A Criminal Moment in Time

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A Criminal Moment in Time: Intent and the Tripartite Continuum

A Theoretical Charting

Abstract

Criminal law jurisprudence considers the concepts of motive, intent and the forbidden act integral to the justice process. Throughout the common law jurisdictions, this trio overshadows a central theme that is a precursor to all criminal acts – the idea of a social responsibility continuum or cognitive dependency. While motive is dispositional on a wider application, intent is situational and is a product of one’s socio-cultural experience. The forbidden act, though central to the process, constitutes ‘a faithful mirror of thought’ – the consummation of a deliberate and manipulated cognition.

The nexus between the three subjects extends beyond the Cartesian vorticism of the criminal act thus illustrating the elective nature of the trio as a plenum of moments in the continuum. This continuum has, for its genesis, the disposition of the actors, for its propulsion, their situational propinquity and for its consummation, the forbidden act. These, in turn, provide impetus for further moments in the continuum. Thus, one’s position in the social responsibility continuum index has a corresponding impact on his relationship with the criminal laws. This has wide-reaching implications for the mechanism of justice-at-large and the underpinning notion of preventive justice.

In this book, I explore the foundations for the range of coercive measures employed by states to ensure public protection and pre-empt violations of the law. In light of human rights jurisprudence, there is a need to develop the principles and values that should inform the use of preventive techniques and powers by government around the world.

I extrapolate the concept of cognitive psychology into criminal law and explore the reaches of cognitive dependency as the foundation for the three elements of crime. Subdividing the continuum into three parts of emotional, ethical and socio-cultural stimuli, the book investigates the inter-relationship between these elements using it to chart a theory of the continuum as a tool for exploring the concept of preventive justice.
A Criminal Moment in Time: Intent and the Social Responsibility Continuum

Chapter One: A Criminal Moment

Criminal law jurisprudence throughout the common law world takes the view that the idea of intent in criminal acts is a clear-cut, exclusive notion that relies solely on a mental disposition or state of mind that is immediately approximate to the crime committed. This notion, it would seem, is often applied with a sense of abandonment and with pedestrian approach. The result is that a number of factors are ignored or relegated to the background in spite of their salience to the subject matter.

Yet, the reality is that a criminal act is time specific and venue specific and draws upon the relationship between the accused and his connectedness to his environment or community. This connectedness can be described as cognitive dependency\(^1\) and is the foundation upon which the intent and its resultant act are consummated. This, in turn, more often than not, has an overriding impact on the subject matter because it has the tendency to fatally alter the objective nature of the act. It is clear from a reading of all the authorities that the question of intent is, by definition, a subjective one. This is why the legal system takes time to articulate its presence as an essential ingredient of a crime. This subjective element introduces itself to the individual, his environment and his connectedness. These are the elements embodied in the concept of the social responsibility continuum. It is also clear that there is, nearly always, an objective element to a subjective issue for the simple reason that the trier of facts is external. The essential point,

\(^{1}\) The concept is borrowed from social psychology, particularly human psychology and describes the relationship between a citizen and his environment. English & English It argues that we are dependent on our social environment for all that we do including whether or not we choose to obey the law and the extent to which we choose to interact with a given environment. It further argues that man is, essentially, a social animal that relies on order to maintain his sanity. That order does not necessarily have to conform to any one’s definition except his or, for reasons of social cohesion, the one he elects to be a part of by collective acquiescence.
however, is that where there is a disconnection\(^2\) of a substantial nature between the individual and her environment, she would feel less restricted in her dealings with and attitudes towards that community. When that happens, she may feel less inhibited to violate the criminal code, however defined, for her own end. It is therefore an interesting situation that an act, done with a subjective judgment, requires an objective evaluation to make sense of it, either to find culpability, excuse or justify the act – was it necessary, was it reasonable and would an external observer concur? If it was reasonable but not necessary, would this objective observer’s understanding of the circumstances leading up to and surrounding the event be sufficient to appreciate why the individual acted the way he did – the circumstances that added to the continuum of event? Should the trier of fact give any considerations to these extrinsic matters? In determining a judgment, should social factors aligned as moments in time play a role? What disparity in time should be tolerated between an offending behaviour and a counter act aimed at addressing it?

