminal law is, at least, one of the most coercive measures used by the state, and a stigmatising one, the scope and the extent to which it ought to be used is controversial. It is agreed that significant harms should be dealt with by criminal law though it is disputed whether the seriousness of the harm is a necessary condition for criminalization.[7] Whether it is the seriousness of anti-democratic threats or the fundamental interests that are threatened by them, it is evident that anti-democratic ideologies should fall within the range of concerns dealt with by criminal law. Yet the question remains: can criminal law offer full protection against anti-democratic threats?

In this chapter I analyse those general principles that govern state coercion as are applied in criminal law (hereafter: the general principles) and have some bearing on the ability to provide a satisfactory defence against anti-democratic threats. The most important and pertinent among these general principles is the harm principle, which is accompanied by two supporting principles in turn: the minimalist principle and the principle of imputation. One of the more acute problems of the harm principle, raised (also) with respect to anti-democratic acts, is the insufficient guidance it provides in cases of remote harm. In these cases, the two supporting principles are found to have special importance in providing some of the missing guidance. This discussion of the harm principle and the two supporting principles takes place against the background of criticism, presented in various forms. The main line of argument is that the harm principle is deficient because it does not distinguish reliably between those acts

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[7] E.g., see Feinberg *Harm to Others, supra* note 2, p 17; A Ashworth 'Is The Criminal Law A Lost Cause?' (2000) 116 LQR 225, 240-244; N Lacey *State punishment* (London Routledge 1988) 108-112. Lacey refers to 'fundamental interests' rather than to the significance or seriousness of harm. But as Ashworth explains in the article cited above, 'The harmfulness of a conduct must be judged in terms of its effect on valued interests…' (p 240).

that should be prohibited and those acts that should not. Almost every act can be said to cause harm in some sense (even when the harm is limited 'to others') and thus the legislator can justify any restrictions he wishes to impose.[8] This objection can only be answered by a careful analysis of the harm principle and the formulation of relatively precise maxims to mediate its application.[9] Keeping to the boundaries defined by these maxims is important. Reformulation of these boundaries, using the harm principle to cover all potential threats, would extend the principle so much that it would no longer distinguish effectively between actions that are harmful and actions that are not.

The fourth principle to be analysed is the principle of proportionality. There are endless kinds of proportionality and I will focus on the need for proportionality between sanctions and the end we wish to achieve through punishment. I will continue with two short comments and observations about the rule of law. Lastly, I will explain why I have not discussed another controversial principle – the paternalist principle – that is regarded by some scholars as an appropriate basis for criminalization. I conclude that these principles provide only partial defence against anti-democratic threats failing to allow restrictions on expressions that do not cause immediate harmful result.

Anti-democratic ideology can be manifested in one of four ways:

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[8] For examples of this line of criticism see D Dripps 'The Liberal Critique of The Harm Principle' (1998) 17 Criminal Justice Ethics 3; RA Epstein 'The Harm Principle – and How It Grew' (1995) 45 U of Toronto L J 369; BE Harcourt 'The Collapse of The Harm Principle' (1999) 90 J of Criminal Law and Criminology 109. S Mendus *Toleration and The Limits of Liberalism* (London Macmillan 1989) 123; R Dworkin *A Matter of Principle* (Cambridge Mass Harvard University Press. 1985) 336.

[9] See Feinberg's account of the purpose of his book *Harm to Others*, *supra* note 2, pp 13-14.

A. The thoughts and beliefs of anti-democratic agents. The emphasis here is on the thought or the belief itself and not on its expression or communication to another person, though the latter is the only way in which we can reveal the existence of a thought or belief.[10] In a sense there is no 'manifestation' of anti-democratic ideology since this stage does not tackle the *communication* of thought. Rather it focuses on a process that takes place within the (mind of the) anti-democratic agent, a process within the agent without any external effect or utterance.

B. Acts of speech and expression. This incorporates those acts that are designed to express an opinion, a proposition, belief, attitude, feeling, emotion, thought, conjecture, or argument, excluding instances where the expression is only an instrument for a further goal (including a request or an order), such as asking a person to pass the salt, ordering the cashier to hand over the money in a bank robbery, etc. In this category I wish to also include assemblies, demonstrations, writing letters or books etc., (i.e. all types of activity that is aimed at effectively expressing the anti-democratic views), because whatever else these activities are, their *main* aim is to spread the anti-democratic ideology. Under this heading one can find a whole range of expression: from a mere explanation of an anti-democratic ideology as part of an educational course, or a declaration of one's own convictions, to actual incitements to perform specific unlawful acts. This wide variety of expressions can be further divided into three types:

Direct expressions – expressions that call for specific violent and, or, (other) unlawful acts, such as incitement to assassinate the Prime Minister;

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[10] Communication is only an instrument by which we can discover the thought or belief and does not have, in this context, any significance in or of itself.

Climate-Creating expressions – including those expressions that are designed to create a climate of violence,[11] i.e., a climate that may lead to unlawful and violent acts in the future, such as praising unlawful acts performed by ideological agents; and

Abstract expressions – including expressions aimed at presenting or convincing others of the validity and force of an anti-democratic ideology. In this last category we can find, for example, a lesson about fascism alongside the recruiting assembly of an anti-democratic association.

C. Acts that are more than expressions (in the wide interpretation given in category B) but do not cause direct harm. This is a small category that includes mainly structural activity: the establishment and the maintenance of anti-democratic organizations. It includes activity that does not involve the use of violent means, such as the foundation of a political party, as well as anti-democratic activity that can be characterized as general preparations to direct harmful acts, such as the establishment and maintenance of a militant, or terrorist organization (which would eventually carry out harmful acts). The borders between this category and category B are somewhat blurred in those instances where there is a combination of expressive ends (i.e. spreading the anti-democratic ideology) with other practical ends. This is true especially when such activity is not a general preparation towards direct harmful acts, because the only way to bring about the political change is either through violence or by gaining public support. Hence, any activity that is not aimed

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[11] The distinction between the first two categories and the term 'climate of violence' is offered by M Gur-Arie in 'Can Freedom of Expression Survive Social Trauma: The Israeli Experience,' *Working Papers Series – Jerusalem Criminal Justice Study Group* (working paper no. 7 2001). See also justice Orr's description of the role of the sedition offence within Israeli criminal law '[to prevent] publications which, even if they do not have the potential to cause immediate acts of violence, have cumulative influence upon the social climate, and by the enmity and hostility they raise toward segments of the population, may lead to such acts at some time that cannot be foreseen in advance…' (Cr.A. 3338/99 *Pakowitz* v. *State of Israel* (2000) para 24).

at using violent means, inevitably has some expressive purposes – gaining the support of the public.

D. Acts causing direct harm to people and property that are motivated by anti-democratic ideology. For example, the assassination of a prime minister, or the hijacking and subsequent destruction of a passenger jet.

These four categories exhaust the ways in which anti-democratic ideology may threaten democratic political and social institutions. The threats posed by the different categories may differ in significance (or may not exist at all), and the way in which the general principles deal with each category may vary accordingly. The question at the centre of this chapter is whether the protection from the various categories of anti-democratic threats offered by these principles is satisfactory.

A. THE HARM PRINCIPLE

The harm principle is the commonly recognized prominent criterion for criminalization in democratic societies.[12] John Stuart Mill was the first to define the principle. According to him the only purpose for which the state is permitted to restrict actions is to prevent harm to others. The principle thus stated includes two separate principles: the first is the core idea of the harm principle according to which harm prevention is the only justification for state

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[12] But see Dripps, supra note 8, that the harm principle is deficient as a limiting principle. He suggests a procedural criterion as an efficient alternative. Other forms of democratic theory may offer supplementing criteria such as paternalism or morality. I will say a few words about these criteria later on in the chapter.

intervention; the second is the anti-paternalism principle. That is, that state intervention is limited only to prevent harm *to others*. Intervention for the purpose of preventing harm to self, i.e. for paternalistic reasons, is prohibited. The subsequent discussion of the harm principle will concentrate on the first of these two principles. I will say a few words about paternalism later on in the chapter but for now I shall leave this second principle aside.

1. Excluding thoughts and beliefs

Whatever the exact meaning of the harm principle is, it is indisputable that thoughts and beliefs are excluded from consideration and cannot be restricted. The rationale is simple. Thoughts and beliefs, in themselves, do not involve any communication with one's surroundings; they affect no change in the world. It is only when a person *causes* (direct or sometimes even indirect) harm or an unacceptable risk of harm that he or she can be restricted. To '*cause* harm' presupposes performance, (or a failure to perform where there is a duty to do so). Hence, thoughts and beliefs that are not accompanied by actions *cannot cause any harm to others*. This reasoning also explains why category A described above, does not generate any threat to democracy; there is no 'manifestation', or presentation, of any anti-democratic ideology. A second reason for not restricting thoughts is that thoughts (and beliefs) cannot be fully controlled,[13] and it is the capacity to choose to do (or in our case – to

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[13] As JS Mill said: 'if thoughts were punishable – we would all be criminals'. Jeremy Waldron brings forth a similar argument provided by Locke in his *A Letter On Toleration* [JH Tully (ed) (Indianapolis Hackett Publishing Company 1983)]. According to Locke we must tolerate other religious beliefs because religious and moral beliefs are not subject to human will. One cannot acquire a belief simply by intending or deciding to believe. After receiving the idea the process of understanding is more or less automatical. Coercive measures work by operating on a person's will. They pressurize his or her decision-making with the threat of penalties.

think) otherwise that is one of the basic principles for criminalizing.[14] Furthermore, thoughts are part of the process of choosing; any act that follows this process is the result of the ensuing choice. Criminalizing thought would ban the possibility of making these choices, and thus empty individual autonomy of any content, since the meaning of individual autonomy is the independence of choosing specific acts.[15] Finally, even if we were to restrict thoughts and beliefs it would be practically impossible to apply direct restrictions[16] as there is no way of knowing what people are thinking (unless they reveal their thoughts through some act or expression).[17]

One important implication of this exclusion of thoughts and beliefs is that it is impossible to prohibit an ideology in itself. Anti-democratic ideology is a set of beliefs about a preferred

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Hence, using coercive measures to prevent thoughts and beliefs is inefficient. J Waldron *Liberal Rights* (NY CUP 1993) chap 4, p 94, 107-113.

[14] HLA Hart *Punishment and Responsibility* (Oxford OUP 1968) chap 2.

[15] Raz might object to this reasoning arguing that autonomy is only valuable when one is choosing between valuable choices. There is no value in the choice between murdering and not murdering someone, hence no loss of value to autonomy if that choice is taken away. Raz *The Morality of Freedom*, *supra* note 1, pp 378-379. However, though there is no value in the choice to murder someone there is value in *choosing* (between two options) not to murder. It is the value of knowing and preferring right over wrong. It might also be valuable for reasons of self-control, resisting temptations etc.

[16] As opposed to indirect restrictions. As Waldron pointed out, though the process within a person's mind cannot be controlled directly, it can still be controlled indirectly. I can effectively control the ideas that a person is exposed to. Practically, the state can identify 'dangerous' expressions and restrict them in order to alter people's behaviour and beliefs. See *Supra* note 13.

[17] It is important to note that the last two rationales cannot explain why there is no threat in category A. At most they can proffer weighty reasons to balance against hidden threats in thoughts (if they existed) as part of a consideration of criminalizing them.

society. Therefore, to restrict an ideology is to restrict a thought or belief, as opposed to restricting *acts* performed in the name of that ideology. Moreover, though ideology consists of beliefs, thoughts and actions, prohibiting *all acts* motivated by the ideology would, practically, be equivalent to a prohibition of the ideology itself. No one would be allowed to transmit his or her beliefs, which would in effect prevent the continuing existence of the ideology. Hence, it is not permissible to prohibit *all* anti-democratic acts.

2. Extending the exception to expression

Mill takes the reasoning for excluding thoughts one step further stating that: 'The liberty of expression and publishing opinions may seem to fall under a different principle [than freedom of thoughts], since it belongs to that part of the conduct of an individual which concerns other people; *but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it*'.[18] Therefore, he argues, speech must not be restricted. On its face, this argument may seem naïve. Can it truly be said that expression cannot cause harm? Indeed, Mill, himself, is aware that speech belongs 'to that part of the conduct which concerns other people' and hence, he must realise that it may cause harm. This is supported by Mill's own examples of exceptional cases in which speech is unprotected.[19] There are several ways to understand Mill's argument. Riley interprets Mill as

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[18] JS Mill *On Liberty* (Oxford OUP 1991) chap 1 p 16-17. Any further references will be made to this edition. The emphasis is mine – S.W.

[19] Mill gives an example of an opinion that corn dealers are starvers of the poor or that private property is robbery. He admits that this opinion may 'justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer, or when handed about among the same mob in the form of placard'. *Supra* note 18, chap 3 p 62.

saying that most expressions are self-regarding acts, namely, acts that are harmless to others.[20] As such they are immune from restrictions (according to the second, anti-paternalistic, part of the principle). However, Mill admits that 'acts of "expressing or publishing opinions" are not truly self-regarding-acts, since they always pose some risks of harm to other people'.[21] Thus, these acts do not receive immunity because they do not fall within the ambit of the principle of liberty. Nevertheless, due to the reasoning given above, any restrictions on these acts should be rare and considered cautiously,[22] so that these expressions are treated almost as if they were thoughts. On this reading of Mill, although expressions are other-regarding acts (i.e. acts that may effect others and cause harm) and as such are subjected to utility calculations, expressions are given priority in almost all cases due to the special value ascribed to them.

A different way of understanding Mill is offered by Daniel Jacobson.[23] He claims that Mill places speech in the same category as thoughts and thus grants it immunity from any restriction. For him (Mill) 'speech isn't just a handy way to express our thinking, but a medium in which we think'.[24] Yet, using this interpretation, 'speech' is restricted only to clear acts of assertion or expression. If speech becomes more profoundly active (e.g. if it creates an obligation, or incites) it is transferred from the category of thoughts to that of acts, and thus

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[20] J Riley *Mill – On Liberty* (London Routledge 1998) 48-49.

[21] Riley, *supra* note 20, p 71.

[22] Riley, *supra* note 20, pp 71-72.

[23] D Jacobson 'Mill On Liberty, Speech, and The Free Society' (2000) 29(3) Philosophy and Public Affairs 276.

[24] Jacobson, *supra* note 23, p 284.

loses its immunity.[25] Mill advocates a freedom of expression that is 'the freedom to express any factual or normative opinion, where opinions are to be understood to be individuated by their content. It is not the freedom to express that opinion in any context whatsoever...'.[26] If this latter view is the true representation of Mill's opinion then I disagree with him for the exact reason that he gives – that expressions (even as understood by Jacobson) concern others, and thus may cause harm where thoughts cannot. Yet I do believe that the special character of expression and its importance in the process of forming opinions and beliefs ought to be reflected in restrictions. Expressions ought to draw fewer restrictions than other acts which cause the same amount of harm. Though I am not sure if restrictions should be limited only to rare extremes as suggested by the first reading of Mill. However, if this (first reading) is Mill's view then the disagreement is only a matter of degree. At this stage, all I wish to argue is that expressions can cause harm and are, for that reason, suitable subjects for restriction. Yet the special value we assign to them may well dictate a different balance, or a different set of standards. A more elaborated discussion about the limits on restrictions of category B acts (expressions) will follow later in this chapter.

3. Defining the harm principle

We have identified that area which is outside the scope of the harm principle, but we still need to determine the exact extent of the principle itself. The harm principle asserts that the only

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[25] Jacobson refers to a promise to quit smoking as an example for this latter kind of speech (though it does not cause harm or create an obligation for any other person but for the person who made the promise). *Supra* note 23, p 285. Furthermore, this classification is *not* dependent on the speaker's intentions or on the danger that the assertion poses (p 286).

[26] Jacobson, *supra* note 23, p 287.

purpose for which actions can be forbidden is to prevent harm (to individuals or to society). According to Mill: '[t]he only purpose for which power can be rightfully exercised over any member of the civilized community, against his will, is to prevent harm to others'.[27] This is, of course, not a sufficient moral condition, but it is a necessary one.[28] Yet, what is to be considered as harm? And what acts are to be considered harmful? It is commonly recognized that 'harm' includes, but is not exhausted by, physical injuries and material damage to property. An act of trespass is considered harmful though no injury (or damage) is inflicted on the owner. Feinberg defines harm as a wrongful set-back to (or impairment of) interests.[29] Another, less stringent definition does not view the link between wrongs and harms as necessary, and settles for a definition of harm as a set-back to (or impairment of) interests.[30] One implication of this definition is that a person may be harmed without knowing. Criminal law protects welfare interests and ulterior interests, which are extensions of welfare interests

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[27] Mill, *supra* note 18, pp 13-14. But see Epstein, supra note 8, for the view that over the years this principle has turned from a shield of individual liberty to justify major government intervention in all its manifestations.

[28] Feinberg *Harm to Others*, *supra* note 2, pp 10, 187. More accurately, Feinberg claims that the principle is not even necessary in the sense that 'each liberty-limiting principle puts forth a kind of reason it claims always to be relevant – always to have some weight – in support of proposed legal coercion, even though in a given instance it might not weight enough to be decisive, and even though it may not be the only kind of consideration that can be relevant'. See also Harcourt, *supra* note 8, p 114.

[29] Feinberg *Harm to Others*, *supra* note 2, pp 32-36. Kleinig defines it in similar terms as 'wrongfully undergoing a change in one's conditions into harmful direction' (as opposed to being in a harmful condition). See J Kleinig 'Crime and The Concept of Harm' (1978) 15(1) American Philosophical Quarterly 27-28. Cf. A Gewirth *Reason and Morality* (Chicago Chicago University Press 1978) p 211-212, 230-236.

[30] I wish to thank John Gardner for pointing out this view. Cf. the second definition of harmed offered by Feinberg in *Harm to Others*, *supra* note 2, pp 34-35.

beyond a minimum level.[31] Welfare interests are the minimum, stable and durable conditions that make possible well-being and the achievement of ulterior ends.

There is no doubt that the potential harm of an anti-democratic threat is within the reach of the harm principle according to the second, less-stringent definition, since it would set-back interests in liberty, free choice and through it the whole range of basic welfare interests, as discussed in the last chapter. This conclusion is consistent even with Feinberg's hard-line definition. According to Feinberg, the term 'wrongful' act indicates that the relevant act is morally indefensible. It can neither be justified nor excused. This requirement is based on the assumption that the person harmed has a moral claim for his or her interests to be respected.[32] By moral claim I mean a claim backed by valid reasons and addressed to the conscience of the claimee or to public opinion.[33] At times, in order to decide whether an act is wrongful, there is a need to rank the competing interests of the agent and of the victim.[34] Being

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[31] Feinberg *Harm to Others*, *supra* note 2, pp 37-45, 55-61, 111-114; Kleinig, *supra* note 29, pp 30-31; See also in CL Ten *Mill On Liberty* (Oxford Clarendon Press 1980); HLA Hart *The Concept Of Law* (Oxford OUP 1961) 188; the references to the basic (necessary) universal rules, the infringement or impairment of constitutes harm. These rules correspond to the welfare interests described above. Cf. Lacey, *supra* note 7, chap 5, especially p 104.

[32] A third intermediate stance is to go along with Feinberg's definition of harm as a wrongful setback to (or impairment of) interest, but to adopt a more flexible definition of 'wrongful' act according to which an act is considered 'wrongful' only when it invades an interest that one has a right to, and in so doing it generates a need for a justification or an excuse (rather than defining it as an indefensible act).

[33] Cf. Feinberg *Harm to Others*, *supra* note 2, pp 109-110; Kleinig, *supra* note 29, pp 32-33. I prefer to refer to a moral claim rather than a moral right as Feinberg and Kleinig did since sympathy, for example, also falls within its boundaries. A more acceptable definition of 'right' is offered by Raz *The Morality of Freedom*, supra note 1, p 166. However, for the purposes of this chapter it is unnecessary to go into this discussion.

[34] Feinberg *Harm to Others*, *supra* note 2, p 113.

universal, welfare interests and the most basic interest of freedom of choice, are moral rights of great weight.[35] In the previous chapter I discussed in detail the nature of the anti-democratic threat. It seriously and directly threatens liberty (or any interest in equal respect and accordingly in freedom of choice), and through it, also threatens (among other things) life and property – all of which are considered welfare interests. Whether we are referring to an interest in liberty or to an interest in equal respect and freedom of choice, these are fundamental interests backed by moral claims.[36] The intended anti-democratic act against them cannot be justified or excused. Thus, it is obvious that anti-democratic acts fall within the scope of the harm principle. The wide definition of harm to include general setbacks to interests, even when no physical injury occurs, allows criminal law to address harm that may be caused to the interests of liberty even when not accompanied by material injury to people or damage to property.

However, in criminal law, the harm principle, by itself, does not provide sufficient guidance to the legislator and must be accompanied by some supporting principles, some of which do not pose any difficulty in the case of anti-democratic threats. In the following pages I will discuss only those supporting principles that might raise some difficulties with, or have some special bearing on, the possibility of providing satisfactory protection from an anti-democratic threat.

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[35] The characteristics, justifications and the possibility to outweigh these rights is disputed among scholars, yet a further discussion is beyond the scope of this thesis. For example see Kleinig, *supra* note 29, p 33; R Dworkin *Taking Rights Seriously* (London Gerald Duckworth & Co 1978) chap 4, 90-94.

[36] For a discussion on the question of the existence of a right to liberty see Chapter One p 37.

B. THE MINIMALIST PRINCIPLE

The minimalist principle is based on the assumption that all coercion is evil.[37] Hence, the principle presents further limitations on the harm principle stating that, even when harm is involved, coercive measures ought to be used only as a last resort. Among the different coercive measures available to the state, criminal law is considered, when all else is equal, to include the most severe measures since it usually deprives the agent of his or her basic liberties, or at least places strict limitations on their use.[38] The most obvious example is imprisonment, which deprives the agent of all (or at least most) of his or her liberties. In addition, aside from direct punishment, criminal law entails condemnation and is stigmatising. Keeping in line with the minimalist principle within the realm of coercion, these features of criminal law dictate that it be used only in cases where all less severe coercive measures fail.[39] Within criminal law there are three aspects to this principle:[40] the first is the choice of criminal law as the measure to be used in order to prevent harm. The principle provides the focus for the distinctiveness of criminal sanction and the need to invoke special justifications for the choice to use it over other coercive and non-coercive controls.[41] The second closely

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[37] E.g. JH Burns & HLA Hart (ed) J Bentham *An Introduction To The Principles of Morals and Legislation* (Oxford Clarendon Press 1996) chap 13, p 158; J Feinberg *Social Philosophy* (NJ Prentice-Hall Inc 1973) 21.

[38] I refer to core criminal law. In recent years many offences regarding relatively minor wrongs as well as strict liability offences were added to criminal law in various legal systems. However, the appropriateness of these modern supplements is controversial. Developing this point is beyond the scope of my thesis.

[39] However, if, in some specific circumstances, other measures are found to be more coercive than the measures of criminal law then the use of criminal law should be preferred over those other measures.

[40] Equivalent aspects might also be true with regard to the application of the minimalist principle on the general use of coercion. Yet the following discussion will focus on the limitations this principle presents in criminal law.

[41] A Ashworth *Principles of Criminal Law* (4th ed Oxford OUP 2003) p 35-36.

connected aspect is the rule of *de minimis* which states that minor harms are not to be criminalized, and the third is the appropriate point (of time) of intervention; in other words, which acts within a set of actions that may lead to a commission of harm can be criminalized. This is the problem of remote harm, and the minimalist principle needs to provide, at least, a partial reply. For the purposes of this thesis it is the third aspect that is of interest to us.

1. Justifying the minimalist principle

One way to justify this principle is by making a presumption of liberty. 'Coercion, may prevent great evils, and be wholly justified on that account, but it always has its price... its direct effects always, or nearly always constitute a definite loss.' If that is so, Feinberg goes on, 'then there is always a presumption in favor of freedom, even though it can in some circumstances be overridden by more powerful reasons on the other side'.[42] The presumption of liberty means: '... that whenever we are faced with an option between forcing a person to do something and letting him decide on his own whether or not to do it, other things being equal, we should always opt for the latter'.[43] Feinberg explains one common ground for this presumption – 'freedom's essential role in the development of traits of intellect and character which constitute the good of individuals and are centrally important means to the progress of societies.'[44] Another common ground can be found in the intrinsic value of liberty, i.e., it is

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[42] Feinberg *Social Philosophy*, *supra* note 37, p 21.

[43] Feinberg *Social Philosophy*, *supra* note 37, p 22.

[44] Feinberg *Social Philosophy*, *supra* note 37, p 21.

morally valuable as part of treating human beings as ends (rather than means).[45] However, the presumption of liberty is an unstable ground. The existence of a right to liberty, or even an interest in it is controversial. It is not clear what the exact meaning of this presumption is,[46] even among those who argue for a right, or an interest, in liberty and it has attracted a wide range of criticisms.[47]

A different justification for the minimalist principle can be found in the concepts of autonomy, respect and in the rights that stem from each of them. Much has been written about these concepts. For current purposes it is enough to sketch out the general lines of the argument which could then be modified to fit the various notions of these concepts. As I explained in Chapter One, accepting basic democratic principles involves accepting and respecting the ability of each human being to form an intelligent conception of his or her own way of life, and to act upon it.[48] This means that society is committed 'to creating and fostering an environment in which citizens can decide to lead their lives in a variety of ways, without undue interference from other citizens or the state, in which their socially

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[45] SI Benn & RS Peters *Social Principles of The Democratic State* (London George Allan & Unwin Ltd 1959) 221.

[46] Is it a substantive presumption or is it to be understood only as a procedural presumption? Is it a presumption in the legal sense or is it a presumption in some other sense? etc.

[47] See Dworkin *Taking Rights Seriously*, *supra* note 35, chap 12 for the view that there is no right to liberty, and DN Husak 'The Presumption of Freedom' (1983) Nous 345, Raz *The Morality of Freedom*, *supra* note 1, pp 8-19 for instances of various interpretations of, and objections to the presumption. Cf. Benn & Peters, *Supra* note 45, p 222.

[48] This is a 'weak' conception of autonomy or the basis for respect. Additional requirements might be added by the various theories, but, as I mentioned before, I do not think these supplements would undermine the main line of argument.

acknowledged fundamental interests are protected and respected, and in which an adequate level of welfare is within reach of every member of the community'.[49] As part of this commitment society has recognized a set of basic rights which, to take Dworkin's description, means it would be wrong to deny people these rights even if it were in the general interest to do so.[50] This commitment is true whether it is based on an individualistic approach or a non-individualistic one; whether one holds a liberal or a social theory of democracy, or a communitarian democratic philosophy. Any coercion, even one that is imposed in order to prevent harm, invades autonomy and conflicts with the value of equal respect. It invades autonomy in two ways: by subjecting the will of the coerced, and, usually, by influencing the quality of a person's choices – dictating a choice based on the bare necessities to maintain a worthwhile life. An autonomous person is one that does not always struggle to secure these minimal conditions. The more one's choices are dictated by these basic necessities, the less autonomous one becomes.[51] It contradicts the value of equal respect since equal respect calls for a principle of non-interference and coercion is the most brutal method of interference. Hence, we should restrict the use of criminal law to being only a last resort.

Another justification is based, once again, on the recognition (and the value placed on this) that human beings are agents capable of reaching their own views, based on rational

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[49] Lacey, *supra* note 7, p 104.

[50] *Dworkin Taking Rights Seriously*, *supra* note 35, p 269.

[51] Raz *The Morality of Freedom*, *supra* note 1, p 155. In order to do Raz justice, it should be noted that he does not view restrictions on 'bad' options as a restriction on autonomy as autonomy refers, in his opinion, only to choices between valuable options. But see the criticism in fn 15.

arguments,[52] and of acting upon them. This justification is based upon the conception that it is not only the act that counts but also the underlying reasons upon which the agent acted. It is important that people act (or refrain from acting) *for the right reasons*; that is, because they believe the specific line of action is morally worthwhile or valuable in some respect and to some degree.[53] Coercion is not directed at giving these kinds of reasons. It is based on threats and fear. Therefore, priority ought to be given to measures aimed at persuading people to act, or to refrain from acting, because they think it is the right thing to do rather than out of fear.

Finally, it can be argued that coercion has financial and other costs to society. Hence it should be used only where there are no other, less costly, options. The problem with this justification is that, though it might well be true for most cases, I am not persuaded that there are no situations in which the costs involved in using other measures, such as education, are not higher than the costs attached to the use of an equivalent coercive measure.

2. The first aspect of the minimalist principle – the choice of criminal law

The first aspect of the minimalist principle states that criminal law has to be used only as a last resort. This stance has direct implication, so I hold, on the possibility to criminalize acts of category C that are not general preparations to harmful acts. Anti-democratic associations that use 'legitimate' means to achieve their goal can be dealt with less coercive measures. Administrative measures, such as restricting the possibility of anti-democratic parties to run to

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[52] Though this does not necessarily mean that their decisions would always be fully rationale. I do not wish to get into the debate over which considerations can set a basis for the decisions.

[53] Cf. Mendus, *supra* note 8, p 57.

parliament or refraining from registering, supporting or engaging with such organizations, as well as using civil law and education are sufficient to proscribe such activity if it is found essential for a comprehensive defence. In so holding I do not take a stance as for the conditions under which such activity ought to be restricted, or dealt with, by other fields of law. Such a position requires further discussion which is beyond the scope of this current thesis. However, it seems to me that as a general rule, even if the possibility to use other less coercive measures encounters difficulties, the solution should be found within that realm rather than turning to the more coercive measure – to criminal law – to deal with it. Thus, the only activity within category C that needs to be considered in the following pages is that characterized as general preparations to direct harmful acts.

The second aspect of the minimalist principle – the rule of *de minimis* does not have any significant application in the case of anti-democratic activity. Thus, I move on to consider the third aspect of the minimalist principle.

3. The third aspect of the minimalist principle – the point of intervention

Another supporting principle for criminalization is the principle of (moral) culpability, which justifies the use of criminal law according to the blameworthiness of the actor who knowingly, if not intentionally, chooses to act, even when he or she foresees the risk of harm that may result.[54] The third aspect of the minimalist principle – the point of intervention –

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[54] I will not discuss here the principle of culpability, as it raises no special difficulties in the case of anti-democratic threats. The anti-democratic agent is culpable, and acts knowingly and intentionally. It is exactly this feature of his or her action – the intention, or the motive, that creates the special threat discussed in Chapter One.

together with this principle of culpability are the foundations for a further limiting guideline: *In jure non remota causa sed proxima spectator* (in law not the remote but the near cause is sought for). This guideline is also known as the causal connection between a wrongful act and its harmful result. The general rule is that only the direct 'but for cause' of the specific harm may be restricted.[55] Furthermore, when an intervening cause is the action of a free and deliberate third person, it disconnects the causal connection between the earlier cause and the harmful result. This requirement is understood to complete the harm principle.[56]

(a) Attempts – preparation distinction

Going along these lines, traditional criminal law offered a distinction that would limit the extent of category D acts, between attempts and preparatory acts. While the former are systematically punishable, the latter, it is argued, are not.[57] An act closely related to the commission of harm that falls short of a successful outcome in a harmful result is considered an attempt, and any act related to the commission of harm that falls short of an attempt is regarded as preparation. There are various opinions as to how far the law of attempts should

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[55] Some modifications to the 'but for' conditions may be necessary in borderline cases such as situations where there are two (or more) acts that cause (or intend to cause) the harmful result. However, a more elaborated discussion about these situations is not necessary for the purposes of this thesis.

[56] Ashworth *Principles of Criminal Law*, *supra* note 41, pp 30, 35-37. (Though he goes on to discuss the seriousness of the offence). Cf. Raz *The Morality of Freedom*, *supra* note 1, p 425.

[57] As a general rule, preparatory acts are not punishable in criminal law. For example see the definition of attempts in the (English) Attempts Act 1981 sec. 1: 'If... a person does an act which is *more than merely a preparatory* to the commission of the offence, he is guilty of attempting to commit the offence'. (The emphasis is mine – S.W). However, criminal law recognizes exceptions to this rule such as conspiracy, going somewhere equipped for stealing (Theft Act 1968 sec 25), or possessing anything with intent to use it to damage or destroy property (Criminal Damage Act 1971 sec. 3).

extend.[58] Consider the difference between the 'first' and the 'last' act tests, each of which draws on a different approach to the 'conduct element' (the *actus reus*). The 'first act' test is based on the view that conduct serves mainly an evidential role. It is a manifestation of the dangerousness of the agent's intentions, and, even at this early stage, it is harmful to the community. Accordingly, any act carried out in the pursuit of a criminal intention is considered an attempt. This is a straightforward test that allows police to intervene early and thus to increase the efficacy of crime prevention. The problem with this test is that it might be considered too broad, not respecting individual freedoms as demanded by the minimalist principle: it convicts even those agents who would voluntarily desist before the completion of a crime; it does not treat people as autonomous agents by allowing them the chance to decide for themselves to abandon a criminal enterprise; it increases the possibility of intrusive and oppressive police investigations in search of evidence of criminal purpose. It also increases the possibility of bringing charges based on alleged confessions or previous similar misconducts unsupported by objectively incriminating facts.[59] This test would narrow the scope of preparatory acts to include only acts of planning. By contrast, the 'last act' test is based on the view that conduct is a constitutive element, an essential paradigm of criminal culpability. Furthermore, it responds to criticisms of the 'first act' test because it permits an agent to decide to abandon a criminal act up until the point that he or she actually commits it.

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[58] I will present a brief account of the two extreme views, at both ends of the spectrum. The description is taken from RA Duff *Criminal Attempts* (Oxford Clarendon Press 1996) chap 2, p 33-75. Cf. KJM Smith 'Proximity In Attempt: Lord Lane's Midway Course' [1991] Crim LR 576; D Stuart 'The *Actus Reus* In Attempts' [1970] Crim LR 505; AP Simester & GR Sullivan *Criminal Law – Theory and Doctrine* (Oxford Hart Publishing 2000) 292-295. G Fletcher *Rethinking Criminal Law* (Little Brown and Company Boston 1978) 135-146, 157-184.

[59] Cf. A Ashworth 'Defining Criminal Offences Without Harm' in P Smith (ed) *Criminal Law – Essays In Honour of J. C. Smith* (London Butterworths 1987) 7, 16-17; for a discussion on the prospect of abandonment see Fletcher, *supra* note 58, pp 184-197.

Hence, according to one extreme interpretation, only the last act that depends on the agent should be criminalized. A less extreme version of this test calls for criminalizing acts that 'crossed the Rubicon and burnt the boat' or are 'immediately connected with' the commission of a crime: namely, acts that come close to the completion of a crime and indicate a fixed irrevocable intention to commit the completed crime[60] (though a further agent-dependent-acts for the completion of the crime may still be required). The advantage of this latter test is that it sets up a clear and straightforward criterion. Yet this advantage is lost if the wider interpretation is accepted. Once again it is necessary to decide whether the act is closely connected or whether it is more remote. The problem of this test is that it almost completely prevents police intervention prior to the completion of the crime. Furthermore, it distinguishes, in my view, unjustly, on the basis of luck, between the moral blameworthiness of the agent who successfully completes the crime and the one who does not.[61] The 'last act' test widens substantially the scope of preparatory acts. Between these two extremes of 'first' and 'last' acts, one can find various tests that determine the extent of preparatory acts.

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[60] The 'irrevocable act' test may actually call for a somewhat different test of 'possible intervention', since there may be cases in which the agent still has time to intervene and prevent the crime even after he or she had completed all the acts that depend on him or her for the commission of the crime (e.g. placing a bomb in a city centre that is set to detonate on the next day). Ashworth 'Defining Criminal Offences Without Harm, *supra* note 59, p 40. However, this interpretation would be even narrower than the 'last act' test.

[61] See A Ashworth 'Criminal Attempts and The Role of Resulting Harm Under The Code and The Common Law' (1988) 19 Rutgers L J 19; but see Duff *Criminal Attempts*, *supra* note 58, chap 4 & 12 s 12.1 for the view that results do matter morally. The greater the harm one brings about, the deeper the culpability. This view is supported by J Horder in 'Crimes of Ulterior Intent' in AP Simester & ATH Smith (eds) *Harm and Culpability* (Oxford Clarendon Press 1996) 153, 164. See also Simester & Sullivan, *supra* note 58, pp 307-308.

The justifications for this distinction draw on the minimalist principle, as well as the principle of (moral) culpability. Punishing criminal attempts is justified for two reasons: first, though no harm has been done, the assault has started and if criminal law is about preventing harm it must be able to intervene even before the harm has occurred, when it is an act that is considered the first step of the harmful action.[62] The second justification is based on the desert theory of criminal liability – in terms of moral culpability there is no pertinent difference in the choices made by a person who tries to cause harm but does not complete his or her act successfully and the one who does manage to cause harm. The difference is only a matter of luck.[63] Neither of these reasons apply in the case of preparatory acts. Preparatory acts do not constitute harm and are removed from the commission of harm. Besides this there is a moral difference between the blameworthiness involved in an act of preparation and a victimizing act. The performance of a harmful act is yet to begin. The agent still has to take the final decision to continue with his or her plan. He or she still has time to repent and thus avoid harmful consequences.[64] The same objections to a 'first act' test (for attempts) can be voiced even more strongly against criminalizing preparations: it convicts even those actors who might otherwise voluntarily desist before the completion of a crime; it does not treat people as

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[62] For example see: Simester & Sullivan, *supra* note 58, p 291.

[63] Ashworth *Principles of Criminal Law*, *supra* note 41, p 449. Cf. for a wider discussion on the role of moral luck see for example T Nagel 'Moral Luck' (1976) 50 Aristotelian Society 137; B Williams 'Moral Luck' in *Moral Luck – Philosophical Papers 1973-1980* (Cambridge CUP 1981) 20.

[64] Repentance is also recognized as an exception for the rule of attempts by the Israeli Criminal Code 1977 which states in section 28: 'A person that attempted to commit an offence, will not be criminally responsible to the attempt, if he proves that only due to repentance he abandon the commission of the crime…' (the translation is mine as currently there is no formal translation). At present there is no parallel statutory defence of voluntary renunciation in English law and the English case law is inconclusive; Simester & Sullivan, *supra* note 58, p 305. Cf. Fletcher, supra note 58, pp 184-197.

autonomous agents (giving them the chance to choose to stop); it increases the possibility of intrusive and oppressive police investigations in search of evidence of criminal purpose; and it increases the possibility of bringing charges which are not supported by objectively incriminating facts relating to a person's current conduct. Lastly, in terms of the first aspect of the minimalist principle, at the early preparatory stages of a commission of harm there might be other, less coercive, ways to reach the same ends; namely, to prevent a harmful result.

(b) The attempts – preparations distinction and anti-democratic acts

What are the implications of this distinction for anti-democratic acts? There are two types of anti-democratic preparatory acts: the first, a sub-category of category C, includes general preparations to harmful activity which is not based on a specific harmful enterprise (hereafter: general preparations). The second are preparatory acts to specific harmful acts. These latter preparatory acts fall within the scope of category D (hereafter: specific preparatory acts). General preparations and specific preparations motivated by some kind of anti-democratic ideology, in essence, do not cause direct harm. They are 'preparatory', the first of a series of steps directed to cause a specific harmful result. The threat that these preparatory acts pose is found in the anti-democratic beliefs of the agents, in their motivation. If the anti-democratic agent is caught at the (general, and even more so specific) preparatory stage and is not punished then it is highly probable that, motivated by his or her beliefs in the righteousness of his or her ideas, he or she would attempt other harmful acts. The claim is for the dangerousness of the anti-democratic agent and that the efficacy of a deterrent would be reduced if preparatory acts were not punished. There is a further danger in general preparations which create the structure that would eventually carry out direct harmful acts. This activity is of great importance. The existence of an organisation, the mental and physical

support it provides to anti-democratic agents, make the anti-democratic threat even more serious as it takes the anti-democratic ideology a step closer to achieving its objectives; it is no longer a number of sporadic acts but rather it would be organised with clearer direction, plans, and possible continuity beyond a specific harmful enterprise. Hence it adds up to the probability that harmful activity will follow. At the same time we must remember that a preparatory anti-democratic act is often even further away from the intended harmful result than the 'regular' preparatory act. An anti-democratic act that causes direct harm to people or property, such as a bomb exploding in a restaurant full of people, is punishable. It is punishable and unquestioned because it involves direct harm to personal integrity. However, the interest we wish to protect through criminal restrictions and punishment is liberty, as well as the entire range of individual interests of society rather than simply the specific interests in life and personal integrity of those who were injured.[65] Focusing on the interests at stake, even a direct harmful act is often only a preparation, or an attempt,[66] to bring to an end a democratic system. Accordingly, the preparation of a single terror attack (specific preparation), and even more so a general preparation, is even further away from harming the interests at stake.

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[65] Notice the current use of the Terrorism Act 2000 (and preceding statutes) instead of 'ordinary' offences of assault, murder, etc. in the case of members of terrorist organizations. Though their acts constitute 'ordinary' offences they are accused under the Terrorism Act 2000 and the like. This can be explained in terms of the different values we wish to protect by the different offences (liberty and the whole range of interests as opposed to the individual's interest in life), and the difference between the danger that the terrorists pose and that of 'ordinary' offenders.

[66] An assassination of a major figure within the political institution, such as assassination of the prime-minister or the president, might be considered an attempt rather than a mere preparation since it might have a direct effect on the stability of the regime.

(c) Possible routes to criminalize preparatory anti-democratic acts

It is plausible to categorise at least some of these last types of offences (that penalise direct harmful acts even though the interest violated differs from the interest at stake) as belonging to an existing group of offences defined in an inchoate mode. These offences proscribe the carrying out of certain acts in order to produce a certain outcome. Although it is the outcome which the law wishes to prevent, the offence is defined so as to penalize the agent for trying to produce it, whether or not the outcome is realised.[67] The use of inchoate-defined offences, which deviates from the regular result-oriented mode of definition, is justified only in special cases by reference to the importance of protected interests, the importance of prevention, the risk to large numbers of people and the voluntary wrong conduct of the agent. Another justification, though limited only to those instances where the act performed is a crime in itself (though a lesser crime than the one intended),[68] is based on the accurate representative labelling of the crime; that is, the inchoate offence is a proper reflection of the nature and gravity of the act performed.[69] The need for a special justification for these types of offences is based on the fact that the inchoate offence takes its elements and maximum penalty from the crime threatened (rather than the one committed). It is also based upon the growing

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[67] Ashworth 'Defining Criminal Offences Without Harm', *supra* note 59, p 8.

[68] This justification is applicable to those anti-democratic acts that do cause direct harm (even if the act is still far from the final objective of altering the regime), for such conduct is done with ulterior intention.

