FREE WILL HUNTING

A RECONCEPTUALISATION OF VOLUNTARINESS, DURESS AND NECESSITY USING ARISTOTLE’S ETHICS

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1: Introduction

Jurisprudential philosophers concerned with the question of legal responsibility will be familiar with the problematic category of cases where conduct which would otherwise attract liability is committed as a result of threats or dire circumstances. When these situations arise in the context of criminal law, the traditional approach has been to invoke the defences of duress and necessity. At least theoretically, the successful establishment of one of these defences is supposed to indicate that an agent’s criminal wrongdoing should not be punished because of the extraordinary circumstances which attended their conduct. In practice, however, duress and necessity have been fraught with difficulty because their scope and application remains manifestly unclear. There is widespread uncertainty, for example, about the type of threats and circumstances that need to be present and what effect they need to have on a defendant for the defences to be activated. There is also significant contention as to whether duress and necessity should be available for all crimes, with a particular reluctance to allow their usage for the most heinous offences such as murder. Over time, this has led to divergences in the law of duress and necessity in different jurisdictions which, if anything, only serves to exacerbate confusion.

As many observers have pointed out, these issues surrounding duress and necessity are hardly the product of isolated considerations.\(^1\) Rather, they derive, at least partly, from an underlying philosophical debate about the theoretical basis upon which duress and necessity should operate to remove criminal responsibility. The prevailing view, expressed in leading cases such as *DPP for Northern Ireland v Lynch*\(^2\) and *R v Palazoff*,\(^3\) is that duress and necessity do

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not actually serve to negate any of the elements of an offence such as the *actus reus* or *mens rea*. Instead, proof of the defences reflects the fact that all the elements required to deem an agent’s act or omission criminally wrong have been satisfied, but that his/her responsibility is diminished by virtue of the duress or necessity.

Whilst such a view is enunciated in current law and accords with the operation of other defences, opponents argue that this approach is problematic because, in reality, it is difficult to draw a strict separation between duress, necessity and the prescribed elements of criminal infraction. In particular, they focus on the universally accepted requirement that for conduct to attract criminal responsibility it must involve action which is exerted voluntarily. On this view, the fact that considerations of whether an act is voluntary intersect with questions of whether an act is committed under duress or necessity is confusing and could lead to injustice.

By focussing on this debate, the ultimate goals of this thesis are (1) to determine whether the prevailing view in the present criminal justice system provides a tenable basis for linking the defences of duress and necessity with the removal of criminal responsibility and (2) if not, to suggest a viable platform for reform. My argument is divided into three chapters. In Chapter Two I outline the *status quo* position on voluntariness, duress and necessity, locating their operation within the broader structure of criminal responsibility in Australia. As canvassed above, this current framework is underpinned by the idea that the defences of duress and necessity operate in a way that is conceptually distinct from the requirement that criminal conduct be exacted voluntarily. By tracking the way these concepts work in the broader context of a ‘three-fold’ approach to criminal responsibility, I argue that such a strict separation is problematic because duress, necessity and voluntariness are all reliant on similar

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4 See Brown et al, above n 1, 630; see also *R v Hudson and Taylor* 1971 2 QB 202, 206 (Lord Parker CJ and Widgery LJ).
terms such as ‘free will’. Whilst there is a consistent attempt by proponents of the current framework to solve this issue, I contend that these arguments are unsuccessful because they are predicated on an arbitrary distinction between ‘physical’ and ‘moral’ voluntariness. The injustice which could result from this problem necessitates a reconceptualisation which captures a more nuanced understanding of the relationship between these ideas.

The rest of the thesis is devoted to the claim that this nuanced basis for reform can be found in the writings of Aristotle. In both the *Nicomachean Ethics* (*NE*) and the *Eudemian Ethics* (*EE*), Aristotle develops the idea that a man can only be held accountable for action that is performed voluntarily. In Chapter Three, I examine these writings in some detail and build an Aristotelian theory of voluntary action. This is a task which is made challenging by difficulties in the texts and the fact that, on an initial reading, there appears to be some contradiction between the *NE* and *EE* accounts regarding his treatment of actions committed under duress and necessity. I argue, however, that close analysis of the relevant passages reveals that Aristotle’s writings are more compatible than they first seem.

In Chapter Four, I analyse how Aristotle’s writings can help to solve the problems with the current law. It is not my contention that Aristotle’s writings can be directly imported into our current legal framework. Rather, I argue that an Aristotelian approach, which acknowledges a more common-sense interaction between voluntariness and the defences of duress and necessity, can provide the necessary springboard to effective reform.

Before proceeding, there are two points which should be made regarding the scope of this thesis. The first is to note that there is often a tendency to think of the law relating to duress and necessity as an area which centres purely on theoretical considerations with little application in actual practice. This is no doubt propagated by the essentially philosophical discussion that surrounds voluntariness, duress and necessity coupled with the fact that
traditionally these concepts have been raised relatively infrequently in court. However, as the House of Lords observed in *R v Hasan*, these types of defences have enjoyed somewhat of a recent revival ‘borne out by the steady flow of cases reaching the appellate courts over the past 30 years ago, and by the daily experience of prosecutors.’ Such a statement reflects that this inquiry has significant practical implications, even though the discussion will sometimes appear to be abstract or theoretical.

The second point is that, as a matter of jurisdiction, when this paper discusses the operation of the current framework, the primary standpoint is the law in New South Wales (NSW). Here, however, duress and necessity operate as common law defences, meaning that the law is heavily informed by decisions in other Australian jurisdictions and other Anglo-Saxon courts such as England and Canada. Therefore, as will become evident, it is necessary to consult the law in all these areas to develop a complete picture of how the law works and how it should be reformed in NSW.

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5 *R v Hasan* [2005] UKHL 22.
6 Ibid 22 (Lord Bingham).
2: Voluntariness, Duress and Necessity: An Uneasy Relationship in Criminal Jurisprudence

2.1: The Broad Structure of Criminal Responsibility

At their core, the issues surrounding the operation of, and interaction between, voluntariness, duress and necessity are borne from theoretical questions about how we construct criminal responsibility. As it stands, the question of whether someone should be held criminally responsible for a particular action is most commonly analysed by reference to whether their conduct satisfies the elements of a prescribed criminal offence. Using the terminology adopted by David Lanham et al, this is usually done through a ‘three-fold’ approach which defines liability by the presence of physical and mental fault components as well as the absence of a valid defence.\(^7\) In the context of this response, an understanding of this approach provides a crucial conceptual background for the rest of the thesis. This is because I argue later that problems with voluntariness, duress and necessity are derived partly from the rigid way in which lawyers sometimes seek to apply this three-fold approach.

For almost all crimes, the first element of the offence is a physical element or *actus reus*.\(^8\) Depending on the crime, the physical component can be constituted in one of three different ways: first, it can be satisfied simply by performing an act or omission which is prohibited (eg, driving above the speed limit);\(^9\) second, it can require the conduct to have a particular effect (eg, murder which needs an act ‘causing the death’ of another);\(^10\) finally, it can stipulate that the conduct be performed in particular circumstances (eg, sexual assault where

\(^8\) Brown et al, above n 1, 323-27; Paul Fairall and Stanley Yeo, *Criminal Defences in Australia* (LexisNexis Butterworths, 4th ed, 2005) 8-12.
\(^10\) *Crimes Act 1900* (NSW) s 18.
the action of sexual intercourse is made criminal by the fact that it was undertaken in a circumstance where there was no consent).\textsuperscript{11}

In addition to the physical component, most crimes also require certain mental fault elements which are sometimes termed together as the \textit{mens rea} of an offence.\textsuperscript{12} Depending on the offence, the mental fault component will be satisfied by proving that the physical component was accompanied by one, or a combination of intention, recklessness, knowledge or negligence.\textsuperscript{13} Each of these words possesses a nuanced legal definition which does not warrant detailed discussion here. Broadly speaking, however, if an offence requires intention, the accused must have foreseen and actively desired the consequences of their act or omission.\textsuperscript{14} Recklessness, by contrast, means that the accused foresaw the consequences of their act or omission but rather than actively desiring the consequences, merely proceeded in the face of that foresight.\textsuperscript{15} Negligence, for the few offences (like manslaughter) where it is prescribed, refers to a situation where the accused did not foresee, but (by standards of a reasonable person) ought to have foreseen, that the consequences of their actions would occur.\textsuperscript{16}

Provided that the prosecution proves, beyond reasonable doubt, that the physical and mental fault components for a particular offence are present, and that they coincide at a point-in-time, the only thing which will generally save an accused from criminal responsibility is a valid defence.\textsuperscript{17} There are a number of defences which operate under Australian law.

\begin{itemize}
  \item \textsuperscript{11} Ibid s 61I.
  \item \textsuperscript{12} \textit{He Kaw Teh v R} (1985) 157 CLR 523.
  \item \textsuperscript{13} Fairall and Yeo, above n 8, 12-20.
  \item \textsuperscript{14} \textit{He Kaw Teh} (1985) 157 CLR 523, 569-71 (Brennan J).
  \item \textsuperscript{15} \textit{Valiance v R} (1961) 108 CLR 56, 82 (Windeyer J).
  \item \textsuperscript{16} See \textit{Nydam v R} [1977] VR 430.
  \item \textsuperscript{17} It is important that the burden of proof is on the prosecution to prove all the elements of the offence. This is sometimes known as the ‘golden thread’ of criminal justice; \textit{Woolmington v DPP} [1935] UKHL 1. It is also important that the physical and mental fault components coincide at a particular
\end{itemize}
including self-defence, provocation, duress, necessity, intoxication and insanity. It is important to note that whilst all of these are often said to come under the broad heading of ‘defences’, this is not strictly correct because some of them (such as intoxication), if established, merely work to negate a physical or mental component of an offence.\(^{18}\) Others, however, such as self-defence or provocation are invoked \textit{ex post facto} after the necessary physical and mental fault components have been proven.\(^{19}\) It is this latter category which is being considered when speaking of a ‘third arm’ to the three-fold approach towards criminal responsibility.

There are also important differences between the defences regarding the extent to which they impact on criminal responsibility. If, for example, it can be shown that an accused was acting in self-defence or under duress he/she can be absolved from criminal responsibility altogether.\(^{20}\) Other defences, such as provocation or substantial impairment, have a more limited application and can only ever reduce a charge of murder to manslaughter.\(^{21}\)

When examining the interaction between the defences and questions of criminal responsibility, some scholars have found it useful to distinguish between a ‘justification’ and an ‘excuse’.\(^{22}\) If a defence operates as a justification it means that the accused’s conduct should not be punished because (in the circumstances) it actually warrants some form of social approval.\(^{23}\) Self-defence is seen as the typical example of this, where purely defensive

\(^{18}\) David Lanham et al, above n 7, 10-11.
\(^{19}\) Ibid; Fairall and Yeo, above n 8, 1, 102.
\(^{20}\) The fact that self-defence is a complete defence is contained in \textit{Crimes Act} s 418(1); for duress see \textit{Lynch} [1975] AC 653, 686 (Lord Simon).
\(^{21}\) These are commonly known as ‘partial’ defences. See Brown et al, above n 1, 514-15.
\(^{23}\) Yeo, above n 22, 5-6.
and protective action against an attacker is often seen to warrant approbation.\textsuperscript{24} An excuse, on the other hand, refers to conduct which, whilst otherwise condemnable, is deemed forgivable often because of the personal circumstances of the accused (eg, the fact that they suffer from a mental illness).\textsuperscript{25} These terms are introduced here because they can occasionally render some assistance when thinking about the underlying rationale for the defences of duress and necessity. This notwithstanding, as Paul Fairall and Stanley Yeo point out, it is important not to use these terms exhaustively, especially because boundaries between them can often be blurred and they have little practical application in court.\textsuperscript{26}

\subsection*{2.2: Three Discrete Concepts: The Operation of Voluntariness, Duress and Necessity}

At present, voluntariness and the defences of duress and necessity are concepts that operate at different stages of the three-fold approach outlined above. Voluntariness, sometimes known as volition, is widely seen to be a requirement within the physical component of any crime.\textsuperscript{27} When the voluntariness requirement is challenged, it is usually labelled under the defence of ‘automatism’.\textsuperscript{28} As outlined above, however, this is not a defence in the sense of a third arm of criminal responsibility because it actually just challenges the actus reus of the offence. Duress and necessity, by contrast, are traditionally raised after the physical and mental fault

\begin{flushright}
\textsuperscript{24} Fairall and Yeo, above n 8, 1.
\textsuperscript{25} Yeo, above n 22, 6.
\textsuperscript{26} Fairall and Yeo, above n 8, 2; see also Zecevic \textit{v} DPP (Vic) (1987) 162 CLR 645, 658 where Wilson, Dawson and Toohey JJ assert that ‘[a]ny practical distinction between justifiable homicide and excusable homicide disappeared with the abolition of forfeiture by statute in 1828 and today it is no part of the law in Australia to differentiate between the two.’
\textsuperscript{28} Ryan \textit{v} R (1967) 121 CLR 205, 217 (Barwick CJ); Bratty \textit{v} Attorney-General for Northern Island [1963] AC 386; see also Fairall and Yeo, above n 8, 280-81.
\end{flushright}
components have been proven to exonerate an offender in situations where otherwise unlawful action is the result of threats or dire circumstances.\(^{29}\)

By itself, the fact that some considerations of criminality occur within the *actus reus/mens rea* dichotomy and others occur outside of it poses no *prima facie* problem. Indeed, some commentators have pointed out that ‘dividing crime into its constituent elements in this way should be no more than a matter of analytical convenience’.\(^{30}\) However, as will become clear by examining each concept in turn, the issue with voluntariness, duress and necessity is that their operations in practice have become confusingly and inextricably linked. Ultimately, this means that a strict separation between them is near impossible which could lead to significant injustices as canvassed in Section 2.3 below.