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\(^2\) The concept is not entirely restricted to intellectual considerations. Emotional connections apply on all levels of human existence and an appreciation of that relationship or lack of it exerts influence on a man’s behaviour. A man who has lost his family in a car accident where the driver was over the alcohol limit may feel justified in mounting a vigilante attack on that driver in order to assuage his sense of revenge. Equally, a man who has been trained to kill with impunity either as a career or for bounty may feel no inhibitions in taking other human life if it sufficiently served his purpose to do so. In such cases, the law’s position may be at odds with his avowed one but it does alter his state of mind and by extrapolation, perhaps his motivation too.
Chapter Two: Intent under English law

The law on self-defense is instructive in this pursuit. It is a tacit recognition that there are times when the state must come to terms with the fact that the aggrieved party will not always allow himself to be restrained or the circumstances militate against such restraint. English Statutory law defines the ambit of self-defense thus:

‘A person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large’.5

Common law, for its part, recognizes the fact that no one can be prevented from protecting and indeed, defending his life or his belongings for it is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary’.6

The profundity of the belief in the sanctity of personal life and space cannot be understated. If a capable man fails to defend himself, he can rely on no one else to defend him.8 In fact, this is a

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3 Self defense is considered a defense to a charge of murder where one’s plea that he acted to preserve his life or the lives of those within his care, to safeguard his property or, in exceptional circumstances, prevent the commission of a crime can prove successful to a charge of murder. The English position on the defense is, at common law, based on the Privy Council case of Palmer v R [1971] A.C 814 and approved in R v McInnes, 55 Cr. App. R. 551. The matter is given a statutory recognition in the Criminal Law Act 1967.

4 English law alludes to ‘circumstances’ in which self-defence is authorized. This recognises the fact that it is not an abiding plea that gives a blank cheque to the person asserting the claim.

5 S.3 Criminal Law Act 1967. This Act applies to the prevention of and effecting or assisting in the lawful arrest of offenders and suspected offenders. Section 3 only applies to criminal matters and does not extend to civil matters such as trespass unless the ‘perpetrators’ were engaged in a criminal act at the material time. Clearly, there is an overlap between self-defence and section 3 of the Act but the criminal and civil distinction is clear.

6 Per Privy Council in Palmer v R [1971] A.C 814

7 Reference is made here only to a person who is physically and mentally able to defend himself using whatever means he considers necessary. The defence will only succeed if the jury finds that the violence used was commensurate and justifiable. This paper does not address any social policy programmes setup by the state to protect the manifestly vulnerable.

8 Even in contract law, one is expected to mitigate his losses by taking proper action such as taking out insurance or being proactive in avoiding the loss altogether.
principle of general law that one must have locus standi to assert a right.\textsuperscript{9} The summary of the law is that depending on the level of fear or concern for his personal safety, a person may use such force, as he deems necessary and reasonable, to preserve himself, his property and those that depend on him or to effect the prevention of a crime. This moment in time is granted a very limited shelf life and must not be allowed too much liberty so as not to injure the spirit of the law or violate the principles of the legal continuum. Self defence is, thus, a momentary assessment of immediate self danger and a momentary liberty to respond, in a commensurate\textsuperscript{10} reasonable fashion, to the immediate threat to oneself.

In order to sustain the wake of the plea, a person must use, per the dictum, reasonable force and there are five limbs of the test. These may exist independently of one another or collectively as follows:

- self-defence or
- defence of another or
- defence of property or
- prevention of crime or
- lawful arrest

\textsuperscript{9} The principle is enunciated in English Law at S (31) Supreme Court Act 1981. The principle is also implied, on an interpretation, in Article 8(1) of the ECHR thus: Everyone has the right to respect for his private and family life, his home and his correspondence.

\textsuperscript{10} The word does not allow for a deliberate premeditated response which may encroach into the domain of intention. In the House of Lords’ case of R v Clegg (1995) 1 All ER 334, the Law Lords ruled that the law is well established that reasonable self defence is a complete defence to murder but that excessive or unreasonable force is no defence. Therefore, given the circumstances of this case and the amount of force used, manslaughter or any other offence was not open to the court of trial. The Lords also considered the Report of Royal Commission 36 HL Papers 157 and went on to approve the dictum in Palmer v R [1971] AC 814 (PC). In a stark disagreement with the Australian jurisdiction, they held that the decisions of the High Court of Australia to the contrary were found to be unworkable in practice and that Court over-ruled itself in Zecevic v DPP (1987) 162 CLR 645. Sure enough, the Australian government enacted the Crimes Amendment (Self Defence) Act 2001 which came into effect in 2002.
What is to be considered to be reasonable force and how do we assess it? Is the test subjective or objective and can it take certain other extrinsic elements\(^\text{11}\) into consideration or should it apply in a black and white fashion?

It would appear from dicta, that the test is both subjective and objective. On the subjective analysis, the questions to be asked are:

- Was it necessary for the person claiming the defence to have used force in the circumstances?
- Given the particular circumstance of the case, was the force used reasonable?