[69] Horder offers this justification for offences that entail 'ulterior intentions' and explains why is the justification limited only to situations in which the act performed is a lesser crime in itself (pp 167-168). These offences are included in the wider group of inchoate-defined offence as identified by Ashworth. Horder 'Crimes of Ulterior Intent', *supra* note 61, pp 157-165. For a detailed explanation of this representative justification see J Horder 'Rethinking Non-Fatal Offences Against A Person' [1994] OJLS 335. On the importance of the principle of representative labelling see A Ashworth 'The Elasticity of *Mens Rea*' in CFH Tapper (ed) *Crime Proof and Punishment* (London Butterworths 1981) 45, 53;

infringement of human rights and on the extension of criminal law beyond the 'last resort' (that is, it is punished even though the final objective was not necessarily achieved – and the (final) harm did not occur).[70] In the case of anti-democratically motivated harmful acts, the further intention – to alter a democratic system – should have an important role as it distinguishes between an 'ordinary' harmful act and a harmful act that is penalized under the inchoate defined offence. According to this analysis offences are to be understood as protecting the interest in democracy rather than a specific interest in life, limb and property. Indeed, the current Terrorism Act 2000 is a good example for such an inchoate-defined offence.[71] Section 1 defines terrorism as follows:

> the use or threat of action[72] where –
>
> …
>
> (b) the use or threat is designed to influence the government or intimidate the public or a section of the public, and
>
> (c) the use of threat is made for the purpose of advancing a political, religious or ideological cause.

Nonetheless, it should be stressed that this analysis does not change the nature of the specific preparatory acts for these single terror attacks, or the possibility to proscribe such acts in accordance with the attempt – preparation distinction.

Bearing in mind that the harm principle is about crime-prevention, it may be argued that anti-democratic acts of general preparations and specific preparations can still be criminalized as an exception to the general rule, the same way that other exceptions have been recognized.

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[70] Ashworth 'Defining Criminal Offences Without Harm', *supra* note 59, especially pp 15-20.

[71] Though not all the offences that are used in practice are of this 'inchoate' character.

[72] Section 2 defines, and limits, the action to actions that involve serious violence against a person, or property or creates a serious risk to health, or safety, of the public, or interferes with electronic systems in order to disrupt them.

The law punishes conspiracy because it finds special danger in agreement with others.[73] It recognizes the effects of the group on the individual, his or her growing commitment to the planned criminal enterprise and the diminishing chances of the individual withdrawing from continuing with the criminal enterprise. For the same reason – namely prevention – other preparatory acts are exempt from the general rule. Why is it not possible to add one or a few more exception to the list? The narrower the scope of 'attempts' is, the more this argument is strengthened with regards to specific preparatory acts. In terms of the minimalist principle this argument in favour of punishing anti-democratic preparatory acts calls for widening the scope of criminal law, as an exception and beyond a last resort. Exempting anti-democratic preparations (especially specific preparations) can also be supported by a general criticism of the 'last act' test as lacking in opportunities for police intervention prior to the completion of the crime (though this criticism weakens the further away we get from the direct harmful act). Indeed, some general preparations are already included in this list, such as membership in a terror organization. Is it not possible to justify these offences as an exemption to the minimalist principle?[74]

Although the option of creating (new) exception cannot be ruled out completely, I do not think it is desirable to do so. This is because it entails the danger of becoming a 'slippery slope'; of opening the door to restrictions on other acts of preparations, which would eventually lead to the collapse of some supporting principles such as (moral) culpability as well as to the diminishing ability of the harm principle and its supporting principles that

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[73] Ashworth *Principles of Criminal Law*, *supra* note 41, p 455-456.

[74] Note, that the fact that some general preparations are already criminalized is not a proof that this is a justified restriction. I am trying to give the moral justification for such restrictions – whether they already exist or are yet to be enacted.

provide a practical guidance to the legislator. This is true especially with regard to general preparations because in their essence they are even further away from the harmful conduct.[75] Furthermore, with regards to specific preparations, unlike other exceptions that can be narrowed down to a specific act or to very few acts, in the case of the anti-democratic actor such a direct restriction might be impossible since victimizing acts may vary greatly.[76] The wider the restrictions are the greater the infringement of the citizen's autonomy. In conclusion, I would argue that a justification for criminalizing specific anti-democratic preparations, as defined by the attempts-preparations distinction, and general preparations in accordance with both the harm principle and the minimalist principle (or more accurately, as an accepted exception to these principles) is possible, though undesired and may raise various difficulties.

(d) Extending the minimalist principle: the last effective opportunity to intervene

The underlying assumption of the causal connection, and of the division between attempts and preparations is the traditional simple interpretation of the minimalist principle, according to which the principle only permits the criminalization of direct victimizing acts. This interpretation seems to imply that penalizing actions that do not cause, by themselves, direct harm is prohibited. Offences, found in various legal systems, that proscribe acts that cause only remote harm are a result of the overriding consideration of the dangerousness of a possible (remote) harmful result and do not comply with the minimalist principle. The

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[75] Once again I wish to stress that the fact that current laws do criminalize some types of general preparations is irrelevant to the question of whether such restrictions can be justified by the general principles discussed above.

[76] This reasoning is limited to specific preparations because it is possible to define, at least, some specific types of general-preparation that ought to be restricted, such as: establishing a militant anti-democratic organisation.

exception is justified because the primary concern of criminal law is with the prevention of harm rather than its occurrence.[77]

However, instead of the grounds for such offences being based on overriding considerations and on the same assumption of causal connection, I would argue that the minimal principle should be interpreted more widely as referring to 'the last effective point of intervention'. In some situations criminalizing only the victimizing act is not effective because it is simply 'too late'. This is the case with car accidents. Criminalizing reckless driving alone is not enough because people who drive under the influence of alcohol, for example, do not have full control over their actions. Thus, it is necessary to go one step further from the victimizing act to prohibit driving under the influence of alcohol. This interpretation goes further than the traditional interpretation of the considerations of dangerousness. It implies that many of the offences that penalise remote harm will not be considered the result of overriding considerations that are contrary to the minimalist principle, but rather a result of the minimalist principle itself.

Von Hirsch refers to three distinct types of acts that may cause remote harm.[78] The first is 'abstract endangerment'. This type of remote harm consists of conduct 'the riskiness of which depends on the existence of a contingency, but where it is not known or knowable to the actor *ex ante* whether that contingency will materialize in the particular situation'.[79] Many criminal

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[77] The guiding rational is that the more important the interest at stake is, the more protection it should receive. Hence, the proscribed act should draw further away from the direct harmful results.

[78] A Von Hirsch 'Extending The Harm Principle: 'Remote' Harms and Fair Imputation' in AP Simester & ATH Smith (ed) *Harm And Culpability* (Oxford Clarendon Press 1996) 259, 263-265.

[79] Von Hirsch 'Extending The Harm Principle', *supra* note 78, p 263

offences often abstractly formulate a prohibition in terms that cover harmless acts which may, at best, cause some kind of remote harm. Such criminal offences include prohibitions on the sale of guns due to future possible accidents, or the intentional use of guns to commit crimes, or a prohibition on driving under the influence of alcohol, setting a unitary limit of 0.8 pro ml level of blood-alcohol content, regardless of individual sensitivity to alcohol. The second type of remote harm is 'intervening choices', namely, acts that are the first in a series of necessary steps that will bring about a harmful result. These further steps entail making an intervening choice (either by the same actor or by another culpable person). Preparatory acts (and to some extent attempts) are included in this category. The last type of remote harm mentioned by Von Hirsch is 'accumulative harms'. These are situations where 'the conduct does the feared injury only when combined with similar acts of others'.[80] The best example for this kind of remote harm is the harm generated by carbon dioxide discharged from cars. Though no single discharge causes harm, each emission contributes to cumulative environmental damage and can therefore be restricted.

In all three types of remote harm, criminalization should raise the question: is criminalizing this conduct the last effective point of intervention to prevent the harm? I would argue that it is only at the last effective point of intervention that the legislature is permitted to criminalize an abstract endangerment, a harm that is remote due to the existence of further intervening choices, or even an accumulative harm.

The interpretation of 'last effective point of intervention' raises some problems. It might be argued that this consequentialist interpretation overlooks questions regarding the moral blameworthiness of the actors. Firstly it does not treat people as autonomous agents since it

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[80] Von Hirsch 'Extending The Harm Principle', *supra* note 78, p 265.

does not allow them the chance to decide for themselves to abandon the criminal enterprise and it would convict those agents who would otherwise voluntary renounce their actions. One possible answer is that this critique is not unique to the last-effective-point-of-intervention interpretation. The same tension exists with respect to the criminalization of attempts as I pointed out earlier in this chapter. However, this answer ignores a pertinent difference between the two situations. The moral ground for penalising attempts is the settled intent of the agent, which creates a moral equation between the attempt and the successful harmful act (or at least provides sufficient moral weight), whereas no similar settled intention necessarily exists at the time of the last effective point of intervention.

Indeed, the third aspect of the minimalist principle in its wider interpretation is no longer an element designed to solely protect retribution. Instead it combines the considerations of retribution with those consequentialist considerations of effectiveness, namely, that criminal law has to be effective in preventing harm.[81] The principle, so I hold, ought to respond not only to the declaratory and censuring purposes of criminal law but also to its preventive

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[81] This is a different aspect of effectiveness than the ones discussed in Ashworth's book *Principles of Criminal Law* (*supra* note 41, p 36). There Ashworth refers to two aspects: firstly, that criminal law should not be used if it cannot be effective in controlling conduct, and secondly, that criminal law should be used only when it is the most effective means of controlling conduct. These aspects are reflected, to some extent in the first aspect of the minimalist principle: the distinct nature of criminal law and the need for special justifications to use it over coercive and non-coercive measures. Cf. the discussion in J Schonsheck *On Criminalization – An Essay In The Philosophy of The Criminal Law* (Dordrecht Kluwer Academic Publishers 1994) chap 3 p 63. In his discussion he uses the term 'offence principle' to refer to the concept of effectiveness (the aspects that are discussed by Ashworth).

purpose.[82] The limitation of 'the last effective point of intervention' does create the correct balance between these three purposes, a balance that is lacking in a traditional interpretation. Furthermore, I think the effect of this interpretation is more limited than it might at first seem. Examining each type of remote harm separately proves the limitations of such a criticism. Consider the criminalization of remote accumulative harms. This type of conduct is not a preliminary preparatory one building up to a 'real' or 'direct' harmful act, which still needs to be carried out in the future. Each and every act causes the same type of harm. In each discharge of carbon dioxide the harm occurs (though by itself it causes only an insignificant harm). Hence, I believe that each action is a wrong in and of itself; one that deserves punishment. The notion of renunciation is not applicable to these types of remote harms. In the same way we should not be prevented from charging a person who has stolen sweets from a supermarket just because he or she might renounce this type of actions in the future and refrain from repeating it.

Proscribing 'intervening choice' acts of remote harm indeed limits the possibility of renunciation. Yet this problem can be mitigated by the recognition of a defence of free and wilful renunciation, alongside these types of offences. This kind of solution is not effective in the case of abstract remote harm. In this latter type of conduct, it is not known or knowable at the time of acting that the contingency will actually materialize under specific circumstances. Hence it is impossible to renounce future harmful conduct at that (abstract) point in time. But even in these instances, the offences that prohibit abstract harm ought to carry a lesser punishment than the offences that proscribe (subsequent) direct harm. In so doing they reflect

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[82] These purposes are inherent to the features of criminal law as a coercive and stigmatising one. For a more detailed discussion about the purposes of criminal law see the references in Chapter One fn 19. See also Ashworth *Principles of Criminal Law*, *supra* note 41, pp 25-28, 36.

both the fact that the agents are not as blameworthy as those agents that have gone ahead and completed the criminal enterprise, and also the recognition of the potential riskiness found in the abstract conduct. I should also note that this limitation does not undermine the restrictions that this principle imposes by the demand of causal connection within a specific offence; only that person whose actions were the 'but for' reason for the harmful result can be punished. The agent who did something which is only an abstract harm is to be punished only for his or her actual actions and not for the potential harm the action might cause.

The question of whether criminalizing a particular type of conduct is the last effective point of intervention to prevent harm should not be mixed with questions about costs to society. If there is a closer effective point of intervention, though the costs of intervening at that point are higher, then the former point of interference is not considered the 'last effective point of intervention'. It is a known fact that citizens' rights have a high price, but we acknowledge this price to be unavoidable. One important consequence of limiting criminalization to the last effective point of intervention is the limitation of the number of innocent people and innocent activities that would be affected by the prohibition. If the last effective point of intervention to avoid car accidents due to reckless driving is prohibiting driving with 0.8 / ml level of blood alcohol, then we should not restrict all driving after drinking (even with low levels of alcohol). This limits the number of innocent people (those not effected by alcohol) who are barred from driving.

This wider interpretation of the minimalist principle has important implications for the possibility of restricting remote harm. It permits restrictions on remote harm as part of this principle instead of as part of a need to present an overriding reason justifying the criminalization of such harms. At the same time it also imposes clear limitations on these

powers – only if restricting the act is the last effective point of intervention. In any case, I do not think this interpretation should have any implications for the attempts-preparations distinction, since it is already incorporated into the distinction. An attempt is a remote harm, which is considered the last point of intervention (at least according to the 'first act' test). Furthermore, the other, more important, considerations – the blameworthiness and the prospect of voluntary renunciation by the agent – are not undermined or affected in any way by this interpretation.

C. THE PROBLEMS OF REMOTE HARM

1. The standard harms analysis

Accepting that some acts which do not cause direct but only remote harm may be criminalized in accordance with the minimalist principle, we must then ask which of these acts is covered by the harm principle? Clearly, not every act that causes remote harm, even when it is the last effective point of intervention, is, or should be, subject to restrictions, since many acts may cause some kind of remote (serious) harm. Possessing sharp meat knives is not restricted in any way though, it might be argued, that this is the last effective chance to intervene in an attempt to prevent the use of knives in quarrels between couples. Proscribing only the use (of the knife) itself, the argument continues, might not be enough since an agent who attacks with a knife is often provoked and hence is not fully responsible for his or her

actions.[83] Failure to distinguish those acts that ought to be criminalized from those acts that ought not, would lead to the collapse of the harm principle as a useful criterion. The answer to this concern lies in some kind of cost-benefit analysis and in the formulation of relatively precise maxims to mediate the application of the harm principle.[84] As I have already said in the introduction to this chapter, keeping to the boundaries defined by these maxims is important. Reformulating these boundaries, using the harm principle to cover all potential threats, would extend the principle so much that it would no longer distinguish effectively between actions that are harmful and actions that are not.

Feinberg developed an analysis that would provide a practical guide for the legislator: the 'standard harms analysis'[85] which is divided into three steps. The first step is an assessment of the risk; namely, the gravity of the eventual harm and the probability of the harm. The greater the gravity and probability, the more a prohibition is justified. The second step is an assessment of the risk against the social value of the risk-creating conduct, and the degree of intrusion upon the agent's choices entailed by criminalization. The greater the social value of the act or activity, the greater must be the risk of harm for its prohibition to be justified. The third and last step is the assessment of side-constraints that would preclude criminalization, such as an infringement of important rights (e.g., free speech).[86] It is important to note that in the case of an anti-democratic agent we do not attempt to achieve a balance between the

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[83] This example is based on an example offered by Ashworth in *Principles of Criminal Law*, *supra* note 41, p 52.

[84] See Feinberg's account of the purpose of his book *Harm to Others*, *supra* note 2, pp 13-14.

[85] This name was given by Von Hirsch, *supra* note 78, p 261. This argument is given as part of a discussion on the need to tolerate people who hold intolerant religious beliefs.

[86] Von Hirsch 'Extending The Harm Principle', *supra* note 78, p 261; *Harm to Others*, *supra* note 2, chap 5 pp 187-217.

interests of society and the interests and rights of the agent (as proscribed in steps two and three). Rawls explains that '[a] person's right to complain is limited to violations of principles he acknowledges himself. A complaint is a protest addressed to another in good faith. It claims a violation of a principle that both parties accept.'[87] The anti-democratic agent does not share our belief in democracy and in the need to tolerate the liberty of others. Thus, he or she cannot justly claim for his or her interests to be respected according to democratic values. So, it may be argued, we no longer need to look for a justification to defend ourselves from anti-democratic agents (and ideologies), since it would always be the case that the victim's interests would take precedence. As Rawls acknowledges, not giving the anti-democratic agent a stand does not entail automatically having a right to suppress and restrict his or her activities. 'Others may have a right to complain. They may have this right not as a right to complain on behalf of the intolerant, but simply as a right to object whenever a principle of justice is violated. For justice is infringed whenever equal liberty is denied without sufficient reason... We are not released from the [natural duty of justice to uphold it] whenever others are disposed to act unjustly'.[88] Hence, we have to weigh the interests we wish to protect with the social values and interests of the risk-creating conduct and with other general rights and side-constraints.

2. The inherent difficulties of remote harm

Remote harm can generate any of the following difficulties: The first difficulty is that the further the act is from the final harmful result the less probable it is that the harm would

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[87] J Rawls *A Theory of Justice* (2nd ed NY OUP 1999) 190-191.

[88] Rawls, *supra* note 87, pp 191-192.

actually occur. This can be explained in part by the further acts or conditions that must be fulfilled for the harm to take place. This would be true whether these further acts and conditions depend (a) on the intervention of another person, or (b) on further actions by the same person who made the initial (preparatory) act. For our purposes there are three kinds of anti-democratic remote harm: category B of acts of expression, general preparations of category C, and the sub category of specific preparations within the acts of category D. Acts of expression usually fall under the former class of acts that involve intervention of a third person, specific preparatory acts usually (though not always) fall under the latter class of actions that involve intervention of the same person and acts of category C can be found in both classes of action. A further reason for the decreasing probability that harmful results will materialize can be attributed to the increasing numbers of innocent people that are restricted by a prohibition of remote harm.[89] To avoid car accidents the law can place restrictions at different levels. The law can place restrictions only on reckless drivers, a restriction that refers only to dangerous people. It can go one more step to restrict driving with a level of 0.8 / ml blood alcohol, a restriction that will limit a few individuals that are not effected by high levels of blood alcohol. Yet again, arguing that this is the last effective point of intervention, the law can go even further and restrict any driving after drinking, which would limit a much larger group of people who are not affected by low levels of blood alcohol. And finally it can restrict drinking altogether, thus limiting even greater numbers of innocent people (including all those

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[89] Mathematically speaking, as the reference group increases to include people that are in a lower risk group the probability for the same result reduces. For example, consider two different groups of people: group 1 with high levels of alcohol in their blood, and probability of 0.9 of a car accident occurring. Group 2 with a lower alcohol count in their blood, and probability of 0.5 of a car accident occurring. By adding people from group 2 to group 1 we decrease the probability of the occurrence of an accident in group 1.

people who do not have a car), though this limitation would probably not comply with the minimalist principle.

A second but related difficulty raised by Von Hirsch is the problem of fair imputation of the harm to the agent. The question is: 'why should I be punished for conduct of a kind that does no harm in itself, merely because it might influence other persons to decide to engage in acts that are potentially injurious?'[90]

Finally, criminalizing remote harm involves a more severe infringement of liberty. Many acts that cause remote harm may often lead to other valuable outcomes, or may support or promote some other interest. For instance, a person may sell a rifle that is later used for self-defence, thus promoting the interest in life. Furthermore, as I explained earlier, criminalizing remote harm involves restricting wider circles of people, including increasing numbers of innocent people. This is bound to expand the possible harmless results of proscribed actions. The further we get from the victimizing act, the weightier these competing interests become (whether it is the social value of the risk-creating conduct or other constraining values) and the less weighty the harm principle is. Some may argue that this last point should not be viewed as a difficulty but rather as a special feature of remote harm. Since the balancing point ought to change as we get further from the harmful result, fewer and fewer actions ought to be criminalized.

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[90] Von Hirsch 'Extending The Harm Principle', *supra* note 78, p 266.

3. Identifying remote harm (that ought to be criminalized)

Feinberg argues that acts which cause remote harm can be identified by the 'standard harms analysis' in the same way as victimizing acts can. Von Hirsch objects to the exclusive use of the 'standard harms analysis', pointing out that remote harms change things. He argues, correctly, that the 'standard harm analysis' cannot stand alone, and further elements are needed to help solve the special problems raised by remote harm.[91] One such element is the minimalist principle in its wider interpretation. This principle responds (at least partially) to the problem encountered at the first stage of the standard harm analysis – the reduced probability of the occurrence of harm, by limiting restrictions only to acts that can be considered the last effective point of intervention. In practical terms this would usually be translated to restrict criminalization to acts that are close to the harmful result and as such are more likely to materialize. The limitation that this principle states also decreases the severe infringement of liberty and limits the amount of innocent people who would be harmed (see the example of driving after drinking given in the previous pages).

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[91] There is no comprehensive proposal that solves all the special problems that remote harm might raise. Developing a full theory and exploring all the various aspects of remote harm requires a fuller argument than I can give here. However, within the limits of this thesis, I do find it important to examine the ramification of the offered interpretation of the minimalist on the first step of the analysis of remote harm and the one problematic aspect discussed by Von Hirsch.

(a) The Imputation Principle

Von Hirsch focuses on one other aspect and develops the principle of imputation.[92] The imputation principle is one aspect of a more general principle of moral culpability, or the blameworthiness of the agent which was mentioned earlier as one of the foundations for the causal connection. It is grounded in the fact that the prohibited act only triggers a series of events that includes actions taken by other culpable people. The problem then is whether one should be held responsible for potential consequences that flow from the choices of other actors. According to Von Hirsch's maxim 'only those acts that did not merely influence the subsequent choice of the matter, but having, in some manner, underwritten that subsequent choice are to be criminalized.'[93] However, Von Hirsch agrees that this principle can be overridden in exceptional situations on the grounds that the potential injuriousness of an act is so grave and widespread as to trump ordinary concerns about imputability.[94] In the following section I will explore the implications (if any) of the minimalist principle (in its wider interpretation) and the imputation principle for anti-democratic acts.

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[92] I do not know of any other attempts to provide a comprehensive solution to all the special problems that remote harm might raise, or even to some of the general difficulties raised in the main text.

[93] Von Hirsch 'Extending The Harm Principle', *supra* note 78, p 267.

[94] Von Hirsch 'Extending The Harm Principle', *supra* note 78, p 271 and his reference to the general exception given by *Dworkin Taking Rights Seriously*, *supra* note 35, chap 7, pp 200-202.

D. ANTI-DEMOCRATIC REMOTE HARMS

Can the various categories of anti-democratic acts be criminalized? Direct harmful acts of category D do not raise any special difficulties. These acts cause direct harm to personal integrity or property and thus can be proscribed. Yet, in many cases these acts are still remote from the agent's final objective. The harm, which justifies the restrictions, might differ from the final harm that creates the special nature of the threat – the destruction and replacement of political and social democratic institutions. There are three further categories in which even direct harm is remote: category B of acts of expression, general preparations of category C and the sub-category of preparatory acts within acts of category D (given that the distinction between attempts and preparations is not undermined by the wider interpretation of the minimalist principle). The question is whether the principles that govern criminal law enable the state to restrict these three types of anti-democratic actions thus providing comprehensive protection against anti-democratic ideologies. Since the various categories of harm raise different difficulties I will examine them separately.

1. Category B – acts of expression

I will proceed in two stages. Firstly, I will examine what impediments there are to the application of the standard harm analysis on anti-democratic expressions. Then, I will explore the possibility of solving these difficulties using the supporting principles of minimalism and imputation.

Applying the standard harm analysis to anti-democratic expressions involves three steps. The first step is an assessment of risk. The case of remote harm does not alter the gravity of the eventual harm. What changes is its probability. The need for further actions and the possibility of intervention along with the occurrence of unknown elements turns any assessment of probability (and through this of risk) into a very complicated (if not an impossible) mission. Anti-democratic expressions are no exception. Any attempt to assess the probability of an occurrence of harm is bound to be complicated. This is especially true with regard to Climate-Creating expressions and Abstract expressions. The probability test loses its meaning when we try to assess an act that contributes to a climate of violence. No specific act, on its own, can create a climate. A climate develops through the accumulative influence of many acts and utterances. This critique becomes stronger the further we go towards statements or utterances of Abstract expressions.[95] Moreover, the content of the expression and the characteristics of further acts that are necessary for the threat to materialise are not the only factors that affect the probability of the harm. General factors such as the vulnerability of a given society and a widespread belief in an anti-democratic ideology may also influence the probability of harm. The relevance of volatile 'general elements' makes it harder to set a single permanent prohibition that would still be sensitive given the plausible variations of

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[95] Gur-Arie, *Supra* note 11, p 30. Gur-Arie analyses a judgment delivered by the Israeli supreme court (Cr. F.H. 1789/98 State of *Israel* v *Kahane* 2000(3) Takdin Elyon 2713). In this case the State accused Kahane of Sedition after he published a pamphlet that described Israeli Arab villages as 'nests of murderers' and called for the destruction of a village every time a Jew is killed by a terrorist attack. The question put before the court was whether the pamphlet satisfies the requirement of the offence of sedition. The court has acknowledged that the probability test fails when the expression only contributes to creating a climate of violence (as opposed to an expression that calls for specific action), and hence preferred to check the content of the publication. Since the content included expressions of hatred the court concluded that the publication did influence the creation of a violent climate.

probability. Even so, the restrictions imposed may be defined in a way that would allow these kinds of variations. Current criminal offences that set probability tests are restrictions of this sort. An offence which states that expressions are prohibited when they cause 'clear and present danger' or 'probable danger' allows different results depending on an assessment of the changes of the 'general elements'. Alternatively, other methods may be used. For example, a more stringent test, which is based on the volatility of a given society, can be set by creating a unified presumption. Specific expressions would than be examined to determine whether they contain elements that fall within the presumption. The Israeli Supreme Court[96] assumes that expressions of hatred have some influence on the creation of a violent climate, and checks the content of publications for such expressions. Though, it should be stressed that this test in itself only responds to some of the difficulties. The presumption provides an answer to the question of whether an expression should be regarded as contributing to the creation of a climate of violence. It does, however, fail to answer the more basic question of whether restricting Climate-Creating expressions is permissible.

As for the second and third steps, I have already explained why we have to balance the endangered interests with other interests, even though an anti-democratic agent does not have a legitimate interest in this process. Balancing values or interests is very problematic and needs at least some supporting-maxims as a guide. In general, the balancing itself is possible and would comprise from evaluating the preservation of liberty on the one hand, and the values of free speech, liberty (this time as an opposition to restrictions) and other side-constraints on the other.[97] Even given endangered social values, and the conclusiveness of the

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[96] For more details see fn 95.

[97] This general statement is subject to the exception of Scanlon's (early) theory of freedom of expression, which is based on the Millian principle. Scanlon argues that the Millian principle is not only a principle to be weighed

realised anti-democratic threat discussed in the previous chapter, due to the weight of the competing interests, and the fact that an interest in liberty is found on both sides of the equation, some compromises must be made (though any position taken on this question is bound to be controversial). Hence, the harm principle may justify the imposition of only limited restrictions on anti-democratic expressions, though the assessment process is very difficult (if not impossible).

Can the supporting maxims solve the difficulties of category B acts? Starting with the principle of imputation, one might argue that the punishment of anti-democratic expressions is consistent with the general principle of imputation. This might be especially true with regard to group activities, since the special threat that flows from these kinds of activities fulfils the requirement of 'underwriting the subsequent choice of other culpable people'. The various expressions are based not on mere (permitted) influences but rather on an exploitation of the audience's emotions. They are carefully directed at the existing emotions of the audience and they use these emotions, illegitimately, to influence the addressees' opinion. Yet there are three problems with this argument: firstly, unless we refer to Direct expressions, namely incitements and other expressions in which the speaker has some underlying influence on his or her listeners,[98] this argument is not convincing. Can it truly be said that a particular speaker's speech has underwritten the subsequent choice of other culpable people? Even if

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against other considerations but rather a constraint that does not allow the weighing of other competing considerations. It should be noted that even Scanlon himself recognized in a later article that his theory is problematic. For Scanlon's theory see T Scanlon 'A Theory of Freedom of Expression' (1971) 1 Philosophy and Public Affairs 205. For his later reservations see T Scanlon 'Freedom of Expression and Categories of Expression' (1979) 40 U of Pittsburgh L Rev 519, 531.

[98] This kind of influence can be explained by the passion of the speaker and the strength of his or her arguments or by some special relationship between an agent and his or her listeners such as a spiritual guru and his students.

this was the intention of the speaker, I find it hard to accept that Abstract expressions (i.e. expressions aimed at presenting and convincing (rationally) others of the validity and force of an anti-democratic ideology) underwrite the ensuing harmful result. The path from these types of expressions to harmful conduct is long and involves many further decisions by culpable people. Accepting the interpretation given above is inconsistent with the concept of autonomy. If we truly believe that a person is autonomous then we cannot accept that someone else has underwritten that person's decisions, at least not when there are so many decisions to be taken along the way. An anti-democratic agent is not forced into believing in an anti-democratic ideology.[99] He or she is not forced into a decision to harm others, nor is he or she forced into the decision to commit a specific harmful act. The agent might be influenced, maybe even heavily influenced, but still, the notions of autonomy and accordingly, culpability (at least in criminal law) mean that we believe that the decisions are his or hers.[100] Furthermore, even if we were to recognize external influence to a point of 'underwriting the consequent result', it would be impossible to determine if it was wholly, or partly, the speaker's influence or public support[101] that had underwritten the agent's actions. If it is some kind of combination, it is often not clear what the contribution of the speaker is; to what extent is he or she responsible given all other relevant factors? The same is true for Climate-Creating expressions. As Gur-Arie explains:

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[99] Except for cases of brainwashing or manipulation, but even these few situations are currently criminalized as incitements.

[100] This account of culpability associates blame with responsibility. Criminal law requires that a person is responsible before we can blame him or her. This account is currently expressed in some of the main defences in criminal law such as intoxication, mental disorder, etc. Yet scholars disagree about whether people must be responsible before we can blame them. Unfortunately, entertaining a wider discussion is beyond the scope of this thesis.

[101] The effects of public support are discussed in detail in the Chapter One.

> The distinction between creating a *climate of violence* on the one hand and incitement [Direct expressions] on the other hand is like the distinction between expression aimed to influence conduct (incitement) and expression aimed to influence beliefs or opinions (climate of violence). Violent conduct clearly falls within the scope of the criminal law; opinions and beliefs do not. Therefore, criminal law restrictions upon expressions aimed to bring about violent conduct may be justified; expression aimed to influence opinions and beliefs should be countered with opposing opinions or belief, not by the criminal law.[102]

The second problem with the argument goes back to the basic critique of the harm principle. If we accept that Climate-Creating and Abstract expressions can be considered 'underwriting subsequent results,' then this would allow the imposition of prohibitions on any speech or any view that criticises government, widespread agreement or general consensus, even without calling for disobedience. As a result, the harm principle would lose its distinguishing characteristics. If I were to speak against a current tax policy in a welfare state, offering to replace it with a capitalist policy, then the legislature would be justified in restricting me on the grounds that I might 'underwrite' a subsequent act of tax evasion.[103] The fact that anti-democratic speech consists of some special threat does not change the nature of the independent decisions taken by anti-democratic agents to use force, and thus cannot set a distinguishing criterion between this kind of speech and any other. In other words, the gravity[104] or the probability of the threat entailed by anti-democratic speech is not relevant to the question of imputation and the independency of the anti-democratic actor's choices.

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[102] Gur-Arie, supra note 11, p 39. It should be noted that she does not differentiate between Climate-Creating and Abstract expressions.

[103] Even if I did not call for an act of disobedience, but there is a chance that someone would be convinced by my argument and decide to go one step further and stop paying taxes.

[104] The gravity of an anti-democratic threat is illustrated by the unique features discussed in Chapter One.

This objection holds even with regards to Direct expressions (incitements), especially the further we get from core situations where the inciter has significant influence over the actor (e.g. a parent, a teacher, a spiritual mentor etc.) and the closer we get to borderline situations of encouragement or advice to commit a crime.[105] This is also true in those cases where the incitement has no effect on the incitee.[106] However, there are two important differences between Climate-Creating and Abstract expressions that do not include reference to a specific crime, and Direct expressions that have (at least) the potential of encouragement to commit a specific crime (and thus underwrite the subsequent results) and are accompanied with *mens rea* of intention. The first pertinent difference is in the dangerousness and the blameworthiness of the speaker that acts in a way that not only legitimises unlawful conduct based on anti-democratic ideological reasons but also actively encourages it.[107] The accompanied difference is the *direct* influence and the power to underwrite ensuing results that incitement (unlike Climate-Creating and Abstract expressions) may have on the agent. However, the initial and further decisions to commit a specific crime are still considered independent decisions made by the anti-democratic actor. It is these two differences: the

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[105] A threshold demand of 'suggestion, proposal or request' is defined in *R* v *Fitzmaurice* [1983] QB 1083, 1089.

[106] M Jefferson *Criminal Law* (6th ed England Longman 2003) 390; *R* v *Krause* (1902) 18 TLR 238, 243. For an example to borderline situation consider *Invicta Plastics Ltd* v *Clare* [1976] Crim LR 131, QB. In this case the defendant company advertised a device (they produced) called 'radatec' which emitted a high pitch whine when within 800 yards of telegraphy transmission used for police radar traps. The advertisement invited drivers to request from them more information. This information included a provision about the illegality of using these devices to avoid police radars but stated that a request to receive the device was not illegal. The court convicted the company of incitement to breach the act through the advertisement, viewing it as a whole, though the advertising was trying to persuade people to *buy* the device (which in itself is not an offence).

[107] There is a substantial moral difference between criticising a policy, a view, or an ideology and a call to a specific unlawful act against such a policy, view or ideology.

dangerousness, blameworthiness and the influential character of incitements, which set out the basis for ascribing blame to the inciter and makes incitement punishable.

Going back to the original problem of the consequences of accepting the claim that a Climate-Creating expression and an Abstract expression can underwrite subsequent (harmful) results, it is important to note that speech in general, and political speech in particular, is vital for the exact reason attacked by the above argument. It is important because speech is a way of encouraging people to change their minds. So, if we accept that Climate-Creating and Abstract expressions may influence others then expressions that are successful in convincing other people would give rise to the possibility to ascribe harm to the speaker. Only unsuccessful expressions will leave the speaker beyond the reach of the legislature. In other words, we will opt for the promotion of only ineffective expressions.

Alternatively, one might argue that countervailing concerns about preventing harm, especially the potential injuriousness of anti-democratic expressions, are of extraordinary urgency and thus override the imputation principle. This line of argument is a dangerous one, as it might become a 'slippery slope' justification for state restrictions that violate individual liberties unnecessarily. Thus, we would fall back on the general critique of losing the distinguishing character of the harm principle. Even if there is no real danger of 'a slippery slope', this line of argument is certainly controversial. Firstly, Von Hirsch bases his exception on that provided by Dworkin in *Taking Rights Seriously*.[108] However, from the examples Dworkin discusses it is transparent that in order to show 'extraordinary urgency' the connection between the act in question and a harmful result must be clear.[109] In those

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[108] *Dworkin Taking Rights Seriously*, *supra* note 35, pp 200-202.

[109] *Dworkin Taking Rights Seriously*, *supra* note 35, pp 202-203.

expressions where the connection is not clear Dworkin rejects the use of this exception to allow restriction of expressions. The case of anti-democratic expressions (as is the case in most expressions) is of this latter kind. As was shown above, it is extremely hard, if not impossible, to assess the probability and the risk of harm consistent in the expression. Secondly, it would be difficult to establish that Climate-Creating expressions and Abstract expressions are of 'extraordinary urgency'. Though they pose a threat by creating public support, etc., the final objective of these speeches, and accordingly any final harmful result, is far off. I argue in the following pages, that the best way to defend society against anti-democratic ideologies is to 'nip it in the bud'; to stop the anti-democratic ideology in the early stages of its development and before it becomes widespread. Hence, the state needs to address these types of speeches as part of its response to anti-democratic threats. But this is different from saying that the Climate-Creating and Abstract expressions create an 'urgent' threat.

A second reason for overriding the imputation principle is that the threat would be widespread. For one thing, anti-democratic expressions may be widespread, but they might also be more limited. Even if we were to restrict expressions only if they are widespread, we would confront a paradox. The reason for restricting expression is that an anti-democratic ideology threatens to gain public support and become widespread. Yet we would not be allowed to restrict it at the beginning, but only when it is already widespread. Only when the damage has been done, and the chances of success are lower, would we be permitted to act.

The minimalist principle does not solve the difficulties encountered in the standard harm analysis either, although it might provide some help. If we keep to the traditional interpretation, it is obvious that Climate-Creating and Abstract expressions cannot be restricted. There is still a considerable distance between the expression that creates a violent

climate (and even more so the expression that only presents an anti-democratic political theory) and a harmful result. By no means can it be considered a 'last resort'. On the other hand, according to the wider interpretation of the minimalist principle, the criminalization of some anti-democratic expressions might be possible (depending on the background conditions). My claim is that anti-democratic expressions are threatening because they create public support. But, if society does not intervene early on – if it waits until anti-democratic agents have committed harmful acts – then it will be too late. The seeds of anti-democratic ideology will have already been planted in society. The last effective point of intervention is at the early stages of ideological development.

Conducting a costs-benefits balance is complicated. Even before going into a detailed analysis of the competing interest of freedom of speech, it is already clear that any restrictions on Climate-Creating and Abstract expressions are problematic and limited. Although these expressions might be said to be within the scope of the 'last effective point of intervention', the application of the other general principles proves to be a difficult task. An attempt to assess the risk involved in these types of expressions will encounter difficulties due to problems involved in evaluating probability, and in any case, restricting such expressions falls short of the principle of fair imputation. In other words, it would be impossible to criminalize Climate-Creating expressions and Abstract expressions in accordance with the general principles.

2. Sub-category C – general preparations

General preparations usually entail the foundation and maintenance of the anti-democratic organisational structure (founding terrorist organisation, raising money, and so forth). Thus,

they involve further intervening choices of either the same person, or of some other person(s). As I have already noted, general preparations are of great importance mentally and physically. The organisation plans, controls, and coordinates future specific harmful activity. It is 'the mind behind future harmful activity', and it guarantees continuity. Organised anti-democratic activity is bound to be more successful. However, there is still a long time before a specific harmful enterprise is to be carried out and there is still time for the anti-democratic agent to renounce his or her actions.

Applying the standard harms analysis does not prove to attract as much difficulties as acts of category B. As the gravity of the prospective harm does not change because it is only remote, the assessment of the risk is dependant only on the probability of the occurrence of the risk. Indeed, the harmful result is still dependant on further intervening choices but as the general preparations are mainly structural-organisational, they point to the seriousness of those who participate, and consequently, to a higher probability that the harmful conduct will eventually take place. The second and third stages depend on the specific activity being assessed. In general, those general preparations that have only one goal – promoting the harmful conduct do not seem to entail substantial benefits in themselves. Those general preparations that have a combined goal of promoting a harmful activity and spreading the anti-democratic ideology are more problematic as they are also within the scope of acts of category B which was discussed above. Finally, in the third stage it is necessary to assess other side-constrains, and most notably freedom of association and freedom of religion. However, these freedoms are qualified, and although they demand further detailed discussion, I think it is possible to argue that those freedoms do not protect instances that promote harmful conduct, especially when this is the main goal of the activity.

The supporting principles also point to the same direction. Since the general preparations are mainly structural, although the harm is still remote, prohibitions directed at these activities can be defined in a way that will exclude innocent people altogether. Consider a prohibition on membership in anti-democratic terrorist organisation – to begin with, innocent people are not going to be involved in such an organisation. All those who participate in such an organisation are bound to be devoted to the anti-democratic ideology and to the chosen means (violence). It might be said that this in itself is not sufficient for criminalization, as long as the individual members themselves do not carry out a harmful act. Consider a person who supports pirate recording of CDs for moral reasons (say, he or she thinks that record companies overprice their CDs) and therefore he or she gives financial and legal support to all those who are caught burning CDs illegally. That in itself does not make him or her a criminal. Why, than, should membership in an anti-democratic terrorist organisation be regarded as a criminal act?

The question thus presented is really a question of fair imputation: why should members in a terrorist organisation be imputed for acts that some other members in that organisation are doing? The principle of fair imputation allows for the imputation of those acts that do not only influence but rather underwrite in some way the further choices made. The essence of the organisation and of the general preparations is to do exactly that – to control the further choices and the future harmful acts. In addition, the organisation provides the mental support to anti-democratic agents that would carry out the direct harmful acts (though, this in itself is not sufficient for fair imputation, because at most it can be considered as influencing subsequent choices but not underwriting them).

Notice, that the difficulty is raised only with regards to those members who will not, themselves, carry out a direct harmful act. Those members who will carry out direct harmful acts raise only one issue and that is the problem of renunciation. However, I think that it would be right to restrict them for the same reasons given above, especially if the prohibition would entail gradual punishment. That is, punishment of membership ought to be lesser than punishment of a direct harmful act thus reflecting the lesser wrong of the act.

Finally, I believe that the general-structural preparations are often the last effective opportunity to prevent the future harm. The structural preparations increase the seriousness of the danger. It is the last opportunity to intervene because often it is impossible to learn about each specific harmful act, and bearing in mind that the acts planned are usually of the more severe type (whether they involve killing and wounding or damages to property). At the same time, as I have just explained, the restrictions limit the number of innocent people who may be effected.

3. Subcategory D – specific preparatory acts

If the various acts of expression, by which I also include assemblies, demonstrations, writing letters or books etc. and acts of category C comprise all the more general preparations of an anti-democratic movement on its way to achieving its end,[110] then the preparatory acts of sub-category D are the first of a series of acts to reach a specific result. These are acts which would help pave the way to accomplishing the movement's final objective; such as planting a bomb or killing an official. Preparatory acts usually involve intervening choices either of the

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[110] Though Direct expressions include expression to perform a specific unlawful act (e.g. incitement).

same agent or of others. The anti-democratic agent is characterized by his or her commitment to the final objective of altering the democratic regime with some other anti-democratic one. His or her actions are focused on that end; they are deliberate and intentional. We can also assume that he or she desires or at least foresees the consequences of the specific act. Are his or her intentions and foresight sufficient grounds for imputation? When the further intervening choices are his or hers, I see no reason why they should not be. This of course does not mean that the way to criminalizing these kinds of preparations is open. I have already discussed the difficulties that are involved in such restrictions in accordance with the harm principle and the importance of an act as a constitutive element,[111] the blameworthiness and the possibility of voluntary renunciation, as well as the minimalist principle. More interesting are the instances in which further intervening choices are made by some other person, or persons. Such a case would be when Amos is providing Betty with the scheduled visits of his boss Edward, who holds an official position (a judge, a minister etc.), as part of Betty's preparations to assassinate Edward; or, when Debby purchases nails to be incorporated in a bomb George intends to build and place in a busy shopping centre; or, the notes Leo takes of the various approach ways to an area Leo, together with his friends, intends to attack. Is it right to ascribe to Amos and Debby the unlawful act executed by Betty or George? Does it make a difference if Leo also takes part in carrying out the plan? In all of these cases the preparatory acts do not underwrite the subsequent choices in any significant way.