### 2.2.1: Voluntariness

The principle of voluntariness operates in order to give effect to a long-standing belief that someone can only be held criminally responsible for action which is the result of free will.\(^{31}\) The rationale for this derives from an examination of what it means to ‘act’, a question which has already been established as being pivotal to *actus reus* considerations. Regarding this issue, some choose to take a narrow view, arguing that an act ‘is simply a muscular contraction which causes the body to move’.\(^{32}\) The vast majority, however, think that this perspective is untenable because there are a number of cases where an agent is undergoing muscular contractions even though we do not conceive them as ‘acting’.\(^{33}\) Basic human functions like heart-beating and digestion seem to fall into this category, as do reflex

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\(^{29}\) See Palazoff (1986) 23 A Crim R 86, 88; see also Brown et al, above n 1, 630.


\(^{31}\) Spain, above n 1, 20-21.

\(^{32}\) Brown et al, above n 1, 327.

\(^{33}\) Ibid.
movements and movements accomplished whilst one is asleep. For these movements, there is a heavy reluctance to impose liability on an accused because their behaviour is not attributable to their character and it is not freely chosen.

In order to account for these marginal cases, the approach the law has taken is to move beyond a simple definition and hold that physical movement requires some form of conscious will before it is considered an act. This is, indeed, the focus in the leading Australian judgments on voluntariness in *Ryan v R* and *R v Falconer* as well as the Commonwealth Criminal Code which have all emphasised that a person is only responsible for an act that is voluntary and that an act is only voluntary if it is the product of free will. In a joint decision in *Falconer*, Mason CJ, Brennan and McHugh JJ held that ‘the notion of will imports a consciousness in the actor of the nature of the act and a choice to do an act of that nature.’

Where this will is not present, it cannot be said that the agent has ‘acted’ in the first place for the purposes of proving the *actus reus* of the offence.

Despite the voluntariness principle being embedded as a fundamental component of any crime, it is rarely an issue which is raised in practice. As many commentators have pointed out, the main reason for this is that where an offence requires mental fault components such as intent or recklessness, it will be far easier for an accused to raise doubt about one of these elements rather than asserting that his/her physical body movements were involuntary.

There is also reluctance to define an act in a narrow fashion as shown by the High Court’s

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34 Fairall and Yeo, above n 8, 1; For unwilling muscular contractions or reflex action as an established type of involuntary conduct see *Ryan* (1967) 121 CLR 205; see also *Williams v R* (1990) 50 A Crim R 213. For actions performed whilst asleep see *Jiminez* (1992) 173 CLR 572.
35 *Ryan* (1967) 121 CLR 205, 213-17 (Barwick CJ).
36 *R v Falconer* (1990) 171 CLR 30, 39 (Mason CJ, Brennan and McHugh JJ); see also *R v Radford* (1985) 42 SASR 266, 276 (King CJ).
37 *Criminal Code Act 1995* (Cth) sch 1, s 4.1-4.2; Criminal Law Officers Committee, above n 27, 13.
39 *Ryan* (1967) 121 CLR 205 (Barwick CJ); Brown et al, above n 1, 328; see also Criminal Law Officers Committee, above n 27, 13.
decision in *Murray v R*\(^{40}\) where an accused claimed that he did not pull the trigger deliberately but rather by reflex action. In this case, Gummow and Hayne JJ (who formed part of the majority) ruled that when defining this act, we should include the whole set of movements which included loading, cocking, presenting and firing the gun.\(^{41}\) Regardless of the fact that the accused may not have consciously turned his mind to all of these processes (such as firing which was a reflex action), it was decided that ‘there is no basis for concluding that the set of movements, *taken as a whole*, was not willed’.\(^{42}\)

The fact that voluntariness will rarely be a contentious issue is accounted for through a procedural rule that where there is no evidence that an act was involuntary the jury does not need to be directed on the issue.\(^{43}\) This notwithstanding, if the accused is able to raise sufficient evidence, and the prosecution cannot disprove beyond reasonable doubt that the relevant action was not willed, the voluntariness principle will allow the accused to be completely exonerated from liability.\(^{44}\)

### 2.2.2: Duress

Thus far, this discussion has introduced duress and necessity without distinction, reflecting the focus of this thesis which is on the theoretical differences between voluntariness and these two defences taken together. There are important reasons for this, notably that for the purposes of examining how the defences work to diminish responsibility and how they interact with the principle of voluntariness, duress and necessity operate on similar grounds. They also seem to be relevant in conceptually similar situations, often leading to an approval

\(^{41}\) Ibid 209-11 (Gummow and Hayne JJ).
\(^{42}\) Ibid 211.
\(^{44}\) As per *Ryan* (1967) 121 CLR 205 and *Falconer* (1990) 171 CLR 30 above.
of Lord Halisham’s statement that ‘duress is only... [a] species of the genus of necessity’. However, similarities notwithstanding, it is important to note that duress and necessity are distinct defences under current law, thereby necessitating a discussion of the differences between them.

Looking at duress first, the law here aims to relieve an agent from responsibility in situations where he/she commits what would otherwise be an offence because they were faced with serious threats. The essence of such cases is not that the accused has been physically overpowered (in which case resultant action would clearly be involuntary), but rather, that the fear caused by the threats overbears on his/her freedom of choice. Duress thus shares with the voluntariness principle the same underlying tenet; conduct can only attract responsibility when it results from freely chosen action which is attributable to the subject in question. Its operation, however, is limited to a select number of cases viz., those where free choice is specifically compromised by threats against the accused.

By nature of the fact that duress operates in situations where conduct would otherwise be deemed illegal, courts have sought to place limits on its operation. The first of these is that duress has traditionally not been available for all crimes, especially homicidal offences. Thus, at common law in NSW, whilst duress may be available to people who are accessories to murder and manslaughter, it cannot be used for first-degree murder. The basis for this resides in the long-standing claim encapsulated by William Blackstone that someone ‘ought rather to die than escape by the murder of an innocent.’ In recent years, however, this idea has been challenged by various law reform bodies typically because there is seen to be a flaw

47 See Fairall and Yeo, above n 8, 134-38.
in the logic that the law should impose a hero mentality on a subject to commit suicide.\textsuperscript{50} Whilst doing so may reflect a certain moral superiority, the argument is that such considerations should not undermine the basic rationale that someone should not be held responsible for action that is not freely chosen.\textsuperscript{51} The effect of these reform proposals has meant that the law on duress has been in a state of flux, with differences in the law across jurisdictions.\textsuperscript{52} In NSW though, common law rules continue to apply which means duress cannot exonerate an accused murderer.

Even for the majority of crimes where it is available, the law has been at pains to impose strict conditions on whether an accused can rely on duress. Broadly, these conditions can be divided into two categories: first, that the threats have to be of a particular nature; second, that the threats must have a particular effect on the accused. Concerning the nature of the threat, the basic rule is that the threats have to be particularly serious and will usually only be allowed if they threaten the subject with the prospect of their own or someone else’s death or grievous bodily harm.\textsuperscript{53} This means that threats to property cannot activate duress.\textsuperscript{54}

Regarding the effect that the threat has to have on the accused, courts have imposed both subjective and objective requirements. From the subject’s point of view, the threat needs to overbear on the will of the accused such that they were not acting independently but rather as a result of the threat.\textsuperscript{55} In this sense, the threat cannot be fleeting, and needs to ‘present and

\textsuperscript{51} Ibid.
\textsuperscript{52} Ibid; according to this report, the abolition of the murder exception has been advocated by the Law Commission of England and Wales in 1977 as well as by the Model Criminal Code Officer’s Committee in Australia. As a result, the Commonwealth and ACT Criminal Codes state that the duress defence is available for murder. Following these jurisdictions the Victorian Law Reform Commission adopted this position as well.
\textsuperscript{53} \textit{R v Lawrence} [1980] 1 NSWLR 122, 142-43 (Moffit P); \textit{R v Hurley and Murray} [1967] VR (FC) 526, 543 (Smith J).
\textsuperscript{54} \textit{Lynch} [1975] AC 653, 686 (Lord Simon).
\textsuperscript{55} \textit{R v Brown} (1986) 43 SASR 33, 37.
continuing, imminent and impending’. From an objective perspective, it also has to be shown that that a ‘person of ordinary firmness’ would have had their will similarly overborne such that they would also have been likely to yield to the threat. It is also important that the accused did not enter voluntarily into a situation where they were liable to duress or that they reasserted their will at some point whilst the threat was present. If this did occur, it would indicate that the free will of the accused was no longer being overborne, thus undermining the very basis upon which duress serves to operate.

2.2.3: Necessity

Whilst duress operates specifically where there are severe threats, necessity is supposed to deal with a broader ambit of cases where the accused breaks the law because circumstances somehow demand it. The focus in these cases is usually on an agent who acts because a contravention of the law represents the lesser of two evils. Throughout history, the criminal law has shown a heavy reluctance to recognise or develop this defence, spurred by a longstanding belief that allowing necessity will open the floodgates to breaches of the law and weaken the authority of existing legal rules and procedures. This notwithstanding, necessity has been raised in a broad spectrum of scenarios including jettisoning cargo to save a vessel, committing cannibalism to stay alive, and driving offences where someone’s

57 Brown (1986) 43 SASR 33, 37; Palazoff (1986) 23 A Crim R 86, 91 (Cox J); Note also that there is some suggestion that in New South Wales the objective test is even more stringent. See R v Abusfiah (1991) 56 A Crim R 424, 434-35 where Hunt J held that ‘the Crown must establish that there is no reasonable possibility that a person of ordinary firmness of mind…would have yielded to the threat in the way the accused did.’
58 Hurley and Murray [1967] VR (FC) 526, 543 (Smith J); see also Fairall and Yeo, above n 8, 144-45.
59 Fairall and Yeo, above n 8, 97-98; Brown et al, above n 1, 615.
60 Reniger v Fogossa (1551) 75 ER 1; Mouse’s Case (1609) 77 ER 1341.
61 R v Dudley and Stephens (1884) 14 QBD 273.
health or safety is at risk.\textsuperscript{62} Despite the fact that necessity is very rarely allowed, such cases have helped to build a small body of case law which deals with the defence.