The English courts have ruled that the defendant’s perspective must be taken into consideration. In other words, the test is subjective and should be based on what the defendant honestly believed the facts were.\(^\text{12}\)

The fatality of the position is clearly inherent. First, how do you test for a person’s honesty when the matter is entirely based on a mental assessment? If he is of a certain disposition that honestly believes a fire bomb is about to be launched at him but is mistaken,\(^\text{13}\) then what? We know that pleas raised on the grounds of self-induced intoxication are bound to fail but some of those based on ‘honest’ mistakes\(^\text{14}\) succeed. Is there a way to adequately judge the honest belief of a man?\(^\text{15}\)

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\(^{11}\) The battered wife syndrome doctrine has its own rules. Extrinsic elements here include the person’s experience, knowledge of the use of weaponry or other tools, state of mind, predisposition and health. Is it possible that a man that has been harassed by a gang may form the intent to kill the next opportunity he feels his life or property is threatened yet plead self defence at the moment of the crime if the circumstances played sufficiently into his hands?

\(^{12}\) R v Williams (G) 78 Cr. App. R 276 and (R v Oatbridge, 94 Cr App R 367).


\(^{14}\) Mistakes as to the facts, carelessness or recklessness would negate the finding of intent and provide the defence. See B (a minor) v DPP [2000] AC 428. In R v Lee, Rose, LJ, in his speech, stated that ‘A genuine or honest mistake may afford a defence in relation to many criminal offences requiring mens rea e.g. rape, if made as to the woman's consent (R v Morgan, [1976] AC 182), indecent assault if made by a 15 year old boy as to the girl's age (B v DPP) and offences of violence if made as to the nature of the victim's behaviour towards the defendant (R v Beckford [1988] AC 130) or another (Gladstone Williams, 78 Cr. App. R. 276). Such a mistake may afford a defence in relation to assault with intent to resist arrest (Brightling CACD transcript 15 January 1991 p 13D-F) or assaulting an officer in the execution of his duty, (Blackburn v Bowering 1994 1 WLR 1324 at 1329A) if it relates to whether or not the victim is a police officer. In such a case, the defendant's mistake may be relevant to whether he intended to
Well, there is an objective element to the test too. Since the matter would be tried before a jury who is the ultimate trier of fact, it stands to reason that the test should be extended to the realm of the ordinary man. Thus, the jurors must determine whether, given all the circumstances or facts as the defendant believe them to be, the ordinary reasonable man would come to the conclusion that the force used was reasonable and that the defendant honestly believed the facts to be what he represents them to be. The Law Lords have stressed the importance of this objective element per the dictum in *Palmer* where Lord Morris opined that:

‘If there has been an attack so that self defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the jury thought that in a moment of expected anguish, a person attacked had only done what he honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken’.

The ambiguity of this ruling manifested itself in 1995 in a Northern Ireland case. Here, the Law Lords ruled on the subject of whether a necessary force used was also reasonable in the circumstances. They concluded, in the Clegg case, that the answer was in the negative. Thus, the test of a mistake as to self defence is to be considered a subjective one. The test as to the amount of force used is an objective one to be judged by the sober and reasonable man.

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15 It seems patently curious that a man can be allowed the plea for acting under the illusion that he is being attacked. Surely, the fact that he held such a belief erroneously ought to impact that plea. After all, he would not have suffered any harm. Insisting on an objectively assessed ‘honesty’ would place a duty on the ‘victim’ to exercise some ‘degree’ of restraint. This would, of course, fly in the face of Lord Morris dictum in *Palmer*

16 *Palmer* v R [1971] AC 814 (PC)

17 See *R v Clegg* [1995] 1 A.C. 482 HL
The defence does not abide and is extinguished the moment the threat becomes sufficiently remote. The idea is to dissuade any covert introduction of malice into what is, to all intents and purposes, the *instinctual* and overwhelming impulse toward self preservation and the primary law of nature. As Thomas Hobbes observed:

‘If a man, by the terror of present death, be compelled to do a fact against the law, he is totally excused: because no law can oblige a man to abandon his own preservation. And supposing such a law were obligatory, yet a man would reason thus: If I do it not, I die presently. If I do it, I die afterwards. Therefore, by doing it, there is time of life gained.’

On a closer reading of Hobbes or any of the authorities, it is quite clear that ‘the terror of present death’ could be given a wide construction. Thus, can the presence of intention be completely ruled out in all circumstances where the defence is successfully raised? In other words, does the defence always operate in a vacuum of intent? It is difficult to answer the question either way because as humans, it is impossible to be completely ignorant of certain events in the community. It is possible that the laws on self defence arose out of the recognition that life is sacred and that it is impossible to defend or claim any rights when one is dead. Furthermore, it is implicit in the right that people might take matters into their own hands in the absence of such plea. The British government claims, as one of its reasons for clarifying the law and in directions to prosecutors, that it wishes to discourage vigilantism. Thus, it is necessary to

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19 Thomas Hobbes, (1651), Leviathan, chap. 27.

