The Theory of Justification and Excuse and its Implications for the Battered Woman.

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"Under what circumstances is a person criminally responsible for the harm that he causes?" According to the Model Penal Code the answer is *" when the state proves beyond a reasonable doubt that he acted voluntarily, with a wrongful state of mind, and in the absence of any excusing conditions."*[1] This piece will focus on the closing phrase of the Model Penal Code's answer, namely on the issue of how and why society chooses to refrain from imposing criminal liability. It is the availability of the criminal law's exculpatory defences that enables the exercise of this option. The question is, is this facility employed in the most optimal manner and for the most deserving cases? In looking for an answer, one must first address why it is that society finds it necessary to absolve responsibility in certain instances, before examining the conditions for such absolution. Only then can one assess the adequacy and suitability of our exculpatory defences, particularly in light of current circumstances regarding domestic homicide.

There is much disagreement regarding the different classes of criminal law defences, which permit an actor to go unpunished for his conduct[2]. Paul Robinson defines these defences as *"any set of identifiable conditions or circumstances which may prevent a conviction for an offence."*[3] He goes on to categorise them into five groups: (a) failure of proof defences, (b) offence modification defences, both of which involve the prosecution not establishing all the elements of the offence beyond a reasonable doubt; (c) excuses; (d) justifications; and (e) non-exculpatory public policy defences such as double jeopardy and the Statute of Limitations, which bar prosecution, but do not alleviate moral responsibility. Justifications and excuses will be the focus of this discussion. Morawetz describes these defences as involving

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[1] Dressler, Joshua. *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code.* [1988] Rutgers Law Journal. 671 at pgs. 671-672.

[2] The conduct I specifically refer to is homicide. Later in this discussion, it will become clear that where a justificatory defence such as self-defence is successful, the act of homicide is not necessarily a 'wrong'. This will be further elaborated in relation to the 'distinction' between justification and excuse. See note 5 and the accompanying text.

[3] Robinson, Paul. *Criminal Law Defences: A Systematic Analysis.* (1982) Vol. 82 Columbia Law Review 199 at pg. 203.

"situations in which the elements of the offence are satisfied and the actor claims that there are sufficient grounds for personal exculpation, moral as well as legal."[4]

Before examining the merits of the distinctions between the criminal law defences, one should first address the general features of the most well known differentiation – justification and excuse. In layman's terms, there is an assumption that where there is justification for acting in a certain manner, the actor did the 'right thing' and though harm may have been caused, no wrong was committed. The reason for this being that despite the act's adverse effect, there is an overall benefit to society that outweighs the harm. Thus the act is encouraged or at least tolerated by society. According to Fletcher, this utilitarian attitude towards the non-punishment of harm-causers is supplemented by intuitions of justice and retribution, to give an accurate account of the theory of justification.[5] This is to say that, in spite of the utilitarian results of some actions, punishment may still be warranted, where the rights and integrity of others have been disregarded. Another factor said to demarcate a justification is that it refers to the act itself and is adjudicated in general, objective terms. The act itself was justified; meaning punishment is not an issue. [6]

In contrast, an excuse covers the situation, where wrongful conduct has occurred, but, for some reason, the actor does not deserve to be sanctioned. Excused behaviour does not provide any net benefit to society. It is both a harm and a wrong, however grounds exist for not attributing blame to the actor. These grounds are individual and subjective to the actor, making him an inappropriate object for punishment, despite the commission of a wrong. In assessing which of the categories of defence is concerned, Fletcher proposes a specific order of questions. First, one must ask, *"Is the harmful act committed by the actor a wrong?"* If it is not a wrong, it must be a justified act, however if it is a wrong, another question must then be posed, namely *'does this actor deserve to be punished for committing this wrong?'*[7] The matter of

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[4] Morawetz, Thomas. *Reconstructing the Criminal Law Defences: The Significance of Justification.* (1986) Vol. 77 Journal of Criminal Law & Criminology 277 at pg. 277. He goes on to explain that the individual defences, which are said to fall under these headings, are not entirely consistent with the two categories. He suggests a hybrid category known as 'justified wrongs' to house defences such as mistake and duress. This will be discussed later. See note 31 and the accompanying text.
[5] Ibid at pg. 285.
[6] Alldridge, Peter. *The Coherence of Defences.* [1983] Criminal Law Review 665 at pg. 665.
[7] Fletcher, George. *The Right and the Reasonable.* [1985] Harvard Law Review 949 at pgs.957-962.

when society excuses and when it punishes a wrongdoer is quite complex and deserves further exploration to shed more light on the phenomenon of excusing.