In terms of defining a theoretical basis for the operation of necessity, the leading discussion is contained within the decision of Dickson J in the Canadian Supreme Court case of \textit{Perka v The Queen}.\textsuperscript{63} Here, his honour teased out the rationale for the defence by considering whether necessity is best conceived as a justification or as an excuse.\textsuperscript{64} If it is characterised as a justification, the defence would be seen to support the proposition that choosing the lesser of two evils should be praised rather than punished because it has resulted in some greater good. Whilst this seems to accord well with utilitarian thought, Dickson J identifies that it also commits us to the view that a person is entitled to ‘violate the law because on his view the law conflicted with some higher social value’.\textsuperscript{65} Such a perspective is seen to be at odds with the present system of criminal justice because it imports ‘an undue subjectivity into the criminal law’ and would alter the traditional role of the judiciary by allowing ‘courts to second-guess the legislature’ (whose role it is to define the law in the first place).\textsuperscript{66}

These weaknesses with treating necessity as a justification compelled Dickson J to consider whether necessity finds stronger footing as an excuse. Conceived in this way, necessity should relieve an accused of criminal responsibility on a humanitarian basis which acknowledges that it would be an intolerable burden on the accused to obey the law. For his honour, this approach is preferred because

\begin{quote}
‘It rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency
\end{quote}

\textsuperscript{62} \textit{DPP v Bell} (1992) Crim LR 176.
\textsuperscript{63} \textit{Perka v The Queen} [1984] 2 SCR 232, 241-50 (Dickson J).
\textsuperscript{64} A discussion of this point is also contained in Fairall and Yeo, above n 8, 144-45.
\textsuperscript{65} Ibid 248; note here Dickson J is quoting here from another judgment of his: \textit{Morgentaler v The Queen} [1976] 1 SCR 616, 678.
\textsuperscript{66} \textit{Perka} [1984] 2 SCR 232, 248 (Dickson J).
situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience.\textsuperscript{67}

Thus, for Dickson J, the underlying rationale for the necessity defence is that, in certain circumstances, ‘normal human instincts’ mean that breaking the law is wrong but ‘realistically unavoidable’.\textsuperscript{68} He even gives credence to a remark by Aristotle to this effect that an agent deserves pardon acting under pressure which ‘overstrains human nature and which no one could withstand.’\textsuperscript{69}

Whilst such a discussion seems to provide the principled basis for allowing necessity to exculpate an offender, in a similar way to duress, there are heavy limitations controlling its availability. Aside from banning necessity as a defence for murder,\textsuperscript{70} the cases suggest that there are three strict elements required for necessity to be used successfully. First, regarding the nature of the circumstance, the situation must be an emergency where there is imminent danger and where breaking the law is the only way to avoid a dire result.\textsuperscript{71} Second, the accused must honestly believe on reasonable grounds that he/she faces imminent peril.\textsuperscript{72} Finally, the response must be proportionate to the peril, as measured by the objective standard of whether an ordinary person would have considered an alternative course of action.\textsuperscript{73} In the

\textsuperscript{67} Ibid 248-50.
\textsuperscript{68} Ibid.
\textsuperscript{69} Ibid 249.
\textsuperscript{70} The discussion regarding the reluctance to extend necessity to murder mirrors the debate surrounding the law of duress. For necessity, the classic statement in favour of the prohibition is from Lord Coleridge in \textit{Dudley and Stephens} (1884) 14 QBD 273, 273-75. However, just like duress the Victorian Law Reform Commission, above n 50, 112-18, reflects that there is a steady shift away from this traditional position.
\textsuperscript{72} Ibid.
\textsuperscript{73} Ibid.
rare scenario where an accused is in such a situation, and these tests are satisfied, their liability will be removed completely.74

2.3: A Problem with the Current Approach

2.3.1: The Overlap Issue

The above analysis demonstrates that there are measures in place in the criminal justice framework to ensure that an agent is not responsible for action which is not attributable to their own free will. However, it also reveals that there is a problem with the way the law presently gives effect to this principle; namely, that it does so in a fashion that straddles at least three different concepts. The fact that this overlap is present is immediately clear from the language used to describe voluntariness and duress which both seem to rest on lack of free will as the crucial factor when determining whether particular conduct was involuntary or whether it was exerted under duress. The same is true of necessity where the rationale that a person is not liable if their action is committed under insurmountable pressure also seems to turn on a question of whether the conduct was governed by free will and choice.

The fact that ‘free will’ appears at the core of voluntariness, duress and necessity can lead to injustices if the area is left unattended. Most significantly, it perpetuates confusion as to which concept applies in a particular scenario and uncertainty as to whether acts committed under duress and necessity are voluntary or not. Thus on a particular set of facts, if a defence raises duress or necessity, it is unclear whether they can ever be successful in arguing that there was no free will because the ‘free will component’ should already have been satisfied when examining whether the actus reus was made out. This, combined with non-applicability of duress and necessity to murder, could create a push to use the voluntariness principle instead of the traditional defences. Ultimately, this could lead to more significant injustices.

74 Ibid.
given that the law relating to voluntariness currently remains undeveloped compared to duress and necessity where there the explicit imposition of objective tests has led to more concrete rules. As it stands, the law seems to lack a clear explanation of how voluntariness differs from duress and necessity, as well as a coherent rationale which defines when to use a particular principle.

2.3.2: A Potential Solution

To their credit, proponents of the status quo do not ignore this issue. Instead, they typically argue that there is no overlap between voluntariness and the defences under the current system. In Australia, the leading perspective of this kind comes from Yeo whose views in the article ‘Voluntariness, Free Will and Duress’ are equally applicable to necessity. In this essay, Yeo acknowledges that the embedding of free will in voluntariness and the defences has the tendency to cause confusion but he is reluctant to say that this is the product of some underlying theoretical problem. Instead, he argues that that the notion of free will actually ‘takes a quite different complexion for each of these matters.’ Regarding voluntariness, free will is said to take on a very narrow definition, referring only to the ‘bodily-movement-caused-by-free will which is essential to conduct being an act of any kind at all’. So with killing, for example, voluntariness is concerned with the ‘basic act’ involved such as moving one’s finger to pull the trigger. By contrast, for duress and necessity, ‘the notion of free will pertains to D’s ability to choose whether to perform the complex act – for instance to kill or

75 Yeo identifies that considerations regarding voluntariness and free will as they relate to duress are equally applicable to necessity since, in the words of Lord Halisham, ‘duress is a specie of which necessity is the genus’; see Yeo, above n 27, 307.
76 Yeo, above n 27, 306.
77 Ibid.
to rape – demanded by the threatener’. Free will here thus goes to a choice as to the consequences of the act, rather than a choice to perform the basic act in the first place.

The crux of Yeo’s point is that with duress (and necessity), there is usually no doubt that the accused’s act was voluntary, in the sense that the agent freely willed their body to move in a certain way. However, it is the case that the complex act associated with the crime is not freely willed, because that act would not have been committed but for threats or dire circumstances. The idea is illustrated by J. F. Stephen’s example of a man walking to the gallows for execution. In this instance, the argument is that the person is clearly walking under compulsion but ‘his motions are just as much voluntary actions as if he were to leave his place of confinement and regain his liberty.’ The man is making the conscious choice to walk forward, and has the physical power over his own body to abstain from this action if he really wants to. At the same time, the fact that he is being threatened bears heavily on his movements and walking to the gallows certainly is not something he would ordinarily do. Indeed, it is this latter suppression of desire which is operating in situations of duress and necessity.

Even prima facie, it is easy to see why this approach is so attractive. By demonstrating that there are different types of free will operating in voluntariness and the defences, Yeo shows that there is a conceptual basis for separating these notions in law. It is a line of argument which has found approval in common law where, in the leading case of Palazoff, Cox J held that:

‘The law speaks of a man acting under duress when his will is overborne by another, but that does not mean that his act is involuntary or unwilled in the sense in which

78 Ibid.
those terms are used by Barwick CJ in Ryan... [I]n a case of duress, the actus reus is voluntary, or willed, and intended, but is, in a real and very relevant sense, undesired. The maxim is coactus volui, but the force is not compulsion, strictly so called, but persuasion created by a dilemma.\textsuperscript{80}

Drawing this distinction between voluntariness and the defences of duress and necessity is seen as having a further benefit of ensuring that there is a separation between the law’s considerations of individual fault and morality.\textsuperscript{81} Voluntariness, in this sense, can be confined to the narrow question of whether the crime was committed as a result of ‘bodily-movement-caused-by-free will’. Duress and necessity, by contrast, can be concerned with the broader issue of whether an agent’s responsibility should be diminished on the basis of social context and moral factors that surrounded his/her actions. Commentators have often sought to express this distinction by referring to the former as ‘physical involuntariness’ and the latter as ‘moral or normative involuntariness’.\textsuperscript{82} Yeo and Alan Norrie emphasise that it is pivotal to separate these concepts and only consider the question of physical voluntariness in the actus reus part of the three-fold approach because it prevents social and political factors from entering ‘at large into the criminal law.’\textsuperscript{83} It is argued that these social considerations reside in a more suitable place when they are dealt with at the ‘defences’ stage of criminal responsibility after the formal elements of the offence have been established.

It is important to note that Yeo still thinks there is some confusion regarding the terminology that is currently used to describe these concepts. He proposes that the terms ‘free will’ and ‘involuntariness’ should be removed completely from the legal definitions of duress and

\textsuperscript{80} Palazoff (1986) 23 A Crim R 86, 88 (Cox J).

\textsuperscript{81} Yeo, above n 27, 308-9.

\textsuperscript{82} See Fletcher, above n 22, 803-7; Alan Norrie, Crime, Reason and History: A Critical Introduction to Criminal Law (Butterworths, 2\textsuperscript{nd} ed, 2001) 112-15; Andrew Ashworth, Principles of Criminal Law (Oxford University Press, 6\textsuperscript{th} ed, 2009) 210-12; Perka [1984] 2 SCR 232, 249 (Dickson J).

\textsuperscript{83} Yeo, above n 27, 309; see also Norrie, above n 82, 113-14.
necessity (including the use of moral involuntariness) so as to avoid ambiguity.\textsuperscript{84} As canvassed above, however, the reason for this is not to alter the current approach to the connection between voluntariness and defences. It is simply to confirm that the determination of whether an act was committed under duress and necessity bears no link to the question of whether the voluntariness requirement is satisfied.

\textbf{2.3.3: The Arbitrary Distinction between Physical and Moral Involuntariness}

Compelling as this argument is, such an approach faces a key problem; namely, that it seems to purport too rigid an isolation of the voluntariness principle, which does not capture its theoretical foundations and compromises the flexibility of duress and necessity as defences. This rebuttal rests on the claim that narrowing the voluntariness principle to considerations of physical voluntariness ignores the fact that the rationale for removing responsibility for involuntary actions can also cover cases which Yeo and others would classify under duress and necessity. In a sense, this problem is foreshadowed through the very use of the term ‘moral involuntariness’ which forges a clear connection between such cases and the voluntariness principle. A better understanding of the issue requires a more detailed examination of why involuntary action warrants the removal of criminal responsibility than that which has already been provided.

As with the necessity defence, there is some dispute amongst scholars about the correct underlying rationale for the voluntariness principle. One perspective, which derives from the thinking of Jeremy Bentham and carries considerable support in modern Anglo-American jurisprudence, is based on the view that involuntary action cannot be deterred, thereby

\textsuperscript{84} Yeo, above n 27, 309-10.
rendering it pointless to impose responsibility and punishment for such conduct.\textsuperscript{85} However, as H. L. A. Hart points out, this argument is based on a \textit{non sequitur}; just because a particular accused might not be deterred by punishment, it does not necessarily follow that his/her punishment will not deter the actions of others in society.\textsuperscript{86} Furthermore, even if an entire society is not deterred by a particular person’s punishment, it might still serve to create a more law-abiding community where citizens, as a whole, are more likely to obey laws if they know that rules will be enforced relentlessly.\textsuperscript{87}

The flaws with this utilitarian model have spurred the justification of the voluntariness principle on a different basis of fairness and agency which was canvassed, to some degree, in the explanation of voluntariness in Section 2.2.1 above. The logic here is that we should abstain from punishing offenders who act involuntarily, not because it would be inefficacious, but because it is unfair to hold someone responsible for actions that cannot be imputed to their character.\textsuperscript{88} In other words, punishment should be limited to those whose actions are consistent with their own agency. Hart explains this idea further arguing that ‘unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him.’\textsuperscript{89} Such an approach seems viable, because it captures our ordinary understanding of the concept of voluntariness and is not susceptible to the objections levelled against the utilitarian approach above.

When the voluntariness principle is conceived in this way to reflect the connection between agency and character, it is easy to see that it is somewhat arbitrary to restrict the voluntariness principle to considerations of physical voluntariness alone. This is because there will be a


\textsuperscript{87} Ibid.

\textsuperscript{88} Klimchuk, above n 85, 4-5.