20 See The Crown Prosecution Service at [http://www.cps.gov.uk/legal/s_to_u/self_defence/](http://www.cps.gov.uk/legal/s_to_u/self_defence/): ‘When reviewing cases involving assertions of self-defence or action in the prevention of crime/preservation of property, prosecutors should be aware of the balance to be struck: the public interest in promoting a responsible contribution on the part of citizens in preserving law and order; and in discouraging vigilantism and the use of violence generally’.
recognise that some degree of revenge\textsuperscript{21} may be a by-product of humanity and in some cases, state inaction in tackling crime and thereby prevent vigilante activities by an aggrieved community of victims. For instance, when there is a crime wave in a particular community, the citizenry is rightly occupied with thoughts, activities and ideas aimed not just at crime prevention but also at bringing the perpetrators to some kind of justice. Such measures may include arbitrary justice and the mens rea for such action is formed, not at the point of confrontation but at the point of enlightenment\textsuperscript{22} or from one’s experience of having been a victim of crime. Thus, when a home owner is confronted with a burglar in his house as opposed to actively becoming an aggressor,\textsuperscript{23} he quickly grabs the loaded gun which he had previously bought for this purpose and activates instructions which he had previously acquired on how to effectively fire at an intruder with the desired effect.

In Balogun, noted above, it was ruled that:

\begin{quote}
\textit{\textbf{A man who is attacked or believes that he is about to be attacked may use such force as is both necessary and reasonable in order to defend himself. If that is what he does, then he acts lawfully. It follows that a man who starts violence, the aggressor, cannot rely upon self-defence to render his actions lawful. Of course, during the fight, a man will not only strike blows, but he will defend himself by warding off blows from his opponent but if he started the fight, if he volunteered for it, such actions are not lawful, they are unlawful acts of violence.'}
\end{quote}

\textsuperscript{21} There is no intention here to equate the defence to that of extra judicial revenge. The submission is that given the circumstances in which one may resort to the use of violence to preserve himself, there are many factors at play and revenge may be one of those. Of course, the burden is always with the prosecution to prove the presence of revenge or the absence of the defence. Revenge is not necessarily encouraged but ‘the mere fact that a defendant went somewhere to exact revenge from the victim did not itself, rule out the possibility that in any violence that ensued, self-defence was necessarily, unavoidable as a defence. See R v Rashford [2005] EWCA Crim 3377.

\textsuperscript{22} R v Deana, 2 Cr. App. R. 75 is authority for the submission that the law does not frown upon a preemptive strike but it will take all the circumstances of the matter into consideration.

\textsuperscript{23} R v Balogun [2000] 1 Archbold News 3
The line is blurred. This ruling is consistent with the notion of Hobbes that an attack, in this instance, is a continuous event by reference to the text ‘believes that he is about to be attacked’. In the defence of himself, his property and his loved ones, he engages in a deliberate activity that uses reasonable force to achieve his aim. He does not need, at the moment of confrontation, to form the mens rea – certainly not in a way that assails the plea. He merely acts out that which already exists – the pre-existing human primordial condition of self-preservation. The courts will find, in all probability, self defence as a spontaneous continuing act or continuum. So far, nothing in English law requires a man or woman to wait to be attacked before engaging in a self-defence activity although the mere act of breaking into someone’s house could rightly be considered an attack on a person. In order to find one guilty of a crime, intent must coincide, at the material time, with the prohibited act. However, there is no requirement in law that intent, when it coincides with mens rea, be formed at the point of attack. It could be a pre-existing state of mind and needs, for its genesis, only a spark in the continuum. In this context, intent, I submit, is ‘a state of mind’ as opposed to a ‘guilty state of mind’. In other words, it is a continuous mental state of mind that is not necessarily consummated or indeed sparked at the point of ‘attack’.

The reality however, shrouded by and from legal principles, is that a man acts within his rights as conferred by the defence. Yet, a number of theories may apply. A single fatal shot aimed at the right spot for maximum impact is considered sufficient to raise the defence. A severe blow delivered by a blunt instrument at the right spot would also have the same effect. This would be particularly effective if the defendant was lying in wait. There is no law on lying-in-wait for an

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24 R v Deana, 2 Cr. App.R.75.
attacker especially if one feels that an attack is imminent although the dictum in favour of pre-emptive strike may serve us here. That dictum allows the plea.

What about a severe beating that achieves the same effect but is prolonged and made necessary either because the assailant put up a spirited struggle or because he was set upon by more than one person at the same time or indeed that he sustained the fatal injuries or blow while attempting to flee? What happens if a man performs a crude but ‘dexterous’ surgery on the would-be rapist who made an attempt at his daughter’s virtue? He, clearly, was fighting to stop a crime being committed and used all reasonable means, as he believed, to achieve it under the circumstances.