Preparatory acts do not necessarily underwrite in any significant way the subsequent choices. However, some preparations may have an effect on the decision not to go ahead with

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[111] Even those who think that the act has a more evidential role are willing to go only as far as criminalizing attempts, and do not think that the act has no constitutive role in criminalization.

the specific criminal enterprise, for example if Leo's notes show that there are not enough escape routes from the area in which the attack is to take place. But even in such instances it may be argued that the effect is not dependent on Leo (they are objective), and is not in his control. Hence, he cannot be considered to be underwriting the subsequent choices made by another person. Furthermore, there seems to be no pertinent difference between whether the agent (Amos, Debby or Leo) takes part in the execution of the crime or not. Yet although the conclusion seems to argue against the criminalization of preparations that involve the intervening choices of another person, these acts are currently punished under one of two headings: as a conspiracy[112] or aiding and abetting.[113] As a conspiracy because if the agent intends to take part, with another, in the execution of a criminal enterprise then we are dealing with an agreement between a number of people to commit a crime (and the preparatory act is

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[112] Though there is criticism as to whether the offence of conspiracy is justified. For example see: P E Johnson 'The Unnecessary Crime of Conspiracy' (1973) 61 California L Rev 1137; P Marcus 'Criminal Conspiracy Law: Time to Turn Back From An Ever Expending, Ever More Troubling Area' (1992) 1 William & Mary Bill of Rights Journal 1.

[113] There is another category of offences that might penalise a preparatory act – the inchoate-defined offences (though, currently, not in any systematic way but only those acts that fall within the reach of some specific inchoate-defined offences). This group avoids the problem of imputability by ascribing to the agent only the part that he or she is responsible for while (unlike aiding and abetting) taking into account his or her intention. The agent is not ascribed with the substantial offence (though the substantial offence is the basis for penalising, or for the severity of the punishment the penalty would be less severe than the substantive intended crime), however his or her acts cannot be ignored due to the intention to help the criminal enterprise. The advantage of inchoate-defined offences over aiding and abetting is that it is not dependent on the commission of the principal offence. Yet, this category of offences refers, if at all, only to very few preparatory acts, and even then the acts referred to are acts that are proscribed in themselves and not 'innocent' preparatory acts. Furthermore, the intention required in any of these offences is not the further intention of the anti-democratic actor (to alter the democratic system). Hence, some anti-democratic actors might be able to evade punishment for these offences.

usually evidence of the existence of such an agreement).[114] As aiding and abetting because the law is defined in a way that incorporates a prohibition on assisting an offender even before an unlawful act is carried out.[115] These two offences respond differently to the problems raised by the imputation principle. Liability for aiding and abetting, in some jurisdictions, avoids the problem of imputability. The agent is not imputed with the main criminal offence but only with that part that he is responsible for – his aid.[116] In other jurisdictions, such as England, the United States and France, liability for aiding and abetting is not distinguished from that of the main offence.[117] In these legal systems aiding and abetting must be viewed as an exception to the imputation principle which can be justified according to a consequence-based theory of deterrence.[118] The problem is that the possibility to use this offence is limited only to

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[114] Criminal Law Act 1977 s 1(1); JC Smith & B Hogan *Criminal Law* (10th ed London Butterworths 2002) 318-321; Ashworth *Principles of Criminal Law*, *supra* note 41, p 471; Jefferson, *supra* note 106, pp 399-400.

[115] Smith & Hogan, *supra* note 114, pp 145, 148; Jefferson, *supra* note 106, p 205; Simester & Sullivan, *supra* note 58, 190; Ashworth *Principles of Criminal Law*, *supra* note 41, pp 413-415; *DPP for Northern Ireland* v *Maxwell* [1978] 3 All ER 1140.

[116] Hence, for example, the Israeli Criminal Code 1977, section 32 restricts the maximum penalty for aiding and abetting to half of the statutory penalty of the principal offence, while German law restricts the maximum penalty for an accomplice to three-quarters of that of the principal (Fletcher, *supra* note 58, p 634 ff). For the advantages and disadvantages of this distinction between the accessory and the principal offenders see Ashworth *Principles of Criminal Law*, *supra* note 41, pp 426-428; Jefferson, *supra* note 106, pp 203-204, 198-199; Fletcher, *supra* note 58, pp 651-657.

[117] See for example: Accessories and Abettors Act 1986 s 8.

[118] I failed to find a convincing intrinsic justification that would explain how a supporting act could (always) be compared to the principal offence. Especially when the only fault required from the accessory is awareness (and not even intention – as in attempts) of the act, its supporting nature and of the 'essential matters, which constitute the offence'. But see Fletcher, *supra* note 58, pp 651-654. For the fault elements see Simester & Sullivan, *supra* note 58, pp 197-198; Ashworth *Principles of Criminal Law*, *supra* note 41, pp 424-425.

instances in which the commission of the main unlawful act has at least begun (i.e. when there is at least a punishable attempt).[119] Similarly, with this second group of jurisdictions, conspiracy falls within the exceptions to the principle of imputation, because of the potential injuriousness of the act, and taking into account that due to the group's pressure there is a high likelihood of the crime going ahead. Conspiracy is also a recognized exception to the minimalist principle, once again for reasons that stem from the 'group' element, and does not entail the (criticized) construction of new offences. It is also worth noting that conspiracy is an independent offence penalising the conspirators before any substantial offence has actually been committed, and regardless of the commission of the joint enterprise.

In conclusion, the criminalization of sub-category C, of preparatory acts, does not cause a significant problem. Specific preparatory acts that are dependent on further intervening choices made, at least partially, by others can be, and currently are, covered by the existing offences of conspiracy and 'aiding and abetting'. The only class of preparations that might create some difficulties if criminalized under the general limiting principles is preparations, which are dependent solely on further intervention by the same agent. Though ascribing blame to the agent might be easier, since the further intervening choices are to be taken only by the agent him or herself, criminalizing such early stages is not consistent with both the minimalist principle and the principle of moral culpability. However, this group of preparations is insignificant since most anti-democratic criminal enterprises would be executed by a group of people rather than by an individual. It is this exact 'public' feature discussed in the previous Chapter that creates one of the main threats in the preparatory act.

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[119] Though in England and the United States, for example, the principal does not have to be convicted. Smith & Hogan, *supra* note 114, pp 169-175; Simester & Sullivan, *supra* note 58, pp 219-220; Fletcher, *supra* note 58, p 641.

E. THE PRINCIPLE OF PROPORTIONALITY

There are endless kinds of proportionality, which correspond to the many different things that must be kept in proportion to each other. The two most influential types of proportionality recognized in criminal law are: (a) forward looking proportionality - between means and ends; that is between the specific means used (imprisonment, fines, etc) and the end for which we punish (say, rehabilitation);[120] and (b) backwards looking proportionality - of sanctions to wrongs (harms); for example, depriving someone's driving licence for three months after he or she was caught speeding in an urban area. Hence, corresponding to the various proportionalities, it is plausible for a sanction to be both proportionate and disproportionate at the same time: Locking up someone for ten years may be disproportionate to the wrong he did (e.g. burglary) but proportionate, say, to the end of incapacitation that society wishes to achieve through punishment, and vice versa: Locking a person up for two years may be proportionate to the end of rehabilitation that the punishment is intended to achieve but it would be considered disproportionate to an act of rape committed by the offender.

It should be noted that in the case of theories that ground the justification of punishment on retribution or desert, this distinction between the forward looking proportionality and backward looking proportionality is somewhat artificial. This is so, because these theories

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[120] This kind of proportionality should not be confused with the equivalent requirement of necessity (between the specific means used and the end for which we punish). The means used could be necessary though not proportionate. For example, assuming the end for which we punish is deterrence, one year's imprisonment might be regarded as the only effective measure, and thus as a necessary punishment, for exceeding the speed limit in town, an offence that has become pandemic. Yet, this punishment cannot be considered proportionate to the end of deterrence.

explain the sanction by reference to the wrong. The punishment, or the sanction, is justified because this is what the offender deserves. Thus, proportionality (a) stipulates that the sanction has to be proportionate to that which the offender deserves. Yet, the offender deserves to be punished only for the harm he or she has done, and 'desert' entails a requirement of proportionality between the wrong and the sanction (i.e. proportionality (b)). Nevertheless, I find this distinction useful. For one thing, this identification of the two types of proportionality is typical only to theories that justify punishment on retributive grounds. For another, there is a sense in which this distinction is still operative even in the case of retributive theories, as shall be seen in the next pages.[121]

Intuitively, the requirement of proportionality appears to people to be a requirement of justice. The feeling is that sanctions should be proportionate both in the first and second senses. Indeed (at least) proportionality (a) is incorporated into the standard harm analysis as part of the 'cost-benefit' analysis. However, appeals to intuition alone are not sufficient; the principle must be supported with explicit reasons. An inquiry into these reasons suggests that the demand of proportionality is, in both cases, not an independent one. It derives from specific theory, or theories, of punishment.

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[121] In general, proportionality (a) corresponds to the moral question of why we punish, and proportionality (b) corresponds to the practical question of the method, and the practical considerations that ought to be involved in determining penalties for crimes. As shall be seen, retributive theories provide answers to both questions however, analytically, it is important to distinguish between these two questions. For a more detailed explanation see the following pages.

Criminal law raises three distinct questions:

1. Why does the community (or the state) use criminal law? Or in other words, when can the community (or 'the state') be justified in using coercion?
2. Why do we punish? That is, why is the community (or 'the state') morally justified to punish?
3. What is the best method or system of determining penalties for crimes?

The harm principle provides the answer to the first question. We are justified in using coercion in order to *prevent* harm to others.[122] The second and the third questions are discussed by punishment theories, though as Armstrong has pointed out, these discussions often fail to differentiate between these two separate questions.[123] The answer to the first question provides us with the final objective we wish to achieve using criminal law. The main goal is to prevent harm to others. In order to attain this end secondary goals might also be introduced such as reforming the criminal, but unless we assume that we have a full right (or duty) of paternalism, such objectives must clearly be secondary to, and derived from, the prevention of harm to others.

Having a moral and socially desirable end – prevention of harm to others – is not enough to explain why are we morally permitted to inflict pain (through punishment) as a means to achieve it. In the same way that my legitimate and desirable goal to buy a house does not

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[122] There is a universal agreement that the harm principle provides the main justification though there is a debate if that is the sole basis for coercion by means of criminal law or whether paternalism can set an additional justification, and if so to what extent. Later on in the Chapter I will explain why I will not develop this additional basis any further.

[123] For Armstrong's analysis of the distinction between the two questions see KG Armstrong 'The Retributivist Hits Back' (1961) 70 Mind 471, 473-475.

justify an act of bank-robbery on my behalf so that I can get the necessary money. Punishment theories that answer the second question provide this essential justification.[124] Several theories promote proportionality (a), which is the topic of the following discussion. This type of proportionality corresponds, within the realm of criminal law, to both substantive and procedural law. The demand is that each of the means used, whether it is the substantive offence and its sanction (e.g. the offence of membership in a proscribed organisation, accompanied by imprisonment of up to ten years[125]) or the procedures that are used to enable the state to achieve its goal (such as the permission to disclose information held by revenue departments, or to retain communication data held by communications providers[126]), must always be proportionate to the objective that justifies them. Meanwhile, proportionality (b) is one of the considerations, or requirements, of some punishment theories (mainly desert theories) aimed at answering the third question about the best method to determine penalties to wrongs.

Which punishment theories[127] support our intuition that justice demands proportionality (a) (i.e. that the sanction ought to be proportionate to the end we wish to secure)? Utilitarian theories justify punishment according to its future consequences, namely crime-prevention in one of three main ways: deterrence, rehabilitation and incapacitation.[128] These theories have a

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[124] See Armstrong's remark about desert theory, *supra* note 123, p 488.

[125] Terrorism Act 2000 sec 11.

[126] Both procedures were permitted, in some conditions, in the *Anti-Terrorism, Crime and Security Act 2001* sec 19, 102 respectively.

[127] In what follows I use the term 'punishment theories' to refer to the theories that respond to the second question. I do not wish to discuss the answers given by punishment theories to the third question.

[128] Due to the limitations of this thesis I will refer only to the deterrent theory, which is the most popular of these three theories.

direct and unquestionable link to the final end defined by the answer to the first question: society wishes to prevent harm and is justified in using punishment as a means to achieve this aim because it will increase the total happiness (or any other final goal they set) of society. The various branches of utilitarian theory offer different 'secondary ends' which are thought to be the best ways to achieve the prior goal of prevention: by special and general deterrence, by the rehabilitation of offenders or by incapacitation. Utilitarian accounts, and most notably deterrence theories, have no internal demand of proportionality (a). On the contrary, as long as the means are found to be necessary, they may be used. If the reason society is justified in punishing, or in threatening to punish, is to deter the offender and the public, then society ought to be allowed to use any sanction that would help it create the desired deterrence. This missing requirement of proportionality and the tendency of such theories to permit disproportionate punishment is one of the most common critiques against deterrence theories.[129]

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[129] It should be stressed that most of the literature concerning the question of utilitarianism and proportionality deals with proportionality (b). For utilitarian accounts that reject proportionality see: L Alexander 'Self-Defence, Punishment, and Proportionality' (1991) 10 Law And Philosophy 323; D Farral 'The Justification of Deterrent Violence' (1990) 100 Ethics 301; W Quinn 'The Right to Threaten and The Right to Punish' (1985) 14 Philosophy and Public Affairs 327. Although Quinn agrees in pp 346-347 that there is an upper limitation on proportionality he comes to the conclusion that 'A penalty cannot be ruled out simply because the threat of it creates more danger for the potential wrongdoers than protection for the potential victims of the crime' (bottom of p 347). Personally, I disagree with both of these views (the general utilitarian stance and Quinn's stance) but this requires a fuller argument than I can give here. For utilitarian accounts that do argue in favour of (a limited) proportionality (though proportionality type (b)) see: J Bentham 'Punishment and Deterrence' reprinted in *Principled Sentencing* (2nd ed Oxford Hart Publishing 1998) 53, 54-56; N Walker 'Legislating The Transcendental: Von Hirsch's Proportionality', (1992) 51 CLJ 530, 533 fn 15; See also A Von Hirsch *Past Or Future Crimes* (Manchester Manchester UP 1986) 31-32. for examples of their critique see: A Ashworth 'Deterrence' in *Principled Sentencing* (2nd ed Oxford Hart Publishing 1998) 44, 47-48; AH Goldman

Unlike deterrence theories, retributive accounts incorporate a demand for proportionality. In general, retributive theories support the proportionality limitation since they justify punishment by the ill-desert of the one punished. The notion of retribution includes the need for proportionality. One is to be punished only for the harm one is responsible for: not more, not less.[130] Most desert theories, if not all of them, would support proportionality (a), though there is some controversy as to the extent, and the strength to which the various accounts support proportionality (b).[131] Thus, as can be seen, there is some correlation between the two types of proportionalities. Only those theories that support proportionality (a) (i.e. desert theories) also support proportionality (b).

'Deterrence Theory: Its Moral Problems' reprinted in *Principled Sentencing* (2nd ed Oxford Hart Publishing 1998) 81. Even Ashworth's objection to the fact that the proportionality that Bentham refers to is between the punishment and probable future offence rather than that the particular crime committed refers to proportionality type (b), rather than proportionality (a).

[130] The desert-based accounts of punishment varies: intuitionist theories, talionic notions of requiting evil for evil, taking away the 'unjust advantage' over others which the offender obtains, theories that emphasise the communicative features of the punishment, etc. See respectively MS Moore 'The Moral Worth of Retribution' reprinted in A Von Hirsch & A Ashworth (ed) *Principled Sentencing* (2nd ed Oxford Hart Publishing 1998) 58; W Sadurski 'Distributive Justice and The Theory of Punishment' (1985) 5 OJLS 47; J Finnis *Natural Law and Natural Rights* (Oxford OUP 1980) 263-264; A Von Hirsch 'Proportionate Sentences: A Desert Perspective' in *Principled Sentencing* p 168; RA Duff 'Penal Communications' in M Tonry (ed) (1996) 20 Crime and Justice – A Review of research 1.

[131] In A Von Hirsch *Censure and Sanctions* (Oxford Clarendon Press 1993) Ch 2, especially p 7-8, Von Hirsch argues that 'unfair advantage' theories fail to support a condition of proportionality in sentencing or to provide an adequate guidance for sentencing. For my current purposes there is no need to examine the strength of the various theories with regard to proportionality (b). All I argue for is that all desert theories would support, by their nature, proportionality type (a).

The question then is, can these backward-looking theories thrive in conjunction with a consequentialist end like 'prevention'? Two attempts have been made to reconcile these seemingly separate concepts at the level of the second question (i.e. punishment theories that justify the use of punishment). Both scholars, Andrew Von Hirsch and Uma Narayan,[132] (independently) argue for a censure-based justification for punishment. They argue that it is necessary to separate the two components of punishment: censure and hard treatment. Censure is 'an expression of condemnation or blame directed at a responsible wrongdoer for the reason that he or she committed a wrongful act'.[133] Blaming is part of holding people accountable for their deeds. It addresses the wrongdoer conveying to him or her the message that he or she has culpably injured someone, is disapproved of for doing so and is expected to respond morally and repent.[134] In addition it addresses the victim and acknowledges that the harm to the victim occurred through the fault of another person. Lastly, it also addresses third parties providing them with a reason to abstain from acting in a similar manner. It gives them a normative message to desist because the conduct is morally wrong. Thus Von Hirsch rejects the utilitarian view that this message is a mere inducement to compliance through threat. Furthermore, he emphasises the importance of a condemnatory sanction as part of treating the wrongdoer as a person who is capable of understanding why his or her action is wrong.[135] This acknowledgement of a person's capacity for choice is not dependent on any beneficial

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[132] Von Hirsch *censure and Sanctions*, *supra* note 131 ch 2; U Narayan 'Appropriate Responses and Preventive Benefits: Justifying Censure and Hard Treatment In Legal Punishment' (1993) 13 *OJLS* 166.

[133] Narayan, *supra* note 132, p 167.

[134] They argue only that censure provides the opportunity for such a response, and deny Duff's claim that censure is a technique for invoking specified sentiments for reasons explained in Narayan, *supra* note 132, pp 174-175; Von Hirsch *censure and Sanctions*, *supra* note 131, pp 10-11.

[135] Von Hirsch *censure and Sanctions*, *supra* note 131, pp 10-11.

social consequence (prevention). This censuring component is the basis for the demand for proportionality: the need to express the exact degree of disapprobation.

Rejecting other explanations that were offered as justifications for hard-treatment,[136] Narayan and Von Hirsch justify hard treatment, or deprivation, by appeal to the 'preventive feature' of criminal law. Von Hirsch explains the preventive character as a supplementary disincentive against temptation providing 'a further reason – a prudential one – for resisting the temptation'.[137] It is stressed that prevention cannot stand alone, and is dependent on the existence of censure to convey blame. Narayan agrees with him and emphasizes that 'censuring wrongdoing and crime prevention are not two independent purposes, such that we could punish in a manner that promotes either end. [She sees] preventive function as an element that holds *within* a censuring framework. Only hard treatment that comports with a censuring function, and one that expresses an appropriate degree of censure is permissible, since it is being inflicted as a response to culpable wrongdoing'. To complete the picture it should be stressed that at the next level, which corresponds to the third question, Von Hirsch rejects prevention as a relevant concern to be considered in determining a particular penalty in a specific case.

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[136] Among these other views we can find the view brought forth by Kleinig, that explain hard-treatment as a necessary and effective component to communicate censure adequately and show that the disapprobation is meant seriously; and the 'benefits and burdens' account held by Duff, which view hard treatment as imposing an offsetting of disadvantages gained by the wrongdoer; accounts which refer to the moral value of the hard treatment to the wrongdoer. Nayaran, *supra* note 132, pp 175-179; Von Hirsch *censure and Sanctions*, *supra* note 131, p 12.

[137] Von Hirsch *censure and Sanctions*, *supra* note 131, p 13.

The account presented by Von Hirsch and Narayan reconciles a retribution-based theory with one that justifies punishment in terms of the beneficial consequences – prevention at the stage of the second question. Yet the retributive function in their account has primacy, and the preventive function is only an additional justification. Does this mean that this theory is incongruent with the purpose of prevention of harm to others? I think it does not, but before I explain the reasons, a word of clarification is needed. Retributivists immediately relate the concept of 'prevention' with utilitarianism but this connection is not inevitable. A consequentialist objective such as prevention, is in itself not a commitment to utilitarian accounts. It all depends on the exact position of this concept within the wider framework. In the passage cited above, Narayan and Von Hirsch acknowledge the possibility that prevention plays a role within a theory of punishment, that is a theory that explains why are we morally justified to punish, while being limited by other more important factors such as censure. Similarly, at a higher level, it is plausible to presume that prevention is a means to enable all citizens to practice their autonomy to its fullest extent. It is concern for individuals and a commitment to maintaining and advancing autonomy that generate the need to prevent harm. Obviously this line of reasoning would restrict any further arguments put forward on behalf of prevention to only those arguments that are compatible with the value of autonomy.

Now that the seemingly inseparable connection between prevention and utilitarian accounts has been dissolved, it is possible to see why Narayan's and Von Hirsch's theory, as well as any other retributive theory, are compatible with having prevention as the final goal. Retributive theories offer us a justification for the use of punishment, which is based on the objective of restraining the wrongdoer as an end, and on acknowledging his or her capacity of choice. The intention is to communicate to the wrongdoer, as an intelligent being, that his or her acts were wrong (and, by some theories, to offset disadvantage). But it is not just

communication for its own sake. The aim is to bring the offender to understand the wrongfulness of his or her actions, and thus modify his or her moral defect. There can be only two explanations for this intention: either it is done merely in order to turn the wrongdoer into a morally better person, or else the objective is to prevent further harmful conduct. The former account is a paternalistic one. It cannot explain why society is permitted to intervene only when the harm is done to others, and should justify *unlimited* intervention to rectify the moral defects of the wrongdoer, even when the results effect only the agent him or herself. Thus, this account is open to all the objections raised against paternalism. Consequently, and though many retributivists would find it hard to admit, the only way to explain any intention to modify the moral defects of the wrongdoer is by reference to prevention. It is hoped that once the wrongdoer receives this message he or she will refrain from making wrong choices again. In other words, the intention is that the message communicated through punishment will prevent the reoccurrence of harm. The ultimate goal must be prevention, though this goal, too, may be understood to be a means to further ends such as the prosperity of individuals, and hence be restricted by the limitations that these further ends impose.

What is the purpose of my attempt to connect retributive theories with the objective of prevention? The only way to justify the principle of proportionality (a) is by appealing to retributive theories. The problem that I am faced with is how to reconcile this principle (and its grounding retributive theories) with the requirement upon which this thesis is based: the need to prevent anti-democratic ideologies from achieving their ultimate objective of altering social and political democratic institutions. It is the special nature of anti-democratic threats described in Chapter One, and especially the conclusiveness of the materialized anti-democratic threat together with the understanding of the crucial need to prevent anti-democratic ideologies from succeeding, that has brought me to examine the use of criminal

law in the first place. However, given that the objective of crime prevention may derive from the recognition of individual liberty, there is no inherent contradiction between the end of crime prevention and a desert-based justification for punishment. Accordingly, even an objective of prevention (i.e. preventing the alteration of a democratic system) must also be limited by the principle of proportionality. The sanction must be proportionate to the harm we wish to prevent and the necessity of the sanction alone (i.e. to prevent the harm) is not sufficient.

F. THE PRINCIPLE OF PATERNALISM

The harm principle as stated by Mill includes two principles. The second of these is the anti-paternalist principle. According to Mill, paternalism cannot set a basis for state coercion. Over the years many have criticized this view. Some argue for a limited role of paternalist-grounded coercion and some argue for a more prominent role - even one which is equivalent to that of the harm principle. Can a justification for the criminalization of anti-democratic acts be based on a principle of paternalism? After all, the anti-democratic agent will also be affected by any regime change and might find his or her own liberty and interests invaded.

Although the anti-democratic agent might well find him or herself harmed at the end of the day, and even if I were to accept paternalism as a legitimate ground for state coercion and criminalization in general,[138] I do not think paternalism can found an adequate justification for

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[138] As can be seen, it is unnecessary for me to take a stance in the debate over the legitimacy of paternalism as a justification of state coercion in general, and criminalization in particular.

the state's duty to defend itself against anti-democratic ideologies. One of the main features of an anti-democratic threat is that it threatens the whole society and not only a few individuals, whether innocent or not. Hence, to base the restrictions on paternalistic considerations – i.e. on the prevention of the harm that would be suffered by the anti-democratic agent him or herself – is wrong. It ignores one of the main features of an anti-democratic threat. It focuses on one of the minor effects of a successful takeover of an anti-democratic ideology rather than on the main danger which is the danger to the whole society – to 'the others'. Furthermore, theoretically, if an anti-democratic agent were able to reassure society that he or she, personally, would not be harmed then the restrictions would no longer be justified.

G. THE PRINCIPLE OF RULE OF LAW

The rule of law is a broad principle aimed at ensuring that the state will not misuse its powers and oppress its citizens. It does so by making sure 'that the actions of state agencies and officials should be subject to laws which the ordinary citizens can enforce, and that ordinary citizens should not be subject to state power except on the basis of law'.[139] Indeed, this thesis is in a sense about the rule of law. The need to find the founding justification for the state's duty of self-defence against anti-democratic ideologies derives from the fear that various states might exceed their powers even when they lack the necessary moral justification to do so.

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[139] J Waldron 'The Rule of Law In Contemporary Liberal Theory' (1989) 2 Ratio Juris 79, 81, paraphrasing the definition lied out by A V Dicey in *Introduction to The Study of The Law of The Constitution* (10th ed London Macmillan 1985) 188,193,195.

In a narrower sense, the rule of law embodies certain standards, which define the characteristic virtues of a legal system. It is, as Waldron explains, the characteristics that 'tell us what the term "law" is supposed to mean for the purposes of [the wider] doctrine [of the rule of law, described above]'.[140] Criminal law, being a set of rules that guide citizens as to which acts they should perform, or refrain from performing, by means of state coercion, is thus governed by these standards. Fuller developed eight principles that constitute the 'internal morality' of the law.[141] The first is the principle that the law should be general; the second demands that laws should be publicised and made known to those to whom they apply; the third is that laws should be prospective and not retroactive; the fourth principle is that laws ought to be clear; fifth, there should be no contradictions within laws; sixth, laws should not demand the impossible; seventh, laws should not change too frequently; and the eighth principle requires a congruence between official action and the law. These eight principles are commonly recognized as necessary though there are many who argue that they are not sufficient to warrant a just system.[142]

Among these principles there are two principles: the fourth and the sixth, that might be of some special interest in our case. The fourth principle – the clarity of the law – is one aspect of the need for predictability and is based on the law's guiding role. An unclear law fails to

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[140] Waldron 'The Rule of Law In Contemporary Liberal Theory', *supra* note 139. See also CL Ten 'Constitutionalism and The Rule of Law' in RE Goodin & P Pettit (ed) *A Companion to Contemporary Political Philosophy* (Oxford Blackwell 1993) 394-395. Cf J Raz 'The Rule of Law and Its Virtues' in RL Cunningham (ed) *Liberty and The Rule of Law* (Texas Texas A&M University Press 1979) 3.

[141] LL Fuller *The Morality of Law* (Revised ed New Haven Yale U Press 1969) 46-91.

[142] An example to this kind of reservation can be found in the writing of HLA Hart 'The Morality of Law' (1964) 79 Harvard L Rev 1281, esp 1282-1283, and in Waldron 'The Rule of Law In Contemporary Liberal Theory', *supra* note 139, p 94.

guide conduct. The characteristics of criminal law and the severe physical (and emotional) sanctions inflicted on those who disobey laws give this principle a special significance within the realm of criminal law. In general, criminal offences are understood to be defined clearly and state the exact behaviour that is to be proscribed, or at least the exact group of actions that may result is a specific harmful outcome that is to be prohibited. Courts tend to keep to a strict 'straightforward' interpretation of offences. The reason is that a person must have a clear idea of what exactly it is that he or she must refrain from doing before he or she can justly be blamed (for not refraining) and suffer the pain inflicted by a criminal sanction.

This requirement might raise some difficulties in two different situations. The first is an attempt to found a clear and straight-forward offence that will restrict only some expressions, say Direct and Climate-Creating expressions while leaving unrestricted Abstract expressions; or restricting some expressions while allowing free and unhampered satirical criticism of authority. However, the intent to exclude only some types of expressions while leaving other types untouched is based on the assumption that there is some pertinent difference between the various expressions. Although it might not be a simple project, it is not impossible to formulate this difference and incorporate it in the definition of an offence, in a clear fashion.

The second, and more disturbing difficulty might arise from the construction of an offence, or offences, that would respond to general but even more so specific preparatory acts. As I have already mentioned, the further we withdraw from a direct harmful enterprise and the deeper we go into the realm of (pure) specific preparatory acts, the harder it is to construct a specific offence since there is a large variety of direct anti-democratic victimizing actions (and therefore an even larger variety of preparatory acts to all the various direct victimizing actions). It seems impossible to create an offence that would provide citizens with clear

guidance as to what is permitted and what is not. Yet this is only an illusionary barrier. Preparatory acts which involve further choices made by more than one person can be restricted under the current offences of aiding and abetting, which deal with practical help that was given, and of conspiracy, which respond to the threat that stems from the group element. As for preparatory acts that involve further choices taken only by the actor – they are not characteristic of an anti-democratic agent who usually operates as part of a group. In those rare instances that the anti-democratic actor does work alone, we might not be able to proscribe some of his or her preparatory acts in accordance with the rule of law but, I believe, it is a (minor) risk worth taking (rather than overriding the principle of the rule of law).

Finally, I wish to comment on the sixth requirement – that the law should not demand the impossible. At the beginning of this Chapter I explained why thoughts and beliefs ought not to be restricted. It is precisely because asking a person not to think about something or not to believe in a particular ideology (religious or otherwise) is demanding the impossible. Discussing this condition Fuller noted, correctly, that 'our notions of what is in fact impossible may be determined by presuppositions about the nature of man and universe, presuppositions that are subject to historical change'.[143] He goes on to give an example of laws purporting to compel people to hold certain religious or political beliefs which are currently disapproved of as being unwarranted interferences in individual liberty. Thomas Jefferson, however, disapproved of them for reasons of impossibility, stating that he was 'Well aware that opinions and beliefs of men depend not upon their own will, but follow involuntarily the evidence proposed to their mind…' I, for one, find Jefferson's reasoning stronger and more independent from any specific political viewpoint. I wish to follow this

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[143] Fuller, *supra* note 141, p 79, quoting from Boyd, *The Papers of Thomas Jefferson* II, 545 (as quoted by Fuller).

argument, take it one step further, and suggest that some of the most 'basic' expressions of one's political (or religious) belief; such as saying out loud 'I believe communism to be the correct ideology (or I support communism) because…' are in a sense involuntary. Though speech is a voluntary act the fundamental inseparable connections between these types of 'basic' speeches (found at the far end of Abstract expressions) and political or religious belief makes the restriction of such expressions impossible to compel by means of legislation. This may also provide some support for Mill's argument that speech ought to be treated as thoughts and should not be restricted, though this support would be limited only to some very 'basic' expressions of a belief.

SUMMARY

A defence against anti-democratic ideologies involves the use of state coercion through criminal law. For a defence to be satisfactory it is necessary to have in place a full range of offences that would respond to all the unique features of an anti-democratic threat. It is also necessary to provide the state with sufficient powers to commence efficient investigations in order to prevent the realization of the threat. In this thesis I focused on the former aspect. I examined whether the general principles that govern state coercion as applied in the field of criminal law, as well as some more specific principles that govern criminal law, enable the formation of the whole variety of offences. The first principle to be discussed was the harm principle. Its scope – to prevent harm to others – excluded thoughts and beliefs from the reach of the state. I discussed the possible interpretations of Mill's claim that expressions ought not to be restricted either. I rejected the equation between expressions and thoughts but accepted

that, though expressions may cause harm, due to their special nature, and their vital roles, they ought to draw fewer restrictions than other actions.

The discussion continued over the exact content of the harm principle – to prevent harm to others, where harm is defined as a wrongful set back, or impairment of, welfare interests recognized as moral rights. Yet the harm principle alone is not a sufficient guide to legislators. Thus I referred to two of its supporting principles that are relevant to the question at hand: the minimalist principle and the principle of imputation. I examined the origins of the minimalist principle rejecting the presumption of liberty as a stable foundation for it. Instead, I suggested two alternative justifications that stem from the recognition of the human capacity for choice. One alternative draws on the derivative value of autonomy while the other draws on the derivative value we ascribe to acting for the right reasons rather than out of the fear of pain and punishment. Focusing on the third aspect of the minimalist principle, the appropriate point of intervention, I presented its traditional interpretation as a demand of 'last resort'. One of its applications is the requirement for a causal connection between a wrong and harmful result and the attempts-preparations distinction. I offered a wider reading of the principle as a 'last effective point of intervention'. I argued that this interpretation includes the restrictions of remote harm as part of the principle and not as an exception based on any overriding considerations. However, due to other considerations that are at the basis of the attempts-preparations distinction this distinction should not be influenced by this latter, wider, interpretation of the principle.

In my discussion of the wide interpretation I implied that some remote harms are restricted by criminal law (according to the traditional interpretation for reasons that override the minimalist principle and according to the wider interpretation – as an application of the

minimalist principle). The question then is how do we decide which remote harm should be criminalized and which (ought) not to be? After all, almost any act may have some future harmful result. This question is sharpened by the background criticism against the harm principle according to which it is deficient since it does not provide a clear distinction between those acts that ought to be prohibited and those that ought not. Feinberg argues that the 'standard harm analysis' designed as guidelines for the legislator can provide an answer in cases of remote harm. The analysis is divided into three stages: the first stage is an assessment of the risk; that is an assessment of the gravity of the harmful result and the probability of the occurrence of harm. The second stage is a cost-benefit analysis of the risk against the social value of the risk-creating conduct. The third and final stage is an assessment of the side-constraints that would preclude criminalization.

However, the standard harm analysis does not suffice as an exclusive guide in cases of remote harm. Remote harm raises some special difficulties, which include the diminishing probability of the occurrence of a harmful result (and subsequently reducing the risk) and the question of just imputation of harm to a person whose actions, by themselves, do not harm, just because of their influence on some possible harmful act. The minimalist principle, in its wider interpretation, provides some answers to the first difficulty, while the imputation principle developed by Von Hirsch provides an answer to the second. According to the imputation principle, only when those acts of remote harm underwrite the consequent result in some way, may the result be (justly) imputed to the agent.

What of anti-democratic acts? There are four kinds of anti-democratic acts: Category A – includes thoughts and beliefs; Category B – acts of expression; Category C - acts that are more than mere expressions but do not cause direct harm; and Category D – acts that cause

direct harm and are motivated by anti-democratic ideology. Acts of Category A cannot be restricted in accordance with the harm principle, which means that anti-democratic ideologies, by themselves, cannot be restricted. Furthermore, restricting all actions performed in the name of an anti-democratic ideology is prohibited since it is equivalent to restricting the ideology itself. Acts of category C that involve the use of (only) legitimate means (i.e. means that do not cause harm in themselves) cannot be criminalized in accordance with the first aspect of the minimalist principle: because there are less coercive measures that can be used to deal with these acts. Acts of category D that cause direct harm do not raise any specific difficulties. They can be proscribed in accordance with the harm principle and the minimalist principle. However, it should be noted that their harmful results to people and or property, which generate the permission to restrict these acts, differ from the interest at stake: the threat to the interest in liberty of the whole society. The difficulties arise in respect of category B, sub category C of general preparations and sub-category D, of specific preparatory anti-democratic acts.

Using the standard harm analysis to determine which acts of category B can be criminalized was proved to be problematic and insufficient. Assessing the probability of the occurrence of the harm is difficult, especially as we draw further towards Climate-Creating and Abstract expressions, and where there is a need to assess the volatility of 'general elements'. Even at this early stage it is clear that the restrictions of Climate-Creating expressions, and even more so Abstract expressions, fall outside the scope of the harm principle. Further difficulties were encountered at the second and third stages of the analysis when attempting to balance the harm with the social value of the expression and with other side constraints. Thus, even if the first stage was proved to allow the restriction of Climate-Creating and Abstract expressions, (and without going into a detailed analysis of the value of

freedom of expression and other side-constraints) doubtless substantial compromises in the ability to restrict such expressions must be made. Even the imputation principle did not help to grant comprehensive permission to restrict Abstract or even Climate-Creating expressions. In such instances it is hard to argue that the (Abstract or Climate-Creating) expression has underwritten the consequent result while holding people responsible for their own choices. It is also hard to assess the exact contribution of a specific expression which led to a subsequent harmful act to the creation of a climate of violence. Finally, if such restrictions were permitted, then criticism of any policy or widespread agreement could be banned due to possible harmful acts performed by other culpable individuals, and would be contrary to the value we ascribe to free speech. I also rejected a possible claim to viewing Climate-Creating and Abstract expressions as part of the exceptions to the imputation principle, since this does not comply with the requirements of such exceptions. Some help came from the minimalist principle in its wider interpretation. I argued that the last effective point of intervention is at the early stages of ideological development, thus allowing possible restrictions to Climate Creating expressions. However, given the failure of the harm principle and the imputation principle to recognize such expressions as deserving punishment I concluded that the restriction of Climate-Creating expressions, and even more so, Abstract expressions is morally proscribed.

The criminalization of general preparations (sub-category of category C) did not raise too many difficulties. Given that most of the general preparations are structural-organisational in their nature, the standard harm analysis was straightforward. Although the harm is still remote, an organisation adds to the seriousness of the threat and the probability that harmful activity will take place in the future. I did not anticipate any difficulties with the assessment of the benefits of such acts (I argued that in most cases there is none such benefits) or other

side-constraints. It is, so I argued, the last effective point of intervention as it is often hard, or even impossible, to prevent each specific direct harmful acts and the criminalization of general preparations does not effect large circles of innocent people. The innocent people most likely to be effected are those who support the anti-democratic ideology and the means chosen to achieve the overthrowing of the democratic order, but would not commit harmful acts themselves. Still, I think the organisation underwrites the subsequent choices of the anti-democratic agents that would carryout the harmful acts and hence participation in these general preparations allows for fair imputation of even this latter category of anti-democratic agents.

Anti-democratic specific preparatory acts are unique due to the special anti-democratic ideological motivation of the agent. Hence, if these preparations were to go unpunished it is highly probable that an anti-democratic actor, who believes in the righteousness of his or her ways, will attempt other harmful acts, which would result in a reduced deterrent efficacy. At first it seems that the only way to deal with anti-democratic preparations would be to create sweeping new offences that would preclude all possible kinds of preparations. However, a deeper examination showed that most of these preparations are currently punishable exceptions to the minimalist principle (or, I suggested, as part of the minimalist principle in its wider interpretation) through either the offence of conspiracy or the offence of aiding and abetting. The only exceptions are preparations, which involve further intervention by the same actor and do not involve other people. In those situations, ascribing the blame to the actor might be easier since the further intervening choices are to be taken only by the actor him or herself. Nonetheless, criminalizing such early stages is not consistent with the principle of moral culpability (and with the traditional interpretation of the minimalist principle). On the other hand, these situations – of a lone actor – are not characteristic of anti-democratic

activity. Hence, I argued that the threat they pose is minor and should not permit a deviation from the general principles.

The principle of proportionality between a sanction and the end that it aims to achieve posed an interesting question. The demand for proportionality is dependent on a theory, or theories, of punishment that justify the state's permission to inflict pain, through punishment, on the wrongdoers. The only punishment theories that entail a requirement of proportionality are desert (or retributive) theories. Given that the only (or at least the main) reason for which the state is justified in intervening and using criminal law is *to prevent* harm to others, how can desert theories that justify the use of punishment be compatible with a consequentialist end for punishment – prevention? This question is of general importance, but arises in all its strength in relation to anti-democratic threats where special emphasis is given to the preventive role of criminal law. I suggested that a consequentialist end of prevention does not necessarily entail a commitment to utilitarian accounts. Furthermore, I argued that all desert theories incorporate a final preventive end. However, in such theories, prevention is viewed as a means to achieve further goals that are attuned to the human capacity for choice. As a means to such ends prevention is limited by the scope of these ends.

Lastly, I made two short comments regarding the rule of law. Though the rule of law is one of the most basic principles that govern state coercion, generally speaking, it does not have any special bearing in our case. However, I found it important to stress that offences responding to an anti-democratic threat can comply with all the principles that constitute the 'internal morality' of any law including the fourth demand of clarity of law even with respect to restrictions on expressions and preparations. I also pointed to the support that the sixth principle, namely that the law should not demand the impossible, provides for the exclusion

of beliefs from the harm principle: since in a sense thoughts and beliefs, including political beliefs, cannot be fully controlled. Thus, a law that attempted to restrict thoughts would demand the impossible.

The analysis of the general principles governing state coercion has proved that the state is limited in its ability to respond to anti-democratic threats. Though it may be permitted to proscribe all actions that cause direct harm, including most general and specific preparatory acts to acts that cause direct harm and Direct expressions, it may not restrict Climate-Creating expressions and Abstract expressions. This means that with respect to those activities that may be proscribed by general principles, the state is not allowed to work outside the framework constructed by the general principles that govern criminal law. Note, that the discussion is focused on substantive criminal law alone. In the next Chapters I will examine whether the way is still open to the state to restrict Climate-Creating expressions and Abstract expressions (so as to provide comprehensive protection from anti-democratic threats) by appealing to a special duty of self-defence; a duty that would grant the state special powers.

Chapter 3 - The individual's right to self-defence

Is the state permitted to use extraordinary measures to defend itself against anti-democratic ideologies? I argue that it is, and that this justification derives from the individual's right to self-defence (hereafter: the right to self-defence, or the right). Any act committed in the name of an anti-democratic ideology, whether it is done in order to strengthen or to promote belief in that ideology in society or to promote its final goal – to alter a democratic system – can be characterized as possessing the same basic features. An act committed *in the name of the ideology* is an intended (active) act performed by a culpable man or woman. What if such acts are committed by non-culpable children, for example children participating in a youth group founded on an anti-democratic ideology, or taking part in a riot motivated by such an ideology? Children under the age of criminal responsibility are not criminally liable since they cannot distinguish wrong from right. In the same manner, children are not capable of understanding the true meaning of an anti-democratic ideology and therefore cannot act *in the name* of that ideology. Acts performed by children, as described above, lack the special extra threat that is hidden in an anti-democratic belief. The features of culpable aggressor and intentional active acts will be our torch once we go into the woods of the right of, and the state's duty of, self-defence.

I will proceed in two stages, which correspond to Chapter Three and Chapter Four respectively. In the first stage I will examine the moral foundations of the individual's right to self-defence: its justification and its limitations. Based on this analysis, I will show, in Chapter Four, that it is possible to justify the state's duty to defend itself against anti-democratic ideologies by appealing to the individual's right to self-defence.

The right to self-defence is very perplexing and raises many interesting and important issues. First and foremost it is necessary to define what type of right is the right to self-defence. Obviously it is different from a right to property or to freedom of speech, but in what way? In the first section I will explore this question and argue that to use defensive measures is *a right* (i.e. an entitlement, rather than mere liberty), which is derived from a more fundamental value of autonomy. In the second and the third parts I will discuss two questions: '*Why* is a right justified?' and '*When* is it justified?' To explain why the defender is permitted to use force in self-defence is to explain why the defender is permitted to prefer his or her own life over the life of the aggressor. These notions are two sides of the same coin. In section two, I will present four lines of justification: a lesser harmful result, a forced choice, rights theory and the vindication of autonomy. The challenge faced by any of the available theories is the same: given that the initiation of the right to self-defence is dependent on contingent facts about the aggressor and the defender (such as the defender's opportunity to retreat), all theories need to explain why the life and the well-being of the defender is more worthy than that of the aggressor regardless of their personality. Yet, I will argue that all theories fail to provide a satisfactory explanation. Following this discussion, I will offer a different justification based on forced consequences.