\textsuperscript{89} Hart, above n 86, 181.
number of cases where action that falls under the category of normative involuntariness cannot be attributable to the agency of the actor involved. The example considered above of a man walking to the gallows seems to fall into this category, for whilst he is physically making the steps forward, it is very difficult to say that this action is voluntary in the sense that it can be imputed to the actor. Dennis Klimchuk puts the point succinctly:

‘In short, normatively involuntary actions share with actions that are involuntary in the sense relevant to negating actus reus the exculpatory relevant feature that renders the latter immune from criminal censure, namely, that involuntary actions resist imputation to the actor putatively responsible for their commission.’

To date, it appears that no significant judicial treatment expressly identifies that the rationale for the voluntariness principle extends to morally involuntary acts in this way. Probably the closest attempt comes again from Dickson J’s decision in Perka, whose following remarks have been considered widely by many scholars and are worth quoting at length:

‘[The] voluntariness requirement simply refers to the need that the prohibited physical acts must have been under the conscious control of the actor. Without such control, there is, for purposes of the criminal law, no act. The excuse of necessity does not go to voluntariness in this sense. The lost alpinist who on the point of freezing to death breaks open an isolated mountain cabin is not literally behaving in an involuntary fashion. He has control over his actions to the extent of being physically capable of abstaining from the act. Realistically, however, his act is not a “voluntary” one. His “choice” to break the law is no true choice at all; it is remorselessly compelled by normal human instincts. This sort of involuntariness is often described as “moral or normative involuntariness”… In my view this rationale extends beyond specific

90 Klimchuk, above n 85, 5.
codified excuses and embraces the residual excuse known as the defence of necessity.\textsuperscript{91}

In his analysis, Yeo says that ‘this exposition has a strong and a weak side to it.’\textsuperscript{92} The strength of the statement, for him, is that there is a separation between the law’s treatment of conduct that is physically involuntary and conduct that is physically voluntary but morally involuntary. Its weakness, however, resides ‘in the felt need to forge a conceptual link between the two forms of conduct through the concept of involuntariness’ because the use of this term might promote confusion.\textsuperscript{93}

In light of the above considerations of the rationale for the voluntariness principle and approval of Klimchuk’s statement, the strengths and weaknesses of Dickson J’s judgment are actually the opposite of what Yeo characterises. The strength of the exposition is that it recognises a clear conceptual link between physical and moral involuntariness. In this sense, an agent who commits an action which falls under the category of moral involuntariness should not be held responsible on the basis of the rationale which underlies the voluntariness principle rather than some other concept.

The weakness of the statement, however, is that Dickson J seems to conceive of morally involuntary conduct as operating separately under the headings of duress and necessity. Given the acknowledgment that moral involuntariness is based on not punishing involuntary action generally, there is no reason to keep physical and moral involuntariness apart by placing them at different sides of the three-fold approach to liability. This does not commit one to the view that duress and necessity are now completely redundant concepts, for it may be the case that these defences find a viable theoretical basis which is distinct from

\textsuperscript{91} Perka [1984] 2 SCR 232, 249 (Dickson J).
\textsuperscript{92} Yeo, above n 27, 307.
\textsuperscript{93} Ibid.
voluntariness altogether. This will be considered in greater detail throughout the rest of the thesis.

At this stage, however, the above analysis can be summarised by two propositions: first, the status quo operation of voluntariness, duress and necessity is untenable because duress and necessity both seem to rely on the same underlying idea as voluntariness (i.e., that an agent should not be held responsible for an act which is not the result of his/her free will or agency); second, that the attempt by scholars to argue that this confusion does not exist because of the separation of physical and moral involuntariness is arbitrary because the underlying rationale behind the voluntariness principle covers both these concepts. Put together, these claims warrant a revision of duress and necessity defences, especially in terms of determining how they ought to interact with notions of voluntariness and free will. This is the primary goal of the remaining chapters.
3: Aristotle’s Conception of Voluntariness, Duress and Necessity

The ultimate contention of this thesis is that effective reform does not require us to conceptualise voluntariness, duress and necessity from scratch. Instead, a basis for reconsideration can be found in the works of Aristotle. Crucial to this project, however, is a determination of what Aristotle actually said about these concepts – a task that is not as straightforward as it seems, because Aristotle’s writings on the issue appear in brief portions of two works (the *NE* and *EE*) in a fashion that is confusing and *prima facie* inconsistent.\(^94\) In this chapter, I show that a close analysis of the texts can yield a sufficiently robust account of the interaction between voluntariness and the defences of duress and necessity. The picture developed here will form the basis for my analysis in Chapter Four, where I demonstrate precisely how Aristotle’s views can be adopted to resolve the issues raised in Chapter Two above.

3.1: Aristotle’s Approach in the *Nicomachean Ethics*

Aristotle’s discussion of voluntariness, duress and necessity is contained in the *NE* at III.1 and V.8. Following others, my focus will be on III.1 because the latter treatment adds little to his primary argument.\(^95\) Aristotle’s considerations regarding voluntary action stem from his broader thesis that the best life a human can lead is one of excellent rational activity. In fleshing out what excellent rational activity means, Aristotle says that such activity actualises the virtues of the rational part of the soul throughout one’s lifetime.\(^96\) Crucial to this concept is Aristotle’s idea that a person’s virtuous activity should be judged only with respect to what

\(^{94}\) There is some discussion of these ideas in the *Magna Moralia* (at I.13), though I follow the usual tradition of not including this in my analysis due to the current consensus that this was not Aristotle’s own work. On this point see Lesley Brown, ‘Introduction’ in Aristotle, *The Nicomachean Ethics* (David Ross trans, Oxford University Press, 2009) vii-viii; see also Dennis Klimchuk, ‘Aristotle on Necessity and Voluntariness’ (2002) 19(1) *History of Philosophy Quarterly* 1, 2.

\(^{95}\) See Klimchuk, above n 94, 2.

\(^{96}\) Aristotle, above n 94, 1097b20-1098a20.
he/she does voluntarily because it is only on such actions that we should ascribe praise or blame. The exposition in III.1 can thus be seen as an aside to Aristotle’s broader examination of virtue, where the analysis of what constitutes voluntary action provides the basis to determine whether we should judge a particular action as contributing to our moral assessment of an agent.

What is clear, however, is that Aristotle did not just see the question of voluntariness as only being important to those considering virtue. Rather, his writings draw specific attention to the law, stating that distinguishing between the voluntary and involuntary is ‘useful also for legislators with a view to the assigning both of honours and of punishment.’ In her commentary, Lesley Brown takes this point even further, arguing that in III.1 Aristotle’s focus seems to be chiefly on the question of legal responsibility and punishment as opposed to virtue. Whilst such a statement seems to indicate that Aristotle’s discussion will be directly relevant to the legal issues in this paper, it should be noted that this is not entirely without controversy given that there is some disagreement about whether the terms ‘voluntary’ and ‘involuntary’ are accurate translations for the Greek terms ‘hekousion’ and ‘akousion’. These Greek words can equally be used to cover other English concepts as well such as ‘intentionally’ and ‘unintentionally’ or ‘willingly’ and ‘unwillingly’. However, as Anthony Kenny points out, ‘despite their occasional unnaturalness: no other pair of terms fares sufficiently better in all contexts to justify departing from the tradition.’ Following this line of reasoning, I take Aristotle’s discussion to be concerned with the issue of

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97 Ibid 1109b30-35.
99 Anthony Kenny, Aristotle’s Theory of the Will (Duckworth, 1979) 27.
100 Ibid.
101 Ibid; for an extended discussion on this point which comes to a similar conclusion see Susan Sauvé Meyer, Aristotle’s on Moral Responsibility (Oxford University Press, 2nd ed, 2011) 9-14.
distinguishing voluntary from involuntary conduct in a fashion that is relevantly similar to the way in which we use these words in contemporary discourse.

Aristotle explains his views on voluntary and involuntary action primarily by trying to illuminate the conditions that would render an action involuntary. Involuntary actions, he suggests, should be attended not with praise or blame but with ‘pardon, and sometimes also pity’.\(^{102}\) The words here are important for present considerations because they seem to map onto legal notions of excuse and justification; an act deserving of ‘pardon’ is one where genuine wrongdoing is deemed forgivable as opposed to an act which we ascribe ‘praise’ to, which warrants some kind of social approval.\(^{103}\) For Aristotle, involuntary acts fall into one of two categories: those involving force (bia) and those involving error (hamartia).\(^{104}\) In situations of force, the ‘moving principle’ of the action is said to be outside the agent. Error, on the other hand, pertains to circumstances where an agent acts on the basis of a genuinely mistaken belief.\(^{105}\) Clearly, however, only the former is relevant to considerations in this paper because if acts under duress and necessity are deemed involuntary, it will be on the basis of force rather than error.

In many ways, Aristotle’s general discussion of force bears similarities to modern explanations of the voluntariness principle. Action, on this view, is involuntary when the person is so divorced from their movements that they be cannot said to have been their own.\(^{106}\) For Aristotle, this is the case when ‘the cause is in the external circumstances and the agent contributes nothing’.\(^{107}\) To use his own examples, in such circumstances, the person’s

\(^{102}\) Aristotle, above n 94, 1109b30-35.

\(^{103}\) Kenny, above n 99, 28-29.

\(^{104}\) Aristotle, above n 94, 1109b30-35.

\(^{105}\) Ibid 1110b15-1111b5.


\(^{107}\) Aristotle, above n 94, 1110b1-5.
action is akin to being ‘carried somewhere by the wind, or by men who had him in their power’.

Properly conceived, this movement cannot even be said to constitute ‘action’, but rather, is a case of someone being ‘acted upon’. The crucial qualification here though is that the involuntariness test can only be satisfied when the person contributes nothing. So if the football player Cristiano Ronaldo is pushed when being tackled, but dramatically falls to the ground in a fashion which is disproportionate to the force of the push, this would not be considered an involuntary act on Aristotle’s account because of his own contribution.

Whilst situations where a person is pushed or picked up by a wind clearly fit into this category of being involuntary by force, for Aristotle, it is clear that not all cases will be this simple. Thus, in order to fully develop the nuances of his conception, he considers actions committed under duress and necessity which he genuinely seems to treat as marginal because ‘it may be debated whether such actions are voluntary or involuntary.’

He provides two examples to illustrate the type of cases that he is talking about: first, an example of duress, where a person does ‘something base’ under the orders of a tyrant who is holding his loved ones hostage and says he will murder them if the action is not performed; second, a necessity scenario where a captain throws cargo overboard in a storm in order to protect the lives of himself and his crew.

Focussing particularly on the case of jettisoning cargo, Aristotle highlights that the challenge with classifying the acts as involuntary derives from the fact that there is a difference between the simple cases of force described above and acting as a result of threats or dire circumstances; namely, that in the latter situation, whilst the agent is doing something which he ordinarily would not, ‘the principle that moves the instrumental parts of the body in such actions is in him, and the things of which the moving principle is in a man

108 Ibid 1110a1-5.
109 Ibid.
110 Ibid 1110a1-10.
111 Ibid 1110a5-15.
himself are in his power to do or not to do.’\textsuperscript{112} This thought process is remarkable given that it seems to correspond exactly to the tension between physical and moral involuntariness examined in Chapter Two above.