One of the challenges of the reasonable man test is that in the modern context, defining the word ‘ordinary’ is a mammoth task. The ordinary man might think that his main task is to stop the attacker. His method for stopping that attack is the subject of the test. How does the ordinary man decide if he is a trained surgeon or a butcher? Does his action have to be directed to a certain part of the body or is every part, under the circumstances, fair game? What happens to intent and malice when a woman, fearing later reprisals, stabs a gang member to death in order to prevent rape at a later date (believing that the gang members would return some other time to finish what they started) even though she had already incapacitated him with a pepper spray or heavy object? Clearly, she paused long enough, before the attack or perhaps during the process,

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25 Per R v Bird, 81 Cr. App. R.110: The failure to retreat when attacked and when it is possible and safe to do so is not conclusive evidence that a person was not acting in self defence…It is simply a factor to be taken into account. It is not necessary that the defendant demonstrates. By walking away, that he does not want to engage in physical violence’. In addition, per Balogun, …during a fight, a man will not only strike blows, but he will defend himself by warding off blows from his opponent…’

26 If the assailant eventually dies from his wounds and bleeding, is there any reason why the defence should fail given that the defendant would plead that he believed a heinous crime was about to be committed on his daughter?

27 Her claim that the pepper spray did not stop the attacker but, probably, merely infuriated him to the point that not only was he now absolutely committed to sexual violence but also to physical violence and that she believed the circumstances to be so. Clearly, we can see an element of intent and malice.
to consider that the attacker, even if she is mistaken, may return another day to exact his revenge and that until he is missing from the community for good, she would never feel safe. Is she considered to have developed the mens rea for the crime at the point of fear of physical and sexual violence or at the point of the attack? Is the presence of malice aforethought found? Can her social and cultural dependency on her community for all sorts of reasons be taken into account at trial as a motivating factor for her action in deciding whether the defence should succeed? Will the law, in its black letter application, recognise her short term and long term needs for self preservation? Can these be seen to be sufficiently approximate to the defence as to afford her the plea?

English Statutory law provides at Section 3(1) of the Criminal Law Act 1967 that:

‘A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.’

At common law, ‘a defendant is entitled to use reasonable force to protect himself, others for whom he is responsible and his property. It must be reasonable.

Compare this case with Lindsay where the use of force was considered to have been exaggerated beyond the danger and developed into an intention to kill. The moment had passed and the continuum developed to the next but not inevitable stage.

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28 Interestingly, under English law, there is no provision for a mistake of facts although a mistake of facts stemming from a voluntary intoxication will nullify the defence. See R v O’Grady, 85, Cr. App. R. 315. One may therefore conclude that the subjective test would apply and that what matters is what she, since she is not suffering from voluntary intoxicated, believed would happen later in her life.

29 Beckford v R (1988) 1 AC 130
Chapter Three: Intent under US law

In the US, self-defence, unlike most rights, is not constitutionally mandated but is treated as part of a special category of defences. In *US v. Lewis*, 65 M.J. 85, although not denying that the accused committed the objective acts constituting the offence charged, self-defence denies, wholly or partially, criminal responsibility for those acts. Furthermore, in *US v. Yenger*, 67 M.J. 56, it was held that the elements of self-defence in a situation of non-aggravated assault require that the accused apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on him, and believed that the force that he used was necessary for protection against bodily harm, provided that the force used by him was less than the force reasonably likely to produce death or grievous bodily harm.

This case is interesting for the simple fact that it marks a departure from the English position. Under English law, force used in self-defence need not be tested against the reasonable likelihood of death or grievous bodily. It merely needs to be considered reasonable under the circumstances as he believed them to be and an objective observer must come to the conclusion that any ordinary person, believing the circumstances to be as the defendant believed them to be, would have done the same.

Indeed, we learn from Article 12 of the Universal Declaration of Human Rights that:

‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks’.

30 *R v Lindsay* (2005) AER (D) 349
31 Such as the self-evident truth of right to life and liberty.
32 See Rowe v DeBryun, 17 F.3d 1047 (7th Cir. 1994)
These sentiments are repeated and adopted at Article 8 (1) of the ECHR where it states that:

*Everyone has the right to respect for his private and family life, his home and his correspondence.*

Imagine a society where such sentiments were neither entrenched in the minds of the citizens nor enforced in the courts by the state which is invested with the authority to enforce the rights conferred upon its citizens. Imagine that perpetrators, states and individuals alike, are routinely allowed to flout the law. It is not difficult to see how this would affect the social attitude\(^\text{33}\) of the citizenry. It could be argued that the individuals having a first-hand or second-hand experience of such willful violations would either feel disconnected from this environment or develop a strong antipathy towards it resulting in the establishment of primary motive or an active intent to violate the criminal laws. The gravamen is that intent is not always expressed in the active nor does it always coincide in time with the prohibited act. It could involve an action or inaction as in silence or non participation in the processes of the community.\(^\text{34}\)