Finally, the third section of the discussion of the individual's right to self-defence will address the content of the right (*when* is it justified). Though the detailed content may be controversial, scholars have commonly agreed on four essential components: an unjust threat / aggressor, necessity, imminence and (more arguably) proportionality. These features set the intrinsic limitations of the right to self-defence, and thus complete our discussion.

The analysis of the right to self-defence has two aims, which correspond to the three sections of this Chapter. In discussing the nature of the right and its justification (sections one and two) I wish to set out a moral basis for the individual's right to self-defence, which could later be used to establish the extension of that right to respond to severe threats to liberty. The second aim, achieved through a discussion of the conditions of the right (section three), is to set out the intrinsic limitations of the right, which would subsequently be applied to the state's duty, thus determining its boundaries.

I should add a note of clarification, that the individual's right to self-defence raises various questions, most of which are beyond the scope of my current research. With regard to the features of a culpable intentional aggressor, the discussion will fall within the consensus of the core of the right as a justification. Yet in addressing the question of the moral justification for an individual's right to self-defence, it would be impossible to avoid discussing some aspects which do not apply directly to possible situations that could arise when dealing with acts committed in the name of an anti-democratic ideology. Among these are two substantial topics: the use of force against innocent bystanders; and the complex issue of whether self-defence serves as a justification at all times or as an excuse when used in certain situations.[1] The disparities among the justifying theories, and the motivation to develop new theories, often stem from the answers they provide to more problematic situations, first and foremost

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[1] For further discussion about this matter see G Fletcher 'The Right and The Reasonable' (1985) 98 Harvard L Rev 949; S Uniacke *Permissible Killing* (Cambridge CUP 1994) Chapter Two pp 9-57; K Greenawalt 'The Perplexing Borders of Justification and Excuse' (1984) 84 Columbia L Rev. 1897. But see D Rodin *War & Self-Defense* (Oxford OUP 2002) chap 4, p 70. Generally speaking, claims of 'justification' concern the rightness or the legal permissibility of an act, while claims of 'excuse' address the personal culpability of the actor following a judgement that the act performed is wrongful or unlawful.

with regard to innocent aggressors and innocent bystanders. These answers turn, to a large extent, upon the distinction and classification of justification and excuse. Accordingly, I will touch upon these subjects, but will limit these discussions to the minimum necessary for the understanding of the various justifications and their critiques.[2]

It is also important to note that, although most of the literature on this subject addresses the possibility of killing in self-defence, the right to self-defence extends beyond this singular defence. In most cases, self-defence requires conduct that is far less serious than killing. The discussions focus on the right to kill in self-defence because it is in these most extreme situations that conflicts are brought to their full intensity. Yet the difficulties raised with regard to killing in self-defence are equally applicable to other cases of self-defence. Even if, at various points, the language refers to killing, it is meant to include all those less severe defensive reactions as well.

A. A DEFENSIVE RIGHT TO SELF-DEFENCE

One branch of the theories of self-defence known as the Doctrine of Double Effect (DDE) will not be addressed here. The Doctrine of Double Effect is rooted in the natural law theory developed by Aquinas. It justifies an act of self-defence as an unintended act (or harm). According to this doctrine there is a difference between an *intended* result and a *foreseen* result. A person is prohibited from *intentional* killing, but if one complies with specified

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[2] With respect to the justification – excuse classification, in most places I will limit myself to mere presentation of the positions of the various writers where these positions are fundamental for their account.

conditions[3] it is permissible to act for some good end (to save one's own life) while foreseeing that a death may result (the death of the aggressor) so long as this death is not intended. In such cases the negative result is viewed as an unintended side-effect.

The Doctrine of Double Effect has been widely discussed and attracted many critiques. Without going into the detailed objections to the doctrine itself, I will have to reject this doctrine as a justification for the use of force in self-defence for my current purposes. The Doctrine of Double Effect is based on the concept that only public authorities are permitted to kill *intentionally*, private citizens are not permitted to engage in intentional killing. Therefore it is necessary to explain the individual's right to use force in self-defence (including deadly force) as an unintended act.[4] In the following discussion I propose to justify the state's duty of self-defence by means of the individual's right to self-defence. The difference in permission to engage in intentional killing between the state and the individual prevents any attempt to use the Doctrine of Double Effect as the foundation for legitimizing the authorities' right (or duty) to self-defence.

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[3] There are four conditions: (a.) The intended final goal must be good; (b.) The intended means must be morally acceptable; (c.) The foreseen bad upshot must *not* in itself be willed (that means must not, in some sense, be intended); and (d.) The good end must be proportionate to the bad upshot (that is, must be important enough to justify the bad upshot). The list was taken from W Quinn 'Action, Intention and Consequences: The Doctrine of the Double-Effect' *Morality and Action* (Cambridge CUP 1993) p 175.

[4] T Aquinas *Summa Theologiæ* (Blackfriars UK 1975) 2a2æ 64, 7, p 43. also see Uniacke, *supra note* 1, p 77. According to Aquinas the authorities are permitted to engage in intentional killing in order to preserve the common good. Aquinas gives two examples of permissible killings: the first example is the killing of the enemy by soldiers in the course of war; the second example is death verdicts given by a judge as part of the authorities' war against thieves.

1. The right to self-defence as an entitlement

What kind of right is the right to self-defence? The discussion in Chapter Two was based on Feinberg's definition according to which to have a right is to have a moral claim backed by valid reasons to X.[5] Raz develops a closely connected definition that focuses on the corresponding duty of others that the right generates. Raz states that 'to have a right means that an aspect of one's well-being formulates a sufficient reason for holding some other person(s) to be under duty with regard to X'.[6] Though this definition explains why it is important to know if individuals hold a right (so as to know if one is under any duty with regard to the right-owner) it still does not explain what the fabric is that rights are made of. A right, it is commonly agreed, is a title held by the right-owner. It is a title given with regard to a class of actions as a class, regardless of the justifiability of one specific act within this class or another.[7] These two definitions refer to two aspects of rights. The first concentrates on a

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[5] J Feinberg *Harm To Others* (NY OUP 1984) 109-110; J Kleinig 'Crime and The Concept Of Harm' (1978) 15(1) *American Philosophical Quarterly* 32-33. I mention this definition as it was the basis for the discussion in Chapter Two at p 58.

[6] J Raz *The Morality of Freedom* (Oxford Clarendon Press 1986) p 166.

[7] In other words, it is a title, which permits its owner to act unjustifiably, and even in a manner that can be criticized (i.e. having a right to do wrong). Thus, if I have a right to vote (freely) I may vote for a fascist party; if I have a right to freedom of expression I may say very offending things to you; having a right to do whatever I want with my money (a right to property) means I can gamble all of it instead of contributing to charity organizations. As can be seen from the examples, the permissive aspect is closely connected to the idea of choice. It protects the choices, whether good or bad, of a specific class of actions. J Raz *The Authority of Law: Essays on Law and Morality* (Oxford Clarendon press 1979) 266-267; R Dworkin *Taking Rights Seriously* (London Gerald Duckworth & Co 1978) 188; J Waldron 'A Right to Do Wrong' (1981) 92 *Ethics* 21; 'Galston on Rights' (1983) 93 *Ethics* 325; W Galston 'On The Alleged Rights to Do Wrong: A Response to Waldron'

corresponding duty and the second emphasizes the entitlement. Thus it is necessary to examine whether the right to self-defence complies with both definitions. The latter definition explains rights as entitlements with respect to a class of actions that we find valuable. The right to self-defence can be described as an entitlement to commit a range of violent acts (from assault to homicide). The common distinctive feature of these acts is that they are taken as defensive responses to an aggressor who poses a threat to the agent. This defensive attitude is reflected in the strict conditions (to be discussed in section three) under which these violent acts can be carried out.

Raz differentiates between 'core rights' and 'derivative rights'.[8] The protected class of actions in core rights is valuable or good in itself, whereas in derivative rights, the protected class of actions may have no intrinsic value. Defensive violent acts, which are protected by the right to self-defence, are actions of the second kind. Violent responses are not good in themselves, but only as a means to protect a more fundamental right not to be killed which is also referred to as a right to life.[9] The right not to be killed is directed against everyone (*ius in rem*) and this imposes a duty on others not to kill the agent. If, however, someone breaches this duty, it establishes an exception to the general prohibition on the use of force. This is in order to provide the defender with the necessary means to safeguard his or her right in the absence of other alternatives. Its importance cannot be underestimated. It has a double role: it

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(1983) 93 *Ethics* 320; but see J Mackie "Can There Be A Right-Based Moral Theory?" (1978) 3 *Midwest Studies In Philosophy* 350. Due to space limitations I will refrain from discussing the reasons for the willingness to accept the 'right to do wrong'. I will just note that there are three common reasons for this stance: institutional, epistemological and reasons based on the virtues of even an abuse of the right.

[8] Raz 'The Authority of Law', *supra* note 7, pp 168-170.

[9] I will avoid discussing whether the right not to be killed is only one aspect of the right to life or whether this is the same exact right (since the right to life consists of only the right not to be killed).

protects one's life from imminent direct harm, and from any indirect threat to autonomy due to fear and instability that the lack of such a right would bring about. It constitutes one of the basic conditions that allow people to live together in society. One of the reasons we value life is because life is a necessary pre-condition to the possibility of living autonomous life and pursue various personal and communal goals. Thus, the right to self-defence can be partly explained by reason of its implications on autonomy. No matter how comprehensive the rules of a given society are, there will always be situations where one does not have the time, nor the ability, to turn to the community for help. Unless the possibility to defend oneself is recognized in these situations, the risks associated with living in a society would increase. Many people would devote their lives to creating conditions that would ensure their survival instead of promoting their autonomy in other ways. Given that life is a pre-condition of (or at any rate, closely connected to) autonomy; even in its main role of self-defence – against a direct threat – it defends autonomy. That is to say, defending one's life is defending one's autonomy.

However, the right to self-defence extends to responses to a variety of attacks, most of which do not involve killing (likewise, the responses do not involve killing either), though it is commonly understood to be confined to attacks that may cause severe injuries. It is hard to justify this extension based on the potential threat it causes to life, as this is not always true. X has a right of self-defence against Y who intends 'only' to break his or her finger, though this is not a threat to X's life. This extension, I would argue, can be best explained by an appeal to the connection between life and autonomy. As I have already argued, life is a necessary pre-condition of autonomy. The reference to life does not simply mean the medical definition of life (basic brain function, breathing and the like) but rather it encompasses the idea of being well and healthy (or at least, not worse off than one's natural health conditions). Accordingly,

the right not to be killed should be defined more accurately as a 'right not to be killed or harmed (physically or mentally)', and respectively, the right to self-defence can be described as a right to use force in order to uphold the existence of the pre-conditions of autonomy, where the damage is irrecoverable (be it death or injury) and when there are no alternatives. This reasoning will be important later on in Chapter Four when I discuss the extension of the right of self-defence in response to threats to liberty. The downside of this explanation is that a more detailed right either makes that right weaker or creates a right of unequal strength according to the severity of the normative harm (other rights though, give different levels of protection to different forms of conduct depending on how far a specific form of conduct is from the core reasoning which justifies the right). Yet the only alternative explanation for the extension is found in the creation of a fiction in which all injuries entail some risk to life and hence trigger a right to self-defence. In general I think it is preferable to avoid fictions as much as possible.

2. The right to self-defence and its corresponding duty

The discussion of the former definition(s) of rights will naturally concentrate on the relationship between the defender and third person(s). This is so, because there is no meaningful additional duty that the right to self-defence imposes on the aggressor. At most, we can refer to a duty not to thwart the act of self-defence. Yet this duty is implicitly incorporate in the corresponding duty to the core right not to be killed which continues to govern the relationship between the aggressor and the defender.

Still, self-defence, it may be argued, places a duty on others to avoid the interference and frustration of these acts. But is it a sufficient duty to treat self-defence as a right rather than a

liberty? On the one hand, a negative duty to refrain from interference is consistent with the duties resulting from some other commonly recognized rights. Consider the right to property. If I am the owner of a house that means I can do whatever I want to do with the house and other people are not allowed to either use the house without my permission or interfere with my actions regarding to the house. My right of ownership places only a negative duty on other people – to avoid interference with my right. On the other hand, the sense that permission to use force in self-defence is accompanied by a general claim against others that they do not frustrate such conduct is true 'only in the trivial sense in which it is true of any act that I am at liberty to perform that others have the duty not to interfere'.[10] Being *at liberty* to act in a certain way means not being under any duty not to act in that manner. This in turn means that no other person has a right to interfere and frustrate that act (for if X has a right to prevent Y from doing Z, it would follow that Y is under a duty not to do Z). If I am at liberty to decide which car to buy (within legal and financial limitations) that means no other person is entitled to interfere with my choice. To maintain a meaningful content to the corresponding duty it must be understood as imposing an obligation on a third person to intervene. A failure to comply with this obligation would be wrong and punishable, or at least one that generates a claim for compensation. Yet no one seriously argues for an imposition of a *stringent obligation* to intervene (that is an obligation to intervene even at the costs of putting the life of the helper at risk – which is the most common situation in which intervention is required). It is true that people who owe a 'duty of care' to the defender are obligated to act (e.g. a parent with regard to his or her child). However, in these cases the source of the obligation derives from the special moral relationship between the defender and the third person(s). The law in Great Britain, as well as in other jurisdictions does not recognize *a general* duty of care. The common stance is that it is merely *a permission*, a 'liberty' (i.e. lack of restrictions on such

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[10] Rodin, *supra* note 1, p 32-33.

intervention) to intervene and help the defender defend him or herself.[11] Even in those jurisdictions that do recognize such a general duty (often named: the duty to rescue) it is limited to instances, which do not involve any personal risk to the intervening-third person(s).[12] Typical situations in which a threat is posed to the defender (that is, a situation involving deliberate culpable aggressors) entail a risk to an intervening third person(s) as well. As a result the third person would be released from his or her obligations. This means that the right to self-defence generates a very weak duty on others (third person(s)) to act.

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[11] In the UK this is settled by the common law defence of private defence, which permits a third party to intervene and help the defender. This position is reflected in s. 3 of the Criminal Law Act 1967 which covers most such situations (since most cases of assistance are in fact 'a use of force in the course of preventing crime'). S. 3 states that 'a person *may* use such force... in the prevention of crime' (the emphasis is mine – S.W). See also the explanation in JC Smith & B Hogan *Criminal Law* (10th ed London Butterworths 2002) 280; *Duffy* [1967] 1 QB 63. Cf the discussions about the a special duty of care as a preliminary requirement for offences by omission (of which third parties duty to intervene in situations of self-defence is but one instance) in Smith & Hogan, pp 60, 63-64; A P Simester & G R Sullivan *Criminal Law Theory and Doctrine* (Oxford Hart Publishing 2000) 60-69; A Norrie *Crime, Reason and History* (London Butterworths 2001) 120-132; A Ashworth 'The Scope of Criminal Liability For Omissions' (1989) 105 LQR 424. See also the law in the United States as set in *People* v *Beardsley* 113 N.W. 1128 (1907) in which it was decided that there is no general duty on third parties to aid a person in need. See also G Fletcher *Rethinking Criminal Law* (Boston, Little Brown and Company 1978) 613. But see Rodin, *supra* note 1, pp 37-38. He argues that sometimes a general 'duty of rescue' should be recognized and that this duty is capable of providing a basis for defensive rights (though not as a derivative right from the defender's right to self-defence). 'This', he holds, 'is the source for the duty and right to defend the lives of third parties who are strangers'. In the main text I explain why it is wrong to refer to a duty in the sense of obligation rather than permission (liberty). Even Rodin admits that 'when the risks to the [agent] are high... the duty to act may become diminished until it is indistinguishable from a full liberty', though there is nothing in his account that would explain why a risk should causes the duty to rescue to diminish. For further discussion see Chapter Four, p 214-216.

[12] For example see the law in Israel: Though Shalt Not Stand Idly by The Blood of Thy Neighbour Act 1998.

Nevertheless, I think self-defence should be viewed as a right rather than a liberty. As I have already mentioned, some jurisdictions do recognize a general duty to assist, even if a weak one, and it is a matter of choice to be decided by each society. Moreover, all jurisdictions grant third person(s) with permission (i.e. a liberty) to assist a defender (this is regarded in literature as 'the right of third person(s)'). Thus, the choice of whether to recognize a general duty to assist ought to be compared to choices made with regard to duties imposed by the recognition of other rights. There is an on-going debate about whether the right to freedom of religion, for example, requires other people simply to refrain from interference or also to assist those who wish to practice their religion. The decision not to recognize such (positive) duties does not change the right into a mere Hohfeldian liberty. Secondly, it would be hard to justify any duty on, or even permission to, others to intervene, if self-defence is only liberty. The fact that a person faced with an imminent attack is under no duty to refrain from using force to defend him or herself, can hardly explain why others are under a duty to (or have permission to) help him or her out.

Rodin suggests that the third person(s)'s 'right' (that is – permission) to intervene cannot be regarded as being derived from the defender's own right. A third person may intervene even when the defender is unaware that he or she is being attacked, or even when the defender has forgone the right completely. Both cases, so he argues, are inconsistent with a derivative right but are consistent with an independent right to a third person(s), which derives directly from the more fundamental right not to be killed.[13] I tend to disagree with the assumptions Rodin makes in his examples. The defender's awareness of the attack is, in my view, irrelevant for the existence of his or her right to self-defence (as opposed to the exercising of the right). If the defender's life is unjustly threatened, the right is triggered in the same way

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[13] Rodin, *supra* note 1, p 32.

that one's ownership of a property is not dependent on one's knowledge. If X inherited a house from his father, the house becomes his, even if he did not know of his father's will (though he cannot exercise his ownership without knowing about it). In a sense, the third person acts as 'the eyes' of the defender.[14] To continue our last example, X may have a right to some property even if he is unaware of his new inheritance, and if X's daughter knows of the inheritance (and assuming she has general permission to enter all his properties), although her father is unaware of it, she may enter the premises without being regarded as a trespasser. As for a situation in which the defender has forgone their right completely, I think there is a strong case to argue that in giving up the right the defender has also given up the possibility that a third person would be permitted to act on his or her behalf. Furthermore, I would agree with Hobbes on this point and argue that such situation is impossible as no one can forgo his or her right to self-defence.[15] More generally, the right of third person(s) to intervene is triggered only (and in all cases) when a right to self-defence is triggered, and is commonly understood as restricted by the same limitations of the right to self-defence. Yet the right of a third person(s) is not a right in the Hohfeldian sense but rather a liberty or a duty (where recognized). If we adopt Rodin's view on this point we would end with a very complicated structure described in the following figure:

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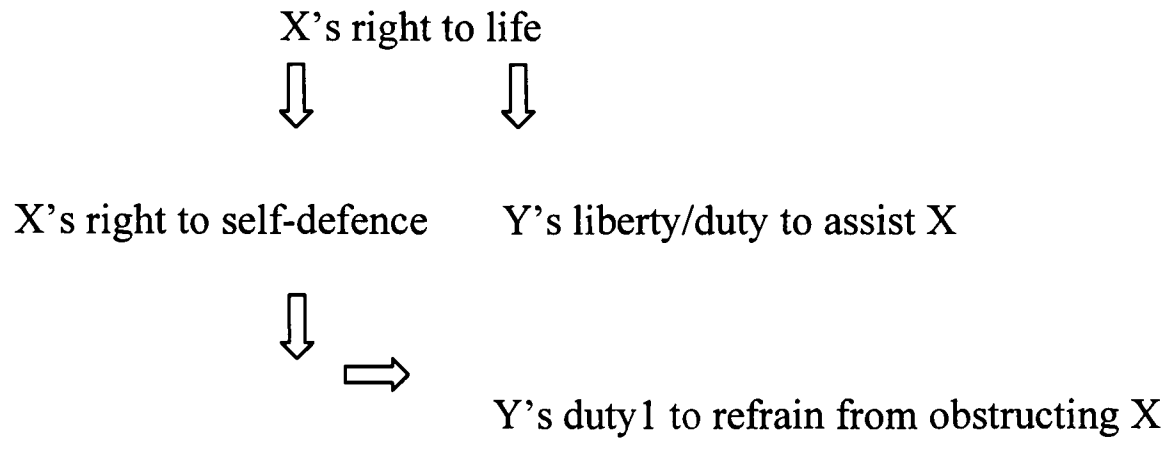
[14] By so arguing, I do not argue that the right to self-defence is objective in the sense that it does not matter for what reasons the defender used force, as long as in reality the circumstances were such that can justify self-defence. I believe that the defensive response **has** to be for the right reasons (i.e. self-defence) but that as long as the third party acts for such reasons, the defender 's unawareness of the attack on him should not matter.

[15] T Hobbes *Leviathan* R Tuck (ed) (Cambridge CUP 1991) Chap 14, p 91. All references to *Leviathan* will be to this edition.



According to this structure the right to life creates a secondary (derivative) right to self-defence and a liberty/duty to a third person(s) to intervene. The right to self-defence, in turn, creates a duty, let us call it duty1, on other people not to interfere. However, duty1 seems to be redundant in the face of the more demanding liberty/duty of third person(s). Instead, I suggest a simple model to explain this dependency, which is rooted in the fact that the right of a third person(s) is derived from the defender's right. Thus, both the duty to refrain from intervening (duty1) and the liberty/duty of a third person(s) derive from the same right to self-defence. This latter explanation is also consistent with gradual demands from others, both an obligation not to interfere and a liberty (or a weak obligation) to assist the defender, along with the similarity of the restrictions imposed on both the right of self-defence, and a third person's right to interfere (that is, liberty or obligation).

3. Additional features of the right to self-defence as a right

In addition, self-defence encompasses several features which are captured in the notion of 'rights' (rather than 'liberty'). (i) It provides a justification for a class of actions that protects the more fundamental interest not to be killed. It establishes a categorical exception to any general prohibition (to use force), confirming that in these situations it is right (i.e. justified)

to act in this particular manner[16] (ii) This justification tends to take precedence over consequentialist considerations when the defender's right conflicts with some other greater good.[17] (iii) As Uniacke suggests, the aggressor who is harmed in an act of self-defence is not wronged in any way.[18]

Finally, although the right to self-defence is a Hohfeldian 'right', it should be noted that often when we talk about the right to self-defence we mean an 'all things considered'[19] right (i.e. justifying a specific act) whereas an entitlement includes 'the right to do wrong'. That is a permission to act unjustifiably, even in a manner that can be criticized.[20]

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[16] This feature is part of the feature of entitlement discussed above.

[17] Dworkin explains that this is one of the features of rights. R Dworkin 'Rights As Trumps' in G Waldron (ed) *Theories of Rights* (Oxford OUP 1984) 153; see also D Wasserman 'Justifying Self-Defense' (1987) 16 Philosophy and Public Affairs 356, 361.

[18] Uniacke, *supra* note 1, p 27. In the following sections I will argue that from the aggressor's point of view this result is not attributed to the fact that it is a right but rather it is attributed to forced consequences. Cf. Rodin's explanation of why the liberty of self-defence (as he views it) is referred to as a right, *supra* note 1, pp 30-31. He provides a third explanation: that like rights, self-defence serves as precedent for action which people may properly rely upon in practical deliberation with respect to similar cases. I am not persuaded that this feature is unique to rights as opposed to all justifications (and not all justifications are rights).

[19] For example see Uniacke, *supra* note 1, p 8.

[20] For further discussion see fn 7.

B. JUSTIFYING THE RIGHT TO SELF-DEFENCE

In order to present a full account of the justifications for self-defence two important questions have to be addressed: *Why* is self-defence justified? And, *when* is it justified? The first of these two questions refers to the underlying assumption of self-preference, which is embodied in the very idea of a right to self-defence. Assuming that all people have a right not to be killed, to explain why self-defence is justified is to explain why the defender is justified in choosing his or her life over the life of the aggressor. Thus it is essential to explain the primacy given to the defender's life. Once the question of self-preference is answered, we need to move on to the second question and uncover the conditions under which the exception to the general prohibition on the use of force – the right to self-defence – is triggered.

Four model theories have been proffered as grounds for the right to self-defence: lesser harmful results, 'forced choice', the rights theory and vindication of autonomy. I will now explore the various justifications these theories provide for the first of the two questions presented above. As will be seen, the difference between the 'why 'and the 'when' is not clear-cut. The various theories advanced to answer the first question set, at times, different boundaries to the right to self-defence (i.e. the second question), most notably with respect to the internal condition of 'unjust aggressor / aggression'.

1. A theory of a lesser harmful result

Some scholars justify self-defence on modified consequential grounds as a choice of 'lesser harmful results'.[21] Self-defence, they argue, should be recognized as an exception to the general prohibition on the use of force because it would bring about less harm than following the general prohibition. This evaluation is based on a comparison between the interests of the defender with those of the aggressor, modified by the responsibility of the aggressor for the situation. This guilt-based modification is introduced into the (otherwise) consequentialist account to respond to the failure of a straightforward comparison justifying the preference of the defender's life in those cases where there is a similar number of aggressors and defenders. Thus the lives of the aggressor and the defender have equal value. The claim is that because the aggressor was the one who brought about the need to use force he or she is morally at fault and this fault devalues his or her interests. Therefore the interests of the defender are more worthy of protection than those of the aggressor.

This modification attracts two different objections. Firstly, it contradicts the commonly agreed Anglo-American principle of the equality of all lives regardless of their moral worth. Secondly, this line of argument seems to depend on the collateral consequences of self-defence. If we accept that moral worth may change the value of people's lives, then there is

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[21] Fletcher *Rethinking Criminal Law*, *supra* note 11, pp 857-858; P Robinson 'A Theory of Justification: Societal Harm As A Prerequisite For Criminal Liability' (1976) 23(1) UCLA L Rev 266; Rodin, *supra* note 1, pp 51-52; Wasserman, *supra* note 17, pp 357-359. Fletcher, Rodin and Wasserman refer to this account as an account of 'lesser evil' or 'choice of evil'. However, I prefer the name suggested above because the name 'lesser evil' does not capture the type of evil that is being considered – the harmful result – and can also be consistent with guilt-based evil or any other kind of injustice.

no reason why the general moral worth of both the aggressor's and the defender's life should not be taken into account. For example, it may be that the defender is a known violent criminal and the aggressor a brilliant scientist on the verge of finding a cure for HIV. Similarly, if the aggressor's life retains any value then the balance between the aggressor and the defender is dependent on the number of aggressors and defenders. Yet the common understanding is that these factors (i.e. the number and the identity of the aggressor(s) and defender(s)) ought not to change the right of the defender to defend him or herself. The law is indifferent to the specific consequences of self-defence.[22]

To answer these critiques some theorists make a move similar to the move from *act* utilitarian to *rule* utilitarian. Instead of a justification concerned with the consequences of specific acts of self-defence, a shift is made to refer to the overall beneficial consequences of a recognition of the right to self-defence. According to this approach the defender's right to self-defence can be justified by 'the anxiety and insecurity that would result if one's life could be taken at any time, and for any reason, and also because of the deterrence it provides against aggressive acts'.[23] But even this approach is subjected to significant criticisms for, so it is

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[22] Wasserman, *Supra* note 17, p 359.

[23] N. Fotion & G Elfstorm *Military Ethics* (Boston Routledge Kagan Paul 1986) quoted in Rodin, *supra* note 1, p 54; See also Wasserman, *supra* note 17, p 360; Fletcher *Rethinking Criminal Law*, *supra* note 11, pp 859-860; Cf. G Williams 'The Theory of Excuses' (1982) Crim L Rev 732, 739. It is worth mentioning that this justification is similar to the social harm which sets the basis for any criminalization according to Lawrence Becker (L Becker 'Criminal Attempt and The Theory of The Law of Crimes' (1973) 3 Philosophy and Public Affairs 262) (For a detailed discussion see Chapter One p 20-30). As such, self-defence does not involve any special justification and is but one aspect of the general principle for criminalization. Its distinction comes from the type of situations it deals with which can be characterized as instances in which general institutions are

argued, it is both too strong and too weak. As Wasserman explains, the account is too strong because taking deterrence seriously may permit defenders to use force in self-defence beyond the commonly recognized limits of necessity and proportionality.[24] At the same time the argument is too weak because the defender's right depends on the marginal gain achieved by granting this right. It fails to provide a moral justification for particular cases of self-defence in which a general deterrence would not be enhanced (if no-one were to hear about it), and may even be reduced if it were to bring about further bloodshed (e.g. blood-revenge).[25]

2. A theory of forced choice

The idea of 'forced choice' offers two distinct ways to explain the right to self-defence. These explanations have usually been mixed in the accounts advanced, and have gone unnoticed because they both stem from the idea of 'forced choice'. The first line of explanation uses forced choice as a basis for a *justification* of a particular distribution of harm (rather than a justification of a particular act), which is rooted in considerations of justice.[26] Two reasons have been forwarded. Montague argues that self-defence is only one implication of a general principle (recognized in torts) of fault-based selection, also known as 'the causer pays'. According to this principle, it is the aggressor's responsibility for forcing a choice between

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unable to help the defender. However, this may blur the difference between self-defence as an act of resisting an unjust attack and punishment, a distinction which will be discussion below in the next section p 183-186.

[24] These limits will be discussed in details in the next section.

[25] Wasserman, *supra* note 17, pp 360-361; Rodin, *Supra* note 1, pp 54-55; F De Roose 'Self-Defence and National Defence' (1990) 7 Journal of Applied Philosophy 159, 161.

[26] Similar to the 'rule' account of lesser harmful results, though the latter justifies harm distribution as rooted in utilitarian considerations.

lives; this permits the defender to direct harm against the aggressor. Wasserman, on the other hand, justifies self-defence by referring to the need initiated by present aggression, which creates the moral asymmetry.[27] At the point of being attacked (or threatened) only the defender is in a position of forced choice between lives. The aggressor, on the other hand, 'never faces that choice – he can withdraw at any time before he or the victim is killed'.[28] He stresses that the aggressor is forcing a choice between lives at the moment that the defender makes the decision. Hence 'he cannot dissociate himself from his actions without eliminating the threat.'[29] Wasserman goes on to stress that if self-defence can ever be justified 'it is not because [the aggressor] has accepted the legal consequences, but only because his actions create a high risk of death'.[30] The difference between the two approaches lies in the contradictory answers they give to the comparisons between culpable aggressors and others with equal fault for a forced choice between lives.[31]

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[27] See also the comment made by Fletcher in his book *Rethinking Criminal Law*, *supra* note 11, Chap 1 p 33, according to which self-defence is justified by need.

[28] Wasserman, *supra* note 17, p 371.

[29] Wasserman, *supra* note 17, p 372.

[30] Wasserman, *supra* note 17, p 377.

[31] Such as past aggressors that have already caused irreparable damage but at the time the defender has to choose between lives it is no longer (actively) *causing* harm. In such a case harming the aggressor can only be justified on retributive grounds, as a punishment. Consider a doctor who swallows the only available pacemaker of his patient. Without it the patient will die. The only way is to kill the doctor in order to retrieve the pacemaker (the example is given by P Montague 'Self-Defense and Choosing Between Lives' (1981) 40 Philosophical Studies 207, 216-217). Due to space limitations I will not be able to entertain a fuller discussion on the answers given by the two approaches.

In the second line of explanation 'forced choice' is used as an excuse. Self-defence, it is argued, is permitted as a necessary response where there is no 'real choice' but to use (defensive) force. When a person is backed up against the wall the human instinctive response is to use force in self-defence. In these situations the defender acts involuntarily, having no *real* choice to avoid the use of force.[32] This position goes along the lines of a defence of necessity. Self-preference is not justified as the 'right thing to do' but rather it is considered an excuse. Ryan develops an interesting variation of this idea comparing self-defence to duress (instead of necessity). He uses the example of the occupying Nazi forces in Greece who forced the mayor to choose and execute five members of the resistance. If he refused all the members of the resistance would be killed. Ryan argues that:

> while [the mayor] pulled the trigger, the mayor is certainly not to blame for the fact that a resistance fighter was killed, for the Germans, not the mayor, are the ones truly responsible. (We might say: it was not his decision to *kill* that person, though it was his decision to kill *that* person.) An appeal to the circumstances in this case would not show that the mayor was 'justified' in his act of killing, it would rather show that it was not *his* act of killing.[33]

Self-defence, so he argues, should be treated the same way.[34] In the case of self-defence, the responsibility for the choice made by the defender lies in the hands of the aggressor who forced the defender into a position in which he or she has to make a choice between lives. The objection to Ryan's account seems obvious. This account is counter-intuitive, for self-defence is commonly understood as the justified act of a person in his or her full capacity. This objection is true with respect to the general line of reasoning which defends self-defence as an

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[32] Fletcher *Rethinking Criminal Law*, *supra* note 11, pp 856-857. Cf. L Alexander 'Excuse of Preemptive Self-Protection' 74 (1999) Notre Dame L Rev 1475. (He extends the excuse of duress to include most cases of self-defence leaving a very limited independent right (i.e. justification) to self-defence).

[33] C Ryan 'Self-Defense, Pacifism, and The Possibility of Killing' (1982) 93 Ethics 508, 515.

[34] He admits that this reasoning is an excuse and not a justification, *supra* note 33, p 516.

excuse by comparing it to necessity. However, it seems to me to be of greater weight when it is compared to duress because of the attempt to transfer the responsibility of the killing itself to another person – the aggressor, whereas the defender has to know, that in some sense, he or she did do something wrong (as taking life is never a 'good thing').[35]

As I have already mentioned, the accounts of the scholars supporting 'forced choice' combine elements of the two lines of reasoning in their explanations. Montague uses 'forced choice' as a justification with regard to self-defence against the culpable aggressor, and 'forced choice' as an excuse in cases of self-defence against innocent aggressors.[36] Ryan, on the other hand, uses 'forced choice' as an excuse to explain self-defence against culpable

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[35] See Rodin, *Supra* note 1, pp 57-61. Rodin's main argument is similar, although I do not agree with some of his detailed arguments (such as his example of the hit-man, which does not seem to me to resemble the example of the Greek Mayor discussed by Ryan) and with his further conclusion in page 63 onwards.

[36] Montague, *supra* note 31, pp 209-211. He does not argue this expressly but that is the only way I can understand his account coherently. He argues that in cases of forced choice which are not brought about by an 'aggressor' (i.e. cases of necessity) the defender is also at liberty (*ceteris parbus*) to save himself at the expense of another person (p 209). He then goes on to compare this with cases of innocent aggressors and cases in which innocent bystanders are also killed and argues that in these latter situations the defender has similar permission (*ceteris parbus*) to use defensive force (p 210-211). He does not explain *why* in the latter cases (including necessity) the defender is permitted to kill, as he himself admits it (p 210). However, he distinguishes them from cases of self-defence against culpable aggressors which are explained by reference to 'forced choice' as justification. Thus, the only way to understand the permission (*ceteris paribus*) for self-defence against innocent aggressors and the killing of bystanders is by reference to 'forced choice' as an excuse, and this would be limited by various conditions such as the number of lives that are at stake. This could also explain his position about the obligation for third parties to intervene in favour of the defender against an intentional aggressor as contrasted with the liberty to intervene and help either sides in the case of innocent aggressor (subject to some conditions, among them the number of lives at stake). (p 211)

persons, whereas he uses 'forced choice' as a justification in respect to self-defence against innocent aggressors.[37] This (latter) account is paradoxical in that in those cases we feel most strongly that the defender has a right to use defensive force (i.e. against a culpable aggressor) he or she is only excused, but in the more problematic situations (of innocent aggressor) he or she is justified.

Even the first two versions of the theory of 'forced choice', which are more appealing as they retain the status of justification, are subject to criticism. Both strands fail to distinguish between innocent aggressors and bystanders. According to the strand of 'the causer pays' argument, the distinction is between the culpable aggressor and the innocent aggressor. The latter's death cannot be justified but only excused in similar terms to the killing of bystanders and victims. A similar distinction is drawn by the creation of 'present aggression'. Only the culpable aggressor is able to withdraw in order to refrain from imposing a choice on the defender. The innocent aggressor, in essence, is either unaware of the threat he or she is posing and therefore, mentally, he or she is unable to withdraw (e.g. a five-year-old child pointing a loaded gun at the defender as he or she enters a room). Alternatively, he or she might be aware of the threat that he or she (unintentionally) poses but is, physically, unable to withdraw (i.e. being an 'innocent threat').[38] For example, a person who is thrown down a narrow well while another is standing at the bottom of it is unable to break his or her fall.[39] Though it is not argued expressly, the implication of this distinction is that innocent

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[37] Ryan, *supra* note 33, p 516 onwards.

[38] This actually, calls for a further distinction (that would be made later on in pp 176-177) between the innocent aggressor and the innocent threat, but this distinction is unnecessary for the current point made here.

[39] This example was given by R Nozick *Anarchy State and Utopia* (Oxford Basil Blackwell 1974) p 34.

aggressors should be treated as bystanders.[40] Drawing the line between culpable and innocent aggressors seems to me to be counter-intuitive. Like other contemporary (as well as classical natural law) theorists, I think that the killing of the innocent aggressor is a justified reaction. In the next section I will elaborate on this last point.

3. The rights theory

The rejection of the last two theories takes us to the third school of thought which is the most common among contemporary theorists, though not the least problematic. This account traces the right to self-defence back to the core right not to be killed (or the right to life), and provides grounds for self-defence based on the prevailing core right of the defender (over that of the aggressor). The various accounts are based on the correlation between one's rights and the duty these impose on others. Thus if the aggressor does not have an (active) right not to be killed (or harmed) the defender is at liberty to kill him or her (or harm him or her respectively).[41] One obvious account of rights theory, advanced by natural law theorists, is to rely on a version of forfeiture:[42] the idea is that the aggressor forfeits his or her right to life, thus allowing the defender to harm him or her (and possibility kill him or her) in self-defence.

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[40] Wasserman supports the similar treatment and his account of 'present aggression' comes to answer another worry he has with the 'causer pays' account. See Wasserman. *Supra* note 17, for example p 366.

[41] But see Ryan, *supra* note 33, p 512. He argues that even the loss of the aggressor's right not to be killed does not necessarily imply that the defender has a right to kill him. This argument is wrong for the reasons I presented in the main text. See also my discussion in previous sections.

[42] Pufendorf refers to this saying: '[h]e who professes himself an enemy is no longer protected by any right which would prevent me from repelling him by any means whatsoever' (V Pufendorf *On The Duty of Man and Citizen* J Tully (ed) (Cambridge CUP 1991) Book I chap 5, p 49) (All references to this book would be made to

This account of a forfeiture of the right to life in the context of self-defence attracts two strands of objections. Firstly, the concept of an unconditional and unspecified right not to be killed (or the right to life) that every person *qua* human being has cannot be consistent with the notion that one's acts (the aggressor's unjust threat to the defender's right not to be killed) along with contingent facts about the defender (such as the inability to retreat) can result in the forfeiture of the right to life (by abandoning or transferring the right). The second problem is that forfeiture is inconsistent with the notion of a right *in rem* not to be killed (or the right to life).[43] The concept of forfeiture is usually used to mean a *permanent* forfeiture. If we accept the concept of forfeiture, and unless we are willing to recognize an idea of temporary forfeiture, then once a person acted in a way that forfeited his or her right to life then he or she cannot regain his or her right when he or she stops acting in a threatening manner. This is contrary to our understanding that a person who does not pose a threat should not be killed even if his or her death would be useful (e.g. donation of her organs to save other people).[44] Furthermore, a right may be forfeited even without the knowledge of its owner, and once

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this edition). Locke's terminology is even harsher when he states that by his own actions the aggressor 'exposes his life to the others' power to be taken away by him... one may destroy a man who makes war upon him, ... for the same reason, that he may kill a wolf or a lion; because such men are not under the ties of the common law of reason... and so may be treated as beasts of prey...' (J Locke *Two Treatise of Government* P Laslett (ed) (Cambridge CUP 1988) Book II p 279). (all references to this book would be to this edition). Grotius does not address this question directly but when justifying self-defence against non-culpable men or women he compares the defender's right not to be harmed by them to the defender's right not to be harmed by wild beasts (H Grotius *Grotius On The Right of War and Peace* W Whewell (ed) (Cambridge CUP 1853) p 62). This might suggest that the action taken by the aggressor makes him like a beast.

[43] See the discussion earlier in section A of this Chapter about the nature of the right not to be killed (or the right of life) as a right against the whole world.

[44] JJ Thomson 'Self-Defense and Rights' *Rights, Restitution, and Risk* (Harvard University Press Massachusetts 1986) 33, 34.

forfeited it is with respect to the whole world. Yet, in self-defence a third person that does not know of the attack of the aggressor (and thus does not know that the aggressor forfeited his or her right not to be killed) is not permitted to attack the aggressor for his or her own reasons.[45]

These two objections refer to two aspects of the core right not to be killed. The former objection refers to the content of the right whereas the latter objection challenges the addressees of the right. They both draw on the idea that the right not to be killed is a natural unconditional and unspecified right *in rem*. Addressing the second objection, Uniacke provides us with two replies. Firstly, she argues, forfeiture of a right (or an interest) does not mean that the intentions and knowledge of a person seeking to deprive another of that right are irrelevant. Sometimes the intention is relevant for some other general concerns (like the need to have a good reason before searching a person since that person should not be interfered without a good reason). The fact that defence is denied to a person who acted against the aggressor for his or her own reasons, unaware that the aggressor forfeited his or her right not to be killed is not necessarily grounded in the ongoing existence of the aggressor's right not to be killed, but could be grounded in some other considerations. Secondly, she argues that the concept of forfeiture, which is the basis for the objection, is not necessarily the only one possible, and that the notion of the forfeiture of a right in the realm of self-defence is consistent with the narrower concept of forfeiture. This narrow concept refers to a right lost due to some crime, fault, or breach or neglect of a contract or rules on the part of the person who forfeits.[46] Rodin explains this further: bearing in mind that the idea of

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[45] G Fletcher 'The Right to Life' (1979) 63 The Monist 135, 143-144. Fletcher's first description of the character of forfeiture – as against the whole world – entails the assumption that the right is a right *in rem*.

[46] Uniacke, *supra* note 1, pp 200-201. It should be stressed that Uniacke argues that one's forfeiture of a right does not necessarily depend on one's culpability (p 206).

rights is a normative relationship between the aggressor and the defender rather than simply a status of the aggressor, 'forfeiture of a right should be viewed as a fact about the normative relationship between two specific parties. In which case there is every reason to believe that the forfeiture of a right will turn upon facts about the status, condition, actions and intentions of both the parties'.[47] If we accept this, he argues, then there is nothing peculiar if the right to life is forfeited with regard to one person but not to another and that it is dependent on facts related to the defender as well as the aggressor.