According to Dressler, when society chooses whether or not to excuse a wrongdoer, it simultaneously discloses its ideas about that particular person, society and *'the nature of humanness itself'*[8]. Society's moral values are put on display through this choice. Dressler contends that the rationale behind excusing wrongdoers lies in *"our passion for justice and our tendency to express compassion";* therefore *"since people have a right to be treated justly and since compassion is a morally uplifting emotion, it is both necessary and morally good that the law recognises excuse defences"*[9]. However, he does warn that though it may well be virtuous to empathise with those who have done us wrong, our zeal to show mercy may in fact overshadow whether the wrongdoer in fact deserves to be excused. Feelings of empathy and compassion should not be determinative, when it comes to the imposition of liability.

> *"Compassion and blame are not mutually exclusive."*[10]

Assigning responsibility for actions need not involve an absence of mercy or understanding. Society can still display its humanity without expunging moral or legal guilt for wrongful conduct.[11] In any event, compassion would prove to be a most arbitrary and unpredictable yardstick for excusing wrongdoing. Over-reliance on this virtue would lead to the punishment of those we simply do not empathise with and the excusing of those, who enjoy our compassion. [12]

Dressler advocates a personhood theory of excuse.[13] In other words, the excusing of a wrongdoer should depend on whether at the time of the offence, the actor had and was able to exercise free choice, a defining characteristic of 'personhood', rather than looking to the actor's character for grounds to void culpability. Dressler contends a wrongdoer's desperate socio-economic background or long history of abuse should not determine whether they are punished. Society's failing of the offender should not

[8] Dressler, op cit at pg. 672.
[9] Ibid at pg. 674.
[10] Ibid.
[11] Sentencing options from imprisonment for various terms to fines or community service orders and so on, mean moral and legal liability can be allotted, while compassion is simultaneously shown.
[12] Dressler, op cit at pg. 689.
[13] Ibid at pgs. 692-702.

furnish the wrongdoer with a 'get-out-of-jail-free-card'. He cites the 'causal excuse theory'[14] as an inspiration behind the drive to expand the grounds for excusing wrongdoing. This theory dictates that, in order for punishment to be imposed, there must be proof of desert, however where the wrong was caused by factors outside the actor's control, no punishment is warranted. It is not difficult to come to the conclusion that this is somewhat of a catch-all theory. While circumstances such as mental illness clearly fall beyond the wrongdoer's control, any wrongful conduct could conceivably be attributed to such uncontrollable circumstances and conditions. Anti-social behaviour and criminal activity could be traced back to a childhood of hardship and abuse. It is an accepted fact that many abusers were once abused. A little imagination combined with our pre-disposition towards compassion makes us easy prey for any excessively creative fan of the causal theory. The line between excusable and inexcusable conduct could become evermore blurred into non-existence. This is supported by the assertion of Professor Donald Horowitz that there is an ever-increasing divergence between the law of justification and that of excuse.[15] He suggests that while justification law, particularly regarding law enforcement, is narrowing[16], the law on excuses seems to be expanding. This extension is evidenced in an enlarged definition of insanity and the inclusion of involuntary intoxication under the Model Penal Code[17]. Despite his appreciation for how the Code effects a

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[14] This theory was identified by Professor Michael Moore in his 1985 article *Causation and the Excuses* Vol. 73 California Law Review 1091 at pg. 1131. Moore highlights the subtle distinction between causation and compulsion, which is often overlooked by those eager to extend excuses to wrongdoers. (Cited in Dressler, op cit at pgs. 680- 689.) Dressler uses a simple example to explain the concept - while rainfall may have made the road unsafe and caused the car to skid and crash, the rain cannot be said to have compelled the accident to occur (at pg. 680).

[15] Horowitz. *Justification and Excuse in the Program of the Criminal Law.* (1986) Vol. 49 Law & Contemporary Problems 109 at pgs. 116-120. (Cited in Dressler, op cit at pg. 678.)