However, silence has its price for it begins to fill the heart until silence becomes the heart – a heart swelling with restraint until it bursts in frustration, anger or even madness.\(^\text{35}\) But the matter does not rest there. In a straight forward case of direct interference as in burglary or physical assault, it is relatively simply to invoke self defence. It is altogether, a different matter when correspondence is involved. How does one invoke the defence in such circumstances while negating intent given the non immediacy or urgency of the situation? Furthermore, in this case,

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\(^{34}\) This, when it involves tortuous or criminal liabilities, could become negligence and the basis for a charge.

\(^{35}\) Michael Ventura, Psychology Today, 1998 (January/February), 31, 32-38, 66, 68.
one is given to covert operations in order to prevent a crime because, the assailant is, usually, invisible nor is there, usually, a direct and immediate physical confrontation.

Chapter Four: The Psychological dimensions of criminal intent

This paper does not take the view that the law is seeking to rule that a crime has not been committed when the plea of self-defence succeeds. It takes the position that the law accepts that a crime has been committed but that it is a lawful act (the act committed is done with the acquiescence of the law, excused or justified by the law due to reasons related to self preservation and the rule of law) and that the law deliberately ignores certain elements inherent in that plea and turns a blind eye to a doctrine that justifies and excuses criminal behaviour on the grounds of self-defence. This is not to argue that the law is wrong but serves to point out that black letter law has many shades of gray the jurisdiction of which is consciously conceded to the finer nuances of psychology and jurisprudential commentary.

In that context and as a legitimate, practical and intellectual pursuit, it is difficult to define a criminal legal term without much reference to the psychology that underpins it. Thus, law and psychology are intrinsically linked with the later providing linguistic and empirical assistance to the criminal process in order not only to explain but also to define the principles that inform such notions as the ‘reasonable man’, dishonesty or theft, murder or intent as

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36 In The Common Law, (Little, Brown & Company, Boston 1881), The American Jurist, Oliver Wendell Holmes, Jr. discusses the notion in the context of the law of tort submitting for the need for an objective and external standard and making it clear that uniformity and predictability of the law requires an objective standard of civil conduct. ‘Suppose that a defendant were allowed to testify that, before acting, he considered carefully what would be the conduct of a prudent man under the circumstances, and, having formed the best judgment he could, acted accordingly. If the story was believed, it would be conclusive against the defendant’s negligence judged by a moral standard which would take his personal characteristics into account. But supposing any such evidence to have got before the jury, it is very clear that the court would say, Gentlemen, the question is not whether the defendant thought his conduct was that of a prudent man but whether you think it was’. 

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essential elements in the committing of a crime. Thus, I submit that the subjective evaluation of legal principles relative to human behaviour and linguistic understanding lies within the competence of social psychology and not black letter law. From here emerges the concept of legal theory or jurisprudence which bridges the gap between black letter law and the other social sciences, between that which is practical and that which is speculative and between a good understanding of the players and why events develop as they do.

Hayes defined cognitive psychology as ‘a modern approach to the study of the processes by which people come to understand the world, such processes as memory, learning, comprehending language, problem solving and creativity’. In the application of ‘intent’ to the

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37 Defined by statutory law in the Theft Act 1968 S.1 (1): ‘a person shall be guilty of theft if he dishonestly appropriates property belonging to another person with the intention to permanently depriving the other of it’ and at common law in R v Ghosh ([1982] QB 1052) DPP v Gomez [1993] A.C. 442, House of Lords. See also Reg. v. Lawrence (Alan) [1972] A.C. 626, H.L.(E.) and Dobson v. General Accident Fire and Life Assurance Corporation Plc. [1990] 1 O.B. 274, C.A.. Compare Ghosh (where it was held that dishonesty was a state of mind of the accused, and not an objective measure, R v Landy [1981] 1 WLR 355 where the Court of Appeal held that the jury should be directed to apply the subject test and 'look into the mind of the defendant' to determine whether he was acting honestly or not. They did not discuss the objective standards of honesty. The inference here is that provided the accused believed himself to be acting honestly, regardless of what other people would think, that was enough to defeat a charge of dishonesty and R v Greenstein [1975] 1 WLR 1353, where the consensus was that the jury should not attempt to use the defendant’s own standards of honesty to judge him, otherwise, everyone who is accused of dishonesty, if he were to be tested by his own standards, would be acquitted automatically.’