These two responses to the problem of forfeiture that were offered by Uniacke are not consistent since fault is either relevant or it is not. This inconsistency goes deeper than it might at first seem. In her first response, Uniacke accepts the presumption that the right not to be killed is a right *in rem* (hence, when forfeited – it is forfeited with regards to everyone – including a third person). On the other hand, if the second response is to overcome the problem of regaining the (forfeited) right once the aggression is over, than it must be understood to suggest an alternative reading of the right not to be killed as a right *in personam* (and there are specific rights not to be killed between X and any other person), for otherwise the argument has pertinent flaws. Rodin argues that since rights are a normative relationship between two people and forfeiture is a fact about this normative relationship then it necessarily follows that forfeiture depends on the actions of the parties (and other factors). Yet this conclusion is not a necessary one. A normative relationship can be, and indeed often is, decided by some undertaking to respect the equivalent right of another but this is by no means the only way to create (or to justify) this relationship. Natural rights, for example, (including the right to self-defence if it is to be viewed as a right *in rem*) are created (or justified) by external ideas. Similarly, the ways in which one can forfeit one's right does not

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[47] Rodin, *supra* note 1, p 76.

have to revolve around one's actions and intentions. It all depends on the sources of the right. As Bedau explains:

> a person could lose rights to life liberty or property by some act which violates those rights in another 'only in so far as these rested on an explicit or implicit undertaking to respect the corresponding right to others...' But natural rights or human rights do not 'rest' on mutual respect, any more than they originate out of contractual, quasi-contractual, status-relational, or other contingent and variable circumstances after the manner so-called 'special' rights. Only in regard to such rights is the notion of forfeiture intelligible. To be sure, violation of another's rights may justify (or excuse) others in interfering with the rights of the violator. But this is by no means equivalent to saying that the violator's right x is necessarily forfeited, or deserves to be forfeited, whenever by some act of his he violates another's right to x.[48]

It should be noted that these flaws remain even if we accept a more lenient concept of temporary forfeiture, which was mentioned earlier.

Alternatively, if the right not to be killed is a right *in personam* then stringent conditions do not necessarily apply, and consequently fault may be a relevant factor. This interpretation is supported by Rodin's own claim that the right not to be killed can be viewed as 'a normative relationship between two specific parties'.

I think both solutions to the problem of forfeiture are problematic. The problem with Uniacke's first solution is that if we accept the concept of permanent forfeiture then this solution may leave the aggressor in a more vulnerable position for the rest of his or her life. At the moment of any unjust aggression the aggressor looses his or her right not to be killed, a right he or she never regains. From that point on the protection of his or her life relies only on

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[48] H Bedau 'The Right to Life' (1968) 52 The Monist 550, 568-569. He, further points out that the idea of forfeiture of the right to life 'involves a bizarre corollary of *lex talionis* (the right to life for the right to life, etc.), which no one really accepts as a general principle...' (p 568).

the existence of other considerations, and these "other considerations" might be rescinded in the face of the rights or considerations of some other person (since they are probably not as stringent as a right not to be killed). It will also result in creating two categories of people: those who are protected by a right not to be killed, and those who are protected by 'other considerations' because of something they have done in the past. Therefore the only way to give meaningful content to this solution seems to depend on the acceptance of an idea of 'temporary forfeiture'. However, if the forfeiture of the right is only temporary than there is no reason to refer to 'other considerations' as there is no problem of regaining the right once the aggression is over.

As for the second solution, I do not think that the right not to be killed can be regarded as a right *in personam*. The right not to be killed is a natural right and like other natural rights – it is a right *in rem*. Constructing the right not to be killed as an indefinite number of rights *in personam* – directed against each person separately – seems to me to be artificial. The notion of a right *in rem* is that it is the same kind of obligation, which is directed to indefinite and unidentified numbers of people. This right is similar to all other basic rights, which are *in rem* (freedom of speech, religion etc.). The construction of the right not to be killed and the derivative right to self-defence is a familiar one: a right *in rem* not to be killed which, if infringed by a specific individual, gives rise to a right *in personam* to self-defence.

But are these the only two options available? Is there a third way which retains the features of the right not to be killed as a right *in rem* and responds to the difficulty of regaining the right after it has been forfeited?[49] Indeed, a third position of this sort is plausible. Such a position would have to reject the assumption made by the first objection that

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[49] And thus will also make Uniacke's two responses consistent with each other.

was put against the concept of forfeiture: the notion that the right not to be killed is an unconditional and unspecified right. Instead, the idea of an absolute right must be abandoned. Namely, it is necessary to give an account of a conditional right to life, which will limit the right to exclude instances of aggression. This idea of conditional right can be achieved in two ways: either by recognising the conditional possession of an unspecified right, that is a non-absolute right which is dependent on the actions (or other circumstances) of its owner, or by recognising an absolute right which has limited scope. The limitation can be defined using 'moral' or 'factual' specifications. Using the former method it is the possession of the right that is conditional and in the latter it is the scope of the right that is conditional.

Referring to the former method, Thomson examines the possibility of treating the aggressor's right not to be killed as 'overridden' by the more stringent right of the defender. The defender's right becomes more stringent when the aggressor wrongly attacks the defender. Yet, this necessitates the right of the aggressor to be indefinitely diminished (if not forfeited), because the defender's right may override any number of aggressors' rights (and this takes us back to the criticism of forfeiture).[50]

The second method, on the other hand, seems to be able to respond better to the problems of forfeiture. The specification limits the scope of the right so as to exclude altogether those situations in which, presumably, the right is forfeited. A satisfactory specification ought to be able to exclude only this type of situations, thus avoiding the need to explain how one can regain a forfeited right (the answer being that one never had a right not to be killed in the situation outside the scope of the specified right but that one never lost the right not to be

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[50] JJ Thomson 'Self-Defense' (1991) 20 Philosophy and Public Affairs 283, 299;Wasserman, *Supra* note 17, p 362.

killed for other reasons such as organ donation). It also allows for humanity to be the only pre-condition of a right, which is not dependent on human conduct.[51] Yet it is not free from other difficulties. Thomson argues that a *moral* specification is bound to be 'viciously circular'. She claims that the concept of a right is supposed to provide an independent answer to the questions of why and when is it justified to kill the aggressor (when the aggression violates the right). However, a morally specified right, which simply states that 'there is a right not to be killed *unjustly*' would fail to provide such an answer, being dependent on a prior view of what is and what is not morally permissible.[52] The *factual* specification is rejected both because it is impossible to set a satisfactory definition and for reasons of circularity. Once again, we would end up defining the right according to a prior view of what is permissible, thus making the explanation of the permissibility of a particular act in terms of the right a circular one.

Two different strands of justifications, which both attempt to overcome the problem of circularity, have been advanced: the accounts developed by Thomson and Uniacke (independently) and Rodin's account. Both are based on the idea of a limited (i.e. specified)

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[51] But see Uniacke's stance according to which there is no normative difference between the two methods (Uniacke, *supra* note 1,pp 208-209) though she provides some practical reasons for preferring to speak in terms of specification of the scope of the right. Cf. Uniacke's explanation of Finnis's preference to opt for the second method by his belief that forfeiture of human right requires culpability on the part of the one who forfeits the right, while rejecting a very limited version of the right to self-defence (which would include only a right against culpable aggressors) (p 206).

[52] Thomson 'Self-Defense and Rights', supra note 44, pp 37-38. It should be noted that when distinguishing between the attack of the aggressor and that of the defender this line of justification does avoid another kind of circularity, that of having two similar rights to self-defence held by the defender and the aggressor, each triggered by the other person's violent act.

right not to be killed (or of life),[53] and both argue that it is possible to provide a moral specification which will independently reflect what individual treatment is just and what is unjust with respect to this right. The moral specification is the basis for the asymmetry between the aggressor and the defender. The aggressor does not possess the specified right not to be killed, whereas the defender does. They differ in the elements that limit the right, and consequently, in the situations that create the asymmetry. Aiming to find a 'unitary theory' for permissible killing (i.e. 'all things considered'), Uniacke holds that the justification is founded on being an unjust immediate threat. The moral specification is based upon an objective fact – the causal responsibility of the aggressor to the immediate unjust threat.[54] In such circumstances (i.e. being an unjust immediate threat) the right not to be killed

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[53] Though, following her view that there is no substantial difference between a non-absolute unqualified right and an absolute right of limited scope, Uniacke is not careful in the terminology she uses and often refers to the latter in terms of the former. For example she states that: 'Natural rights are grounded in our nature and are conditional: their continued possession, by those who possess these rights in virtue of their nature, is conditional on conduct' (Uniacke, *supra* note 1, p 210). This is not an accurate description of natural rights. Natural rights are rights that we possess by virtue of being human, but their scope can be a limited one. See also HLA Hart 'Are There Any Natural Rights?' A Quinton (ed) *Political Philosophy* (Oxford OUP 1967) 53, 54. As for Thomson, she does not expressly state that she prefers the second method to the former. However, in her article 'Self-Defense' (*supra* note 50) she provides a specification of the right and refers to instances which fall within the specified conditions as elements in which the aggressor 'lacks the right' even if he does not forfeit it (p 301). Hence, I understand her to argue in favour of an absolute, though limited right.

[54] More accurately, she differentiates between the 'less stringent version' of having an unqualified right to life and a conditional right not to be killed and the 'more stringent version' which entails that the right to life itself is conditional.

I will say more about her choice of 'unjust threat' (causal responsibility) as opposed to 'unjust aggressor' (fault) when I discuss the content of the right to self-defence in the next section. At this time I would just point out that an 'excused' attack (i.e. in the case of innocent aggressors) is considered unjust because an excuse means that

does not exist. It is this causal responsibility that creates the asymmetry between the aggressor's and the defender's rights. This specification avoids circularity. The answer to why the defender is justified in using force in self-defence (i.e. self-preference) is that he or she has been subjected to an immediate unjust threat (i.e. an attack lacking any justifying circumstances) by the aggressor.[55]

Rodin develops a closely related account in which the right not to be killed is morally specified in a way which combines the aggressor's fault. In this account, the limitation, and consequently the asymmetry, are based on the fault of the person who created the unjust threat, namely, the 'unjust aggressor'.[56] To avoid the vicious circularity, he defines his account in the following way:

> I have a right to life. Therefore, if an aggressor makes an attack upon my life, in the absence of any special justifying circumstances, he wrongs me. Because I am innocent and he is at fault for the aggression, his claim against me that I not use necessary and proportionate lethal force against him becomes forfeited (or fails to be entailed by his right to life). Therefore I have a right (liberty) to kill

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the defender was *wronged* by the aggressor but there is some reason not to attribute this wrong to the aggressor. See Fletcher *Rethinking Criminal Law*, *supra* note 11, pp 759-762.

[55] The same idea is advanced by Thomson who justifies self defence against a person who 'would otherwise kill you in such a way that they would violate your right to life'. See Thomson 'Self-Defense', *supra* note 50, pp 298-303. This idea avoids the circularity in the following way: the defender has a (limited) right not to be killed. Therefore, if an aggressor makes an unjust immediate attack on the defender's life he wrongs him or her. Because the defender is innocent and the aggressor is causally responsible for the attack, his claim that the defender not use necessary and proportionate lethal force against him fail to be entailed by his (the aggressor's) right not to be killed. Therefore the defender has a right to kill him. Therefore, when the defender attacks the aggressor to defend herself, she does not violate his right not to be killed, and hence she does not wrong him. Because she does not wrong him she does not fail to possess her right not to be killed.

[56] Thus there are two elements to be proved: the *actus reus* – that the act of the aggressor created the immediate threat and the *mens rea* – that the aggressor is at fault.

> him. Therefore, when I attack him to defend myself, I do not violate his right to life, and hence I do not wrong him. Because I do not wrong him, I do not forfeit (or fail to possess) my right to life.[57]

At this point I will not comment on the choice of the moral specification. This will be discussed in great detail in the next section. However, I oppose the underlying assumption in both accounts that the right not to be killed has a limited scope. Although I accept the general claim that absolute (natural) rights may be specified, I believe that the right not to be killed is what Uniacke calls an 'unqualified' right (i.e. unspecified right), maybe the only one of this kind. I believe humanity is a pre-condition of the right, but also the only specification of it. I find it hard to accept that in some situations a person can be said not to have a right to (physically) exist. I find support for my stance in two aspects of the right of self-defence. The first is the awkward implications of the requirement of proportionality for a specified absolute right not to be killed. The requirement of proportionality is one of the internal requirements, which limit the right to self-defence. I will elaborate on this requirement in the next section. In general, the requirement limits permission to use defensive force to only that amount which would be proportionate to the potential force (i.e. the harmful result) the aggressor uses against the defender. This requirement is accepted by almost all theorists, including Uniacke, Thomson and Rodin. Yet, this correlation is irreconcilable with the idea of a specified right. In practice, in most instances of self-defence, because the threat is not to life itself (only injury), the permitted defensive response does not involve killing but only the inflicting of lesser and proportionate harm. There are two ways of explaining this phenomenon in terms of the specified right not to be killed. The first is that the specification is more complex and instances which involve only the threat of injury are excluded from the right (or the part of the right) not to be injured but are still within the scope of the right not to be killed. But then the

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[57] Rodin, *supra* note 1, p 79.

specification becomes difficult and may be impossible. A second way to resolve the problem is to hold that such instances fall within the specified category that limits the right not to be killed. That is, these instances are excluded from the right not to be killed. However, the defender is not permitted to kill the aggressor due to other considerations (see Uniacke's first response to the problem of forfeiture). Yet all the considerations I can think of go back to the value of life, and where one's life is not protected – it is not valued, at least not to the extent that it should impose a burden on another.

The second support is found in the position held with respect to defenders (and third parties) who use force against the aggressor for some reason, unaware that in fact, the aggressor was about to attack them, thus giving rise to a right to self-defence on their behalf.[58] Legal theorists disagree about the way that these 'defenders' should be treated. I do not wish to go into the details of this argument.[59] However, one common stance that is reflected in

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[58] For example, A knows that his enemy B is going to a pub at the end of each day. He decides to go to the pub tonight, and when A would steps into the pub he intends to shoot and kill him. Unaware of A's plan, B decides to kill A. He finds out that A is at the pub. He takes his rifle with him and when he enters the pub he shoots A and kills him, not knowing that A was holding his own gun and was about to kill him (i.e. B). B acted because he was angry with A, although A's intentions to kill him would have afforded him a right to shoot A in self-defence.

[59] But see for example Fletcher for the view that self-defence requires subjective belief in the justification, and Robinson for the view that objective existence of the justifying circumstances is sufficient. G Fletcher 'The Right Deed For The Wrong Reason: A Reply to Mr. Robinson' (1975) 23(1) UCLA L Rev 293 (especially case C which is an instance of self-defence); Robinson 'A Theory of Justification', *supra* note 21, pp 284-291 and the further references therein; PH Robinson 'Causing The Conditions of One's Own Defense: A Study in The Limits of Theory In Criminal Law' (1985) 71(1) Virginia L Rev 1.

English law and which is also supported by Uniacke,[60] is that these 'defenders' are not regarded as acting in self-defence. The main reason is that they did not act *on* that right; they did not *intend* to act in self-defence. From their point of view they knowingly did something wrong. They intended to violate a right of, who they thought was, an innocent person (but who is in fact an aggressor). Yet if in fact, according to the specified-right-account, the aggressor in the situation did not have a right not to die then there is nothing wrong with their action and criminal law does not punish bad intentions, even if the agent acts on them (where X wants to steal Y's handbag, where Y and X have identical handbags, and X acts on her intentions and takes the bag next to Y's chair just to find out that it is really her bag (that is X's bag), which she forgot about – X does not commit any crime although she had the intention to commit a crime and acted on this intention).

Another way to overcome the difficulties of forfeiture is to distinguish between the possession of a right and its exercise. This account accepts that the right to life is an absolute (unlimited) natural right; that is, a right which is not created, nor can it be eliminated, by laws. Governments therefore have a duty to recognize and protect this right.[61] The suggestion is to distinguish between the *possession* of the right, which is absolute, and the *exercising* of it. This can be conditional and depend on the aggressor's actions, intentions etc. However, the only way to make sense of this claim is by appealing to the distinction between moral and

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[60] Uniacke, *supra* note 1, p 200. Thomson and Rodin do not refer to this possibility directly in their writing, but from their stand with respect to other questions they would, presumably support this position too.

[61] This line of explanation is attributed to Bedau in his interpretation of Blackstone's theory on the right to life. See Bedau, *supra* note 48, pp 554-558. It should be noted that there is a two-way relationship between moral and legal rights. While some moral rights precede legal rights (i.e. they are not created by, nor can they be eliminated by law), other moral rights are founded on legal rights, and hence can be eliminated by the law. Natural rights, and respectively the right to life, are moral rights of the firmer kind.

legal rights: one has an absolute moral right to both possession and exercise, but a conditional legal right to exercise. Even then, to forfeit the moral right to exercise it is equivalent to forfeiting the right itself (in these circumstances).[62] The question of self-preference is a question about the moral right (rather than the legal right) and thus we are back to square one.[63]

4. Vindication of autonomy

In the fourth and final account, which is reflected mainly in the German legal system, self-defence is grounded in the vindication of autonomy. The significant feature is the unilateral violation of the defender's autonomy. The violation of the defender's autonomy elicits the defender's right to restore his or her autonomy.[64] This account is based on Kantian thinking which differentiates between 'right' and 'morality' (justice). 'Right' guarantees the legal freedom of everyone in society. It is a set of conditions under which the choices of each person can be reconciled with the choices of others, under universal laws of freedom. In so doing, it enables people with diverse purposes to live together. On the other hand, 'morality' addresses our duty to respect humanity in ourselves and in others (and is more demanding). The result is that the 'right' does not try to resolve conflicts that occur in social life while evaluating the moral weight of competing interests. Accordingly, the right to self-defence is viewed as the privilege to use minimal (necessary) force against a wrongful attack on one's

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[62] Uniacke, *supra* note 1, pp 203-204.

[63] Bedau suggests a third line of justification of self-preference based on the distinction between 'right' and 'the right thing to do' but I do not find any meaningful difference between this suggestion and the one discussed in the main text. (Bedau, *supra* note 48, p 569).

[64] For a detailed analysis of these theories see Fletcher *Rethinking Criminal Law*, *supra* note 11, pp 855-875.

right. A 'wrongful act' is determined by objective standards – the nature of the intrusion, leaving aside the aggressor's culpability as irrelevant.

What is interesting in this theory is that I think it creates two points of view: the defender's point of view (right) and that of society (morality). This account, foreign to Common Law thinking, is contrasted with the other theories, which assume that the right to self-defence has to be moral; that is, that the right has to resolve conflicts by evaluating the moral (or consequential) weight of competing interests. As such, the theory of a vindication of autonomy has conceptual benefits to other theories. It allows us to differentiate, and to recognize to their full extent, those interests of the defender that deserve protection from other interests including those of the aggressor (and thereby offer them the fullest protection). On the other hand, some of the implications of this account, which will be discussed in the next section are very objectionable.[65]

5. A theory of forced consequences

I wish to offer a different account for justifying self-defence. I have already explained that I believe the right not to be killed is an absolute and unqualified right. Thus, I claim, permission for the defender to take the life of an aggressor is not based on some balancing between two rival rights (the defender's and the aggressor's), but rather it is based on other considerations; namely, considerations of forced consequences. These considerations, I will

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[65] First and foremost I refer to the denial of the requirement of proportionality. For the full discussion see p 196-197.

argue, establish a right to self-defence that is triggered by the unjust threat posed by the aggressor.

At the outset of this discussion I wish to stress that the law of self-defence is found in criminal law only because it provides an exemption to the general rule that prohibits the killing of another. However, justification for this exemption does not have to be based on the underlying principles of criminal law. Instead, it can be founded on principles, which are commonly recognized in civil law, and especially in torts. After all, self-defence is about repelling or warding off an attack and is not about punishment.[66] In this sense, it may be compared to the reliance of criminal law on other rights that are established by 'civil' principles, such as the law of theft that is based on the concept of ownership, a concept that is determined by 'civil' law. The account I wish to advance distinguishes between the moral appraisal of the aggressor and the permissibility of the defensive response.

Starting from the premise of an absolute unqualified right not to be killed it follows that self-defence, as a derivative right must be an absolute natural right too (i.e. not created nor eliminated by laws but having to be recognized and protected by them). This is so because without an absolute right to self-defence the right not to be killed can hardly be regarded as a right if it provides its owner no effective tools to protect it. As I explained earlier in this chapter, self-defence plays a major role in resisting the direct imminent threat posed by the aggressor, and it has an additional role in the defence of an indirect threat to autonomy (a

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[66] A detailed discussion of this distinction will follow in the next section.

threat that is generated by the fear and instability that the lack of such a right will bring about).[67]

The account I offer goes along some way with the account of 'forced choice' and extends it. In the core situations of culpable aggressors the permission to use defensive force is based, so I argue, on the commonly accepted principle (in torts) of 'the causer pays' as modified by Wasserman to 'the present aggression' (a modification which does not allow the aggressor to disassociate him or herself from his or her actions).[68] The idea that the person who is responsible for a situation ought to be the one to bear the burdens that that situation involves follows our general intuitions about fairness. Hence, an aggressor who brought about a situation in which the defender is forced into choosing between his or her life and the life of the aggressor ought 'to pay the price' for his or her actions.

As was pointed out earlier, the difficulty with this reasoning is that it draws the line between culpable and innocent aggressors, justifying the former and excusing the latter. It fails to distinguish between the innocent aggressor and the bystander. To extend the right to self-defence so as to include responses to innocent aggressors, and to make a distinction between them and bystanders, it is necessary to abandon any justification that is based on a moral appraisal of the aggressor.

The acts of innocent aggressors may take one of two forms: either an unintentional act; that is an act that is not intentional but nevertheless can be attributed to the aggressor, such as

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[67] See the discussion above p 136-137. In Chapter One I have referred to this indirect threat as 'secondary harm'. See p 30.

[68] See above p 149

a child who points a loaded gun at me ready to shoot, unaware of the possibility that he or she will kill me, or an event involving an aggressor who lacks any agency, such as Nozick's example of a person who is thrown, against his or her will, down a narrow well at the bottom of which stands a person who will be killed when the 'aggressor' lands on him.[69] In both cases it might be said that the aggressor had 'bad luck' in becoming an aggressor. Hence we can describe the situations of innocent aggressors as situations in which due to some bad luck the aggressor threatens the life of the defender, thus creating a situation in which either the aggressor or the defender will have to pay the costs (i.e. lose his or her life).

Now consider the following situation: A and B are the last two people to have an appointment on a given day – A has an appointment from 18:50-18:55 and B has an appointment from 18:55-19:00. Both cases are urgent (let us assume that both A and b suffer from the same disease, and as it is Friday afternoon, both would suffer a lot of, and the same, discomfort until Monday when they will next be able see the doctor). Each case requires at least five minutes of the doctor's time and the doctor must leave the surgery at exactly 19:00. Although A left home in time she was held back due to a car accident which she was not involved in, and arrives at the surgery at 18:55 together with B who is just about to go in. Now, assuming that only one of them can see the doctor, who should it be? I think it should be B. Although A is at no fault – it was only due to bad luck that she was put in this position, given that it is either her or B that would have to pay the costs she must be the one to pay it. It is this same idea that justifies the defensive response. The innocent aggressor, through bad luck is wronging the defender – violating his or her right not to be killed. He or she is posing an unjust threat to the defender, creating a situation in which either the defender or the aggressor will have to pay the costs. In these circumstances, I think it is wrong for the

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[69] I will discuss the various types of aggressors in more details in the next section. See p 176.

aggressor to transfer the burden to the defender and demand that the defender should be the one to suffer the consequences. Hence, it is the causal responsibility of the aggressor for the unjust threat that spawns the right to self-defence. And note that, as self-defence is not about punishment but about resisting, repelling or warding off an attack, we are no longer confined to the concept of moral responsibility.[70]

Further support for my position can be found in the fact that if the aggressor becomes aware that he or she is posing an unjust threat, or regains control of his or her actions (depending on the reason for being an innocent aggressor),[71] he or she is required to do everything in his or her power to eliminate this unjust threat, even at the expense of his or her own life, and even if he or she got into this situation innocently.[72] This demand is founded on

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[70] Thus, this view is consistent even with the position according to which moral luck ought not play a role in the attribution of blame. For further discussion about the relationship between moral luck and responsibility see forexample: B Williams 'Moral Luck' in *Moral Luck* (Cambridge CUP 1981)20; T Nagel 'Moral Luck' (1976) 1 Aristotelian Society Supplements 137; B Rosebury 'Moral Responsibility and "Moral Luck"' (1995) 104 Philosophical Rev 499; S Sverdlik 'Crime and Moral Luck' (1998) 25 American Philosophical Quarterly 79; H Jensen 'Morality and Luck' (1984) 59 Philosophy 323; J Andre 'Nagel, Williams, and Moral Luck' (1983) 43 Analysis 202; B Browne A Solution to The Problem of Moral Luck' (1992) 42 Philosophical Quarterly 345.

[71] Imagine the following situation: Aggressor, unknown to him, was drugged with a drug that makes him lose control for about 10 minutes. He gets into the car and starts driving. The drug kicks in and he loses control and is heading towards Defender who has nowhere to run. A few seconds before Aggressor hits Defender the effect of the drug wears off. The only way for Aggressor to avoid hitting Defender is to divert his car but in so doing he will fall off the cliff and be killed.

[72] The aggressor is found in a situation of necessity. In such situations, it is agreed, the aggressor is not *justified* in killing another person who does not, in him or herself pose the threat. It should be noted, that even when the harm to the other person is less than death, and the defence of necessity is accepted it is only an *excuse* and not a *justified* act.

the position that one is not allowed to make another person pay for the consequences of one's own actions even if one is not (morally) responsible for it. This rule, that applies to an aggressor in respect of his or her own actions, should allow any another person to act in the same manner.

This account draws a clear line between permission to use defensive force against an aggressor who poses an unjust threat and the impermissibility of using force against a bystander – who does not pose an unjust threat. The bystander does not do anything. He or she has neither 'good' luck nor 'bad' luck and hence any permission to use defensive force against the aggressor is not applicable. On the contrary, in such situations it is the defender who suffers 'bad' luck and should not make another person – the bystander – suffer the consequences of that 'bad' luck.

At this point I should offer two notes of clarification, I maintain a mixed justification of forced choice, in the case of culpable aggressors, and the consequences of luck and in the case of innocent aggressors, because it would be incorrect and misleading to talk about the aggressive actions of the culpable aggressor in terms of 'luck'. These actions are intentional and planned.

The second clarification is the distinction between the argument of forced choice and the argument of the consequences of luck. In the former the claim is that the defender is solely forced into a position in which he or she has to make a choice between lives. In the latter, the emphasis is not on the forced choice that the defender is made to make, since *ex hypothesis* the aggressor cannot bring this state of affairs to an end (either he or she is unaware of if or is

not in control of his or her actions). The emphasis of the consequences-of-luck justification is on the causal responsibility, which is the basis of the aggressor's luck.

This account does not suffer from the problems of forfeiture that rights theories have suffered from. It can explain why it is that when the aggressor ceases to pose an unjust threat he or she may not be killed – because once the attack ceases there is no longer a need for anyone to pay the costs, whether intentional or innocent.[73]

Finally, the account is dependent on full compliance with internal requirements (to be discussed in the next section). For only when an aggressor poses an imminent unjust threat[74] in which either the aggressor or the defender must pay the costs, can it be said that the defender is forced to make a choice between lives (in the case of the intentional aggressor). Or, it becomes inevitable for one of the sides to pay the costs (in instances of an innocent aggressor). Likewise, the requirement of proportionality must be kept. Only when there is a threat to inflict severe harm can we demand that an aggressor pays the costs: in the case of the innocent aggressor – because he or she is innocent; and in the case of the intentional aggressor – because he or she does not force the defender into choosing between lives (or substantial well-being).

One last note, I think that even when a person cannot be justified in killing in self-defence either because the threat is unjustified or because the threat is not caused by another person (necessity), in the absence of other options to avoid the threat, the defender might be morally excused. This is because of a deep instinct for self-preservation: every human being generally

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[73] Though the intentional aggressor might deserve punishment but this is a separate issue.

[74] Thus complying with the requirements of unjust threat, necessity and imminence.

prefers his or her own life to the life of another. I think any attempt to give this 'instinct' a moral explanation fails because it cannot be explained rationally.[75]

C. THE CONTENT OF THE RIGHT TO SELF-DEFENCE

The content of the right to self-defence sets the intrinsic-moral limitations of the right. Scholars who discuss this topic generally agree on four main virtues that constitute the right: the unjust threat, necessity, imminence and proportionality. The details of these virtues, as I shall demonstrate are somewhat controversial. These requirements are necessary for an action to be justified as self-defence. Only when all four requirements are met would a defensive act be regarded as a justified act of self-defence.[76]

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[75] In accordance with this line of thinking I think that a prisoner on death row can be excused if he or she kills one of the jailors in her escape. I do not have a direct answer to the common criticism that my excuse of necessity in cases of killing would result in excusing a patient who needs a heart transplant desperately and kills a visitor in the hospital in order to get a heart. However, the same criticism could be levelled at any interpretation of necessity as an excuse: can we excuse the taking of a kidney from a visitor (which would wound, but not kill the visitor) in order to save life of a patient neither of whose two kidneys are working? Since the discussion about necessity is beyond the scope of my current discussion I will not develop this point.

[76] I will refrain from discussing the controversial issue of whether these requirements are to be assessed using an objective or a subjective test.

1. The unjust threat

With the exception of Hobbes, all legal theorists ground the right to self-defence in the special nature of the danger which triggers the defensive act.[77] There has been some variance in the terminology used to define the nature of the danger. Some theorists refer to the *unjust aggressor* (e.g. Locke, Pufendorf and Grotius[78]) while others refer to the *unjust threat* (e.g. Uniacke, Thompson and other contemporaries[79]). The discussion of rights theory in the previous section has already revealed that these definitions point to two distinct requirements. This is not a mere variance in terminology where the latter definition is a more accurate description of the same 'virtues' of the danger. In his recent book, Rodin revives the distinct requirement of an 'unjust aggressor', one that has been abandoned for many years.[80]

The common stance is that self-defence can be used only in response to an *unjust threat*. The focus on the *unjust* threat (or the *unjust* aggressor, for that matter) is essential if self-

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[77] According to Hobbes, even in the civil state one cannot renounce the right to resist an attack on one's life. There is no further limitation of the right based on the nature of the threat (just or unjust threat). Hobbes, *Supra* note 15, p 93.

[78] *Grotius*, *supra* note 42, pp 61-68; Pufendorf, *supra* note 42, pp 48-55; Locke, *supra* note 42, pp 278-285.

[79] For example: Uniacke, *supra* note 1, p 73; Thomson 'Self-Defense', *supra* note 50, pp 285, 288-289, 299-301; Nozick, *supra* note 39, p 35.

[80] Rodin, *supra* note 1, pp 70-99. It should be noted that, for many years, there has been an ongoing controversy with respect to the way in which self-defence can be explained in various cases (justification or excuse). Yet, there was a consensus that self-defence of one sort or another is triggered by the unjust threat. Rodin, on the other hand, holds that where there is no moral fault self-defence is not triggered in any form.

defence is to be considered a justification rather than an excuse.[81] I suggest the following definition for the 'just threat' (and the 'unjust threat' respectively): *A just threat is a necessary threat to kill X in order to secure the lives of others from a threat posed by X (e.g. an act of self-defence). The threat of killing X (and subsequently the killing) is subjected to very strict conditions.* This definition is consistent with a wide range of theories, and encompasses even some of the accounts that justify capital punishment,[82] though, personally, I think capital punishment ought to be prohibited.[83] Notice that I did not refer to X's right not to be killed (or right to life) because most theories argue that once X (possibly, intentionally) poses a threat to Y he or she forfeits, or is not entitled to, the right not to be killed (at least with respect to self-defence). Thus, we cannot talk of a violation (or a threat to violate) X's right to life.

The requirement of an *unjust threat* states that self-defence is triggered by, and responds to, an unjust threat or (unjust) act of aggression.[84] To understand these various positions it is necessary to distinguish between four types of people at whom a defensive force needs to be aimed: (i) culpable agents – these are the typical aggressors who pose an unjust threat

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[81] Due to space limitations I am prevented from entertaining here a more detailed discussion about the status of self-defence at all times (i.e. is it a justification or an excuse). Generally, a claim of justification is a claim that the act is universally right and anyone (in the same circumstances) is licensed to act in the same way. On the other hand, an excuse is personal to the actor and carries no implications to others. For a further discussion see Fletcher *Rethinking Criminal Law*, *supra* note 11, pp 759-762.

[82] The requirement of 'necessity' in the definition would exclude those justifications of capital punishment that are based on reasons of retribution (since retribution cannot be interpreted as a *necessary* killing), but would still include justifications that are based on reasons of deterrence or self-protection.

[83] The development of the full arguments against capital punishment is beyond the scope of my thesis.

[84] Which Pufendorf and Grotius mistakenly term ' unjust aggressor'.

intentionally (such as anti-democratic agents); (ii) non-culpable agents – this category is often called 'innocent aggressors'[85] and include all those who pose an unjust threat through an unintentional aggressive act (being unaware of the threat that he or she poses). Consider an attacking sleepwalker, or a five year old playing with a loaded gun that is pointed towards me as I enter the room; (iii) non-agents – this category is sometimes referred to as 'innocent threats' and include people who pose an unjust threat but not through an act of aggression. Rather, they are being used as an object (i.e. do not 'act') to threaten the defender. Consider Nozick's example of the person thrown down a narrow well towards a person unable to move to avoid the impact (and Rodin's explanation of this situation); or a close example given by Thomson of a fat person who is pushed (against his will) off the edge of a cliff just above X. If he falls on X he will kill her, but survive. The only way X can avoid dying is by moving to the side at the cost of there being nothing to stop his fall so that he will die.[86] And finally (iv) innocent bystander (or 'innocent shields of threat' to use Nozick's term) – this category include people who do not pose a threat themselves but can be used by the defender as a shield and thus may be hurt.[87] A person is not to be considered an aggressor (even in the third category) by his mere existence, or presence, even if it would impede my interests.[88] Pufendorf bases the right to self-defence on the fact that a person is an aggressor (categories i-

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[85] Though, as shall be seen, this term is also used as a general term to include attackers from both the second and the third categories.

[86] I am citing this second example because Nozick's example involves shooting at the falling man and as such may cause some inconvenience to some in permitting the killing of the non-agent. In the second example the defender's act does not involve the use of weapon and thus seems to me to be a more intuitive case in which self-defence may be permitted.

[87] This category includes all three types of bystanders identified by Thomson: substitution-of-a-bystander, use-of-a-bystander and riding-roughshod-over-a-bystander. Thomson 'Delf-Defense', *supra* note 50, pp 289-291.

[88] Consider situations of competition for limited food supplies. See Uniacke, *supra* note 1, p 69.

iii). That is, he or she poses a threat to the defender, regardless of culpability or agency. He differentiates between the innocent aggressor (which include non-culpable agents and non agents[89]) and the innocent bystander (category iv). Inflicting harm on the innocent bystander cannot be justified using the right to self-defence, although early natural law theorists disagree as to the possibility of justifying it on other grounds. Grotius argues that if an innocent bystander could be hurt then the right to self-defence would be overridden and the defender would be expected to sacrifice his or her life.[90] Pufendorf, on the other hand argues that the killing of an innocent bystander can be justified as an unintentional killing.[91] In any case, as Uniacke correctly argues '[the discussion]... allows us to see that *non-threats* who are harmed as means, or as an incidental effect of warding off the threat are not harmed in self-defence; rather, they are harmed in the course of self-defence. Force used *in self-defence* resists, repels or wards off an *immediate threat*'.[92] Indeed, from this discussion of the innocent bystander we also learn that the unjust threat can be posed even by people who can hardly be called 'aggressors' (such as non-culpable agents and non-agents). Nevertheless, these innocent aggressors will still, according to this definition, trigger the right to self-defence. The unjust element of the threat is to be found in the violation of the defender's rights.[93]

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[89] Pufendorf himself does not refer to the two categories directly, and it is arguable whether he had in mind situations of non-agents at all. However, his position sets the basis for the modern stance, which does consider non-agents among the aggressors that may be killed in self-defence.

[90] Such a killing is regarded by Grotius as an intentional killing. Grotius, *supra* note 42.

[91] Pufendorf, *supra* note 42.

[92] Uniacke, *supra* note 1, p 73. The emphasis is hers. In other words, killing the innocent bystander can be justified, at most by the justification or excuse of necessity. The defence of necessity is beyond the scope of my current research.

[93] These precise distinctions are not fully explained in the theories of Grotius and Pufendorf. See Uniacke, *supra* note 1, p 73.

Some scholars criticize this last point arguing that there is a pertinent moral difference that ought to distinguish the innocent (i.e. non-culpable and non-agent) from the aggressors who are morally at fault.[94] This moral difference amounts to the initiation of a right to self-defence only with respect to the latter category. The right to self-defence, it is argued, is grounded in the *unjust aggressor*. That is, an act of aggression by an intentional, reckless or negligent *culpable* person.[95] The non-culpable and non-agent aggressors are not different from the bystander and should be treated in the same way (namely, regarded as one that does not initiate a right to self-defence). Rodin, a contemporary proponent of this view develops an interesting argument. He argues that the demand for an unjust aggressor is the only coherent possibility, for it establishes a sufficiently substantive normative connection between the unjustified threat and the person against whom one uses defensive force (that is, it ensures that the aggressor is treated as a subject). To accept the idea of '*unjust threat*' requires an explanation for the different treatment given to non-culpable and non-agent aggressors (which triggers the right) and the innocent bystander (which does not trigger the right), but any explanation is bound to fail. One way to explain the difference is by appealing to the causal responsibility of the non-culpable and non-agent aggressors (but not the bystander). Rodin contends that usually causal responsibility is important because it is one constituent of moral culpability. However, in these circumstances the culpability has *ex hypothesis* been ruled out. Thus, it bears no significance.

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[94] By which I mean to include intentional, reckless and negligent aggressors.

[95] For example see RF Schopp *Justification Defenses and Just Convictions* (NY CUP 1998) 33-34; Cf. Montague, *supra* note 33, p 209. He finds the killing of an innocent aggressor similar to the killing of an innocent bystander, though he argues that even the latter is excusable.

One possible response is that causal responsibility is important because it reflects that the defender was wronged (his or her rights have been infringed/violated), even if the aggressor's responsibility is diminished.[96] If it is agreed that the non-culpable and non-agent aggressors are not privileged, or at liberty, to kill the defender, then that means that the defender has a claim against the aggressor that he or she (the aggressor) will not kill him or her (the defender). But Rodin dismisses this argument. Using Nozick's example of the man thrown down a well, he compares the non-agent aggressor to a falling stone, which is obviously not subjected to any duties. Likewise, the non-agent aggressor, qua posing the threat, is an object, which is not subject to any moral duty not to violate the defender's right. Hence, his or her threat does not violate (or infringe) the defender's right.[97]

Now, it is true that the stone is not subject to any duties, but it is also not in possession of any rights. It has no claims from others not to blast the stone in an attempt to avoid its impact. Conversely, in the case of the non-agent aggressor the argument is that at the time of the act of aggression he or she is both an object not subjected to any duties, and a person in possession of a right not to be killed. If at the time of the act of aggression the non-agent aggressor is an object, then she should be treated this way. One cannot, at the same time, not owe duties as an object, but be owed a duty as human (subject).[98] Furthermore, this suggests that A can never be justified in resisting a non-agent B from violating his or her (A's) rights.

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[96] A similar idea has been developed in the writing about justification and excuse, whereby a justification means that A was right to act as she did and her action did not wrong B, and excuse means that A's actions have wronged B but for some reason they cannot be attributed to her. See Fletcher *Rethinking Criminal Law*, *supra* note 11, pp 759-762; Rodin, *supra* note 1, pp 84-85.

[97] Rodin, *supra* note 1, pp 85-86.

[98] Rodin himself demands that the defender, in his defence, would treat the aggressor as a subject; *supra* note 1, p 88.

If such a resistance infringed any of B's rights, B would be under no obligation towards A to refrain from violating his or her rights. Note that we are talking about *warding off* potential harm (which at the time of B's reaction is still in the future), and not about *possible compensation* for damage that already happened. For example, Dan is coming into a room holding a cup of coffee. He stumbles over a book that was left on the floor by Alex. John, who is sitting near the entrance working on his computer, can prevent the coffee spilling over the computer (and damaging it) only by hitting Dan's hand and making him drop his cup. According to Rodin's account John has no *right* to break Dan's cup because Dan, qua falling is an object and does not owe John a duty to refrain from damaging his computer, as opposed to John who is under a duty to refrain from damaging Dan's property.

Secondly, as Rodin acknowledges, even if one is to accept this explanation, it is limited to non-agent aggressors and does not apply to non-culpable aggressors. These latter aggressors can hardly be regarded as removed from the realm of obligations altogether (i.e. acting 'like a stone'). Rodin argues, that where there is an excuse (i.e. the aggressor is non-culpable) then there is an insufficient normative connection between the unjustified threat and the aggressor against whom the defensive force is to be used. Hence, to use force against him or her would not be treating him or her as a moral subject but only as a physical entity.

Rodin acknowledges that in the case of non-culpable aggressors there is a 'wrong'; a violation of the defender's right. It means that the defender has a moral claim against the aggressor (although the aggressor is excused for not living up to his obligations). The recognition that the defender was wronged is itself recognition of the aggressor as a moral subject who has obligations. This is further reflected in the requirements of necessity and proportionality. It is important to remember that we are not dealing with punishment or with

what the aggressor 'deserves' but only with resisting or warding off an attack.[99] This distinction will be further explored later on. It is also important to note that Rodin gives some examples, which reflect his intuition, such as a child who had got hold of a gun and was shooting at me. He claims that the younger the child is the less he is inclined to say he has a right to shoot the child.[100] He builds his argument on this perception assuming that it is consistent with our intuition, and therefore his argument, too, is consistent with our intuitions. Yet, this perception seems counter-intuitive to me. In the case of the threatening child, I believe that even if he is an infant I have a right to shoot the child, and I do not 'wrong' him. I might think that this is not 'the right thing to do' but I am permitted, as part of my entitlement, to go ahead and shoot the infant.

The condition of the 'unjust aggressor' is also supported by an account based on the lesser harmful results theory.[101] As explained earlier, this theory is based on balancing the interests of the defender and the aggressor. The problem is that if we simply compare the interests of the two parties, we would never be able to justify the killing of an innocent aggressor by the defender in those instances where only the defender's life is threatened. What favours the defender is the aggressor's culpability in starting the fight. It is, as Fletcher explains, the moral fault of threatening the defender's interests that gives less consideration to the aggressor's interests in the balancing process.[102] Thus, the threat posed by the innocent aggressor cannot tilt the balance.

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[99] In a different context Rodin acknowledges that there are different conditions for just punishment and just defence (*supra* note 1, p 96).

[100] Rodin, *supra* note 1, p 93.

[101] Rodin himself is a proponent of the rights theory.

[102] Fletcher *Rethinking Criminal Law*, *supra* note 11, p 858.

I support the former account of the unjust threat. The use of force in self-defence is justified only because it is aimed at preventing harm, and not because of any attribution of blame.[103] Hence the emphasis should be on (1) whether or not the person acts intentionally, culpably or is an agent, he or she still poses a threat; and (2) the fact this threat is not objectively justifiable.[104] It is these features (of causal responsibility) that tilt the balance in favour of the defender, rather than his or her culpability.