What follows from Aristotle is a somewhat equivocal attempt to resolve this tension and come to a conclusion on whether acts committed under duress or necessity are involuntary. In reference to jettisoning cargo he contends that ‘in the abstract no one throws goods away voluntarily, but on the condition of securing the safety of himself and his crew any sensible man does.’\textsuperscript{113} This leads him to the critical conclusion that such actions ‘are mixed, but are more like voluntary actions, for they are chosen at the time they are done, and the end of an action is relative to the occasion.’\textsuperscript{114} There is certainly a sense in which this line can be read as settling matters, insofar as it recognises the confusion but ultimately shows that Aristotle is siding with the classification of these actions as ‘voluntary.’ The problem with drawing such a swift conclusion, however, is that Aristotle goes to some lengths to say that the matter is not completely clear. Indeed, almost directly after declaring that such actions are more like voluntary ones, he says that ‘[b]oth the terms, then, ‘voluntary’ and ‘involuntary’ must be used with reference to the moment of action.’\textsuperscript{115} A few lines later he tries to collect these ideas together, deciding that ‘such actions, therefore, are voluntary, but in the abstract perhaps involuntary, for no one would choose any such act in itself.’\textsuperscript{116}

As Kenny points out, the confusion with Aristotle’s analysis here is derived from the fact that he seems to be implying a ‘bizarre metaphysic’ according to which ‘one and the same individual action may have certain properties before being performed and others while being performed, and may have certain properties if it is performed and others if it is not

\begin{itemize}
\item \textsuperscript{112} Ibid 1110a15-20.
\item \textsuperscript{113} Ibid 1110a5-15.
\item \textsuperscript{114} Ibid.
\item \textsuperscript{115} Ibid 1110a10-20.
\item \textsuperscript{116} Ibid.
\end{itemize}
performed.117 This seems strange, given that we do not ordinarily think of there being any such thing as an action performed ‘in the abstract’. However, as Kenny suggests, it is possible to extract a more sensible interpretation of Aristotle’s point. He proposes that Aristotle merely uses the term ‘abstract’ to refer to the fact that the same action can be described in multiple ways. So to use the given example, we can report the captain’s conduct in the abstract as ‘throwing the cargo overboard’ or in a specific sense as ‘throwing the cargo overboard to save oneself and one’s crew’.118 When examining these sentences, it is evident that the first describes an action which no one would want to do whilst the second describes an action that any sensible person would perform. For Kenny, the fact that both of these statements stand as correct descriptions of the action in question is what leads Aristotle to characterise the action as ‘mixed’. This notwithstanding, when trying to determine whether the action is involuntary we should look at the second, more complete description. Taken in this way, it is argued that jettisoning cargo finds better classification as a voluntary action as opposed to one that is forced.119

This reading of the opening of III.1 provides the basis for a firmer understanding of the subsequent three paragraphs which begin with the claim that

‘[f]or such actions men are sometimes praised, when they endure something base or painful in return for great and noble objects gained; in the opposite case they are blamed, since to endure the greatest indignities for no noble end or for a trifling end is the mark of an inferior person. On some actions praise is indeed not bestowed, but

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118 Ibid.
pardon is, when one does a wrongful act under pressure which overstrains human nature and which no one could withstand.\textsuperscript{120}

There are different ways these lines could be interpreted. It could be said, for example, that Aristotle is relaxing his initial claim that voluntary actions receive praise and blame and involuntary ones are accompanied by pardon and pity. On this line of reasoning, there are some voluntary actions that may warrant ‘pardon’ even if they are not deserving of praise or blame. The problem with this, however, is that it seems to undercut Aristotle’s original goal; namely, to identify voluntary actions for the purpose of ascribing praise and blame.

A better approach is to say that Aristotle conceived of a kind of spectrum of human action. On one side of the spectrum is involuntary action, the threshold test for which is ‘pressure which overstrains human nature and which no one could withstand’. In such circumstances, an agent’s action is entirely attributable to the force of external circumstances or events and is tantamount to a case where the subject is pushed or carried by a wind. The fact that these actions are involuntary means that they are excused or pardoned. Obviously, however, this test will only be fulfilled in a very small number of situations. In circumstances where it is not (and where the conduct is not rendered involuntary by ignorance), the action will be deemed voluntary which means praise and blame will be attributable. For Aristotle, the question of whether a particular action deserves praise or blame is answered by reference to specific circumstances. If the agent is faced with the prospect of committing a small infraction for the sake of a ‘great and noble’ object, praise is appropriate. On the other hand, an action is blameworthy if the gain is disproportionate to the wrongs committed.

Whilst Aristotle’s writings on the issue are far from unambiguous, such a reading seems consistent with everything else put forward in III.1. It accords well, for example, with his

\textsuperscript{120} Aristotle, above n 94, 1110a20-25.
arguments regarding the imposition of a high threshold for involuntariness, saying that force will only be proven in extreme situations where external circumstances bear completely on the individual’s conduct.\(^{121}\) Perhaps more importantly, this approach is also consistent with evidence that Aristotle viewed the separation between voluntary and involuntary action as a difficult and subtle distinction which, in his words, ‘is not easy to state; for there are many differences in the particular cases’.\(^{122}\)

Before moving on to the *EE* account, there are two further points which should be noted. The first concerns Aristotle’s overarching claim that conduct committed under duress and necessity are ‘mixed, but more like voluntary actions.’ In light of the scale outlined above, I would argue that this should be interpreted as an assertion of fact that in most cases of duress and necessity, threats or external circumstances will not be strong enough to render the agent’s action involuntary. This is not to say, of course, that all cases of duress and necessity are voluntary. Rather it simply reflects that when imposing a test of whether human nature is overstrained, the threshold for involuntary action will not often be met. It also does not mean that the person will always be blamed for conduct under duress and necessity because it may be the case that their actions in the specific circumstance are deemed admirable and, therefore, praiseworthy.

The second point is that, in one part, Aristotle adds a caveat to his claims, asserting that there are some actions we can never be compelled to perform. He cites matricide as an example, claiming that ‘the things that ‘compelled’ Euripides’ Alcmaeon to slay his mother seem absurd.’\(^{123}\) The idea here seems to be that there are some actions so heinous that even the most extreme external forces (such as the prospect of ‘death after the most fearful sufferings’)

\(^{121}\) Ibid 1110b10-20.
\(^{122}\) Ibid 1110b5-10.
\(^{123}\) Ibid 1110a25-30.
would not be sufficiently strong to ‘overstrain human nature’ so as to excuse the individual. Whilst Aristotle only spends a sentence on this idea, the thought process is intriguing; it implies that the determination of whether an action is involuntary is at least partially predicated on an examination of the specific actions that an agent is required to perform. This particular view seems inconsistent with Aristotle’s underlying claims about involuntary action. However, given that the main goal of this section is to reconstruct Aristotle’s view, I revisit this argument in greater detail in Section 4.1.3 below.

3.2: Aristotle’s Approach in the Eudemian Ethics

In the EE, Aristotle also spends some time discussing the distinction between voluntary and involuntary action. His exposition regarding duress and necessity comes at the end of II.8 in a passage that is not only difficult to follow but also seems inconsistent with the NE. The fact that there such difficulties begs the question of why one would choose to look at the EE at all, especially given the consensus that it is an earlier work and that the NE represents Aristotle’s mature ethical views.124 This opinion is supported to some extent by the fact that Books IV-VI of the EE appear almost exactly as Books V-VII of the NE, which has led to the simple conclusion that the NE is a revision of the EE, in which Aristotle saw no reason to rewrite the central books.125 On this view, if there are any inconsistencies between the EE and NE they should be resolved quickly in favour of the latter treatment. However, notwithstanding the fact that the NE may be a later text, a number of scholars have indicated that the EE at times presents a more nuanced discussion of some concepts.126 The passages regarding the nature of voluntary action certainly seem to fall into this category where, as Sarah Broadie observes,

125 Ibid; see also Hutchinson, above n 106, 198.
126 Rowe, above n 124, 4; Sarah Broadie, Ethics with Aristotle (Oxford University Press, 1991) Foreword.
the EE seems to shed ‘special light’ on Aristotle’s opinion.\textsuperscript{127} It is for this reason that the discussion in II.8 of the EE is examined here.\textsuperscript{128}

Part of the reason why the EE chapter on action is seen as more nuanced is because Aristotle’s discussion is contained in a rigorous section of the text where he tries to explicate how the concept of force interacts with his physical theory of motion.\textsuperscript{129} From a jurisprudential standpoint, this context seems to provide a slightly stronger footing for an examination of voluntariness than the NE because it moves away from an overarching aim of determining moral responsibility towards a more general conceptualisation of what it means to ‘act’. The starting point for Aristotle is thus an examination of motion in a universal sense, where he says that all physical objects (animate and inanimate) ‘travel according to their nature and their essential impulse.’\textsuperscript{130} Using this as his basis, Aristotle describes ‘violent’ or ‘forced’ (biaion) movement as occurring when ‘something external moves them against their internal impulse.’\textsuperscript{131} So to use his examples, when a stone is moved upwards or fire is moved downwards, this is compelled motion because it occurs against these objects’ natural internal tendency.\textsuperscript{132} Similarly for non-human animals, action is deemed involuntary when the animal is forced to move in a direction which is different from what it would do naturally.\textsuperscript{133}

For humans, Aristotle suggests that we can characterise involuntary action as similarly residing in movement against our natural tendencies. He recognises, however, that unlike inanimate objects or non-human animals, humans are a more complicated case because we

\begin{itemize}
\item \textsuperscript{127} Broadie, above n 126, Foreword.
\item \textsuperscript{128} Whilst some expositions only look at the NE, a number of scholars have chosen to look at both texts in their discussions; see, \textit{inter alia}, Susan Sauvè Meyer, ‘Aristotle on the Voluntary’ in Richard Kraut (ed), \textit{The Blackwell Guide to Aristotle’s Nicomachean Ethics} (Blackwell, 3006) 137-57; Kenny, above n 99; Broadie, above n 126, 124-178; Klimchuk, above n 94, 1-19.
\item \textsuperscript{129} Aristotle, \textit{Eudemian Ethics} (Michael Woods trans, Oxford University Press, 2\textsuperscript{nd} ed, 2009) 1222b15-1225b20.
\item \textsuperscript{130} Ibid 1224a15-20.
\item \textsuperscript{131} Ibid 1224a20-25.
\item \textsuperscript{132} Ibid 1224a15-20.
\item \textsuperscript{133} Ibid 1224a20-30.
\end{itemize}
can often have conflicting internal tendencies, typified by the fact that reason and desire may be in disagreement.\textsuperscript{134} This is a conflict which plays out through a consideration of Aristotle’s conceptions of the continent and incontinent person. The incontinent person reasons to act in a certain way but yields to passions, whereas the continent person overcomes passions to act in accordance with reason.\textsuperscript{135} The question arises as to whether actions undertaken by the continent and incontinent person are involuntary given that the continent is acting against his/her passions and the incontinent is acting against his/her reason.\textsuperscript{136} In both of these situations, Aristotle is of the opinion that the agent is acting voluntarily because the origin of the action is internal. Despite any internal conflict which may be present, the action still belongs to the human being by nature and so cannot be characterised as violent or forced.\textsuperscript{137}

In the course of this discussion, Aristotle makes it clear that a person’s action is only forced when it derives from an ‘external starting-point’ which ‘impedes or generates change against impulse.’\textsuperscript{138} To illustrate this point he provides the example of someone picking up another’s hand and striking him with it. This, he argues, is clearly a case of externally generated action as contrasted with the internal conflict of a continent or incontinent person.\textsuperscript{139} Upon concluding that the continent and incontinent person are acting voluntarily Aristotle spends the last part of his discussion on the more difficult question of whether actions under duress and necessity are involuntary. His discussion opens with the remarks:

‘In another way, men are said to act under compulsion and to be forced to act though reason and inclination are not in disharmony, and when they do what they take to be

\textsuperscript{134} Ibid.
\textsuperscript{135} Aristotle makes it clear that the most virtuous individuals do not have this internal conflict between desire and reason. Rather both reason and desire are aligned with the good; see Aristotle, above n 94, 1151b30-1152a10.
\textsuperscript{136} Aristotle, above n 129, 1224a30-1224b10.
\textsuperscript{137} Ibid1224b5-1225a5.
\textsuperscript{138} Ibid 1224b10-15.
\textsuperscript{139} Ibid.
both unpleasant and bad, yet, if they do not do it, flogging or imprisonment or death await them. They certainly say they are forced to do these things. Or is that not so? Do they all rather do the thing itself voluntarily. For it is open to them not to do it, but to endure the other experience.' 140

The framing of the debate regarding actions under duress and necessity thus follows a similar trajectory to the NE. In both texts, Aristotle acknowledges that the issue of whether such acts are forced is a ground for genuine debate, wherein confusion arises from competing intuitions: on one hand, the presence of the external force draws us towards the conclusion that the action is forced; on the other hand, it could be argued that the action is voluntary because the agent is moving his/her own body parts and they have the ultimate power to abstain from the action.