38 The modern definition of murder is taken from the legal writings of Sir Edward Coke (Chief Justice of England 1613-16 (Institutes of the Laws of England, 1797)): the unlawful killing of a living human being, under the Queen’s peace, with malice aforethought, express or implied. In murder cases, David Ormerod’s Smith & Hogan (2005) Criminal Law, OUP, USA 14th Edition defines intent as stated in clause 18(b) of the Draft Code (See the classic Nedrick or Woollin direction, after the cases of R v. Nedrick [1986] 1 WLR 1025 and R v. Woollin [1999] 1 AC 82) as follows: ‘A person acts ‘intentionally’ with respect to ... a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events.’ See R v Matthews and Alleyne [2003] EWCA Crim 192: Applying the subjective element with an element of objectivity, the Lords, in this classic direction, held that ‘Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that death [or serious bodily harm] was a virtual certainty (barring some unforeseen intervention) as a result of the defendant’s actions and that the defendant appreciated that such was the case.’

process of determining the mental status at play so as to link it to the forbidden act, it becomes necessary to extrapolate this definition in the context of the cognitive dependency concept.

Intent in criminal law generally, is defined as ‘a state of mind accompanying an act, especially, a forbidden act’.\(^{41}\) Note that it does not say ‘a present state of mind’. The absence of the word ‘present’ is instructive in that it recognises the present continuous nature of intent.

Implicit in Hayes’ definition, is recognition of the social responsibility continuum which is a pre-existing state unto which all human beings are consigned and which, by definition, is a process. It is also clear that this definition places a burden on the individual making his relationship with the process both elective and fatalistic. His interpretation of and response to this relationship determines the nature and extent of his interactivity with it.

Thus, I define cognitive dependency, taking a cue from Hayes, as ‘a process by which an individual comes to understand his environment and the degree of his connectivity with it’. From this definition, we can extrapolate some very interesting concepts. We can also see the shoots of an emerging idea that the social responsibility continuum depends, for its cycle, on the relationship between the individual as a cognizant being and the degree of his acceptance or rejection of his environment.

One of those concepts is the idea that an individual’s election to engage in a criminal activity owes its credibility to that environment’s level of tolerance of the act\(^{42}\) and the extent to which it will go to dissuade participation in the forbidden act.\(^{43}\) In other words, does he care what you think of him? Does the society care what he gets up to? Does the community take steps

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\(^{42}\) There is an acknowledgment that the presence of a law does not, per se, negate its violation by individuals on an elective basis. However, enlightened citizens, it is argued, avoid a voluntary violation based on their definition of shame, self respect, avoidance of encumbrances, connectedness and advanced thinking.
\(^{43}\) It is further argued that failure by the authorities to enforce a law for whatever reason will have the tendency to lower the social stigma attached to that law. Individuals will thus have little reason to comply.
to ensure not just compliance with but also positive affectation by safeguarding the rule of law and dispensing justice when required?

We can also extrapolate from the above definition that the matter of cognitive dependency is in the active. Man is an active being by virtue of his competence – a motive to understand and interact with selected aspects of the environment.\textsuperscript{44} Thus, the concept of intent is directly linked to the exploration of one’s sense of curiousity. The result of each moment yields fresh fields for the next and each, in turn, produces the stimulation to continue the quest however unintended the outcome or destructive the path. The process thus produces fodder for the continuum. Cognitive dependency therefore, is a scale for measuring two important social activities:

1. The level of awareness possessed by an individual of his community and thus, the strength of intent in a criminal act. The lower on the scale that an individual’s understanding is, the lower his appreciation of the implications of his involvement in a criminal act.

2. The level of his connectedness to and dependence on that community as a result of the knowledge or awareness he possesses of that community. If he has a lower position on the scale of connectedness, his propensity to engage in criminal acts would be correspondingly higher.

Cognitive dependency is, thus, a definition that turns on itself. The cognition depends on the connectedness which, in turn, depends on the cognition. The relationship is one of an eternal cycle. In other words, to be connected, one needs to be aware and to be aware, one needs to be connected.

\textsuperscript{44} White, R. W. (1959). Motivation reconsidered: The concept of competence. Psychological Review, 66, 297-333. White states that he prefers the term ‘effectance’ rather than satisfaction because the latter connotes specific rewards. White also stresses the continuous nature of much of behaviour and the absence of a ‘consumatory climax’. At p.322, he explains that ‘effectance motivation subsides when the situation has been explored to the point that it no longer presents new possibilities.
The matter is not as simple as stated and there are complex elements to consider when designing or devising such a scale.

Cognition is defined as a ‘generic term for any process whereby an organism becomes aware or obtains knowledge of an object’ or more technically as ‘all the processes by which the sensory input is transformed, reduced, elaborated, stored, recovered and used’.

It is clear that neither of these definitions really clarifies the nature of the subject matter and both almost exclude the rational non-emotional characteristic of the issue.