Furthermore, an emphasis on the aggressor's culpability may suggest that self-defence has some role (even if a minor one) in punishment.[105] Indeed, the connections between self-defence and punishment appear in the writing of some theorists, though in other contexts. Pufendorf, for example, argues that the only exception to a prohibition against using force in the defence of property is in situations where the thief cannot be brought to court.[106] A more

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[103] I leave open the possibility of a person who uses defensive force for multiple reasons only one of which is self-defence and the person who acts due to reasons other than self-defence, though in fact (whether he or she is aware of it or not) the circumstances would allow him or her to act in self-defence in order to justify his or her actions *post facto* by appealing to the right to self-defence. Personally, I would allow this defence for the former defender (who acts on multiple reasons), but not for the latter (who acts for other reasons). Even so, this stance requires fuller arguments than I can give here and it is unnecessary for my current discussion.

[104] This argument was presented by J Horder to justify the use of force in self-defence against an innocent aggressor. J Horder 'Redrawing The Boundaries of Self-Defence' (1995) 58 MLR 431, 436.

[105] Though this is not a necessary conclusion. This is so because, as I will stress in the following pages, the defender may not act for reasons of desert but for reasons of self-defence. Furthermore, it is arguable that to say that since aggressor intentionally created a situation in which defender will have to suffer harm aggressor deserves to suffer harm by the defender in the process of resisting the attack initiated by him is not the same as saying that aggressor deserves to be punished for creating a threat of harm to defender. The 'desert' in the two situations refers to slightly different things (suffer harm *in process* of resisting the attack and punishment).

[106] This is Uniacke's interpretation of Pufendorf. See Uniacke, *supra* note 1, p 87.

explicit connection is advanced by Nozick who holds that self-defence ought to be treated the same as, or at least equivalent to, punishment. As such, if the defender inflicts harm on the aggressor in the course of self-defence, the harm suffered should be subtracted from the punishment that the aggressor deserves for his or her criminal act.[107] Yet as I have already explained, the reason why self-defence is located within the realm of criminal law is only because it provides an exemption to the general rule that prohibits the killing of another. This location does not necessarily entail a similarity of purposes between the two – criminal law and punishment on the one hand and self-defence on the other. And act of Punishment and an act of self-defence (as a right) are each based on different moral foundations. Self-defence expresses, exclusively, the right to prevent harm that is threatened, whereas punishment has various functions, none of which involves the prevention of instant harm. Fletcher notes that in self-administrating systems where self-defence is the primary mode of suppressing aggressive intrusions, and where state punishment appears as a continuation of the repressive measures initiated by the threatened defender, this connection might be an adequate one. Yet Anglo-American systems are not systems of this kind. In these, latter, systems the moral foundations for the right to self-defence and for punishment are distinct. Consequently this relationship between self-defence and punishment cannot exist.[108]

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[107] Nozick, *supra* note 39, pp 62-63.

[108] G Fletcher 'Punishment and Self-Defence' (1989) 8 Law and Philosophy 201. Examining the moral foundations of self-defence and punishment in Kant's theory, Fletcher shows that self-defence is founded on the concept of 'right' while punishment is grounded in the concept of 'justice'. See also G Fletcher *A Crime of Self-Defense* (NY The Free Press 1988) chap 2 p 18, esp. p 34.

The objection to a connection between self-defence and punishment given above is grounded in the presumption that punishment is justified by distinct reasons.[109] Yet there are theorists who argue that punishment is justified on the basis of self-protection.[110] According to this stance, it might be argued, a connection between self-defence and punishment may (and perhaps even should) exist. But, even if we were to accept some sharing of purposes between self-defence and punishment, there is still a pertinent difference between the two. Punishment and self-defence each achieve this (same) end in different ways: while self-defence is about *disabling* the *actual* criminal (aggressor), punishment is about *giving reasons* to the *potential* criminal by imposing censure and deprivation.[111] And, as Quinn explains: '[s]elf-protective threats of [punishment] will be our defenses of the first resort, serving to keep the contemplated offences from ever eventuating. Their capacity to play this role would be considerably diminished if potential criminals knew that any injury they might receive from the defendant's self-defense would reduce their [punishment]'.[112] In other words, the distinct means used by punishment and self-defence necessarily make these two institutions

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[109] Self-defence is justified by self-protection while punishment is justified by desert, deterrence, rehabilitation and the like.

[110] Quinn, for example, holds that punishment is justified since it is derived from the right to make people liable for punishment (i.e. the right to threaten people with punishment), and the latter right is justified on the basis of self-protection. Thus, the right to punish, too, is justified on the basis of self-protection. W Quinn 'The Right to Threaten and The Right to Punish' (1985) 14 Philosophy and Public Affairs 327, 348, 356. A separate question is whether the justification of punishment suggested by Quinn is sound but such a discussion would be beyond the scope of my current research. For some discussion on this issue see M Otzuka 'Quinn on Punishment and Using Persons as Means' (1996) 15 Law and Philosophy 201.

[111] This is so because, according to this stance, punishment is justified on the basis of the right to threaten with punishment and this latter right is justified because it provides people with reasons not to offend.

[112] Quinn, *supra* note 110.

exclusive of each other (i.e. unconnected). Furthermore, those who hold that punishment is justified by self-protection are often of the opinion that punishment is not subject to a requirement of proportionality.[113] Consequently, there is no reason for the recognition of any relationship between self-defence and punishment. The only reason Nozick advances this connection is in order to maintain proportionality between aggression and its subsequent punishment,[114] and this latter attempt to maintain proportionality is (according to this stance) pointless and erroneous. Accepting Rodin's argument of 'unjust aggressor' demands an additional explanation which would stress that although the demand is for the aggressor to act culpably, the defender may not act on reasons of desert but on the need to resist an imminent threat to his or her life (i.e. reasons of self-defence). That is, the defender is not allowed to act because he or she believes the defender deserves to be punished and suffer harm. The defender is allowed to act only because that is the only way for him or her to avoid the infliction of harm on him or herself.[115]

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[113] L Alexander 'The Doomsday Machine: Punishment, Proportionality and Prevention' (1980) 63 Monist 199; L Alexander 'Self-Defence, Punishment and Proportionality' (1991) 10 Law and Philosophy 323. I should note that, personally, I disagree with Alexander's position. However, discussing the validity of Alexander's rejection of a moral limit (to punishment) to proportionality requires a fuller explanation than I can give here. See also my discussion of the need of proportionality in Chapter Two section E.

It is also interesting to note that for similar reasons Alexander holds that self-defence, too, should not be subjected to proportionality.

[114] He holds that the harm suffered by the aggressor in the course of self-defence should be deducted from his or her punishment.

[115] In this discussion about the connections between self-defence and punishment I have tried to address the general claim that moral culpability has an important role in the justification of self-defence. For a further discussion of the details of Rodin's argument see the discussion of rights theory, above p 153 onwards.

In the previous section I also addressed the difficulties faced by advocates of the lesser harmful results theory to incorporating the culpability of the aggressor into the balancing process.[116]

In any case, for the purposes of this discussion there is no need to decide between the two interpretations of this requirement. Intentional unjust acts of aggression, which characterize anti-democratic acts, fall within the scope of both accounts, the unjust threat and the unjust aggressor.

2. Necessity

The requirement of necessity refers to 'some aim, purpose or end for which, or in the achievement of which, the use of force is indispensable or unavoidable'.[117] It brings in the principle of last resort, stating that self-defence can be used only when there is no other way to avoid the threat; namely, when the use of force is essential to secure life. Thus, it secures the use of defensive force as an exception to other ways of settling conflicts in society. It is also understood to call for patience in cases of minor harms, though the nature of this patience is controversial.[118] This requirement answers two questions: *'when'* to use force (only when it

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[116] See Above p 146-147.

[117] Uniacke, *supra* note 1, p 32.

[118] Grotius for example sees it as instances where the right have been overridden by Gospel laws, while Pufendorf sees it as waiving a right. He argues that the purpose of the right is to secure life. However, responding to a minor attack might escalate the level of force needed to secure life and in doing so endanger the defender's own life. See Grotius, *supra* note 42; Pufendorf, *supra* note 42. Though Uniacke does not express this explicitly, one can discern from her writing that she implicitly believes that self-defence is permitted only in

is necessary) and *'how much'* force can be used (only the necessary amount required to resist, repel, or ward off the attack).

The first limitation of *'when'* addresses two things: the defender's need to retreat, and his or her need to refrain from going about his or her own business. Of the natural law theorists, only Pufendorf addresses both these aspects. He argues that there is no general duty to retreat due to the possibility that it might weaken the defender's position. This reasoning does not convince me that there should not be a general duty. It covers only certain situations, thereby omitting other cases where the defender does have an option to retreat and avoid the danger and the need to use force in self-defence. Even if the defender's retreat only delayed the coming attack on his or her life, it would provide an opportunity to turn to the authorities and seek their help. The duty to retreat is also supported by the first two underlying theories of self-defence. The account of lesser harmful results demands retreat because only when there is no choice but to use force can the interests of the defender outweigh those of the aggressor. A similar stance is taken by the forced choice account, for only when there is no option to retreat is the defender forced into making a choice – and hence excused (or justified). (Where the defender can retreat he or she has another choice – to retreat, and thus is not forced into making a choice between lives.)

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cases of severe or deadly threats to life. However, this stance might be connected to the fact that her book focuses on killing in self-defence and therefore is limited to severe or deadly threats. Uniacke, *supra* note 1, pp 9-57.

Two other reasons that are commonly used in the United States to reject the need to retreat are the 'right reasoning' and the 'honour reasoning'.[119] 'Right reasoning', which is based on the fourth theory of vindication of a defender's autonomy, claims that no one can be compelled by a wrongdoer to yield his or her rights (to stay where he or she legally is). The law should favour and defend the liberty of law-abiding citizens over that of any aggressors. This stance attracts two different objections. Firstly, it might be argued, that although the freedom of movement and actions of the law-abiding citizen is essential, it should not be applied to homicide. The question posed is not merely about the right to be wherever the defender may rightfully be, but concerns the right of the defender to take the life of another. In these cases, the defender's right ought to be overridden. The second objection centres on the fact that ordinarily the law does not secure the enjoyment of rights, but rather grants redress for the violation of rights.[120]

The 'honour reasoning', also known as the 'true man rule', expresses the view that a cowardly retreat dishonours the defender. The obvious response to this is that the idea of honour cannot be compared with the value of human life and that retreat should not generate feelings of shame. In terms of the theory of lesser harmful results, the interest to be somewhere cannot be balanced against the interest in life. Moreover, an honourable person would regret even more the thought that he or she had the blood of another human being on his or her hands.

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[119] See JH Beale 'Retreat From A Murderous Assault' (1903) 16 Harvard L Rev 567; PE Mischke 'Criminal Law-Homicide-Self-Defense-Duty to Retreat' (1981) 48 Tennessee L Rev 1000.

[120] Beale, *supra* note 119, p 581.

The objections raised are all grounded in the high value we place on human life. This value ought to be translated into a general duty of retreat, although with possible exceptions. One such exception would arise in a situation where retreat would only worsen the defender's position and would not prevent the immediate, or shortly anticipated, threat to his or her life. This is the stand taken by current English law as explained by Ashworth.[121] Another exception recognized by English law is when an individual is attacked in his or her own home, though the reasoning differs from that of Pufendorf. The exception derives from an acceptance that a defender's right to remain in his or her home is valued more highly than an aggressor's basic rights, which would receive greater protection if the full duty to avoid a conflict applied. This is based on the physical and psychological need for some sort of shelter and sanctuary. Thus, one's home is regarded as one's 'castle'; that is, the place where one should be most protected. It is a vestige of the time when English law was based on a theory of the vindication of autonomy.[122] This exception can be criticized on the purely logical ground that 'the normal principle of avoiding conflict should apply where a householder's person is attacked or threatened, and that the principles applicable to defence of property should apply if the threat is to evict her or to steal or damage her property'.[123] It can be understood only as a compromise based on the survival of the principle of autonomy (which in earlier centuries was much more acceptable in common law).[124]

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[121] A Ashworth 'Self-Defence and The Right to Life' (1975) CLJ 282, 284-285, 293-294. See also Rodin, *supra* note 1, p 40.

[122] Fletcher *Rethinking Criminal Law*, *supra* note 11, p 863.

[123] Ashworth 'Self-Defence and The Right to Life', *supra* note 121, p 294. Ashworth brings this critique though he does not support it. This general exception makes the specific problems that would otherwise be raised by battered women and other people suffering from domestic violence superfluous. (e.g. the absence, or the feeling of an absence, of other places to hide from the abuser, the difficulties in leaving with children, etc.).

[124] Fletcher *Rethinking Criminal Law*, *supra* note 11, p 868.

The need to retreat does not call for the defender to refrain from going about his or her own business. This is the stand taken by Pufendorf, and this is the position currently held by English law.[125] A defender has a duty to retreat only when an adversary is in sight and an attack is imminent. The reason given is that the law favours the greater liberty of law-abiding citizens to continue acting lawfully in an early attempt to avoid violence and thereby protect basic rights. Ashworth correctly argues that this exception should be limited by the stipulation that in cases where the defender is aware of the threat, he or she has a duty to inform the authorities about this imminent threat thereby displaying an effort to avoid the anticipated conflict.[126]

With regard to limitations on *'how much'* force can be used, it should be noted that necessity does not require that the defensive response is the only possible method of avoiding an unjust threat, but merely that there be no less harmful alternative, which would achieve the same result. Thus, if X can shoot the aggressor in the arm instead of killing him or her, then X is not permitted to kill him or her. However, the fact that X could shoot him or her in the leg instead of the hand (and cause the same damage) does not undermine the permissibility of the defensive response.[127]

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[125] Fletcher *Rethinking Criminal Law*, *supra* note 11, p 295; A McColgan 'In Defence of Battered Women Who Kill' (1993) 13(4) OJLS 508, 525; *R* v *Field* [1972] Crim LR 435, CA.

[126] Ashworth 'Self-Defence and The Right to Life', *supra* note 121, p 296.

[127] Rodin, *supra* note 1, p 40.

3. Imminence

The requirement of imminence states that the danger that triggers a defensive response must be imminent. If the threat is not imminent the defender has to pursue an alternative line of action (e.g. turning to the authorities for help). Although this requirement stands on its own, its underlying reasoning suggests that it is derived from a requirement of necessity. Only when a threat is *imminent* is the use of force *necessary* (and hence, permitted).[128]

This requirement raises the question of pre-emptive defensive action. Natural law theorists hold that (in the civil state) a pre-emptive attack is permitted as an act of self-defence when the anticipated attack is immediate. That is, when the aggressor has already taken up a weapon, but excluding a pre-emptive attack which is based on mere suspicion and fear.[129] This demand is commonly accepted today. Yet, in recent years the understanding of the requirement as a strict prerequisite for a close connection in time between any pre-emptive defensive response and a potential attack (hereafter: immediacy) has attracted much criticism (which I support), especially (though not exclusively) in connection with battered women who kill their abusive partners while they are sleeping. To understand this criticism, consider a hostage held by her kidnappers. The hostage is told that she will probably be executed within a week. The history of the kidnappers (known to the hostage) demonstrates that there is

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[128] Cf. Grotius, *supra* note 42; Rodin, *supra* note 1, p 41; PH Robinson *Criminal Law Defenses* (vol 2 West Publishing Co Minnesota 1984) §131(b)(3), (c)(1) pp 76,78-79; WR Lafave & AW Scott *Criminal Law* (3rd ed, West Group Minnesota 2000) §5.7(d), p 495; RA Rosen 'On Self-Defense Imminence and Women Who Kill Their Batterers' (1993) 71 North Carolina L Rev 371.

[129] Grotius, *supra* note 42; Locke, *supra* note 42; Pufendorf, *supra* note 42. Pufendorf even adds that the aggressor has to be in close range of the defender.

a good chance they will kill her. The hostage finds herself alone with only one guard who has fallen asleep. Her only chance of escape is to kill the guard (who will otherwise call for help when he wakes up).[130] The threat posed to the hostage cannot be deemed immediate because she still has a whole week before she is killed. However, it is an *imminent* one considering that this is probably her last chance to escape. Can it be said then, that killing the guard was not an act of self-defence by the hostage merely because the threat to her life was not an *immediate* one? In such situations, critics argue, where the threat is 'all over' the defender there is a 'second order threat', that is the threat that when the aggressor attacks (and this anticipated attack is highly probable) the danger will be inescapable and the defender will not be able to resist, repel or ward off the attack. This second order threat deems the threat *imminent*, and it is this characteristic that justifies the use of force even though the threat is not *immediate*.[131]

Any modified requirement is founded on the underlying principle for the requirement of *immediacy*: the value of life, that stipulates that human life should be maintained as long as possible. Dressler points out that, recognizing the problems battered women might face, the Model Penal Code (in the United States) widened the permission to use force in self-defence in an attempt to avoid harm, even when that harm is not immediately forthcoming, by changing the requirement of 'imminence' to 'immediate necessity', at the same time keeping

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[130] This is the example used by McColgan, *supra* note 125, pp 517-519; J Horder 'Killing The Passive Abuser: A Theoretical Defence' in S Shute & AP Simester (ed) *Criminal Law: Doctrines of The General Part* (Oxford OUP 2002) 283; Horder 'Redrawing The Boundaries of Self-Defence', *supra* note 104; (Canadian case) *R* v *Lavallee* [1990] 1 SCR 852, 889.

[131] This term has been suggested by McColgan, *supra* note 125.

faithful to the value of human life.[132] Yet this definition still falls short of the definition offered by McColgan. She claims that recognizing self-defence in those situations discussed above adheres to the 'lesser harmful results' theory. If the defender has to wait for the anticipated attack in order to use force, then society gains nothing and the risk of being killed falls solely on the defender.[133] Horder suggests a somewhat different definition, which would respond to the situations described above while balancing the risk: 'a fair and reasonable opportunity to do otherwise'. Thus, whereas the requirement of *immediacy* shifts the burden of risk from the aggressor to the defender, and only a subjective requirement of fair opportunity (i.e. in cases of putative self-defence) would shift the risk to the aggressor, the requirement suggested gives an equal treatment to both. In so doing it follows the need to preserve human life.[134]

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[132] Model Penal Code §3.04 (1985); J Dressler 'Battered Women Who Kill Their Sleeping Tormentors: Reflections on Maintaining Respect For Human life While Killing Moral Monsters' in S Shute & AP Simester (ed) *Criminal Law: Doctrines of The General Part* (Oxford OUP 2002) 259; CO Finkelstein 'Self-Defense As A Rational Excuse' (1995-6) 57 U of Pittsburgh L Rev 621, 628. The new definition is supposed to include a case where violence against the defender is about to occur, such as a case where the abuser is going to his room to bring a rifle and the woman kills him with a kitchen knife, but will not include a case of killing a sleeping abuser, since there is no 'immediate necessity'.

[133] McColgan, *supra* note 125, pp 527-528.

[134] Horder 'Killing The Passive Abuser: A Theoretical Defence', *supra* note 130, pp 292-293. Other suggestions that have been introduced in the American literature include reading the requirements of 'reasonableness' and 'imminence' as 'inevitable' by referring to the concepts of fairness and equality that are the grounds for these requirements. (The important element is not the immediacy of the threat but the immediacy of the response necessary in defence.) See A Ripstein 'Self-Defense and Equal Protection' (1995-6) 57 U of Pittsburgh L Rev 685, 702-4. Rosen criticises Ripstein by saying that there are different meanings to the words 'imminence' and 'inevitable' and thus the interpretation is impossible. He offers to cancel the requirement of imminence and stay

This interpretation is more flexible and is consistent with the position that the requirement of imminence is merely one element (though an important one) of *necessity*. Ultimately, the defender has to prove that the use of defensive force was necessary and no other less harming alternative was available to her. This interpretation is appealing and one important implication will be discussed in Chapter Four.

4. Proportionality

The fourth and final requirement to impose inherent limitations on the right to self-defence is the requirement of proportionality. The proportionality demanded is between the harm inflicted by the defender and the potential harm that the aggressor would have inflicted on the defender if it were not for the defensive response, seeking parity in the worst cases.[135] This requirement is distinct from that of necessity. A defensive response might be necessary to avoid the harm of the unjust threat but may still be disproportionate. Similarly, a defensive response may be proportionate yet unnecessary. Consider two people, X and Y, walking along the railway. A train is approaching fast. Y is about to step on X's toe. The only way for X to avoid being stepped on would be to push Y. If pushed, Y would fall on the railway and be killed by the coming train. In this case the harm avoided by X (being stepped on) is not proportionate to the harm inflicted on Y (being killed), even though the response is a necessary one. Now consider C sees his old enemy D coming towards him on the main street waving a stick and threatening to break his bones. C sees a police officer a hundred yards

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with the necessity that expresses the underlying concept of inevitability or unavoidability, Rosen, *supra* note 128. For more criticism and other suggestions see the symposium in (1995-6) 57 U of Pittsburgh L Rev 461-824.

[135] Uniacke, *supra* note 1, pp 32-33.

away but instead of turning to him for help he picks up a piece of wood he finds on the pavement and when D attacks him he defends himself and breaks D's leg. C's response was *proportionate* to the harm he was threatened with but nevertheless it was not *necessary* because there was an alternative of turning to a police officer.

The difference between necessity and proportionality can be viewed from another angle. Necessity considers only the needs of the defender. Meanwhile, proportionality is concerned with the interests of the aggressor as well.[136] The theory of vindication of autonomy does not demand proportionality. Bearing in mind that 'rights' guarantee only the legal freedom of everyone in society, the right to self-defence is viewed as a privilege to use minimal (necessary) force against a wrongful attack on one's right. The right to self-defence reinforces the basic structure within which each individual can practice his or her rights. Thus, by definition, the interests of the aggressor should not to be taken into account. A right, it is claimed, can never yield to wrong. Thus there is no demand for proportionality.[137] Yet a view stating that only necessity can recognize a defensive act as being an act of self-defence

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[136] Fletcher 'The Right to Life', *supra* note 45, pp 141-142.

[137] Fletcher 'The Right and The Reasonable' (1985) 98 Harvard L Rev 949, 964-969; 'Punishment and Self-Defence', *supra* note 108, pp 208-211; This stance has been mitigated by the courts that view cases where there is no proportionality as an abuse of the right. Yet this is only a second order limitation and is not part of the right itself. This is to be contrasted, for example, with Uniacke's account. She argues that the justification of self-defence is an 'all things considered' justification, meaning that it is an overall judgement that it is permissible or right after all the aspects taken to be morally relevant have been considered. Uniacke, *supra* note 1. Personally I find myself somewhere in between, though close to Uniacke's stance. As I explained in the previous section, I hold that moral aspects have to be considered. However, a right to self-defence may include permission to use force even in some instances where it may be argued to be morally wrong (as against a five-year-old who is pointing a loaded gun at me).

dehumanises the aggressor, treating him or her as a creature rather than as a human being. Especially if the right to self-defence is understood not to depend on the culpability of the aggressor but on the unjust threat he or she may pose, even without any intention.

The requirement of proportionality raises the question of the interests that fall within the scope of self-defence. The natural law theorists differentiated between the state of nature and that of civil society. In a state of nature the right to self-defence extends to life, physical injury, freedom and property. Hobbes explains this by appealing to the liberty each individual has to do everything within his or her power. The reason given by Locke is that if the aggressor does not respect the defender's right to property the defender cannot be sure that his or her right to life and freedom would be respected.[138] However, in civil society the right is much more limited. All agree that the right extends to life and severe physical injury. The controversies focus on the possibility of using self-defence in the defence of freedom and property. Pufendorf argues that there is no right to use force in the defence of property itself, unless the thief (using force) threatens the life of the defender. In other words, Pufendorf holds that there is no right to self-defence in defence of property, but only in defence of life and, he accepts, that life may be threatened in the course of a robbery. Locke takes this position one step further. He claims that, although self-defence cannot be used against a thief for having stolen 'all that I am worth', it is permitted to use defensive force against the thief who targets only the property because of the threat to the life of the defender. That is, even if the thief does not threaten the life of the defender directly, the force used by the thief to steal the defender's property may still constitute an indirect threat to the life of the defender (the thief may still turn his force against the defender) and it is this threat to the defender's life that justifies his or her response. Yet I do not think that all instances of theft, and even all

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[138] Hobbes, *supra* note 15; Pufendorf, *supra* note 42; Locke, *supra* note 42.

instances of robbery entail a real (serious) threat to the defender's life.[139] This is a matter of a case-by-case evaluation. Thus, given that Locke's justification for the use of force is the threat to life and limb and not the threat to property, it cannot constitute a general rule for the use of force in defence of property. Grotius holds that force may be used in defence of property only when the life of the defender is endangered either by the thief or by the loss of property. However, this right extends to those situations in which the defender comes into danger trying to defend or recover his or her goods. That is because the defender has a right to try and recover his or her property.

Most contemporary scholars ignore the possibility of self-defence of property, most probably because they concentrate on the use of lethal force, which would be prohibited as being disproportionate to the potential harm to property. Rodin finds the use of force in defence of property upon which one's life directly depends permitted (such as where the thief steals all the water of a person who is travelling in the desert). That is, in such cases it would be permitted (and proportionate) to kill in self-defence. Following Grotius, Rodin bases the permission to kill in such cases on the threat to life rather than property. In all other instances (where there is no threat to life), Rodin argues, the defender is prohibited to use lethal force in defence of property. This is so because of the established and effective *post facto* means of redress (or reconstruction) in the case of attacks on property, which do not exist in cases of attack against a person.[140] However, as I have already mentioned, his discussion is limited to

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[139] At least according to current English law which hold that robbery includes those cases in which force was used to seize the property, and not to threaten the life of the victim (*R v Clouden* [1987] Crim LR 56, CA). Obviously, in cases of theft (i.e. which do not involve the use of force) the threat to the defender's life is reduced even further.

[140] Rodin, *supra* note 1, pp 44-45.

the use of lethal force and does not provide a general overview on the prospect of self-defence of property. In my opinion, self-defence ought to be permitted in defence of property so long as it fulfils the standard requirements of necessity, imminence and proportionality. This would mean, among other things, that: (i) proportionate power may be used only to stop an imminent threat to property and not in an attempt to stop a retreating empty-handed thief; and (ii) force may be used only if there is no other way to protect the property. It should be stressed that, in my opinion, under no circumstances would killing be a proportionate use of force in defence of *property* (it would though be proportionate if the loss of property generates a direct threat to life - that is, if the defender's life is directly dependent on the property – but then it is no longer a defence of property but of life). I am aware that the practical applications of this principle might raise some difficulties, however, these require fuller discussion than I can give here. I will just add that this position is accepted today in England and other jurisdictions, though there are jurisdictions that permit even killing in defence of property qua property,[141] similarly, jurisdictions which are based on the theory of a vindication of autonomy (e.g. Germany) hold that the right of self-defence extends to protect unjustified violation of the defender's rights, including his or her right to property.[142]

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[141] See the wide definition of s 3 of the Criminal Law act 1967 which covers the use of force in the prevention of crime against property, and the explanation in Smith & Hogan, *supra* note 11, p 283, 712. See also the law in Israel: Criminal Code, 1977 s 34J. But see Fletcher *A Crime of Self-Defense*, *supra* note 108, p 35 for the position of some states in the United States that permits killing in defence of property.

[142] Fletcher *Rethinking Criminal Law*, supra note 11, p 864. This is coupled with the absence of a requirement of proportionality. Although, he goes on to explain the way in which the German law can limit the scope of self-defence to only physical attacks.

SUMMARY

In this Chapter I have set out to justify the individual's right to self-defence. This examination is aimed at achieving two objectives. Firstly, it aims to establish the moral basis for the individual right to self-defence which will be used in the next Chapter to establish that an anti-democratic threat can set off the individual's right to self-defence (and consequently the state's duty). Secondly, it aims to set the boundaries of a right which would subsequently determine the internal boundaries of the state's duty of self-defence. The right to self-defence is a derivative right that originates from the core right not to be killed (or right to life) and is aimed at defending this core right. It is a right in the Hohfeldian sense although many jurisdictions recognize only a negative corresponding duty on a third person(s) not to frustrate the defender's response and only a corresponding *liberty* to, and not an *obligation* on, third person(s) to intervene and help the defender. The right to self-defence further encompasses three features, which characterize (Hohfeldian) rights. It establishes a categorical exception to the general prohibition (to use force), confirming that in these situations it is right (i.e. justified) to act in this manner. It also tends to prevail over consequentialist considerations when these conflict with other greater goods and where the aggressor is not wronged in any way when harmed in the course of self-defence. In adopting this position I have rejected Rodin's suggestion that permission (whether a liberty or a duty) for a third person(s) to intervene originates from an independent source (the core right not to be killed). For as much as his view is based on his intuition with respect to certain situations I do not share these intuitions. More generally, I think his position creates an awkward and complex structure of rights which makes the duty of a third person(s) not to intervene that does derive from the right to self-defence redundant.

I then go on to discuss the justification of self-defence. I address two questions: *why* is self-defence justified (that is, why is the defender permitted to prefer his or her life to the life of the aggressor), and *when* is it justified (that is, what are the internal requirements of the right). The first question generated four different answers. Some theorists hold that the answer is found in the 'lesser harmful results' of the defensive response. This position entails balancing the interests of the aggressor with those of the defender, taking into consideration the fault of the aggressor as the one who set off the chain of events. In response to criticisms a move has been made from showing that in any specific case the killing of the aggressor is a lesser harmful result, to referring to the overall beneficial consequences of a recognition of the right to self-defence – the reassurance to society and the deterrence it provides against aggressive acts. But this modification is still open to objections as being too strong and too weak. Too strong because if it is taken seriously it ought to permit the use of force even when it is unnecessary or disproportionate and too weak because it is still dependent on the marginal gains achieved by a recognition of the right.

Other theorists justify self-preference by reference to 'forced choice'. One strand of this school of thought uses forced choice as the basis for a justification of a particular distribution of harm rooted in considerations of justice. One consideration is the general rule of 'the causer pays' as being the side responsible for forcing the other side (the defender) into a position in which he must make a choice between lives. The second consideration is the present aggression, which creates a moral asymmetry since the aggressor can retreat leaving no such choice to the defender, and which does not allow the aggressor to disassociate him or herself from his or her own actions. The second strand of this school of thought advances the idea of forced choice as an excuse. Self-defence is permitted as a necessary response where there is no 'real choice' but to use defensive force. Ryan develops a variation of this view

comparing self-defence to duress. Both strands are subject to criticism. The second strand for counter-intuitively explaining self-defence only as an excuse rather than a justification (and Ryan who holds a combined view of both strands as paradoxical - excusing cases of intentional aggression about which we feel more strongly, and justifying cases of innocent aggressors about which we feel less strongly); and the first strand for failing to distinguish between those cases in which the aggression is unintentional (i.e. innocent aggressors and innocent threats) and the unjustified killing of an innocent bystander.

A third position, which is the most common among contemporary theorists, bases the justification on some variation of a 'rights theory'. They trace the right to self-defence back to its core right not to be killed (or the right to life), and ground self-defence in the prevailing core right of the defender (over that of the aggressor). The various accounts are based on the relationship between one's rights and the duty these imply on others. These theories face a substantial difficulty: they need to overcome the problem of forfeiture that is entailed in their theory (that is, they need to explain how one can lose one's right not to be killed, through one's actions), while providing a justification that would not be dependent on prior feeling towards, but be a guidance to, deciding which situations are covered by the right to self-defence. I have examined two possible responses to this problem: the first is to recognize a non-absolute right which is dependent on the actions of its owner. The second is to recognize an absolute right of limited scope (the limitation being either factual or moral). The advantage of the second method is in its response to the problems of forfeiture: a proper specification would limit the scope of the right so as to exclude all (and only) those situations in which presumably the right is forfeited. It also allows for humanity to be the only pre-condition of a right, which is not dependent on human conduct. Indeed, the first method is rejected for not overcoming the problem of self-preference. Using the second method theorists try to develop

a careful moral specification that would not be circular and would set the basis for the asymmetry between the aggressor and the defender. Uniacke (and Thomson, independently) suggests that a moral specification is founded on an objective fact – the causal responsibility of the unjust immediate threat, whereas Rodin holds that it is the aggressor's fault that is the basis for moral specification. I rejected the underlying assumption of both justifications according to which the right not to be killed has a limited scope. I found support for my position in two consequences of any limited-scope justification. Firstly, in cases of self-defence, in its irreconcilable correlation with the requirement of proportionality to a threat of injury which does not involve killing. Secondly, in its insufficient explanation of the situations of defenders who use force against their aggressors for some reason, unaware that in fact the aggressor is about to attack them, thus giving rise to a right to self-defence on their behalf.

The fourth justification I referred to is reflected in German law and justifies self-defence as the proper response to the vindication of a defender's autonomy. This justification is based on the Kantian view that distinguishes between rights and justice (morality). 'Right' guarantees the legal freedom of everyone in society, while justice addresses our duty to respect humanity in ourselves and in others (and is more demanding). The 'right' does not try to resolve conflicts that occur in social life while evaluating the moral weight of competing interests. Accordingly, self-defence is a privilege using minimal (necessary) force against a wrongful attack on one's right (determined objectively and leaving aside the aggressor's interests).

Finally, I suggested a different justification, one which is based on forced consequences. Consistent with my position that both sides have an absolute unconditional and unqualified

right not to be killed, I argued that the right to self-defence is based on other considerations. The justification combines two separate explanations that respond to two distinct situations: in cases of an intentional aggressor I adopt the justification strand advanced by the forced choice theory according to which 'the causer pays'. However, as this justification by itself cannot explain why innocent aggressors also trigger the right to self-defence and why they should be distinguished from bystanders, I offer a distinct justification for the right to self-defence in instances involving innocent aggressors. Given that it is either the aggressor or the defender that would have to pay the costs of the aggressor's bad luck, the aggressor must be the one to pay it. This justification, by its essence is limited to one that covers only the latter situations, and distinguishes between the innocent aggressor and the bystander (who has no 'good' or 'bad' luck).

I moved on to discuss the content of the right (*when* is it justified) identifying four elements: the unjust threat or unjust aggressor, necessity, imminence and proportionality. The first element was found to be of great importance as it is at the root of the controversy between the various positions held by right-theorists, including Uniacke and Rodin. The question is what actions trigger the right to self-defence. At one end we can find Uniacke, who echoes a common perception among contemporary writers, according to which it is the unjust threat posed by the aggressor which sets off the right to self-defence. This position widens the scope of self-defence to include the use of force in response to non-culpable aggressors and non-agent aggressors. The line is drawn according to the responsibility of the aggressor for the unjust threat posed to the defender, leaving an innocent bystander beyond the reach of the right (that is, the killing of a bystander is not justified as an act of self-defence). At the other end of the spectrum, Rodin advances the view that it is the unjust aggressor that triggers the right to self-defence. It is the fault component in the aggressor's

conduct, thus setting a narrow right which covers only the use of force against the culpable aggressor. Supporting the former position I rejected Rodin's view on the grounds that the causal responsibility reflects the fact that the defender was wronged (his or her rights have been infringed/violated), even if the aggressor's responsibility is diminished. I further rejected his claim that the non-agent aggressor is not subject to any rights, and thus cannot wrong the defender. I argued that this position is incoherent because a person cannot at the same time, and qua the same act, both not be subject to any duties and have claims from others (that his or her right not to be killed will not be violated). With respect to non-culpable aggressors I argued that a recognition that they have 'wronged' another (which Rodin himself agrees with) is recognition of the aggressor as a moral subject who has obligations. This is further reflected in the demands made by the requirements of necessity and proportionality. Finally I warned that a position that is based on the notion of fault might be interpreted to mean that self-defence has some role of punishment (even if only a minor one). I explained why this position should be rejected. Punishment is founded on different principles and is aimed at achieving distinct ends, none of which are consistent with those ends at the basis of the right to self-defence (i.e. with the reasons on which the defender may act).

The requirement of necessity is often viewed as the most important requirement. It addresses two questions: 'when to use force?' – for which the answer is: only when it is necessary; that is, only as a last resort; and 'how much force is to be used?' to which the answer is – only that amount that is necessary to resist the attack. This requirement raises two interesting issues: the first is with regard to the need to retreat and the second to permission for the defender to go about his or her own business. In some States in the United States the law does not demand that the defender retreat in the face of an imminent threat. The reasons given for this stand is 'right reasoning' – that right should never yield to wrong, and 'honour

reasoning' – that it would be a disgrace for a person to run away from danger. I found both reasons to be unsound. Against the right reasoning I argued that freedoms of movement and action (enjoyed by law abiding citizens) ought to withdraw when the life of a human being is at stake (the aggressor's life) and against honour reasoning I pointed out that sparing a person's life cannot be compared with one's honour (the defender's). The only exception to this rule of retreat is where the attack is taking place in one's home. Here, contrary to the general rationale, the law follows psychological feelings that 'a person's home is her castle' and thus, deserves greater protection. Unlike this demand to withdraw in the face of an imminent attack, there is no demand that a person would refrain from going about his or her own business in anticipation of possible danger. For the freedom of law-abiding citizens is to be favoured (so as to allow them to continue acting lawfully in early attempts to avoid danger).

The third requirement is that any threat posed must be imminent. Though distinct, this requirement is but one aspect of necessity. As such, I argued, it should be properly understood as 'the last reasonable opportunity to resist the harm' so as to accommodate possible 'hostage' situations in which there is a gap of time between the last effective opportunity to ward off the attack and the time in which the threat is to be executed.

Finally, I addressed the requirement of proportionality, which demands that (in the worst situations) any harm inflicted on the aggressor would not exceed the potential harm that the aggressor were to inflict on the defender. In attempting to set the limits that this requirement imposes on self-defence I also referred to threats to property. Though most contemporary theorists reject an extension of the right to include the defence of property I argued in favour of such an extension so long as it fulfils the standard requirements of necessity, imminence

and proportionality. Other theorists rejected this extension mainly because their discussion concentrates on *killing* in self-defence. However, if we limit to non-fatal force, there is no reason not to extend the right to the defence of property. Thus, proportionate power may be used only to stop an imminent threat to property, and the force may be used only if there is no other way to protect the property. Under no circumstances, I argued, would killing be a proportionate use of force in defence of property. With this I have completed the analysis of the individual's right to self-defence, and set the premise for Chapter Four.

Chapter 4 - The derivative duty of the state to defend itself from anti-democratic ideologies

In the last Chapter I discussed the individual's right to self-defence against a threat to life and limb, but how is this right connected to the state's duty of self-defence against anti-democratic ideologies? In this Chapter I will try to establish a derivative connection between the individual's right and the state's duty, and the extension of the state's duty to include the use of some pre-emptive measures against anti-democratic conduct that is temporally remote from its undesired consequences. As a derivative duty, the state's duty of self-defence is limited by the same principles that govern the right to self-defence. Still, this move from the individual to the state is not a trivial one, and some pertinent differences must be addressed in the application of these principles to the state's duty. The duty recognized, even after these differences are accommodated, is still a limited one.

In the first section I will suggest two ways to explain the connection between the individual's right to self-defence and the state's duty of self-defence. I will reject the first account as unsatisfactory and concentrate on the second. In section two I will develop this second account and argue that the right to self-defence is triggered not only in the face of a threat to life but also in the face of a threat to liberty. Next, I will attempt to justify the state's duty by appealing to the individual's right to self-defence. I will consider three possibilities: a duty which corresponds to the individual's right (a similar one to the duty of third persons), a duty which is part of a general duty of care (similar to the duty of other third parties who owe a special duty of care, such as parents to their children), and a duty which derives from the individual right, and from it being a *just* course of action in the specific case, and that transforms from a right to a duty in the shift from the individual to the state. I will reject the

first two possibilities, the first as having an unsound basis, and the second as being an inaccurate description, and will opt for the latter explanation as being the most accurate. Finally, sections three and four examine what is entailed by this duty of self-defence. What are the limitations that the internal principles governing the right to self-defence impose on the state's duty, and why there are no further external limitations based on other basic rights.

A. TWO ACCOUNTS OF A RELATIONSHIP

There are two possible routes to establishing the connection between the individual's right to self-defence and the state's duty to defend itself against anti-democratic ideologies. The first shows that the individual right of self-defence against threats to life (hereafter: the core-right) generates a special duty of self-defence against the same type of threats owed by the state to its citizens.[1] This duty also extends to include severe threats to liberty (i.e. anti-democratic threats). The second route shows that the individual right to self-defence extends to include a right to self-defence against threats to liberty (hereafter: the extended right), and that this extended right generates a special duty – owed by the state to its citizens – to defend itself against anti-democratic ideologies.

The first account suffers from, what I think is, a major weakness, for the two stages of the argument[2] cannot be reconciled. The argument advanced in the second stage is that the

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[1] I use the term 'citizens' in a loose sense to refer to the members of a given society.

[2] From the right to self-defence against threats to life to a duty of self-defence against threats to life, and subsequently from a duty of self-defence against threats to life to a duty that covers threats to liberty.

individual has only a core-right to self-defence (i.e. against threats to life) whereas the duty of the state that this right generates extends to include threats *to liberty*. Yet this argument is inconsistent with any reasoning we might give to explain the move that takes place in the first stage. In this first stage I need to explain how the individual core-right to self-defence generates the state's duty of self-defence against threats *to life*. There are two possible explanations for this relationship between the individual's core-right and the state's duty (against threats to life). Either the state's duty is the corresponding duty entailed in the individual core-right, or else the state's duty derives from the individual's core-right to self-defence. Both explanations limit the state's duty to the boundaries set by the individual's core-right. A right cannot generate a corresponding duty to another person to act beyond the boundaries of permission. If A has a right to X and not to Y it means that others have a duty to act in a way that promotes X (either by refraining from intervening with A's actions with regard to X or by actively helping him to get X) but this right to X cannot generate a duty to others to act in a way which promotes Y. Similarly, a derivative right (or duty) cannot extend beyond the scope of the right from which it derives.

It might be argued that there is yet another way to explain the second stage – as justified by an analogy to the state's duty against threats *to life*, and hence there is no inconsistency between the two stages of the argument. According to this line of argument, once we have established (in the first stage) that the state has a duty of self-defence against threats to the lives of its citizens, it is possible to justify the state's parallel duty to defend itself from anti-democratic threats as an analogous duty. This is similar to the move that took place in the previous Chapter in which I argued that the right to self-defence should extend to include

defence of property.[3] In my discussion there I expressly rejected the claim that defence of property might be justified by appealing to the right not to be killed (or the right to life). Instead, I argued that defence of property *per se*, even when no threat to life is involved, ought to be recognized as long as it is subjected to the same conditions of necessity, imminence and proportionality which characterize the core-right to self-defence. Going along these lines, is it not possible to argue that an extension of the state's duty to defence against threats to liberty can be made? I think this line of reasoning is not sustainable due to the pertinent different justifications that ground both the right to self-defence (both the core right and the property-extension) and the state's duty of self-defence. In the individual realm, the right to self-defence against threats to life is justified by appealing to a core right (the need to resist an imminent threat to the right not to be killed). Therefore I think it is legitimate to appeal to a second core right (to property) to base an analogous derivative right in defence of property (i.e. a need to resist an imminent threat to property). To be able to make a similar analogy in the realm of the state, the justification of both the core-duty of self-defence against threats to life and of the extended duty of self-defence against threats to liberty have to be of the same kind. However, the core-duty of the state is justified by appealing to the individual core-right to self-defence. Theoretically, this means that the extended-duty of self-defence ought to be justified by reference to an individual's extended right to self-defence. Yet the essence of the first account is to overcome the problem that individual citizens do not have a right to self-defence against threats to liberty. If individual citizens do have such a right then the most straightforward way would be to try and justify the state's duty by appealing to that extended-right as is suggested by the second account above. Indeed, as I will argue in the following sections, individual citizens have a right to self-defence against threats to liberty and consequently, the state's duty derives from this right.