Despite the broad line of enquiry remaining the same, it should be noted that there already seem to be some differences between the accounts. Perhaps most crucially, Aristotle is using slightly different terminology with the use of the word ‘force’ (bia) in the NE being replaced with the more complex phrase under ‘force and compulsion’ (bia kai ananke) which is sometimes also translated as ‘force and coercion.’ 141 A clear issue, therefore, emerges as to whether these additions should bear on our examination of involuntary action. Kenny, who prefers the translation of ‘force and coercion’, argues that the word ‘coercion’ does add a further element to Aristotle’s discussion in the EE because it allows him in a later passage to draw a distinction between action which is neither coerced nor forced and action which is coerced but only ‘forced in a manner’. 142

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140 Ibid1225a1-10.
141 Kenny, above n 99, 41.
142 Ibid 44-5.
Whilst Kenny supports this reading with a subtle analysis of the Greek in these passages, he acknowledges that there are several difficulties with interpreting the text. He also notes that there is something strange about distinguishing between ‘forced’ and ‘coerced’ movement because ‘elsewhere in EE and NE coercion and force seem to be more or less equivalent.’\textsuperscript{143} Following these arguments, I would contend that it is unlikely that Aristotle conceived of the conceptual separation of the terms ‘forced’ and ‘coerced’ adopted by Kenny. Rather, I suggest that the word ‘compulsion’ or ‘coerced’ (ananke) has been inserted to add substance to the word ‘forced’. There would be good reasons for this addition in the context of II.8 because it helps convey that the issue of forced (biaion) movement is more nuanced in the case of human action as opposed to non-human action which was just discussed. It is also a reading which enjoys philological support: in Greek the word ‘kai’ in phrases like ‘bia kai ananke’ is said to operate epexegetically rather than as a simple conjunction.\textsuperscript{144} Adopting this interpretation, the qualification added by ‘coercion’ or ‘compulsion’ to the term ‘force’ does not, by itself, indicate an inconsistency between the EE and NE accounts.

As one continues through the middle part of the EE section, more issues of interpretation arise. In the next lines, for instance, Aristotle claims cryptically:

‘Alternatively, someone might assent to some of these things, but not to others. All things of that kind that are such that it is within someone’s power whether they come about or not – even if he does things that he does not wish to do- he does voluntarily and not under compulsion\textsuperscript{145}; but things of that sort which are not within his power are, in a way, under compulsion...’\textsuperscript{146}

\textsuperscript{143} Ibid.
\textsuperscript{144} J. D. Deniston, The Greek Particles (Clarendon Press, 2\textsuperscript{nd} ed, 1934) 316-321.
\textsuperscript{145} Following the above analysis, when Aristotle uses the word ‘compulsion’ alone I take this to be synonymous with the word ‘forced’.
\textsuperscript{146} Aristotle, above n 129, 1225a5-15.
The confusion here primarily stems from the difficult phrase, ‘all things of that kind that are such that it is within someone’s power whether they come about or not’ which could be taken as concluding that an action is voluntary when it is within the agent’s power to perform the action or not. The problem with this reading, however, is that it yields an awkward result in the next sentence because it means that action which is not within the agent’s power is only ‘in a way, under compulsion’ (rather than saying that such action is conclusively forced which would be more in line with Aristotle’s broad point). A better approach, which Kenny alludes to, is to interpret one’s ‘power whether they come about’ as referring to whether one has the power to prevent themselves from entering into a situation where they are exposed to duress or necessity.  

Taken in this way, Aristotle is claiming that if someone voluntarily puts themselves in a situation where threats or dire circumstances are imminent, they cannot then claim that the actions performed under these conditions are involuntary. On the other hand, if the agent has no power over whether he/she enters into the situation, we can say that the action is compelled ‘in a way’ but further analysis is required to determine whether the action is forced or not.

The benefit of this interpretation lies not only in the fact that it makes the *EE* passage more internally harmonious, but also that it fleshes out Aristotle’s argument in the *NE* that an agent’s action can only be deemed involuntary when he/she contributes nothing. What it means, however, is that Aristotle has not yet come to a conclusion on the critical question of

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147 Kenny, above n 99, 42; as Kenny highlights, we should not treat this distinction as unimportant because the issue has received some discussion by the courts. In *Lynch* [1975] AC 653, for example, the House of Lords held that the defence of duress was not available for an appellant who voluntarily joined a terrorist organisation because he put himself in a position where being forced to carry out orders under threats was predictable. The principle is also contained within key expositions in Australian law. See *Hurley and Murray* [1967] VR (FC) 526, 543 (Smith J).

148 Kenny does not seem to acknowledge this parallel positing that ‘only the Eudemian draws the distinction between duress which is itself voluntary and duress which is itself involuntary’; see Kenny, above n 99, 47. Whilst it is true that it is only in the *EE* that Aristotle adds in this distinction explicitly, it seems that the ultimate point is that a person cannot claim their action was involuntary if they contributed to it in a relevant way. This is why I argue that the *EE* passage is best interpreted as ‘fleshing out’ the agent contribution point.
whether acts committed under duress and necessity are voluntary or not. Whilst this is the job of the remaining part of the *EE* treatment, matters get even trickier because it is here that Aristotle’s discussion seems most at odds with the *NE*. Aristotle’s thoughts begin with an example:

‘If someone kills in order to prevent someone from catching hold of him, it would be absurd if he said that he did so under compulsion, and because he was forced to do it; the evil which he is going to suffer if he does not do the thing has to be greater and more unpleasant. For a man will, in this way, be acting because he is forced, and under compulsion, or not naturally at any rate, whenever he does evil for the sake of a good, or a removal of a greater evil, and he will be acting involuntarily, as those things are not within his control.’

If the first sentence of this statement is taken at face value, it suggests that an action cannot be deemed involuntary unless the evil that the agent is threatened with is greater and more painful than the evil they will experience by committing the act. The second sentence appears to imply that the corollary of this is that a person is necessarily acting involuntarily whenever evil is done for the sake of a greater good or if it represents the lesser of two evils. Taken in this way, however, the passage clearly reflects a significant shift from the *NE* which holds that acts committed in the face of greater evil (such as jettisoning cargo) are more like voluntary actions. The divergence between the two accounts continues in the next paragraph as well where Aristotle argues that ‘love’ and ‘certain cases of anger’ can be categorised as ‘involuntary’ because they are ‘of a certain nature as to constrain human nature’. Given that he established a high threshold for involuntary action in the *NE*, it seems remarkable that Aristotle would say that the test could be satisfied by basic human passions or circumstances

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149 Aristotle, above n 129, 1225a10-20.
150 Ibid 1225a20-25.
where one might have to do small evil for the sake of a good. Aristotle seems to return to a
more qualified position in a brief summary:

‘And a man would appear to be acting under compulsion and involuntarily more when
he does so to avoid suffering a severe pain than when he does so to avoid a slight one,
and, in general, more when he does so to avoid pain than when he does so to get
enjoyment. For what is in one’s power, on which the whole issue turns, is what one’s
nature is able to withstand. And what it is not able to withstand, and is not within the
scope of one’s natural inclination of reasoning, is not in one’s power.’151

Notwithstanding this qualification, however, the critical passages in the EE seem to diverge
from the NE position. The NE account is characterised by the perspective that whilst acts
under duress and necessity present difficulty, the control of the agent involved will usually
lead to the categorisation of these cases as voluntary. In the EE, by contrast, Aristotle has
shifted the focus of his discussion almost entirely towards involuntary action, which seems to
be satisfied in cases which would have been considered voluntary on the NE position.

3.3: Resolving the Tension

The fact that there exists an apparent contradiction between the NE and EE writings
necessitates some kind of response. The approach of some scholars has been to provide an
analysis of why we should favour one account over the other. Susan Meyer, for example,
states that there is a clear, irreconcilable difference between the two writings, but that we can
justify the shift from the EE to the NE account on the basis that ‘his different verdicts about
the voluntariness of these actions reflects a changing assessment of whether they are
internally caused in the way that voluntary actions must be.’152 Without going into Meyer’s

151 Ibid1225a20-30.
152 Meyer, above n 101, 93.
analysis of this point in great depth, I would say that her approach is broadly correct. The texts do reflect a shift that needs to be accounted for. However, Meyer’s line of entire discussion starts from the assertion that the EE and NE are irreconcilable.\textsuperscript{153} This ignores the significant similarities that underlie the accounts. In this section, I propose that the EE and NE should be read in a spirit that gives weight to their core similarities rather than their differences. Doing so not only shows that the two accounts are not as divergent as they initially seem but also yields a picture of Aristotelian voluntariness which is sufficient for use in Chapter Four.

Taking up this approach, the first point to bear in mind is that the setup of Aristotle’s writings in both texts conveys the same broad themes. In both, as has already been discussed, an action is involuntary if it is forced and an action is forced if the moving principle of the action is external to the agent. An important aspect of this is that the agent contributes nothing to the action, which is teased out in the EE account to exclude cases where a person voluntarily puts themselves in a position where they are prone to threats or dire circumstances. Furthermore, there seems to be consensus on the fact that involuntary actions warrant excuse.

The only substantive difference between the texts lies in the issue of whether duress and necessity constitute involuntary action. Whilst this question is critical, even here the core of Aristotle’s argument rests on the same key tenet; that an act can only be deemed involuntary when external pressure overstrains human nature in a way which no one could withstand. Despite everything else that Aristotle says in these passages, in both accounts he gives this particular notion great credence, describing it in the EE as the element ‘on which the whole issue turns’.\textsuperscript{154} Bearing in mind Aristotle’s obvious commitment to this proposition across both texts, I would argue that other statements regarding duress and necessity should be read

\textsuperscript{153} See Ibid 94-97.

\textsuperscript{154} Aristotle, above n 129, 1225a25-30.
merely as a guide to determining whether human nature has been overstrained in a way which no man could withstand.

If we adopt this statement as Aristotle’s core position on the interaction between voluntariness, duress and necessity, any conflicting aspects of the *EE* and *NE* represent competing perspectives in a secondary debate about determining when human nature will be taken to have been overstrained in a way which no one could withstand. In trying to account for the shift between the two texts, it could then be argued that Aristotle’s writings reflect differing opinions because he was genuinely uncertain on this secondary question. This is a reading would be supported by his statements in both texts that the issue is a contentious one which does not lend itself to a clear-cut solution.155

Even here, however, I am reluctant to say that Aristotle turned his view around completely. This is primarily because the examples Aristotle uses could reflect that he simply has differing views on threats and dire circumstances. In the *EE*, Aristotle seems to be relying more on cases of threats given that his reference point is a case where ‘flogging or imprisonment or death’ await the subject if he/she does not perform an action.156 By contrast, the *NE* discussion is more informed by the example of jettisoning cargo and thus seems to reflect a case of necessity of circumstance.157 The uses of these different illustrations perhaps indicate that Aristotle is inclined to say that human nature is more likely to be overborne in situations where threats are at play. Conceived in this way, there may be even less basis to say that the two accounts are irreconcilably different.

155 As Meyer explains, the reason for the shift could be that Aristotle changed his assessment regarding internal causes of movement. The primary point, though, is that he is consistent on the idea that actions under duress and necessity are involuntary when human nature has been overborne. 156 Aristotle, above n 129, 1225a5-10. 157 Kenny seems to allude to this distinction also; see Kenny, above n 99, 30.
Ultimately, for Aristotle, the question of whether an action committed under threats or dire circumstances is voluntary or not rests on the determination of whether human nature is overstrained in a way that no one could withstand it. Often, there will be no easy way to answer this question but as a rough guide we can look to Aristotle’s explanations in the *NE* and *EE* and argue that an action committed under duress is more likely to be deemed involuntary whereas actions in a situation of necessity are probably voluntary. Such statements should be taken only as a guide though because the intricacies of duress and necessity often make it difficult to apply a hard and fast rule. It is critical, therefore, on Aristotle’s view to examine the nuances of a particular case and decide whether human nature has been overborne. As will become clear in Chapter Four, it is this general approach to duress and necessity which I find especially attractive about Aristotle’s account and, perhaps more than anything, it is the adoption of this general approach which would provide a tenable basis for effective law reform.
4: Towards Reformulation: Applying an Aristotelian Approach

4.1: Mapping Aristotle onto the Current Law

Given that a significant portion of this thesis has been devoted to a reconstruction of Aristotle’s perspective on voluntariness, duress and necessity, there may be a tendency to think that I am advocating for Aristotle’s writings to be taken up directly by the law. There are two reasons to avoid this. First, whilst Aristotle’s views can be seen as shedding light on modern problems, his brief remarks on duress and necessity cannot replace the significant body of jurisprudence that imposes strict and detailed conditions on the operation of the defences. To apply Aristotle’s views with no regard for the modern context of criminal liability would undoubtedly run into theoretical problems and be of little practical benefit.