First, it should be clear that all allusions to cognition or awareness do not stand in isolation. Thus, a more pedestrian definition of awareness would embrace such elements as the ability to observe, experience and be appreciative of the challenges and opportunities inherent in a given environment. Placed in this context therefore, what is known about an environment and how one relates to that environment as a result of what is known form the basis for what we call a ‘sense of belonging’ or cognitive dependency. It is submitted that without this sense of belonging, not only will the rule of law be thwarted but also that the basis for our criminal justice system would need to be re-valued. An individual who feels he has nothing to lose or who, on both objective and subjective levels, is disconnected, as a function of his awareness, from that environment would not make for a good citizen. There are a number of psychological factors

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47 We insist, in our legal system, that one must have a close proximity to a case in order to claim or assert a right. We also choose our jurors from the local community where the crime was committed for reasons of connectedness. Further, our courts are organized so as to serve local communities and those that dwell within their boundaries and even our representative democracy is organized along the lines of local affiliations. For this reason, Europe struggles with the idea of federalism and the UK government devolved political power to local assemblies in order to better reflect the needs of those it serves. In an increasing homogenous society, it might be tempting to parachute ideas and candidates from afar into a particular community but as we see time and again, in politics, it is crucial for the candidate or idea to adopt local connections in order to find resonance.
affecting the concept because it is an integration of various processes and tends to defy a direct and all-embracing definition. We shall consider them in turn.

Chapter Five: Competence as an essential quality of a person in committing a criminal act

The law defines competence as ‘a basic or minimal ability to do something’. Without doing too much violence to the definition, it is implicit that it does not contain, in this context anyway, a full appreciation of that which is being done nor does it refer to any degree of skill necessary to accomplish the action. As far as the definition goes, it is sufficient that ‘he is able’ to do something.

In the criminal rules of evidence, the old law developed from the notion that only those who were prepared to testify on oath on the gospel were competent witnesses. This is to say that those who submitted to testify on oath were ‘able’ to be called as witnesses in a case before the courts. Clearly, this indicates not just their physical ability to provide testimony, but also their appreciation and understanding of the issues at stake and the solemn nature of their oath. The criminal law takes the view that while some witnesses to a case may be competent to testify, they may not be compellable and vice versa and in either situation, the party calling the witness bears the evidential burden of showing, on a balance of probabilities, that the witness is competent or eligible to be sworn on oath and the courts play a very active role in this.

In marital cases, a spouse is deemed to be competent to give evidence but may not be compelled to do so for reasons of public policy stemming from preservation of the institution of

50 See ss (55), (56) Youth Justice and Criminal Evidence Act 1999.
51 Expert evidence may be adduced to prove or disprove credibility in some cases but this is a matter largely within the competence of the trial jury. See R v Watson [2003] EWCA Crim. 3490
matrimony.\textsuperscript{52} The law generally takes the view that at every stage in criminal proceedings, all persons are (whatever their age), competent to give evidence.\textsuperscript{53}

It is important to point out that the word ‘competence’ has both a factual and a legal meaning and both converge on ‘being able’ to understand questions relating to an issue and provide answers that can be understood’. But how does psychology deal with the matter as it relates to a person’s mental state?

The Psychologists’ definition of competence refers to a motive to understand selected aspects of the environment, the ability to effect an outcome and the attribute of persistence\textsuperscript{54} as distinguished from curiousity and exploration which are considered to be reactions that change the unfamiliar into the familiar. This definition, although not altogether comprehensive or elegant, is linked to the concept of self-efficacy which Bandura\textsuperscript{55} defined as a sense of one’s capability to manage problems’.

\textsuperscript{52} See s (80) Police and Criminal Evidence Act 1984. Per Cross & Tapper on Evidence, ‘when interest was the principal ground for disqualification, there was no need for the special rules relating to the evidence of spouses, ex spouses or close relations. After 1843, when interests ceased to be principal ground for disqualification, special rules of spouse competence and compellability were created.’ See Cross & Tapper at pp 261 to 264. In its 11th Report, The Criminal Law review Committee felt that the preservation of marital harmony could not justify the retention of spousal incompetence and that the only argument of any substance at all was the dilemma that would be created for spouses in cases where there was no compellability. However, see the US case of Trammel v US 405 US 40 (1980) which was criticized for reaching a decision on similar argument by Lempert (1981) 66 Iowa LR 725.

\textsuperscript{53} S. (53) Youth and Criminal Evidence Act 1999. The implication is that even children are deemed to be able to or presumed able to understand questions put to them as witnesses and give answers to them that can be understood at s. (54). The Australian Court have found sympathy with this position in a similar Act as espoused in R v Brooks (1998) 44 NSWLRR 121