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[3] See Chapter Three, p 198 above.

B. THE STATE'S DERIVATIVE DUTY OF SELF-DEFENCE

The second account that attempts to explain the relationship between the individual's right to self-defence and the state's duty of self-defence against anti-democratic threats requires a two stage analysis. In the first stage I will establish an extension of the individual's right to self-defence to include responses to threats to liberty. Subsequently, in the second stage I suggest that the state's (extended) duty derives from the individual's extended right of self-defence.

1. A right to self-defence against threats to liberty

Do threats to liberty trigger the individual's right to self-defence? Although liberty may seem a very worthy candidate for the protection of self-defence, the possibility of such an extension of the right has attracted very little discussion in recent years. Locke was the first to argue that self-defence entails the right to use force (including lethal force) in defence of liberty. Liberty, he claims, is the main instrument the defender has to preserve his or her life. The fear is that once the aggressor takes away the defender's freedom he or she will be able to do as he or she pleases with the defender, and even deprive the defender of his or her life.[4] Rodin further explains the connection between life and liberty stating that:

> Life and liberty are often listed together as basic human goods of central importance, and it is sometimes claimed that it is justifiable to kill in defence of liberty. These assertions derive their plausibility from the observation that liberty is a necessary condition for the shaping of any

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[4] This reasoning tallies with the flexible interpretation of the requirement of imminence: defensive force to protect freedom is permitted because that is the last reasonable opportunity for the defender to protect his or her life (even though at the time he or she is deprived only of freedom and it is not certain that he or she will be killed later on).

> meaningful life. Liberty is both a component of, and a precondition for, many of the substantive goods that we value; in part we value life because of the liberty that it enables us to exercise. For this reason, it is conceived that it may sometimes be proportionate to defend one's liberty with lethal force, for to deprive a person of liberty in certain contexts is to deprive them of meaningful life.[5]

However, he continues, this claim is restricted to permitting the use of lethal force only in very extreme situations such as enslavement, lifetime incarceration or other very grave violations of liberty. Even the deprivation of one's political freedoms does not engender, according to Rodin, the right to use lethal force. For only in these extreme situations can the loss of the value of liberty come close to that of life. Yet although he is willing to permit the use of lethal force in extreme situations, he adds that even then it would usually be difficult to fulfil the requirement of necessity, because it is often hard to determine whether and when it is necessary to kill to escape the harm.

I agree with the justification Rodin proffers for the use of lethal force in defence of liberty but I do not agree with the limits he places on that permission. Obviously, not every violation of liberty generates permission to use lethal force. In many cases, such force would be disproportionate to the loss of liberty and in many cases *post facto* redress is possible. However, the loss of political freedom, by which I mean the loss of the possibility to maintain self-government, is in my view a grave loss of liberty. A loss of this kind that triggers a right to self-defence would justify even the use of lethal force. I would argue along the lines of Locke's position that, once political freedom is lost, individuals have no way of ensuring control over either any future decision regarding their preferred way of life or the preservation

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[5] D Rodin *War & Self-Defense* (Oxford OUP 2002) 47.

of the way of life already chosen.[6] At the time when this control were directly impeded, and if individuals' freedom were severely violated, they would probably be in a position where they cannot effectively oppose or stop potential harm (including the possibility of losing their lives). The threat may be an imminent one, even if some time passes before it is realized. The argument draws on both the same core right not to be killed and on other core rights to the various basic interests we have: it draws on the core right not to be killed – because as I have explained in Chapter Three, life is closely connected with the idea of liberty, and is at least partly, justified by it. Therefore, a threat to one's liberty is also a potential threat to one's life (this is Locke's position); and it draws on other core rights, for as I argued in Chapter One a threat to liberty is a threat to the whole range of basic interests.[7] These combined core rights on which this extension draws, and the importance of the right not to be killed in the justification of this extension, make the extension an inseparable part of the right to self-defence rather than a mere analogy to the right to self-defence against threats to life.[8]

In terms of the 'forced consequences' justification of the right to self-defence, since we are dealing with culpable aggressors, the justification of the right is based on the guilt-based selection principle of 'the causer pays'. It is due to the fact that the anti-democratic agent forces the citizen into a position in which he or she has to choose between his or her personal freedom and the anti-democratic agent's life that permits his or her violent (and even lethal)

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[6] For a detailed discussion about the types of threats to liberty that the loss of political freedom generates see the discussion about the second difference in Chapter One, p 36-38.

[7] See the second difference above, p 36-38

[8] It is interesting to see that indeed, article 2 (subsection 2(c)) of the European Convention of Human Rights does allow for the use of lethal force in response to 'insurrection'; a term which includes non-violent revolution and thus, I think, captures threats to liberty *per se*.

response.[9] Furthermore, I do not think that the practical implications of the interest in liberty would, in general, as Rodin claims, cause special difficulties. This is so even if we adopt the more stringent approach in which the test to assess the existence of the requirements of self-defence (necessity, imminence and proportionality) is an objective test with subjective elements. A two-stage test can be constructed in the following manner: (i) did the defender honestly believe that his or her actions were a necessary (and proportionate) response to an imminent attack? If so, (ii) was the defender's response reasonable (i.e. would a *reasonable* person, or a reasonable person with the characteristics of the defender respond in a similar way) given the information that was *reasonably* available in the circumstances?[10] The practical implication of this test means that future knowledge as to the accuracy of the judgement is not relevant. It is a question of common sense. Similarly, I would argue that the question of imminence should be interpreted widely to include 'the last reasonable opportunity' even if the attack (harm) is not immediate in time.

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[9] Note that since we are dealing with anti-democratic agents we are limited only to intentional aggressors. Hence the justification is the same one given by the justification version of 'forced choice' theory, and there is no need to appeal to matters of luck as discussed in the last Chapter.

[10] Obviously, if we adapt the more lenient approach, which demands only that the defender would honestly believe in the imminence of the attack and in the necessity of the response, we would not encounter any special difficulties. Due to space limitation I shall not discuss in details the controversies surrounding the subjective verses the objective tests.

2. The state's derivative duty of self-defence against anti-democratic ideologies

(a) A duty of third party which corresponds to the right to self-defence

Now that I have established the extended-right of self-defence I can move on to the second stage, in which I argue that the individual's extended-right to self-defence triggers the state's duty of self-defence against anti-democratic ideologies (hereafter: the state's duty of self-defence). The first attempt to justify this position compares the state to third parties. Although, as I shall later show, this is an unsuccessful one, it is important to explore it so as to understand the alternative justification I will offer. The claim is that the state should be compared to other third parties. In the previous Chapter[11] I argued that the (defender's) right to self-defence gives permission (*liberty*) to unspecified third parties[12] to come to the aid of the defender. The aim of this corresponding permission is to help save the life and physical integrity of the defender, and there is nothing in this reasoning that should restrict it from being extended to include the ('third party') state. If the state (through its agents) can provide this help, it is, at the very least, *permitted* to do so. Such a comparison must, obviously be, sensitive to the distinct characteristics of the state – its powers and the restrictions that must be placed on their use for various reasons. Nevertheless, based on the background reasoning for the permission, it should apply to the state too.

Still, it may be argued that this line of reasoning can take us only so far – all it can do is establish *permission* for the state to intervene, whereas I have set out to justify the premise

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[11] p 138-143 above.

[12] I refer to 'unspecified' third parties to distinguish them from third parties who owe a special duty of care to the defender. The latter will be discussed in the following pages.

that the state has a *duty* to intervene. One, that is not dependent on the state's good will, but is an *obligation* which it is expected to fulfil. The answer lies in the nature of this permission to intervene. Permission, it must be remembered, is a weak form of a corresponding duty, which characterizes rights. Yet many jurisdictions do not recognize a more rigorous analysis of this relationship, which would not only *permit* third parties to intervene, but would also make it an *obligation* to intervene – a 'real' duty. Two main reasons have been given to justify this stance, both of which do not apply in the case of the state.[13] The first is the danger to the life of the helper (i.e. third party) that, in many cases, such an obligation entails. Often, coming to the help of the defender would mean putting your own life at risk. However, this reasoning does not explain why a limited duty is not recognized, one that would require third parties to

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[13] The discussion about this obligation is part of a wider discussion about a general duty to rescue, also known as 'the good Samaritan law'. The (lack of) obligation to come to the aid of the defender is only one instance in which a third party is required (or not) to help a person in physical distress. These are often among the more problematic situations, because in helping the third party one may put one's own life at risk. Thus, the various reasons given to explain why a general duty to rescue is not recognized bear extra weight in these cases. So much so that even in jurisdictions that do recognize the 'good Samaritan law', the obligation to intervene is limited to only those situations in which such intervention does not endanger the helper's life. On the other hand, an obligation to intervene in the case of self-defence differs from other instances covered by the general duty to rescue. This is because in instances of self-defence the intervention, practically, means giving permission to third parties to use force against other people – the aggressors, whereas in other situations of distress a duty to rescue does not necessarily entail such permission (e.g. intervention in situations that fall under the heading of necessity). For a more detailed discussion of the general duty to rescue see for example HM Malm 'Bad Samaritan Laws: Harm, Help or Hype?' (2000) 19 Law and Philosophy 684; AD Woozley 'A Duty to Rescue: Some Thoughts on Criminal Liability' (1983) 69(2) Virginia L Rev 1273; J Silver 'The Duty to Rescue: A Reexamination and Proposal' (1985) 26 William & Mary L Rev 423; Cf. A Ashworth 'The Scope of Criminal Liability For Omissions' (1989) 105 LQR 424.

intervene only where such intervention would not put their own life at risk.[14] Thus we turn to the second explanation, which says that a duty (i.e. an obligation) to intervene involves a substantial intrusion into the freedom of a third party. The aim of the law is to maximise individual liberty, so as to allow each individual to pursue his or her own conception of good. Therefore the only legitimate constraints to one's freedom are those necessary to restrain someone from causing injury or loss to another person. An obligation to rescue someone necessitates the imposition of a requirement to act in a specific way at a specific time. By its nature, this demand may be inconvenient to the helper, may conflict with his or her interests and may prevent the helper from doing anything else at that particular time.[15] A related argument is that even if it is appropriate to require some affirmative actions, rescue is not one of them. The decision to come to the aid of a person in distress should be left to the conscience of each individual and recognition of an obligation is an inappropriate paternalistic act of 'Big Brother'.

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[14] One answer to this is that if we were to create a law that would create a duty to rescue only with respect to situations not involving risk to the helper, especially in situations which give rise to a right to self-defence, the duty recognized would be so marginal as to make such a duty unworthwhile. See Woozley, *supra* note 13, p 1276. On the other hand, in those jurisdictions that do recognize a general duty to rescue, it is indeed limited to situations in which helping a person in distress does not involve putting at risk the life of the helper. For example see the law in Israel: Though Shalt Not Stand Idly by The Blood of Thy Neighbour Act 1998, which states in s 1(a): Any person faced with another person in serious and immediate danger to his or her life, physical integrity or heath must provide help unless doing so puts the helper and / or other persons in danger. (The translation is mine as there is no formal translation – S.W).

[15] This would be true whether a failure to fulfil such obligation were dealt with in either criminal law or civil law.

Even if we accept the reasons given to justify rejecting a general duty to rescue, they do not apply in the case of the state. The state, unlike individual citizens, cannot argue that because the life of its agents may be put at risk (which is the only sensible way to interpret the idea of 'putting the state's life at risk') there should be no obligation on it to help its citizens. Similarly, the concept of individual freedom is not applicable in the case of the state. The state has no interest in 'freedom'. Hence, it seems possible to argue that with respect to the state, the right to self-defence generates a duty – an obligation – and not mere permission.

(b) A duty founded on a (special) general duty of care

Though this may be possible, it seems that what we demand from the state is more basic than that. It is not merely that the above reasons do not apply to the state. It is rather that the state is created *in order to* provide this help. At least one of its major roles is to secure the lives and liberty of its citizens and protect them from threats, internal as well as external.[16] The claim is that the essence of the state is in its duty to secure the lives and freedom of its citizens. In other words, the state has a prior general duty of care. Thus, it seems better to compare the state to other instances in which third parties have a special duty of care.

Though, for the reasons explained above, the right to self-defence is commonly understood to give mere *permission* to unspecified third parties to intervene, it is also agreed that those third parties who owe a special duty of care to the defender *must* intervene. They are under an obligation to help the defender, even at the cost of risking their own lives (though the level of risk varies according the specific duty of care). Thus, a parent has to

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[16] This role of the state is commonly accepted by the various traditions of democracy, whether as the sole role – in the libertarian tradition - or as one of the roles of the state – in communitarian traditions.

come to the help of his or her son when the latter is being attacked; a doctor must try and stop the nurse who is about to inject a lethal amount of morphine to a patient; a lifeguard must come to the aid of a person who is being dragged underwater in the swimming pool in which the lifeguard is working, and so on. In the same manner we speak of a police officer's duty (or any other agent of the state) to intervene and help the defender. It would be an unnecessary complication to explain the police officer's duty of care as arising from his contract with the state, and the state's duty as arising from a comparison with the general unspecified public, rather than its special duty of care to its citizens.

Where does this obligation-to-intervene owed by third parties of this latter category come from? Does it derive from the defender's right to self-defence, or is it rooted in some other rational explanation? The answer is found in the common characteristics that define this group; the duty originates in the special (general) duty of care, rather than the defender's right to self-defence. More accurately, the obligation to act is embodied in the special moral relationship between the third party and the defender (though this moral relationship may differ from one case to another: a contract, family, promise etc.). This special relationship establishes a general duty to protect the defender, and situations of self-defence are only one sub-category among others in which the third person is required to intervene.[17] Yet the content of this general duty, in the case of self-defence, does in a sense derive from or correspond to, the defender's right to self-defence, at least in the core cases of intentional attack by a culpable person, which are at the centre of this project. Third parties are permitted (and required) to intervene only when the defender is permitted to defend him or herself. Their permission extends only to actions that are permitted to the defender him or herself (i.e. they are restricted by an unjust threat, necessity, imminence and proportionality). In other

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[17] Cf. Rodin, *supra* note 5, p 37-38.

words, these third parties draw on a distinct and independent general duty of care in order to explain why they are not only at liberty to help the defender but are obligated to do so. They appeal to the justification of the defender to explain why they are permitted to harm another person. Unlike other situations in which aid required of a third party does not involve hurting another person, in situations of self-defence helping the defender involves harming the aggressor. Thus third parties have to provide a justification for preferring the life of the defender to that of the aggressor. Their justification is that of the defender him or herself. Their claim is as follows: we have a duty to protect the life of the defender. Therefore, in any situation in which the defender is permitted to protect him or herself we must come to his or her aid. Situations of self-defence are no exception to this duty – if the defender has a right to self-defence based on forced consequences (or any other reason for that matter) then his or her permission extends to include our help. So, although the duty to come to the aid of the defender is founded on a distinct duty of care (i.e. a general duty of care), it is still correct to refer to this duty as being derived from the defender's right to self-defence (the essence of the permission derives from that right). I will leave open the question of the permission (and obligation) in this category of third parties to intervene where the defender has given up his or her right to self-defence. In the last Chapter, I pointed to the direction of my intuitions, but I will not develop here a full argument as these situations are beyond the scope of my current research.

(c) A transference of the individual's right to self-defence

Yet even the explanation above seems to fall short of the description of the relationship between citizens and the state. The threat that anti-democratic ideologies pose cannot be answered by the individual citizen. The individual does not face one or a few aggressors who are physically standing in front of him or her. The number of aggressors is unknown and the

threat, though not physically present, may nevertheless be a real and imminent one. Furthermore, as explained in Chapter One in the discussion of the first characteristic of the anti-democratic threat, it is a first order threat to all the individuals who would be harmed from one and the same successfully materialized anti-democratic threat. The claim is that in these circumstances the individual citizens do not only appeal to the state for help but rather transfer their right to the state (as the only institution that can effectively resist the threat), which acts as an agent on behalf of its citizens. This, I think, is the reason for referring to the state's duty to defend itself against anti-democratic ideologies in terms of a right – because it is the result of the transferred right of the individual. However, in the transfer, this right changes into a duty, in the same way that other rights do when they are transferred to third parties. When the rights of a landowner are transferred to a guardian, the guardian is obligated (and not merely permitted) to take all necessary steps to ensure the rights of the owner and to benefit him or her.

(d) A right to self-defence which is also a just cause of action

Even so, so far, the discussion about the individual right to self-defence focused on the existence of a 'right' – a status – in criminal law which prevents ascription of blame to the defender, or the third party who comes to his or her help. But, as I have noted in Chapter Three[18] having a right means that one 'has a right to do wrong' without the interference of others. Acting upon one's right is not necessarily the *just* course of action, or to use Uniacke's terminology – it may not be the right thing to do 'all things considered'. At times, *justice* would demand that a person would not hold to his or her right but rather act in a conflicting way. If A has a right to freedom of expression it means that she can dress up as a Nazi soldier.

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[18] See p 135 *above*, especially fn 7.

This, however, does not deem her action the right thing to do – the action may still be considered bad taste, and the wrong thing to do. The distinction between having a right to self-defence and acting justly in self-defence in a specific case is of great importance. The state is a special entity and is expected to act on principles of justice. Throughout the thesis I have argued that it is not enough that the state is not prevented from acting in a certain way. It has to act because this is what *justice* demands of it. If so, then unless I can show that the individual right to self-defence against an anti-democratic threat is not only a *right* but also a *just* course of action, the right to self-defence could not form the basis for the state's duty of self-defence against anti-democratic threats. This is true especially if this duty is to grant the state permission to use coercive measures of criminal law.

So, is acting in self-defence against an anti-democratic threat also a just cause of action? I believe that acting in self-defence against a culpable anti-democratic aggressor is a just response. The anti-democratic actor is a culpable actor: he is aware of the harmful consequences involved, and chooses to carry out the anti-democratic enterprise. According to the 'forced consequences' theory, which I hold to be the correct justification for the right to self-defence, the relevant justification for the defensive response to anti-democratic threats is based on the guilt-based justification of the causer pays. According to this theory, discussed in the previous Chapter, the victim has a forced choice of either using force against the aggressor or being injured himself by the aggressor. The aggressor, on the other hand, had no such forced choice: he had the option of refraining from attacking the victim; and had acted culpably in not so refraining. Thus, if some harm must befall someone in an attempt to prevent the threat from materializing, it is the aggressor who deliberately created this situation

(from which he can retreat) who deserves to suffer such harm.[19] That is, in these instances the moral guilt of the aggressor plays a role in the reasoning of the right. Indeed, the right to self-defence against non-culpable and non-agent aggressors is based on the causal connection *per-se*, on the forced consequences. Consequently, in these instances I do not necessarily think that acting on the right to self-defence is consistent with acting justly. Thus, although I would recognise a right to self-defence in these instances I think, for example, that the defender might be required to compensate the aggressor in the aftermath of the attack. I can also imagine situations in which although the defender has a right to defend him or herself, the just thing to do would be to refrain from any response. Consider a situation where a single defender is faced with a large number of innocent aggressors, or even the defender who is facing a five-year-old playing with a loaded gun.[20] Thus I hold that the individual is justified (i.e. for reasons of justice) in acting in self-defence against anti-democratic threats and consequently, the state has a duty, based on principles of justice, to act in self-defence. This duty is the basis for the actions taken by the state as will be discussed in the next section. It

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[19] Note, the term 'desert' does not refer to penal desert generally, but specifically to the guilt-based theory for self-defence.

This, so I hold, is the reason why the state is allowed to kill a person who is holding hostages in a bank robbery. The police may be permitted to kill the robber (assuming there is not other, less extreme way to neutralise him while ensuring the well-being of the hostages) because the robber intentionally created a threat to the lives of the hostages and hence he deserves it.

[20] I think this is the reason for the conflicting intuitions scholars have regarding the five years old. The defender in this case has, so I argue a right to kill the child in self-defence, and would not be ascribed criminal liability for doing so, even if this is the wrong course of action and he or she should refrain from acting on his or her right (this is the meaning of having a right – having a right to do wrong). Some of those who believe that the defender should refrain from responding to the on-coming attack mistakenly conclude that there should be no right to self-defence in these situations, although the correct analysis, so I hold, is found in the distinction between having a right and doing the right thing in the specific circumstances.

should be stressed that the fact that justice demands it because the aggressor deserves this response does not mean that the defender may act for reasons of desert. The defender, when responding to an imminent threat should not be motivated by, or act for, reasons of desert. Instead, the defender should act only to resist the attack – because he or she is faced with a forced choice between his or her life and the life of the aggressor. Still, it is important to discuss not only the justification of the action but also it being a right. This is because the justification is limited by the same internal limitations of the right and it is these limitations that would also draw the boundaries of the state's duty of self-defence as will be seen in the next section.

Finally, I wish to note that I use the term 'the state's duty of self-defence' (or refer to the state's duty to defend *itself*, or the state's right to defend itself – earlier in the thesis) in order to express the idea that this duty derives from the individual right to self-defence. That is, that the state is obligated to defend *its citizens*. I do not claim that the state has a duty to defend *itself* for the benefit of its citizens, though in practice, threats to citizens are found in the threat to the state (the more serious the threat to the state, the more serious the threat to the individual citizens). Nevertheless, and although a little misleading, for reasons of simplicity I will continue to use the term 'the state's duty to defend itself'.

C. THE CONTENT OF THE STATE'S DUTY OF SELF-DEFENCE – INTERNAL LIMITATIONS

In the discussion above I made two important observations about the unique features of the state as a defender. Firstly, I argued that the state does not defend itself, but rather its citizens. The threat to the state, or more accurately to the regime, generates a threat to the citizens of that state. This triggers the individuals' right to self-defence, which in turn generates the state's duty to defend its citizens. In practice this means defending the regime. Secondly, unlike other human defenders, the state is an artificial entity that is created for the purpose of securing its citizens. This means that the state has an additional role in identifying and punishing those who wrong others. The state is uniquely responsible for maintaining a secure sphere for its citizens, and is granted permission to use coercive measures to that end. One of the main means used to achieve this end is criminal law, which is also one of the main tools used by the state in the execution of its duty of self-defence. In practice, this means that the two responsibilities of the state (to punish and to defend itself) may coincide and this raises interesting questions that will be discussed in the following pages.

Being the artificial entity that it is, the state also takes a different stand from individual defenders in the equation of power between the defender and the aggressor. The state has much more power and authority over an anti-democratic aggressor than the individual defender has (if at all) over those who are attacking him or her (hereafter this feature will be referred to as the state's powerful-stand). However, the size of the anti-democratic group is not necessarily an important factor. In some instances small anti-democratic groups whose members are placed in strategic positions may generate a more severe danger. This difference does not affect the nature of the internal restrictions placed on the state's duty of self-defence.

Rather, it changes the point of equilibrium in terms of what would count as an imminent threat (i.e. what would be the last reasonable opportunity to intervene) to trigger the state's duty of self-defence and in terms of what would amount to necessary and proportionate (defensive) responses.

The concern that this 'distinct defender' raises is an obvious one. It is necessary to ensure that the duty of self-defence will not be abused by granting the state more powers than the duty requires. In other words, granting power to the state inevitably comes at the expense of the freedom citizens enjoy, and we must take care not to give away too much of our freedom. When we extend the permission of the state to include situations that would otherwise be unpunished, say to prohibit academic writing advancing an anti-democratic ideology, inevitably we reduce our freedom of expression (unlike situations of individual self-defence in which the aggressor's actions are regarded as wrong regardless of the defender's permission to use force). The balance is a delicate one: on the one hand it is necessary to grant the state sufficient powers in order to secure our liberty, and on the other hand, any power given to the state reduces the precise liberty it aims to protect. The fear of violating citizens rights refers to both the rights of innocent law abiding citizens and the rights of anti-democratic agents (for although they may have no stand to argue for their rights justice demands that the violation of their rights would be minimal and limited[21]).

There is, of course, an additional practical concern: that the powers granted would be abused by the state. This latter practical concern refers to the way in which the authorities implement moral permission to use their powers, whereas the former is a theoretical concern that addresses the need to restrict any moral permission to use force only to those instances in

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[21] See my explanation in Chapter Two p 85.

which it is found necessary. In this thesis I do not attempt to solve the second, practical concern. Such an attempt requires further detailed examination, which I cannot carry out here. This concern may have some bearing on the current discussion only if one holds that since there is no successful way to ensure that the authorities will not abuse their powers, we ought not to grant these powers in the first place. This stance objects to the state's special duty on the grounds that the authorities are likely to abuse the special powers that the duty accords them and that this is a more real, and thus more serious threat, than the one posed by anti-democratic ideologies. Still, I think that there are sufficient arrangements in place to ensure that the permission to use special powers will not be abused by the state. Or else such arrangements, (including, for example, the separation of powers and the role of the courts and parliament) will at least downgrade the likelihood of this concern materializing to the point where the likelihood that an anti-democratic threat will materialize is substantially higher.

Bearing in mind that the state's duty to defend itself is not really a duty to defend *itself* but rather to defend its citizens, and being sensitive to the unique features of the state as a defender we can now go on to apply the requirements of the right to self-defence onto the state's duty. The claim I am making is that the state has a positive duty to defend its citizens against anti-democratic ideologies. This duty exists whether or not its democracy is stable. It should be stressed, however, that I do not point to one set of laws and regulations that must be implemented in all states, and at all costs; laws, that the failure to introduce would entail a failure by the state to uphold its obligations. On the contrary, the internal requirements of this duty of self-defence are flexible and sensitive, among other things, to issues such as the stability of the state. A state whose democracy is stable may find, for example, climate creating expressions by anti-democratic agents unthreatening because there is no real danger that this kind of expression will attract public support (although in unstable democracies such

activity may count as dangerous, and of a kind that – as I will argue – complies with the requirements of necessity and imminence). Hence, in a stable democracy restrictions of such activity would not be considered to comply with any internal requirements (i.e. it would not be the last reasonable opportunity to intervene).

It should also be stressed that the need to comply with various limitations has its price; one we must recognize and accept. If we want to keep our basic freedoms and maintain our democratic system while protecting ourselves from the threat posed by anti-democratic ideologies, we must accept that there is no hermetic protection. We will, sometimes, have to compromise on the quality of that protection and take some risks.

1. The requirements of necessity and imminence

(a) 'When' can the state use force? – The disparity of powers and the state's additional role of punishment

In the previous Chapter I discussed the various requirements that characterize the individual's right to self-defence. In what follows I will discuss the application of these requirements to the state's duty of self-defence. The first of the requirements to be discussed with respect to the individual's right to self-defence was the unjust threat, but there are no special changes that need to be made to accommodate it in the state's duty of self-defence and hence I will move on to discuss the three remaining requirements.

The requirement of necessity, so we have seen, addressed the questions of '*when*' to use force and of '*how much*' force is to be used. Force may be used only when it is necessary, and

even then, only that force which is deemed essential should be used. That is, force is to be used only as a last resort. Given the state's powerful stand, and given the fact that any special permission to use force inevitably entails reducing our freedom, the emphasis on 'last resort' is even more important. If the use of force were permitted where other measures (or less coercive measures) would suffice, we are bound to, unnecessarily, give up some of the freedom we enjoy as individuals.

Furthermore, as mentioned earlier, the powerful stand of the state as a defender changes the balancing point of the necessity test. Some actions or expressions might be considered as complying with the requirement of necessity, if the two sides (the aggressor and the defender) were two entities of the same kind (e.g. two human beings). However, these actions or expressions might not comply with the necessity condition once the defender and the aggressor are substantially different entities from one another, such as the powerful defending state and the small aggressing groups. Thus only those actions or expressions that cause a very serious threat to the state (a 'last resort' kind of threat), with regard to the latter's powers, are to be considered as complying with the necessity condition.[22]

On the other hand, the test of turning to the authorities, which is used to determine the necessity of the defensive response as part of the right to self-defence is, evidently, inapplicable to the state's duty of self-defence. The state has no one to 'turn to' for help, for *it* is the sole entity responsible for its citizens and its own security. The demand from the individual to turn to the authorities for help is based on the belief that the authorities would

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[22] Once again I wish to stress the first unique feature of the defending-state – the complex way in which the duty is created and the fact that it is a duty to defend its citizens rather than a duty to defend itself. For the detailed discussion see, above p 219-220.

respond to a threat through the mechanism of criminal law. Hence, when the defender is the authorities themselves they combine both the duty to use force in self-defence only as a last resort (i.e. the duty of self-defence), and the general duty to respond to threats and defend its citizens (hereafter: the general duty). The state is the first and last line of defence. But the difference between the individual and the state goes even deeper. The structure of the right to self-defence is based on a two-stage protection: the first line of defence is upheld by the state which is required to respond to any 'real threat' (by means of criminal law). Only when this line is penetrated, and the threat becomes a 'real and imminent threat' (i.e. last resort), is the individual permitted to use force. That is to say, in employing criminal law, the state is supposed to stop threats at an earlier stage – before they become imminent. However, when we turn to examine the state's duty of self-defence things change. The reason for recognizing this special duty is to extend the reach of the state to include earlier stages of anti-democratic activity (namely, type B acts – of speech and expression[23]) that cannot normally be prohibited in accordance with the principles that govern the general duty. In other words, an appeal to the duty of self-defence is based on the understanding that all cases that can be restricted in accordance with the general duty are cases of 'last-resort-to-state' but that this latter category includes additional cases whose restriction can be justified only by the special duty of self-defence.

To understand how the scope of the duty of self-defence can be so far reaching we need to turn to the requirement of imminence, which is an aspect of necessity. Earlier on I argued that this requirement ought to be understood as 'the last reasonable opportunity to respond'.[24] This interpretation recognizes that there might be situations in which the last reasonable

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[23] For the detailed definition see Chapter Two p 50.

[24] See Chapter Three, p 192-195.

opportunity to act is some time before the danger becomes immediate (in time), such as in the case of the hostage discussed earlier. The nature of the danger posed by anti-democratic threats is, in many instances, similar to the danger posed to hostages by their kidnappers. Namely, that the only way to resist danger effectively is to act some time before it becomes immediate. At the point in which the danger is immediate it might be too late to eliminate it. The fifth feature of the anti-democratic threat, discussed in Chapter One, is exactly the fear of the expansion and endorsement of the anti-democratic ideology by large sections of society. Thus, if the state were to wait until anti-democratic agents acted upon their beliefs, and attacked the state (which is the point at which the state is permitted to intervene in accordance with the general principles governing criminal law), it would be too late, for these beliefs would already be well-rooted within society.[25] Hence, the last reasonable opportunity to effectively 'nip anti-democratic ideologies in the bud' is to intervene at a much earlier stage. Yet we have to be very careful that the last reasonable opportunity does not become *any* reasonable opportunity. The importance of freedoms of both speech and action, can never be over stressed. If a last reasonable opportunity were defined or implemented incorrectly, the harm done to these freedoms would be enormous.

Nevertheless, the individual right to self-defence applies only to narrowly defined emergency situations when the threat is too immediate to resort to normal legal processes; and to help ensure that the self-defence principle cannot be employed to undermine the normal safeguards of criminal law. How, then, can we extend the scope of self-defence to allow the criminalization of anti-democratic conduct that is temporally remote from its undesired consequences and which 'ordinary' criminal law precludes? The answer, is, I believe, found in the relationship between the two stages of protection described in the previous paragraph;

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[25] For the detailed argument see Chapter One, p 43-45.

between the individual's right to self-defence and the state's 'ordinary' use of criminal law. Every person has a basic right to protect his life and liberty from inevitable unjust harm by another, a right that originally extended to allow doing all that is needed to resist or repel the unjust threat. However, given that the state is significantly more effective in preventing these harms, and that leaving the issue of personal safety to individuals may lead to anarchy and the collapse of organized society powers were given to the state to undertake the major role in preventing harm to others at the expense of individuals who gave up their right to act in those situations where the state can respond. Giving priority to the state, the right of individuals was reduced to respond only to those emergency situations where unjust harm to the individual is inevitable yet the state cannot respond. The underlying assumption being that apart from emergency situations of imminent unjust threats to the life of the individual, the state, through the use of 'ordinary' criminal law, can provide a sufficient and comprehensive defence to its citizens. Thus, from the individual's point of view it may no longer be regarded as situations in which unjust harm is inevitable. He or she is no longer forced into choosing between his or her life and the life of the aggressor,[26] since he or she can turn to the authorities to prevent the harm. Consequently, the individual right to self-defence was defined (through its internal requirements) as a complimentary right that does not overlap with criminal law.

The case of an anti-democratic threat, however, presents us with a different picture, which diverges from the underlying assumption and the general picture it draws in two respects. For one thing, as I showed in Chapter Two, 'ordinary' criminal law does not provide a sufficient defence against an anti-democratic threat, not even in situations that normally trigger the right to self defence; that is, situations in which the use of force is necessary and are regarded as

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[26] As the 'forced choice' (as a justification) is the preferred justification in the case of culpable aggressors, according the 'forced consequences' justification.

'the last reasonable opportunity to respond' (i.e. imminent). Another reason is that, in emergency situations the individual cannot effectively resist, repel or ward off the anti-democratic threat.[27] The inability of the individual to effectively resist the anti-democratic threat generates the derivative duty of the state to protect its citizens, as explained in the previous section. The failure of the 'ordinary' criminal law to provide sufficient comprehensive defence allows for the right of self-defence to extend beyond the ordinary safeguards of 'ordinary' criminal law. The extension is true to, and draws on, the objective of self-defence: to resist, repel or ward off an imminent unjust threat. The narrow definition of the individual right to self-defence, which ensures that the right will not undermine the safeguards of criminal law, is based on the assumption that criminal law provides a comprehensive defence. Hence, when ('ordinary') criminal law may be applied there is no need for the individual to resort to the use of force. However, when the regular legal procedures cannot defend the individual and there is no way to avoid the threat, it brings the situation back to that realm of permitted individual response. In the case of an imminent threat by culpable aggressors - because the threat cannot be avoided the harm is inevitable - and a choice between lives is forced on the individual. In the previous paragraphs I argued that the anti-democratic threat is a threat of this type. It may be imminent, although at times the specific activity in question is temporally remote, where this is 'the last reasonable opportunity to respond'. The right of the individual generates the state's duty of self-defence, hence where 'ordinary' criminal law cannot provide a sufficient defence, the state ought to be permitted to draw powers from this duty of self-defence.

What are the implications of the combination of the general duty and of the duty of self-defence? Before I turn to discuss the possible relationship between these two duties, it is

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[27] See above the discussion in section B of this Chapter.

necessary to set out the premise and to clear one possible objection out of the way. My discussion is based on the assumption that the duty of self-defence entails permission to use more (coercive) powers than would otherwise be permitted. It may be argued that the individual's right of self-defence permits the defender to use force *not* for the purpose of punishing the aggressor but only to resist, repel or ward off the aggressor. Consequently, the state's permission to use force as part of its special duty ought to be restricted to these purposes of resisting, repelling, or warding off anti-democratic ideologies and their related activities. Indeed, the state has a general duty to secure its citizens (life, property etc.) but this is a distinct role that should be kept separate. Each of these roles is based on different principles and involves distinct considerations.[28] The powers granted to the state for self-defence cannot be used for punishment. The duty of self-defence entails permission to use force only to resist, repel or ward off an attack, whereas general duty involves the use of coercive measures to punish those who have wronged others; measures that are subject to the general principles of criminal law. There is no overlap between the two duties, though many of the tools used to fulfil them might be similar (such as the need to arrest, etc.). This difference between the two duties can also be viewed as the traditional distinction between self-defence and self-protection. Self-defence is understood to refer to actions taken in response to a sudden attack (i.e. to ward off the attack), while self-protection is usually understood to refer to all the measures taken to protect oneself including pre-emptive measures taken in an anticipation of an attack and acts of self-defence (i.e. prevention of harm by means of criminal law etc.).

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[28] See my discussion about the distinction between punishment and self-defence in Chapter Three, p 183-186.

This criticism illuminates another important difference between the individual defendant and the defending state.[29] The individual right to self-defence is limited to resisting, repelling or warding off an attack because in civil society the individual citizen does not have a right to punish. The right (or rather the duty) to punish is restricted to the authorities. A permission to allow individuals to punish is bound to result in anarchy. The state, on the other hand, is required to punish for reasons of self-protection or prevention (as well as for other reasons such as desert etc.).[30] In the case of threats posed by anti-democratic ideologies, the need to transfer citizens' rights to self-defence to the state is based on the understanding that individual citizens do not have the means to effectively resist these threats, whereas the state does. Excluding the use of a tool that is generally permitted to the state – the criminal law mechanism of offence and punishment – from among the means that may be used by the state to fulfil its duty of self-defence is to defeat the purpose of allowing the duty of self-defence in the first place. One of the main tools a state has to *resist* an attack is pre-emptive in its nature; i.e. criminal offences and punishment. This is true especially in respect of anti-democratic threats, due to their special nature (which was discussed in Chapter One). The whole point of bringing in the duty of self-defence is to grant the state extra powers, as the regular powers – namely, the power to punish under the general rules – do not give sufficient protection from anti-democratic threats. A permission to use pre-emptive measures (self-protecting measures) as part of the 'special' powers does not contradict the individual's right to self-defence, since the reason for restricting the individual does not apply to the state.

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[29] This difference was the reason I did not discuss the Doctrine of Double Effect as a possible justification for the individual's right of self-defence. See above Chapter Three, p 133-134.

[30] The state's right to punish is obviously restricted to specific judicial procedures. Without going into the question of the independence of the judicial review, in the sense relevant to this discussion, the court is part of the 'democratic authorities', and its specific role is to identify those who deserve punishment.

Let us now go back to the question I raised earlier: what are the implications of the combination of these two duties? Does it mean that (with respect to the treatment of anti-democratic activities) the principles that govern (and restrict) the general duty are to be abandoned in favour of the principles that govern the duty of self-defence? Does it mean that the authorities should be permitted to use the special powers of self-defence – subject to a finding that the use of coercive measures is necessary (i.e. a last resort)?

Note, that the term 'special powers' or 'special forces' may be misleading. In using this term I mean to refer to state powers that draw on its special duty of self-defence as opposed to the powers that draw on its general duty to protect its citizens. Moreover, since my analysis was limited only to substantive criminal law, and I did not examine whether the general principles that limit other fields of law, such as criminal procedures or civil measures, prevent the state from offering adequate protection in those fields, in referring to a permission to use special force I limit myself only to the possibility of using criminal measures (including detention[31]) beyond the regular boundaries imposed by the general principles that govern special force. Namely, the possibility to proscribe activity that cannot be proscribed in accordance with the general principles that govern criminal law (i.e. Climate Creating expressions).

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[31] Since detention is in essence a criminal measure of imprisonment without going through the regular legal procedures of trial, and though it may also be connected to criminal procedures and/or to constitutional law. I wish to stress that even in those rare instances where detention ought to be recognised the detention should be regulated so as to ensure it is not used beyond what is indeed necessary, and in order to prevent an abuse of power by state-agents.

One plausible stance is to give an affirmative answer. Since the state's general duty and its special duty of self-defence – are combined, the authorities should not be restricted by the general principles governing criminal law, and they ought to be permitted to practise their special powers (of self-defence) in the course of their actions towards the fulfilment of their general obligations.[32] This position attracts various objections. For one thing, it would allow the authorities to use their special powers even when regular powers were sufficient (though the regular powers may demand more resources).[33] Bearing in mind that permission to use more powers comes at the expense of the freedom of citizens, the mere fact that the same body – the democratic authorities – executes both duties cannot in itself justify permission to use more coercion than needed. Moreover, this position contradicts the second aspect of necessity – that only the necessary amount of force will be used. This means that, in those cases in which force is used in accordance with the general principles governing criminal law and is sufficient, the state should not be permitted to use its special powers. The duty of self-defence is based on the extra threat that is posed by anti-democratic ideologies. These foundations suggest that the duty is an *additional one* to the general duty, owed by the authorities, to defend their citizens.

The objection raised leads to a second position according to which the two duties ought to exist side by side. Special powers, I would argue, ought to be practiced only where the powers granted by the general duty are not sufficient. This position is in accordance with the

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[32] In referring to the 'general obligations', I mean to refer only to those actions taken by the state (according to the general principles that govern criminal law) in respect of anti-democratic activity.

[33] Such as preferring detention over trial; or setting a higher punishment, which reflects only considerations of deterrence, rather than the whole set of consideration usually taken into account (e.g. retribution, rehabilitation, facts about the offender such as age and gender, etc.).

limitations placed on the special duty of self-defence by the requirement of necessity. Where 'ordinary' powers are sufficient it is not necessary to use special powers. Only when these 'ordinary' powers are not sufficient to deal with a threat, though the threat may be the last reasonable opportunity to (effectively) intervene should the 'special' powers come into play. These situations can be either within the realm that is covered by a general duty – such as a case where the anti-democratic agent is involved in violent activity but there is not enough evidence to bring him to trial (e.g. where he is the mastermind behind an attack), or when the punishment is not sufficient to prevent the agent on trial and other anti-democratic agents; or outside the realm that is covered by general duty – such as the criminalization of climate creating expressions (when they are the last reasonable opportunity to intervene). Furthermore, this position would ensure extra protection without yielding more than the essential powers. This way, the requirement of necessity is maintained as an important feature of the state's duty of self-defence.

Before we can move on, one more point demands clarification. The test of imminence – the last reasonable opportunity of intervention, is similar to the test I suggested for the minimalist principle: the last effective point of intervention.[34] Given this similarity, how is it possible that the application of this same test would produce different results? How could it draw two distinct boundaries of permission to use criminal law: a restrictive one in the analysis of the general principles that govern criminal law, and a more lenient one as part of the individual's right to, and the state's duty of, self-defence? The answer to this troubling question is found in the distinct purposes of the two institutions: punishment and self-defence, and is reflected in the other principles that govern each of these institutions. Indeed, in both cases the test is based on the need for prevention. But whereas in punishment it is mitigated

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[34] See my discussion of the minimalist principle in Chapter Two.

by other principles and in standard harm analysis (e.g. the notion of retribution and of treating the offender as an end and not as a means, as well as the balancing of other rights, interests and side-constraints), there are no such mitigating considerations in the case of self-defence. Hence, it was not the application of the "last effective point of intervention" by itself that drew restrictive boundaries for the general employment of criminal law (i.e. for punishment). Rather, this is the accumulative result of the application of all those general principles governing criminal law which were discussed in Chapter Two. The pure application of this test, as can be seen from the discussion of the imminence principle, provides us with distinct and more lenient boundaries, and therefore the differences in the results.