Second, there are portions of Aristotle’s views which we should not endorse. To admit these aspects of Aristotle’s perspectives into the current law would undermine the very points in his writings that render the greatest assistance.

In order to account for these issues, this chapter seeks to defend an Aristotelian approach to voluntariness, duress and necessity. In this section, I map out this approach by examining what of Aristotle’s writings is already contained in the law and analysing what we should and should not take from Aristotle’s views set out in Chapter Three above. In Section 4.2 I demonstrate how the Aristotelian approach assists us in resolving the issues canvassed in Chapter Two.

158 The use of an Aristotelian approach as opposed to the mere adoption of Aristotle’s position is not unique to this context. Christopher Toner, for example, advances an Aristotelian account of well-being to assist philosophers thinking about questions regarding the prudential value of one’s life. See Christopher Toner, ‘Aristotelian Well-Being: A Response to L.W. Sumner’s Critique’ (2006) 18(3) Utilitas 218, 225-30.
4.1.1: Common Ground between Aristotle and the Current Criminal Framework

The primary point to bear in mind when considering how Aristotle’s views can assist current legal thinking is to note that the application of an Aristotelian approach to voluntariness, duress and necessity does not represent a paradigm shift from the status quo. Whilst it is true that Aristotle’s views sometimes differ from the current framework, the structure of his thought is often remarkably similar to the present system. In terms of a broad delineation of concepts, for instance, both Aristotle and the current framework agree that involuntary action should not be punished and that, at the very least, this covers cases where an agent is physically overpowered and forced to act in a certain way. Furthermore, notwithstanding the disagreement about whether acts committed under duress and necessity are involuntary, both Aristotle and the current framework discuss situations of threats and dire circumstances as separate categories. This adds weight to the argument that duress and necessity should continue to operate as related but distinct principles, rather than being collapsed into a single defence as some commentators have suggested.159

Perhaps the most important similarity, however, is that Aristotle’s threshold test for an involuntary act (i.e. human nature being overstrained in a way that no man could withstand) fits well onto the underlying rationale for the voluntariness principle (i.e. that an agent should not be held responsible for conduct which is not freely willed because it is unfair when the act cannot be imputed to their character). In acknowledging this similarity, it is particularly important to note two points. First, regarding the reason why this connection holds, Aristotle’s notion of human nature, especially as explicated in the EE, conceives of voluntary action as that which belongs to a human by virtue of their internal causes and natural tendencies. This lies close to the conception of the voluntariness doctrine championed by

159 See Spain, above n 1, 2-5.
Klimchuk and Hart, which requires that an act be attributable to the agency of the actor involved.\textsuperscript{160} Furthermore, regardless of whether modern jurisprudence deals with these issues in voluntariness, duress or necessity, both accounts seem to stress that someone’s will or nature cannot be overstrained in situations where a contribution on their part reflects that they reasserted control over their actions. This is also seen to extend to cases where an agent voluntarily exposes him/herself to a situation where they might be vulnerable to being overborne by an external force.

The second point is that in order to deal with the inherent difficulties of cases where threats or dire circumstances are operating on an accused, both Aristotle and the current framework seem to recognise the value of using objective tests to determine whether an accused’s responsibility should be removed. In Aristotle, this finds a slightly primitive enunciation through the phrase that they should be overborne in a way which ‘no one could withstand.’ The present law, however, seems to have developed quite a strong body of jurisprudence on this point, focussing on whether a person of ‘ordinary firmness’ or ‘ordinary fortitude’ would have yielded to the threat or circumstance in a similar fashion to the accused.\textsuperscript{161} Obviously, the fact that these modern explications of objective elements are more detailed and in line with current law mean that they should be utilised ahead of Aristotle’s elementary conception. Nonetheless, it is important to recognise that both accounts see the need to impose high bars for the satisfaction of voluntariness, duress and necessity and thus move beyond purely subjective notions of fault when they are used in practice.

The fact that there is this underlying commonality means that, regardless of whether acts under duress and necessity are deemed to be voluntary, any conceptualisation of the law

\textsuperscript{160} The link between Aristotle’s conception of nature and modern ideas of ‘free will’ relating to voluntariness is confirmed to some degree in Perka [1984] 2 SCR 232, 248-49 (Dickson J).

\textsuperscript{161} See the exposition of the law on duress and necessity in Sections 2.2.2-3.
relating to threats or dire circumstances needs to retain some form of an objective test. As it relates to actions where an agent is physically forced to do something, an objective element will clearly find simple (and perhaps hardly noticeable) application, which potentially reflects why the voluntariness principle in the current framework contains no explicit detail of an ordinary person test.\(^{162}\) However, pertaining to any circumstance where the agent still has the physical power to control his/her basic bodily movements, an objective element allows for a more nuanced approach to criminal responsibility, ensuring that breaches of the criminal law will only be allowed in cases where the accused’s reaction to threats or dire circumstances accords with broader societal standards.\(^{163}\) When combined with the other substantial similarities explored above, it hopefully becomes clear that many core aspects of the status quo will not require revision if an Aristotelian position is imposed.

### 4.1.2: What Should be Taken from Aristotle’s Position

Notwithstanding this overlap between Aristotle’s position and the current framework, present jurisprudence stands to gain from a re-examination of Aristotle’s views. The assistance Aristotle can render can be distilled into two key points.

First, Aristotle provides us with a conception of the relationship between voluntariness, duress and necessity that is amenable to the subtleties that reside underneath these concepts. Rather than simply pigeon-holing voluntariness as being in a differing sphere of criminal responsibility to duress and necessity, Aristotle recognises that categories are not so fixed when threats and dire circumstances are bearing on actions. In some cases, such as being forced to commit a small evil under orders from a tyrant who is holding one’s wife and

\(^{162}\) This is probably also derived from the extremely narrow application of the voluntariness principle, as explained in 2.2.1 above. As discussed in that section, voluntariness will rarely be used in the current law in a situation which is not clear-cut, because it will be easier for a defendant to challenge their charge on the basis of mental fault components such as intention or recklessness.

\(^{163}\) For a broad discussion of the relative merits of objective tests where this point is made generally see Brown et al, above n 1, 351-53.
children hostage, it may be reasonable to conclude that an agent’s will or nature has been
overborne such that the act cannot be attributed to their agency. However, in other situations,
such as jettisoning cargo from a ship, it is more likely that the conduct will be considered
voluntary just because the course of action seems to represent a calculated choice on the part
of the person involved rather than a case of the person’s will or nature being overstrained.

Under Aristotle’s approach, then, we cannot (like proponents of the current framework) make
the bold claim that all acts committed under threats or dire circumstances are voluntary just
because the person has control over the basic movements of their body parts. Rather, we need
to examine the specific facts that give rise to a particular person’s actions and determine on
that basis whether it is reasonable to say that a person’s will or nature has been overstrained
in way that means the acts cannot be imputed to their agency. Importantly for Aristotle
though, even if it is deemed that a person’s acts under threats or dire circumstances are
voluntary, this does not necessarily mean that a person is going to be held liable for their
conduct. It may be that they are seen to be deserving of praise rather than blame. This caveat
is crucial because it shows that having a broader and more subtle conception of the
voluntariness principle does not require that duress and necessity collapse into empty
concepts. Instead, in terms of the current law, they would retain their place as third arm
defences, reserved for considerations of whether someone’s criminal responsibility should be
altered in cases where threats or dire circumstances clearly influenced an agent’s actions, but
not in a fashion which would render their conduct involuntary.

Whilst this more nuanced relationship between voluntariness, duress and necessity is clearly
the primary idea we stand to gain from Aristotle, as the second key point, his writings provide
some useful interpretative tools for those seeking to determine whether an act is voluntary or
not. The main innovative resource I see here derives from the discussion in Section 3.3
above, which pointed to the fact that the differences between Aristotle’s discussion in the *NE*
and EE support the view that acts which are threatened have a greater propensity to be
deemed involuntary as compared to acts under dire circumstances. Notwithstanding that there
is no explicit remark from Aristotle reflecting this opinion such a position could be of great
practical use by providing the basis for the development of a rebuttable presumption that acts
committed under threats are involuntary whereas acts in dire circumstances are voluntary.
Obviously, there may be cases where the presumption is displaced because dire
circumstances overbear heavily on an accused or threats cannot be imputed to their agency.
However, this does not prevent the presumption from providing a good practical guide for the
majority of cases.¹⁶⁴

Part of the reason why the presumption would be useful is because it gives effect to a long-
standing intuition that whilst threats and dire circumstances should be treated using the same
general principles, there are relevant distinctions between the two cases. This is often cited as
a reason why duress and necessity should be kept separate. Yeo, for instance, suggests that
‘this difference is material because a threat from a natural source is easier to avoid than one
from a human source.’¹⁶⁵ By providing for the development of the presumptions detailed
above, Aristotle gives us an approach which would ensure that these intuitive separations
between threats and dire circumstances have voice in the context of the broader and more
nuanced conception of voluntariness which is being suggested. Again, it should be noted that
this does not preclude duress and necessity from continuing to operate as distinct third arm
defences. Logically, however, one would expect more cases where an agent is pleading
necessity rather than duress, given that the presumption for dire circumstances (as opposed to
threats) is that the acts are voluntary in the sense relevant to the actus reus of the offence.

¹⁶⁴ Rebuttable presumptions such as this are used widely in all areas of law to make legal processes
easier. Elsewhere in criminal law, for example, there is a rebuttable presumption that a child aged 10-
14 cannot possess the necessary knowledge for a criminal offence (doli incapax). On this point see C
¹⁶⁵ Yeo, above n 22, 26-7.
4.1.3: What Should Not be Taken from Aristotle’s Position

Whilst these core parts of Aristotle’s account would provide reformers with significant assistance, as mentioned earlier, there are certain aspects which would cause problems if adopted. My main issue here concerns Aristotle’s claim in the _NE_ that there are some acts, such as matricide, that could never be rendered involuntary, no matter how grave the threat or dire circumstance that the agent was faced with. Such a thought process is intriguing, not least because it seems to have had some residual impact on Western law through the principle that duress and necessity should not be available for the most heinous offences such as murder. However, as discussed in Section 2.2.2 above, recent scholarship on this issue seems to have moved away from these exceptions. Whilst resisting threats or circumstances might reflect a certain moral superiority, so long as the relevant subjective and objective tests are met, ‘the criminal law should not stigmatise as a murderer a person who does not meet this standard of heroism as a murderer.’\(^{166}\) Applying a similar logic to the Aristotelian framework, provided that someone’s nature or will is overstrained in a way that also fulfils the requisite objective components, there should be no act for which it could not at least be argued that the conduct was involuntary. Instead, each case should be decided on the basis of its particular merits rather than any forgone conclusions.

As a minor point, I would also suggest that there are certain examples Aristotle provides which should not be taken at face value when applied in a modern context. The statements towards the end of the _EE_ passages seem to fall into this category where Aristotle says that, in many cases, human passions such as love and anger constrain nature. To some extent, by arguing in Section 3.3 that we ought to read these finer points of the _EE_ in a spirit that acknowledges the similarities rather than differences between the _NE_ and _EE_, I have already

\(^{166}\) Victorian Law Reform Commission, above n 50, 117.
suggested that there are some points in Aristotle’s writings that should be played down when developing an Aristotelian account. But there is a further reason to play down these considerations; namely, that in a modern legal context, it seems absurd to claim that a criminal action would instantly be considered involuntary if it was committed out of anger or love. Again, this does not mean that we cannot consider these emotions when assessing whether an agent was overstrained in a situation or whether this was a reasonable response. Rather, it should simply work to confirm the position that the imposition of liability should be decided on a case-by-case basis, instead of a simple assumption that a person is automatically blameworthy because they committed a particularly heinous act or automatically pardoned because their evil deed was the result love or anger.

4.2: Voluntariness, Duress and Necessity: An Easier Relationship with the Aristotelian Approach

Given the preceding discussion, it should be clear that the Aristotelian approach mapped out above helps to resolve many of the issues with the current framework. In this final section, my aim is to make this explicit by tracing out the benefits of the Aristotelian approach as they relate to the problems discovered in Chapter Two. As I see it, these benefits can be set out in terms of two main contentions: first that the Aristotelian approach better accords with the underlying rationale for the voluntariness principle; second, that it leads to greater clarity in the law relating to duress and necessity.

4.2.1: Conformity with the Underlying Rationale for Voluntariness

An examination of the prevailing approach to voluntariness, duress and necessity in Section 2.2 yielded a clear overlap problem whereby, under the status quo, it was shown that all three concepts seem to turn on the issue of whether an act is freely willed by the agent in question. Whilst proponents like Yeo offer a defence that ‘free will’ takes on a different complexion in
each of these concepts, I demonstrated that this logic is unconvincing because it relies on an arbitrary distinction between physical and moral involuntariness. The primary problem with drawing this strict separation is that it causes us to lose the preferable rationale for the voluntariness defence explicated by Klimchuk and Hart that liability should not be imposed for acts that cannot be imputed to the agency of the actor in question.

If we apply the Aristotelian approach advocated above, we can avoid these issues. The main reason for this, as alluded to in Section 4.1.2, is that the Aristotelian idea of voluntary action as consisting in human nature being overstrained can be closely aligned with the underlying rationale for the voluntariness principle that an act cannot be attributable to the agent when their usual capacity to freely choose their actions is overborne. Now whilst the reformed law might be worded in a slightly different way to Aristotle’s writings (for example, perhaps using the word ‘will’ being overborne rather than ‘nature’ and fleshing out the objective tests to reflect the modern jurisprudence), the fact is that the adoption of a formulation for voluntariness which is relevantly close to Aristotle’s conception would also capture the preferable rationale for the voluntariness principle.

Ultimately, this is important because by attaching the formulation of the voluntariness principle nearer to its underlying rationale, the law is less susceptible to developing arbitrary distinctions, such as the separation between physical and moral involuntariness. Instead, situations will be dealt with on a more nuanced basis, free from the untenable line of reasoning that an act can only be rendered involuntary (in the sense relevant to the actus reus) if the agent is no longer in physical control of his body movements. Whilst, the use of prima facie presumptions discussed above might assist this process in a practical sense, the question of whether an act is voluntary comes down to whether it can be imputed to the agency of the actor involved. By going straight to the heart of this theory, the Aristotelian approach
immediately fares better than the prevailing view adopted in the status quo, therein avoiding the confusion generated by the unnecessarily strict separation of relevantly similar concepts.

**4.2.2: Increased Clarity for the Law Relating to Duress and Necessity**

The flow-on benefit of having a broader and more nuanced conception of the voluntariness principle is that it can help to clarify the law relating to duress and necessity. In an initial sense, this is obvious through the fact that when the voluntariness principle is expanded to cover cases where threats and dire circumstance overbear on an agent, there is no need for any reference to notions of ‘free will’ or agency in the defences of duress or necessity. This is because, in circumstances where these defences are raised, the actus reus will already have been established and this will include the reformulated voluntariness requirement. The immediate effect of this for duress and necessity is that it removes the overlap problem and, in turn, clarifies matters for practitioners who would presently be confused about whether arguments relating to the will of the accused should be raised as a part of the actus reus or as a defence.

The added appeal of having considerations of free will and agency subsumed under the actus reus of the offence is that when the defences of duress and necessity are raised, there is usually no doubt that the act is attributable to the agent who performed it. This means that the only question for the revised duress and necessity defences is whether his/her otherwise unlawful conduct deserves some kind of special reprieve. According to the Aristotelian account, this would occur when the agent’s voluntary conduct is seen to be praiseworthy when considering the particular situation he/she was faced with.

The reason why this is crucial is because it facilitates a separation between the law’s consideration of individual fault and morality which, according to the opinions of Yeo and Norrie canvassed in Section 2.3.2, is actually one of the perceived benefits of handling
physical and moral involuntariness under different arms of criminal responsibility. Whilst it is acknowledged that there is strong value in preventing broad social and political factors from entering ‘at large into the criminal law’, the problem with separating voluntariness from duress and necessity by drawing a line between physical and moral involuntariness is that this loses the underlying rationale of the voluntariness principle. However, by adopting the Aristotelian approach, we can ensure that the right balance is struck between individual fault and morality without losing sight of the voluntariness principle’s theoretical basis. This is because moral factors are only relevant to the actus reus of the offence insofar as it impacts on the capacity of the act to be imputed onto the agent in the first place. All other social and moral factors will be considered in the ‘defences’ arm of criminal responsibility, distinct from proof of any physical or mental fault components of an offence.

On this final point, one might raise an objection on the basis that conceiving of duress and necessity as a mechanism to give an agent reprieve when their action actually warrants some kind of social approval means that these defences are clearly operating as justifications. Recalling Dickson J’s statements in relation to necessity, this could be seen as problematic because it imports an ‘undue subjectivity into the criminal law’ allowing ‘courts to second guess the legislature’ and commits us to the view that a person can ‘violate the law because on his view the law conflicted with some higher social value.’

In response to these remarks, I would contend that Dickson J is correct to suggest that characterising the defences under justification would allow courts to make rulings which reverse a criminal finding in extreme situations where their unlawful conduct is actually seen to deserve approbation. In my view, however, he is wrong to construe this as a problem. On

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167 Yeo, above n 27, 309: see also Norrie, above n 82, 113-14.
168 See Perka [1984] 2 SCR 232, 248 (Dickson J). Note that whilst the remarks are applicable to duress as a revised third arm defence, under the Aristotelian approach, the majority of cases where threats are involved will ordinarily be dealt with under voluntariness (hence the presumption).
the contrary, it actually seems to be an advantage of such a system; it acknowledges the fact that whilst prescribed offences might be able to deal with the vast majority of social conduct and circumstances, there will be rare cases where the usual framework might deliver an unjust outcome to someone who can reasonably be judged to have acted correctly. When such situations involve threats or dire circumstances, duress or necessity allow an informed judicial body to decide that the full force of the law should not be brought down against them.

Before concluding, there are two further comments which should be made in relation to Dickson J’s comments. The first is to point out that his remarks seem to suggest that when understood as a justification, the defences will be able to be raised frequently by any agent who, by their own standards, thinks that their abrogation of the law is right. By looking at the general caution that surrounds granting clemency to people in situations of threats or dire circumstances, it is evident that any tests courts develop for the revised defences of duress and necessity will likely be rigorous and create a high threshold for criminal responsibility to be removed. Whilst I see it as beyond the scope of this paper to discuss what tests courts should use to assess whether someone’s conduct grants approval, they would, at the very least, include the imposition of objective components to determine whether the agent’s conduct accorded with broader societal standards, thereby showing Dickson J’s concerns to be unfounded.

The second point to note is that Dickson J’s comments against classifying necessity as a justification led him to contend that the defence should operate as an excuse whereby a just criminal law should acknowledge that ‘normal human instincts’ impel disobedience. The problem with this approach is that it yields a picture of necessity which is susceptible to the overlap problem because it turns on a consideration of what the agent could or could not reasonably withstand in a particular situation. By treating both duress and necessity as justifications for a particular act, we can conclusively move away from this conflated line of
reasoning. This ensures, in accordance with the preferable theoretical underpinnings, that voluntariness turns on a consideration of whether the act can be imputed to the agent in question and the defences of duress and necessity are concerned with whether the commission of an act should be met with approval in light of the broader situational factors involved.
5: Conclusion

In Chapter One, I established two broad goals for this project: ‘(1) to determine whether the prevailing view in the present criminal justice system provides a tenable basis for linking the defences of duress and necessity with the removal of criminal responsibility and (2) if not, to suggest a viable platform for reform.’ The first goal was achieved in Chapter Two, where after situating voluntariness, duress and necessity within the broader structure of criminal responsibility, it became obvious that the current system is flawed because the test of whether an action was freely willed lies at the core of defence and necessity as well as the voluntariness principle. The scope and effects of the problem were elucidated through an examination of a potential solution which posits that the relationship between these concepts is tenable because ‘free will’ operates in a different way in voluntariness as compared to duress and necessity. Ultimately, I showed that this approach is unsuccessful because it relies on an arbitrary distinction between physical and moral involuntariness which loses the preferable rationale for the voluntariness principle; namely, that an agent should not be held responsible for acts which cannot be imputed to his/her agency as an actor.

The second goal was met over the course of Chapter Three and Chapter Four, where I demonstrated that a viable platform of reform can be found in an Aristotelian account of the relationship between voluntariness, duress and necessity. From the outset, it was granted that such an argument could only be tenable if we possessed a consistent picture of Aristotle’s opinions on these issues. However, particularly on an initial reading, to yield the type of account required seemed impossible because Aristotle’s views are developed separately in the *NE* and *EE* in a fashion which is unclear, has different conceptual starting points and is at times contradictory.
In the face of these apparent difficulties, it was decided that the best methodological way to proceed in Chapter Three was to provide a close textual reading of passages in III.1 of the *NE* and II.8 of the *EE* where Aristotle’s core opinions on these topics reside. Interestingly, this analysis revealed that Aristotle’s remarks were not as incompatible as they initially appear; in both the *NE* and *EE*, Aristotle contends that forced action is where the moving principle is outside of the agent and that an action cannot be rendered involuntary if the agent contributes to it. Viewed in this way, the only difference between these writings is whether acts committed under the defences are voluntary. Even here, however, I argued that Aristotle’s writings could be construed in a relevantly consistent manner if credence is given to the core similarity between the two writings; namely, that an act can only be deemed involuntary when external pressure overstrains human nature in a way which no one could withstand. When taken in this manner, the rest of Aristotle’s arguments can be subsumed under a set of interpretative tools that help determine whether this core test is satisfied in a particular case.

Through the discussion in Chapter Four, it became evident that the reason why this core similarity is so important is because it provides the basis for a conceptualisation of the voluntariness principle which is closer to its theoretical foundation. Under this Aristotelian account, the issue of whether an act is involuntary (in the sense relevant to the *actus reus*) turns on a determination of whether human nature or will has been overborne in a way that fulfills prescribed objective criteria. Now whilst Aristotle’s views provide the basis for some useful presumptions, ultimately this question is to be decided on the nuances of the particular situation which attended the agent’s conduct. It is certainly not predicated on the idea that a person can only act involuntarily where they have no physical control over their bodily movements, nor is it based purely on simple assumptions regarding the nature of the event or particular passions the agent might be experiencing. This provides a way of dealing with threats and dire circumstances which not only complements the underlying rationale for the
voluntariness principle, but also opens up a better path for duress and necessity to operate as defences where an agent’s voluntary action is seen to deserve a kind of social approval.

When one looks retrospectively at this line of reasoning, an astute observer might question the tenor of this project on the basis that none of the conclusions I have made necessarily require such a lengthy analysis and application of Aristotle. Indeed, on this view, if the main result of this enquiry is that the law should attach its conception of voluntariness closer to its underlying rationale and adapt some interpretative principles in line with this to reform the law of duress and necessity, Aristotle’s writings are not needed at all to access these points.

In some senses, and at the very least in terms of logical consistency, such an observer would be correct to level such an argument. By means of conclusion, however, I would contend that to do so would be to miss the more general, implicit theme of this entire enquiry. For apart from providing a method of interpreting critical passages of the EE and NE in a way that contributes to the academic study of Aristotle, what I have tried to exhort here is a style of analysing modern legal problems which is slightly different to the approach taken on by most leading textbooks. It is a method which takes us out of the confines of micromanaged legal structures (such as the three-fold approach to criminal liability) and forces us to interrogate how our underlying theories hold up in the face of nuanced circumstances. Aristotle provides a way of doing this, not just because he was extolling his viewpoints in a broader context of moral philosophy, removed from modern Anglo-Saxon legal traditions, but primarily because of his philosophical process – a method which, as I see it, is characterised by elucidating a core claim through a discussion of marginal cases. His approach to threats and dire circumstances typifies this because he clearly sees these as the subtle situations which inform and clarify our understanding of voluntariness. More than anything, it is this style of reasoning which makes his views pertaining to voluntariness, duress and necessity so
relevant, providing his perspectives with an ability to hold weight in contemporary jurisprudence some two-thousand years after their original formulation.
6: Bibliography

N.B. given the significant number of legal sources consulted, the Australian Guide to Legal Citation (3rd Ed) has been used for referencing in this bibliography and footnotes throughout the thesis.

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