(b) The duty to retreat

As we have seen with the individual right to self-defence, the requirement of necessity demands that the defender retreat in the face of danger, while allowing him or her to go about his or her own business (even while anticipating some possible danger). Does the state owe a duty to retreat as part of the requirement of necessity? I think not. If 'retreat' is to be understood as a geographical requirement, then the state, within its own borders, falls under definition of 'home exception'. The territory of the state is its home – the home of all its citizens – and should therefore be compared to the defender's home, especially given the reason for the home exception idea: the belief that a person's home should be his or her castle and therefore be worthy of greater protection. In the case of the defending state, a duty to retreat is impractical and nonsensical. There is no place for the state, or for its people to retreat to. Leaving the territory would turn the citizens into refugees and would cause, most probably, the destruction of that society, for usually, societies cannot exist outside their own territory. A retreat would be a victory for the anti-democratic ideology – it would bring to an end the democratic system, though in a different way than intended (the destruction of a

society entails the destruction of its political system). It may be argued, that all that is needed is to retreat from parts of the territory, but this view should be rejected for the same reasons given for the home exception of the individual citizen: the feeling that every person must have a place where he or she is most secure, and where he or she receives the greatest protection. Alternatively, a retreat may be interpreted as a means of avoiding responding to the attack. But then there is nothing new in this, since necessity permits the state to respond only to 'last resort' threats in the first place.

(c) The citizens' permission to go about their business

Securing the defender's right to go about his or her own business can be viewed in terms of preferring to safeguard the greater liberty of law-abiding citizens to continue acting lawfully (as opposed to restricting them, so as to prevent violence). The application of this position to the duty of self-defence can be understood to mean that it is applied either to citizens' right to go about their own business or the authorities right to go about their own business. If we adopt the former alternative, then I see no reason not to recognize a germane right derived from the individual right to self-defence. If citizens can do it individually, a fortiori they ought to be able to do it collectively. On the contrary, if we value the specific law-abiding individual we must value all law-abiding individuals as much, and must protect their basic rights. If we adopt the latter alternative, then the reason to recognize this right is even stronger, for the authorities must be allowed to act freely (whether that 'business' is in the domain of social security, foreign policy, or the collection of taxes) in order to safeguard society. If they were to withdraw in the face of possible threats, they would neglect their duties towards their citizens (and among these neglected duties – the general duty and the duty of self-defence). Harming law-abiding citizens is contrary to our preference in favour of

them, and would, ultimately, make it harder for them (i.e. the citizens) to go about their own business.

2. The requirement of proportionality

The third feature of the right to self-defence is the requirement of proportionality. The demand is for parity between the harm inflicted by the defender and the potential harm to be threatened by the aggressor (in the worst situations). That is, the defensive response must not inflict any greater harm on the aggressor than the threatened harm would have, if it materialised, inflicted on the defender. When we come to apply this requirement to the state's duty of self-defence it is necessary to bear in mind that some of the defensive steps (those that are supposed to be permitted by this duty) are pre-emptive: criminalizing certain acts and sentencing anti-democratic agents for their successful acts as well as for their unsuccessful attempts. Thus, the demand is that both the normative and the particular sanctions be proportionate to the harm intended (or done). We further have to remember that the intended harm (or the harm done) is not merely the immediate harm to life, limb or property but the further harm intended by the anti-democratic agent through a specific act. For example, in a case of planting a bomb the harm intended is not merely the harm to the lives of the people who would be injured but also presumably certain political intentions: to create instability in society (which could set the background conditions for the rise of the anti-democratic movement). Similarly, if the anti-democratic agent intended to assassinate the prime-minister, the harm intended is not merely murder but also the furtherance of a political agenda (to change certain policies in an undemocratic way, or to bring down the regime, etc.). It is important to note that this proportionality differs from the kind of proportionality demanded by general principles governing state coercion. The proportionality required there is between

means to ends (be it prevention, desert rehabilitation etc.).[35] Though the proportionality required by the duty of self-defence may at times set stricter limits on the use of force, in practice, this requirement is more lenient; especially if we take into consideration the extra threat (the political purpose).

D. On human rights and other external limitations

Before I can put my pen down, I find it necessary to attend to one final point and explain why I do not proceed to examine the restrictions that basic rights, such as freedom of association, freedom of expression and freedom of religion, may impose on state action; and (assuming anti-democratic ideologies would be protected at least to some extent by these rights) how these restrictions might be reconciled with the state's duty of self-defence. The individual's right to self-defence is not, in my mind, subject to basic human rights and does not have to be balanced against them. Bearing in mind that the right to self-defence is concerned with resisting an imminent, unjust threat (and not with a punishment of the act), the right provides a clear set of conditions under which a violent act would be justified. There is no need to further balance these conditions with other basic rights of the aggressor before we can give a final answer as to whether the force used is justified. The right as defined in Chapter Three is the 'full package'. That does not mean that human rights are inapplicable and excluded from the process altogether and that the interests of the aggressor, and his or her rights, are not being taken into consideration. They are being incorporated in the internal condition of

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[35] See my discussion in Chapter Two, section E. Although, if the end is desert, it may go, to a large extent, hand in hand with the proportionality required by the duty of self-defence.

necessity, and even more so – in the condition of proportionality.[36] The extension of the individual's right to include responses to threats to liberty does not change this assessment. The internal conditions still provide sufficient guidance and set the ultimate boundaries of the right; and the conditions of necessity, imminence and proportionality still solely govern the right. In practice, however, this would probably limit the number of cases in which lethal force may be used, because it may often be found to be disproportionate. Thus, the lack of external limitations of human rights does not give the state permission to use, for example, kidnapping and/or assassination as legitimate means, since the internal requirements incorporate basic rights. This type of conduct can never be regarded as a necessary (or proportionate) measure. For one thing, I doubt that such conduct can be considered part of substantive criminal law with which I am concerned in this project. But more to the point, even if it may be argued that this is another measure or punishment designed solely for prevention – surely there are other, less coercive and more humane measures: first and foremost a trial with its regular punishments (e.g. imprisonment in various levels of security and isolation) and even if a trial is not possible – detention (strictly regulated).[37]

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[36] See also my criticism of the justification of vindication of autonomy in Chapter Three, p 166-167.

[37] I hold that assassination or even capital punishment can never be a necessary measure. Even when it is feared that an anti-democratic leader will continue to direct anti-democratic activity from his or her prison-cell there are less severe measures that can ensure the orders will not reach the anti-democratic activists; such as, isolated imprisonment in a high security prison. Similarly, kidnapping can never be a necessary measure. If the act is done in order to ensure secrecy of investigation – there are other less severe measures to achieve this goal (though this has to do more with criminal procedures which is beyond the scope of my thesis). If this is a used as punishment (that is, if there is an offence to which kidnapping is set as punishment) than there must be a trial to ensure that blame is justly ascribed to the anti-democratic offender, which in essence contradicts kidnapping, and when trial is not possible for various reasons than there is always the possibility of detention (strictly regulated and with proper, and on-going, judicial review).

The transfer to the state of the individual's right to self-defence creates a duty that is defined by the same internal principles. The power of the state and its ability to violate the rights of citizens (both law abiding citizens and anti-democratic agents) has already been taken into account in the application of the principles (i.e. necessity, imminence and proportionality) to the state's duty. Although the means used are similar to those used for punishment (i.e. criminal law), the ends for which they are used differ greatly. The state's special duty of self-defence is aimed at resisting or warding off an imminent unjust threat. As I have argued in Chapter Four, this distinct objective differentiates between the considerations that ought to be taken into account when drawing the boundaries for the use of criminal law as part of the state's general duty and those that ought to be taken into account as part of the state's duty of self-defence. In the latter case, I do not believe there is a need for additional balancing with other basic rights.

This stance, of course, does not mean that the state has unlimited permission to use lethal force against anti-democratic agents. The demands of necessity, imminence, and – most importantly – proportionality, would drastically limit such permission. Although I argued that the state is permitted to intervene in early stages when the last reasonable opportunity to thwart the anti-democratic agents arises early on, the response required to resist the anti-democratic threat at this stage is usually significantly less drastic than the use of lethal force. In such situations, the use of lethal force would not comply with both the requirements of necessity and proportionality. I feel it is important to stress that I believe it is only in very rare occasions that lethal force would be a necessary means, and that no lesser means would be available to respond to a threat to liberty *per se* (that is, a threat to liberty that is not

accompanied by a threat to life).[38] In reality, most situations in which defensive lethal force may be used would also involve threats to life, thus making the question unnecessary.

SUMMARY

The threats posed by anti-democratic ideologies cannot be dealt with sufficiently by the general principles that govern state coercion. They do however trigger a special duty of self-defence owed by the state to its citizens and this duty entails a permission to use force beyond that which is granted by general principles. In this Chapter I set out to explain the origin of this special duty of self-defence and its internal limitations. In Chapter One, I argued that anti-democratic threats are threats to each of the citizens. In this Chapter, I argue that these threats trigger individuals' right to self-defence and are also the just course of action in these circumstances; but since individual citizens cannot respond to anti-democratic threats, they transfer their rights to an entity that can: the state (or the authorities), thus creating a special duty of self-defence against anti-democratic threats owed by the state to its citizens.

I began by introducing two possible accounts of the relationship between the individual's right to self-defence and the state's duty to defend itself against anti-democratic ideologies. The first account holds that a special duty of self-defence against threats to life owed by the

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[38] It is interesting to see that indeed, article 2 of the European Convention of Human Rights does allow for the use of lethal force in response to 'insurrection'; a term which includes non-violent revolution. Although this term has not been interpreted so far, I think it also captures threats to liberty *per se* (as the threat does not have to also involve threat to life or limb which is entailed in violence).

state to its citizens derives from the individual right to self-defence against threats to life and that this duty ought to be extended to include responses to threats to liberty. I rejected this account for being inherently inconsistent. I then offered a second account, according to which the individual right to self-defence extends to responses to threats to liberty, and subsequently triggers the state's duty of self-defence against anti-democratic threats.

I established an extension of the individual's right to self-defence to include defence of one's liberty. Rodin, the only contemporary theorist to consider this position was, reluctantly willing to accept it in the most extreme situations such as enslavement, lifetime incarceration or other very grave violations of liberty. For only in such situations does the value of liberty come close to that of life. He did not consider the loss of political freedom to fall within those extreme situations. Following Locke, I argued that the loss of political freedom is a grave loss that triggers the right to self-defence. In losing political freedom (i.e. self-government) citizens would lose their only means of ensuring control over both future decisions regarding their preferred way of life and the preservation of the way of life they have already chosen. I went further to reject his fear of the difficulties in assessing whether the defensive force used complied with the requirements of necessity and proportionality. These, I claimed are not unique to defence of liberty and can be properly assessed using commonly recognized objective tests. Since anti-democratic threats are threats to the political freedom of all citizens, anti-democratic threats spawn the individual right to self-defence, and the defensive response to resist these threats is also the *just* thing to do given the moral guilt of the anti-democratic aggressors.

Yet anti-democratic threats are not threats posed by one of a very small number of individuals. Consequently, individual citizens are not equipped to resist such threats, even

when a threat is imminent. Therefore and given that a defensive response is also the right thing to do in the circumstances, citizens transfer their rights of self-defence to that institution which is fit to respond to these threats – the state, creating a special duty of self-defence against anti-democratic threats owed by the state to its citizens. I examined three possible relationships between the individual's extended-right to self-defence and the state's duty of self-defence. Firstly, I tried to compare the state's duty to the permission granted to all third person(s) to come to the aid of the defender. I argued that the reasons preventing the imposition of an *obligation* (rather than a mere *liberty*), namely, the risk to the life of the helper, do not apply to the state and therefore, in the case of the state, we ought to recognize a corresponding duty – and this is the state's duty of self-defence. But then again, this duty of self-defence seems to be more basic than that and so I attempted to compare it to those third person(s) who are under an obligation to help the defender even if such help entails some risk (e.g. parents to their children). The source of their obligation is not in the defender's right, but rather it is found in an independent (general) duty of care owed by those people to the defender. Hence, I suggested, that the state, too, owes a general duty of care to its citizens (this is the main role for which it was created) and the special duty of self-defence is but one aspect of the general, and independent duty of care.

Still, even this justification failed to accurately capture the relationship between the individual's right and the state's duty. Though individuals have a right – they cannot effectively practice it and so, I argue, they 'transfer' their right to the state to act on their behalf. The most accurate description would therefore be to justify the state's duty of self-defence as deriving from the individual right to self-defence, in the same manner that a trustee's duty to take care of X's property derives from the owner's rights in the property, making the owner the beneficiary of the trustee's actions and allowing the trustee to take all

the steps that the owner is permitted to take. Aware of the special character of the state and its need to use coercive measures only in accordance with principles of justice (and not merely based on the lack of restraining reasons) I stressed the fact that the individual's right to self-defence is not only a right but is also what justice demands in the circumstances (since anti-democratic aggressors deserve it). Hence, the state's derivative duty is not only based on the individual's right but also on principles of justice, which can found the permission granted to the state to use coercive measures.

The next and final step was to examine what those steps are that the state is permitted to take. In other words, what is the content of the state's duty of self-defence? What powers are granted and what restrictions are imposed? Evidently, the content of the state's duty is an application of the individual's right, though this application has to be sensitive to the special features of the 'helper' (or defender) – a powerful state, created for the purpose of securing its citizens' interests. Leaving aside the component of the unjust threat, as its application does not change a thing, I examined the requirements of necessity and imminence and the requirement of proportionality.

The requirement of imminence states that it must be the least reasonable opportunity to respond. Our quest for the special duty of self-defence was based on the conclusion that the general principles that govern state coercion do not provide sufficient protection given the special characteristics of an anti-democratic threat – that it will gain public support long before any direct harmful activity takes place. In other words, the conclusion in Chapter Two was that the permission to use state coercion granted by general principles cannot eliminate even the imminent (in its wider interpretation) anti-democratic threat. The last reasonable opportunity to effectively respond to these threats (and eliminate them) may be outside the

reach of 'regular' criminal law. In such circumstances, permission to respond to the imminent threat goes back to the individual as part of the right to self-defence, and subsequently is transferred to the state in the form of the duty of self-defence. This duty allows the state to use criminal measures (i.e. create new offences) against anti-democratic activity which seem to be temporally remote from its undesired consequences and to regulate detention when these activities are regarded as the last reasonable point of intervention.

If the state owes two duties – a general duty of the state to defend its citizens and a specific duty of self-defence – what is the relationship between them? To answer this question I first had to answer a preliminary objection. According to this, these two duties are distinct (having distinct ends) and therefore the tools used to fulfil the former general duty, namely: criminal law, are not to be used by the state in the course of fulfilling the latter duty of self-defence. Furthermore, so the objection went on, individual citizens are not permitted to use private punishment (or 'private criminal law') and so the derivative state's duty should be restricted in the same manner. I claimed that the individual's right to self-defence was transferred to the state because the state was capable of responding to the threat, and it was able to respond to anti-democratic threats because of the special means at its disposal. One such pre-emptive tool is criminal law. To forbid the state to use it would go against the rationale that transfers the right to the state in the first place. Moreover, I stressed that using criminal law beyond its general limitations (i.e. to restrict temporally remote harm) is permitted because when such anti-democratic activities are the last reasonable opportunity to intervene then the individual has a right to self-defence.

Once the premise was set, I held that anti-democratic activity that is currently sufficiently dealt with using coercive measures granted by the general duty should not be dealt with using

the special force permitted by the duty of self-defence, since lesser force (of the general duty) is apparently adequate. However, anti-democratic activity beyond the reach of the general duty can be dealt with using criminal measures (including detention), which are permitted by the duty of self-defence, as long as the use of the 'special' force is necessary.

The final internal requirement I examined was the application of the requirement of proportionality on the state's duty of self-defence. I noted that the kind of proportionality required by the right to self-defence – between the harm done by the defender and the potential harm to the defender – is substantially different than the kind of proportionality required by the general principles that govern the general duty. In practice this kind of proportionality is more lenient and would allow the state to use more force.

Finally, I explained why I find it unnecessary to examine further external limitations that other basic rights might impose on the state's duty of self-defence. I held that the internal limitations already incorporate all the considerations that other basic rights might raise. The requirements of necessity, imminence and proportionality are the result of all these considerations and present the 'full package'. With this I have completed my analysis. I have established the existence and the origins of the state's duty of self-defence against anti-democratic threats, and its contents.

Conclusion

When anti-democratic ideologies threaten social and political democratic institutions, politicians, political theorists, and ordinary people often refer to a right or duty of self-defence, possessed by the state, in order to justify the actions that it takes against those who act upon such ideologies. I set out to examine this assumption, focusing on criminal measures used by the state to combat anti-democratic ideologies. In my thesis, I aimed to find a moral justification for the use of criminal law and the extent to which the democratic state uses this as part of its response to the threat posed by anti-democratic ideologies. I argued that the general principles governing state coercion as applied in criminal law yield only a limited justification, and consequently provide only a limited permission to use criminal law in response to anti-democratic threats. However, the state owes an additional special duty to defend itself against anti-democratic ideologies. This duty, I maintain, derives from the individual's right to self-defence, in circumstances in which it is also the *just* course of action. The individual's right to self-defence extends to include defence against threats to liberty. To maintain its effectiveness, the individual's right to self-defence is transferred to the state, thus creating the state's duty of self-defence, a duty that is restricted by the same internal principles that govern the individual's right to self-defence. In this Conclusion I will review the main signposts of the argument I developed throughout the thesis.

In Chapter One I set out the premise for this research: I defined the group of ideologies which I was focusing on, and explained why they deserve the special attention that is given to them in this work. Anti-democratic ideologies, I argued, are *undemocratic* ideologies that aspire to overthrow a democratic system, replacing it with an anti-democratic one. Since undemocratic ideologies vary greatly, I suggested a negative definition that captures their

common essence. I defined undemocratic ideologies as those ideologies that oppose one or more of the three threshold conditions for democracy: democratic participation, non-discriminatory rights, and freedom of thought and expression. Democratic participation refers to a system in which the citizens themselves are the ones to decide on the rules that will bind them. The idea of self-governance entails, first and foremost, periodic free and fair elections among competing leaders and ideologies, and in which suffrage is universal. In addition, the citizens must have control, directly or indirectly, over public decisions. Furthermore, citizens ought to be the ones to choose (again, directly or indirectly) which issues are to be decided on by the citizenry. The second condition, that of non-discriminatory rights, requires that all citizens are politically equal. That is, it requires that all citizens have all the rights, obligations and opportunities involved in democratic participation. All citizens ought to be able to design their own futures (within the constraints of mutuality), and the interests of all citizens ought to be given equal concern and respect. Finally, the third condition states that all citizens must be granted qualified freedom of thought and expression, which is a necessary requirement for both forming and expressing views as people participate in the democratic process.

These three conditions were not intended to create a comprehensive theory of democracy. Rather, as can be understood from their descriptions, they are intended only to set up the threshold conditions needed for an ideology to be considered democratic. There are many ideologies that comply with these conditions. All of them should be considered democratic. As such, they are excluded from the group of undemocratic ideologies, and consequently from the group of anti-democratic ideologies, even if their supporters seek to replace a current democratic system with their own, alternative version of democracy. Furthermore, all such democratic ideologies (when implemented within the social or political institutions of a society) are subject to the same threat that anti-democratic ideologies pose, and they all ought

to be able to embrace the moral justification that I have offered as a basis for their authorities' duty of self-defence. A second group of ideologies that is excluded from the group of anti-democratic ideologies at the focus of my thesis are those ideologies that motivate acts of civil disobedience. For although these ideologies aspire to change the law in an undemocratic way, through deliberate violations of the law, civil disobedience accepts the general legitimacy of established authorities. It acts within the framework of established political democratic institutions and only wishes to condemn (and alter) a specific law or policy.

Democracy expresses and encourages the autonomy of individuals under conditions of social interdependence, where many important matters must be decided collectively. Anti-democratic ideologies, by their nature, do not accept that all people are able decide their own future. Given that the ability to decide for oneself is necessary in order to recognize the value of autonomy, anti-democratic ideologies display an implicit lack of respect for the equal autonomy and liberties of all members of society. Thus, anti-democratic ideology threatens the equal autonomy and liberty of all citizens. Since a major role of the state, according to all democratic theories, is to promote individual autonomy and liberty, anti-democratic ideals threaten individual citizens within all kinds of democracy. Even if anti-democratic ideologies pose a distinct threat to the state due to some special role or to the prerogatives assigned to the state under some types of democratic ideology (such as those granted the state under communitarian democracy), such a threat would only exist in addition to, and would not exclude, the threat to individual citizens.

Five characteristics distinguish the anti-democratic threat. Each of these characteristics differentiates anti-democratic threats from most, if not all, ordinary threats. Even with respect to that small group of ordinary threats that can also be characterized by some of these features

the anti-democratic threat is unique, for it is only the anti-democratic threat that combines all five characteristics. The first characteristic is the difference in the addressees of the threat. The anti-democratic threat, I have argued, is a threat to the whole society. At the end of a detailed discussion, I suggested the following definition: *while most of the threats posed by 'ordinary' wrongful acts, if actualized, will cause direct harm only to interests of a specific person or persons (though there might not be an apparent reason for the person chosen), the actualized anti-democratic threat would cause first-order harm to the individual interests of all citizens (or, at least, the overwhelming majority).* The second characteristic is more accurately defined as consisting of two components: *first, the direct threat to liberty, and second, the threat to the entire range of endangered interests, including a threat to life*. The third characteristic is the conclusive nature of the realized anti-democratic threat. The fourth characteristic is the extra 'special' threat incorporated into anti-democratic activity, in addition to the 'ordinary' threat that is part of all 'ordinary' criminal activity. Finally, the fifth characteristic focuses on the public support that (successful) anti-democratic activity attracts.

Once it was clear why anti-democratic ideologies deserve special attention, I moved on to examine the possible responses to these threats. The first option that needed to be addressed was whether this threat could be fully met by the regular principles that govern state coercion as applied in criminal law. In Chapter Two I examined these general principles, focusing only on those principles that could have some bearing on the possibility of responding to anti-democratic threats. I examined four principles: the harm principle with its two supporting principles – the minimalist principle and the principle of imputation – and the principle of proportionality. At the background of the discussion was a common criticism, according to which these principles are too vague and do not provide sufficient guidance to the legislator. Hence, it was important to establish clear boundaries and stick to them. Extending these

boundaries using the harm principle to cover all potential threats would blur the distinction between those acts that ought to be criminalized and those that ought not.

At the outset of this discussion, I have divided the manifestations of anti-democratic ideologies into four categories that cover the whole variety of manifestations: thoughts and beliefs; acts of speech and expression which are in turn subdivided into three subordinate categories: Direct expressions, Climate-Creating expressions and Abstract expressions; acts that are more than mere expressions but do not cause direct harm. This category consists of acts that entail only non-violent means and general preparations for direct harmful acts; and finally, category of acts that cause direct harm to people or property. This last category also consists of all the specific acts of preparation towards direct harmful conduct.

Mill was the first to define the harm principle, stating that 'the only purpose for which the state is permitted to restrict actions is to prevent harm to others.' Thus defined, this principle consists of two sub-principles: the idea that harm is the only reason for state intervention, and the anti-paternalistic principle that was left out of the discussion for reasons of irrelevance. My analysis in Chapter One stressed that the main feature of the anti-democratic threat is that it is a threat to others, namely to all citizens. Hence, it would be wrong to base the justification for criminalization of anti-democratic activities on paternalistic reasons; that is, on the possibility that an anti-democratic agent might also be harmed by an anti-democratic ideology, should it succeed in overthrowing the democratic regime.

The harm principle excludes thoughts and beliefs from the domain of criminal law, since they do not themselves cause harm. Thus, the first category of anti-democratic manifestations was excluded from the realm of criminal law. I also discussed and rejected Mill's position

according to which the exemption ought to be extended to include speech and expression, because unlike thoughts, speech can cause harm to others. Nevertheless, I agreed that the special importance we ascribe to speech dictates a special, and more careful, treatment when considering its criminalization. Following Feinberg, I claimed that the harm principle allows for criminalization of acts that wrongfully set back (or impair) welfare interests and ulterior interests that are an extension of welfare interests.

Since the harm principle fails by itself to provide sufficient guidance, I went on to examine its two supporting principles. Firstly, I examined the minimalist principle. The first aspect of this principle states that criminal law should be used as a last resort. Thus, acts that entail only non-violent means (subcategory for category C acts) should also be excluded, as there are less coercive measures that can respond to them. The main part of the discussion focused on the third aspect of the principle – the demand that criminalization be used only as a last resort, when all other less coercive measures fail. One important implication of this principle is the attempts-preparations distinction. Criminal law systematically punishes attempts but not preparations, because if criminal law strives for the prevention of harm, then it ought to be able to stop the person just before harm occurs. Furthermore, there is no moral difference between the agent who only attempts to cause harm but for some reason is unsuccessful in achieving his or her objective, and one who completes the harmful act (though such moral difference between preparatory act and the complete harmful result does exist).

In its current form, the minimalist principle will not allow for the criminalization of anti-democratic acts that are preparatory in their nature (both general and specific preparations) and cause only remote harm. I have discussed the possibility of defining an inchoate offence

to cover these actions, but was reluctant to establish yet another exception to the general principle. Instead, I offered a new interpretation of the minimalist principle, which is based on the idea of prevention underlying its justification. I suggested that the minimalist principle should be read as 'the last effective point of intervention', even at the expense of overlooking some questions of moral culpability. For, as I have shown, these issues are raised only in a very limited number of cases, and even then they may be mitigated by a defence of voluntary renunciation. This widely defined principle allows for the criminalization of some remote harm, while providing clear guidance as to the limitations of this permission; however, in itself, it does not provide sufficient guidance.

The problem that the minimalist principle attempts to address is the problem of remote harm. Namely, how do we determine which acts causing only remote harm ought to be criminalized? I presented Feinberg's solution of the 'standard harm analysis,' which contains three stages. Stage one is an assessment of the risk; stage two is an assessment of the risk against the social value of the risk-creating conduct, and the degree of intrusion upon the agent's choices entailed by criminalization; and finally, stage three is an assessment of side-constraints that would preclude criminalization. Yet given the special difficulties that remote harm raises (the problem that the further an act is from a harmful result, the less likely it is to occur; the problem of fair imputation of the eventual harm to the agent, and the wider violation of individual liberties that such criminalization entails) I rejected Feinberg's claim that this analysis provides sufficient guidance to the legislator. Thus, I introduced the imputation principle developed by Von Hirsch, which states that 'only those acts that did not merely influence the subsequent choice of the matter, but having, in some manner, underwritten that subsequent choice are to be criminalized.'

Having discussed all three principles, I applied them to the three categories of anti-democratic activity. The application of these principles to expressions (category B) showed that only Direct expressions could be criminalized in accordance with the general principles. Climate-Creating expressions, and even more so Abstract expressions could not be criminalized. The application of the principles to general preparations (category C) allowed for their criminalization without raising major difficulties. The category of direct harmful activity (category D) also proved an easier task. Direct harm can be criminalized with no special difficulties and even preparatory anti-democratic activity can be criminalized using existing offences of conspiracy and aid-and-abet.

The fourth principle I analysed was the principle of proportionality. I concentrated on the proportionality required between means and ends. This demand is founded on theories of punishment that justify the state's permission to punish on retributive grounds. The problem was to reconcile these theories with the ultimate reason I argued for, for which the community may use criminal law – the prevention of harm to others. I advanced a position according to which a consequentialist objective of prevention would not necessarily entail any commitment to utilitarian theories; and according to which retributive theories may incorporate this preventive objective, but subject it to even higher ends attuned to the human capacity for choice. Thus, the principle of proportionality does not add any further limitations to those already imposed by the harm principle and its two supporting principles.

Limitations on the permissibility of criminalizing anti-democratic activity forced me to look elsewhere for a justification that would grant the state wider permission enabling it to offer a more comprehensive protection from anti-democratic threats. At this point, there was no point in going on to examine whether various human rights, and most notably freedom of

expression, freedom of association and freedom of religion, might impose restrictions on the capacity to criminalize anti-democratic activity additional to those imposed by the general principles governing state coercion.

In the second part of my thesis, in Chapters Three and Four, I developed a moral justification for the state's duty of self-defence, based on the individual right to self-defence, and the fact that the defensive response is the just course of action in the circumstances. In Chapter Three I analysed the individual's right and in Chapter Four I showed how it could set the basis for the state's duty of self-defence. The analysis of the individual's right to self-defence in Chapter Three has three aims: to examine whether the right can be extended to cover threats against liberty, to ensure that the derivative duty of the state is consistent with the reasons that underlie the individual's right, and to determine the bounds of the right later to be applied to the state's duty of self-defence. Thus, I addressed three aspects of the (individual's) right to self-defence (though they did not directly correspond to the three objectives).

The first part of the chapter dealt with the nature of the right to self-defence. The question was, what kind of a right is the right to self-defence? I argued that it is a right in the traditional sense. Namely, it is a title given with regard to a class of actions as a class, regardless of the justifiability of one specific act (within this class) or another. It is a derivative right, originating from the core right not to be killed. First and foremost, it is recognized to enable the individual to resist an immediate threat of breach of his or her right not to be killed. In addition it allows individuals to live in society and concentrate their efforts on things other than survival, thus promoting the possibility of living autonomous life.

The right to self-defence is also a right in the Hohfeldian and Razian sense: it is a claim that is a sufficient reason for holding a person or persons under duty with regard to X. I rejected the view that it is only a liberty, and argued that the corresponding duties that this right imposes on others is not to interfere with the defender's defensive response, and permission or limited obligation (depending on the jurisdiction) to come to the aid of the defender. As part of the discussion, I have critically examined Rodin's proposition, according to which a third person's duty to help the defender originates from the defender's right not to be killed rather than from his or her right to self-defence. Finally, I pointed to other features that the right to self-defence shares with other rights.

In the second part of Chapter Three I dealt with the moral justification of the right. Three main theories have been developed over the years in the common law tradition. All of them found a justification that would allow for an extension of the right to cover threats to liberty, and for the subsequent explanation of a derivative duty of self-defence owed by the state to its citizens. Nevertheless, I found all of them to be lacking, and hence I offered a novel justification. The theory of lesser harmful results maintains that allowing the defender to kill his or her aggressor is, on balance of interests of the two sides, the lesser harmful result if we bear in mind that the aggressor is the one responsible for the situation and hence the weight of his or her interests ought to be diminished. This position encountered two difficulties. Firstly, it contradicts the common conception, according to which equality of life is independent of a person's moral worth. Secondly, if we accept this dependency, then there is no reason not to consider the general moral worth of the two sides; and consequently the right would depend on the results of each specific case and on the numbers of aggressors and defenders. Even after a move toward the weighing up of the overall effect of recognizing a right (promoting a feeling of security and deterring potential aggressors), the right would still be dependent on

marginal gains. Furthermore, if we take deterrence seriously, then there is no support for the commonly recognized restriction of proportionality.

The theory of forced choice contains mixed explanations of justification and excuse. As an excuse, the situation is compared with that of necessity. The argument was that the defender does not really have free choice and that his or her actions are instinctive. Another version compared the situation to that of duress, holding that the responsibility for killing lies with the aggressor, who caused the situation, rather than with the defender. The problem with these explanations is that they are only excuses, though we tend to think that the defender's actions are the right thing to do (i.e. justification) and that his or her actions are the actions of a responsible person. Furthermore, it fails to distinguish between the killing of the innocent aggressor, whose killing is permitted, and that of a bystander, whose killing is prohibited.

The justification offered by forced choice theory builds on the civil law principle of the 'causer pays'. The aggressor, being the one who forces the defender into a position that compels him or her to choose between his or her own life and the life of the aggressor, ought to be the one who pays the price. Wasserman stressed that it is the present aggression that creates the asymmetry between the aggressor who can end the situation at any given moment, and the defender who does not enjoy that capability. However, this argument could only justify the right to self-defence against the culpable aggressor. The innocent aggressor is neither morally responsible nor capable of bringing the situation to an end (he or she either does not control his or her actions or else he or she is unaware of the nature of their actions).

The third line of justification is based on rights theory. The argument retracts the core right not to be killed, and grounds the right on the prevailing right of the defender over that of

the aggressor. Traditional natural law theorists argued that the aggressor, through his or her actions, forfeits his or her right not to be killed. Yet, assuming that the right not to be killed is an unqualified and unconditional right *in rem* and that the concept of forfeiture refers to permanent forfeiture, their position raised a number of difficulties. Firstly, with regard to the content of the right: their position linked the existence of the right with one's actions, as well as other contingent facts, contrary to the assumption that every human *qua* human has a right not to be killed. Secondly, their position fails to explain how an aggressor regains the right not to be killed at the end of the act of aggression. Lastly, it fails to explain how a third person who killed the aggressor can enjoy the defence of self-defence only if he or she acted on an intention to come to the aid of the defender.

I have discussed three possible answers to these difficulties. Addressing directly the problem of regaining the right, Uniacke suggested that the prohibition against killing the aggressor after the threat is over is not necessarily dependent on a regained right of the aggressor not to be killed, but could also be the result of other considerations. More important were the other two answers, which attack the two parts of the underlying assumption. The first answer held that the right not to be killed is a right *in personam* (having indefinite number of rights against indefinite number of people) rather than a right *in rem*. I, however, considered this an artificial division, given that there are an indefinite number of rights *in personam*. A second and more successful answer attacks the assumption that the right not to be killed is unqualified and unconditional. This could be accomplished either by maintaining an unqualified right contingent on one's action, or else by maintaining a qualified, yet unconditional right. The qualification could arise through either factual or moral specification. The advantage of the latter position is that it avoids the problem of regaining the right, since at the time of the aggression the aggressor does not forfeit his or her right. To begin with, the

situation was not covered by the right, and all along he or she maintains the right not to be killed in situations other than that of an act of aggression. I presented two propositions for a moral qualification: the unjust threat and the moral fault of the aggressor. Yet I maintained that the right not to be killed is an unqualified and unconditional right. I found support for my position in the difficulties that any qualified (or conditional) right would encounter in explaining two things: firstly, the need to maintain proportionality in situations that prohibit the defender from using lethal force and secondly, the denial of the defence where the defender was unaware of the threat to his or her life and acted for reasons other than self-defence.

I also briefly presented a justification based on a theory of vindication of autonomy, which is common to continental thinking, in order to contrast it with the common-law approach.

Due to the difficulties I found in all three justifications, I suggested a justification based on forced consequences. In cases of culpable aggressor, I suggested, the right to self-defence is based on the civil principle of 'the causer pays,' as explained by the justification version of the theory of forced choice. In cases of innocent aggressor, self-defence is justified because of a general consideration according to which, in a situation where one of two parties must pay a cost, the first cannot transfer the burden of his or her 'bad luck' to the second. I believe that this premise can justify an extension of the right sufficient to cover threats to liberty and the consequent derivative duty of self-defence owed by the state.

In the third part of Chapter Three I discussed the intrinsic moral limitations to the individual's right to self-defence, which would subsequently be applied to the state's duty of self-defence, after the required adjustments. The unjust threat creates an asymmetry that

triggers the defender's right to self-defence and distinguishes between his or her lethal response and the aggressor's actions. I held that the pertinent factor is the unjust threat rather than the unjust aggressor. Thus, the right to self-defence extends to cover responses to threats made by culpable aggressors as well as innocent aggressors (that is: non-culpable agents and non-agents). I critically presented the position that it is only the unjust aggressor who triggers the right to self-defence. I stressed that self-defence does not share any purposes with punishment (as might be suggested by the proposition of 'unjust aggressor') and hence the moral fault, which is at the centre of punishment, should not set the boundaries for the right to self-defence.

I went on to discuss the principle of necessity. The principle determines two aspects of the right: when force may be used and how much force may be used. I accepted the position that since force is to be used only when necessary, the defender is obliged to retreat when possible. The 'honour reasoning' and the 'rights reasoning' that are argued for in the United States against this demand were also discussed, but I found them to be unsound when comparing the right not to be killed with freedom of movement (the right to be wherever one wishes). The only exception to this demand is in the case of one's home, for a person's home is his or her castle. The second aspect of this principle determines that no more than the minimum necessary force may be used to resist the attack.

The principle of imminence is a consequence of the principle of necessity. In a controversy regarding the extent of this principle, I joined the side of those who hold that the principle must be interpreted according to its purpose, so as to mean that self-defence is permitted at 'the last reasonable opportunity to resist the attack', rather than the more restrictive interpretation, commonly accepted in courts, which allows only for a response to a

temporally immediate – which is to say, imminent – threat. It is only this wider interpretation that allows for defensive response in situations such as the case of a hostage, in which the last opportunity for the defender to act is relatively far from the time in which the threat is to be actualized. This wide interpretation was found to be most important when applied to the state.

Finally, I addressed the principle of proportionality which states that the defensive response must be proportionate to the potential harm to the defender, with parity sought in the worst cases. As part of the discussion, I asked which interests would fall within the scope of the right to self-defence. Some natural theorists, such as Locke and Pufendorf, allowed the use of lethal force in defence of property in cases where the defender's life depends on his or her property, or where a threat to the defendant's life arises in the course of a robbery. Yet this extension returns to the idea that self-defence is permitted only in response to a threat to life. I carried the reasoning one step further and argued that self-defence ought to be permitted also in defence of property *per se*. The requirement of proportionality ensures that this right would not allow the use of defensive lethal force in such cases, since that would always be considered a disproportionate response. This extension was important because it proved that it is possible to extend the right to self-defence beyond threats to life or serious bodily harm without blurring the boundaries of the right. Indeed this principle is recognized in England and Wales.

After determining the features of the core individual's right to self-defence, I was able to show that the state owes a duty of self-defence against anti-democratic ideologies, which is associated with the individual's right to self-defence, and where the right is also the just course of action. In Chapter Four I addressed two theoretical ways to establish this relationship. The first was to argue that the individual's right to self-defence generates a

special duty of self-defence against the same type of threats owed by the state to its citizens, and that this duty extends to anti-democratic threats. The problem was that the two stages of the argument could not be reconciled. The first stage, which established the connection between the individual's right to self-defence against threats to life, and a similar (or a corresponding) duty of self-defence owed by the state, implicitly limit the state's duty to the boundaries of the individual's right. Hence, it cannot be extended to cover threats to liberty, as is required by the second stage. I have also shown why it is not possible to argue by analogy for an extended state's duty. I argued that to do so would necessarily require a similar extension of the individual's right, and the essence of this position is that the state's duty surpasses the individual's right to self-defence.

Indeed, a second possible way of maintaining a state's duty of self-defence against threats to liberty, which would be connected to the individual's right to self-defence, was by showing that the individual's right extends to include a right to self-defence against threats to liberty. This extended right generates a special duty, owed by the state to its citizens, to defend itself against anti-democratic ideologies. I claimed that once political freedom is lost, individuals would lose any control over the ability to live by their past decisions and to retain the ability to make new decisions. Yet the last reasonable opportunity to prevent this is at the time their political freedom is taken away. Given the close connections between the values of life and liberty, and given that the threat to liberty is also a threat to the whole range of the individual's interests, I concluded that the right to self-defence ought to be extended to cover anti-democratic threats. I went on to examine three possible relationships between the individual's right and the state's duty. I examined the possibility that the state's duty is the corresponding duty that the individual's right generates, but a corresponding duty can justify only a permission and not an obligation. I then moved on to examine the possibility that the

state is duty-bound, as part of a general duty of care that the state owes to its citizens. Yet this explanation, too, seemed to fall short of an accurate description of the relationship between the state and its citizens, and consequently between the individual's right to self-defence and the state's duty of self-defence. Therefore, I suggested that it is the individual's right itself that is transferred to the state, since individual citizens cannot effectively resist anti-democratic threats. The state acts as an agent on behalf of its citizens. However, the state is a special agent that may take affirmative action only if such action complies with principles of justice. Having a right to self-defence was not sufficient in itself because having a right means that the individual may do the wrong thing in particular circumstances. It was important to explain why acting on the right to self-defence in such circumstances is the right thing to do. I held that defending oneself against an anti-democratic threat is just because anti-democratic agents are culpable agents. As such they deserve to be the ones to suffer harm, where harm must befall someone.

The fact that the state acts as an agent on behalf of its citizens is also the reason we refer to the state's duty in terms of 'a right', although, like other individual rights, when the right is transferred to another it transforms into a duty. This reasoning also means that although we talk about the state's duty to defend *itself,* it is really a duty to defend *its citizens,* rather than a duty to defend itself for the benefit of its citizens.

The final stage of my argument was to apply to the state the content of the individual's right to self-defence. The application was sensitive to the special features of the state as a defender: the fact that it is really defending its citizens rather than itself; the fact that it is an artificial entity created to provide security for all the individual citizens in society, and hence it is granted permission to use criminal law to that end; and the unique size difference in the

equation of powers between the aggressors and the defender. The application was also sensitive to a possible concern of an abuse of the duty of self-defence to grant the state more powers than required, which would eventually lead to an unnecessary violation of citizens' rights. I also stressed that this concern must not be confused with the related practical concern that the state may abuse the powers allocated to it, because this latter concern is irrelevant to our theoretical discussion of moral justification.

When applied to the state's duty of self-defence against anti-democratic ideologies and taking into account the special features of the defending state (and most notably the general role to defend its citizens), the requirement of necessity holds that special powers ought to be used only when powers granted under the general duty are insufficient. This stance draws on the requirement of imminence in its wider interpretation, which allows for intervention in stages that cannot be criminalized, but which is nevertheless the last reasonable opportunity to intervene and prevent harm. It is accepted that such instances fall within the realm of the individual's right to self-defence because the threat is imminent (in its wider interpretation) but nevertheless the state cannot respond to it in accordance with the general principles that limit criminal law; and the recognition that the two duties, the general duty and the duty of self-defence, do not share purposes, but do share criminal law as a common means. Further, the use of necessity does not demand retreat, since it is either impractical or unreasonable in the case of the defending state. It does, however, maintain the right 'to go about its own business', whether this right is to be interpreted as referring to individual citizens or the authorities.

Lastly, I applied the requirement of proportionality, pointing to the difference between the current demand of proportionality and the one discussed as part of the general principles that

govern state coercion and criminal law. The application was sensitive to the pre-emptive nature of some of the defensive responses of the defending state, recognizing that the intended harm may not be merely the immediate harmful result but rather may include the further harm intended by the anti-democratic agent. Thus, it is to be understood as a requirement that both the normative and the particular sanctions be proportionate to the harm intended or done.

The assumption that the state has a right – or, more accurately, a duty – of self-defence against anti-democratic ideologies is, I maintain, accurate. Focusing on the use of substantive criminal law (i.e. creating new offences and possibly detention), it is a special duty that derives from the individual's right to self-defence; a right, which is also the just course of action in the circumstances. Nevertheless, this duty is a limited one, and cannot be used to justify any arbitrary measure taken by the state in its fight against anti-democratic ideologies. Like its founding individual's right to self-defence, it is governed by the principles of unjust threat, necessity, imminence and proportionality. These principles, as applied to the state's duty of self-defence, should guide the democratic legislator. A sensitive application of the duty may differ from one state to another pending on the stability or volatility of each society. Measures that go beyond the boundaries that these guidelines set for each society in the ordinary operation of the state[1] cannot, at the very least, be justified by appeal to the duty explored here, and must therefore find an additional justification, if such a justification exists.

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[1] Though in emergency situations such measures may be legitimate, but the discussion of emergency measures and the principles that govern such situations is beyond the scope of my thesis.

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