[16] Dressler, op cit at pg. 678. Dressler concurs with this assessment regarding the tightening of justification law in regard to law enforcement in light of the increased value placed on human life, including that of the wrongdoer, however this is where he parts company with Horowitz's assertion. Dressler gives the example of self-defence under the Model Penal Code. Self-defence, once falling under the heading of excuse, is now considered a justification. Historically, Anglo-American common law ruled out justifications such as self-defence, where the actor was unreasonably mistaken in relation to the facts justifying his conduct. In contrast, the Model Penal Code allows the actor avail of a full or partial defence in the case of an unreasonable mistake.

[17] The recognition of diminished responsibility under s.2 of the English Homicide Act 1957 similarly indicates a trend of expanding excuse law. Even though the Irish courts have unequivocally refused to identify diminished responsibility as a feature of Irish criminal law, it can be said that the acceptance of 'irresistible impulse' is a widening of the law on insanity. In Doyle v. Wicklow Co. Co. [1974] I.R. 55, the Supreme Court upheld the decision in People (A.G.) v. O'Brien [1936] I.R. 263 stating that the M'Naghten Rules were not the *"sole and exclusive"* criteria for insanity. It went on to endorse an earlier ruling in People (A.G.) v. Hayes Central Criminal Court 30th November 1967 in which Henchy J held that the M'Naghten Rules were based on knowledge and failed to take into account a person's inability to act or refrain from acting despite that knowledge. The defendant's impulse to kill was

proper extension of excuse law regarding intoxication and insanity under what can be identified as personhood principles, Dressler is critical of any inclination to excuse an actor due to their *'disabling condition'* or *'crimogenic circumstances'*. Rather *"desert is most plausibly based on whether, at the time of a criminal act, the actor had the capacity and fair opportunity to choose freely whether to commit the blameworthy act."*[18] In other words, the personhood theory of excuses demands that a defence should be available, where the individual's capacity for free choice is adversely affected at the time of the offence. Dressler is not opposed to an extension of excuse law, but recommends a thoughtful and well-structured expansion.

One may ask if the personhood theory of excuse steers away from using the actor's character and history, what does it mean for the battered woman who kills her abusive husband. Does it completely excise the woman's tortured background? In all likelihood, it would simply shift focus from the abuse itself towards whether it adversely affected the woman's capacity to exercise free will. Battered women experience a dissolution of their dignity and self-respect at the hands of their abusive partners. Their suffering leads to feelings of self-blame and isolation. Escape seems futile and dangerous.[19] The fear of being hunted down and punished for escaping is very real. This, together with a knowledge of the antipathetic and suspicious attitude of law enforcement agencies towards domestic violence situations,[20] leaves battered women believing they have no options. How can their capacity to exercise free will not be restricted? Even with a more cautious extension of excuse law in line with

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found not to be controllable due to mental illness and in spite of the knowledge of what he was doing and that it was wrong, the defendant was acquitted of his wife's murder.

[18] Dressler, op cit at pg. 715.

[19] McColgan, Aileen. *In Defence of Battered Women who kill.* [1993] Oxford Journal of Legal Studies 508 at pg. 517. McColgan cites Graffe (in *Battered Women, Dead Husbands.* Vol. 10, No.1 Loyola of Los Angeles International & Comparative Law Journal 1), who discloses that a German study in 1980 revealed that in ninety-nine out of one hundred cases in which a man killed his partner, the woman had been attempting to leave the relationship.

[20] There is a marked reluctance by victims of domestic violence to seek refuge from law enforcement agencies - according to the Home Office report on domestic violence entitled *Safety and Justice: The Government's Proposals on Domestic Violence* presented to Parliament on June 17th 2003 (pgs. 8-9), women tend to wait until they have incurred, on average, thirty-five beatings before contacting the police. See Ford, David. *Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships* in Sanders, Prosecution in Common Law Jurisdictions (Aldershot, Dartmouth, 1996). Criminal justice agencies tend to view domestic violence complaints by women as a waste of time and resources given the propensity of abused women not to follow through on a complaint.

personhood principles, it is entirely possible that the battered woman's suffering could ensure her eligibility to be excused and not be cast aside as irrelevant.

Having discussed the motivations behind excusing and the way in which society has and may in the future extend forgiveness to those who do it wrong, it now becomes necessary to address how the criminal defences are classified between justification and excuse and why or at least if they fall within these headings. In relatively recent times, the significance of the distinction between justification and excuse has re-emerged as a topic of debate amongst legal scholars. For some time, it was not considered as bearing relevance to the operation and understanding of criminal law.[21] Its increased importance in legal debate can be attributed to the works of George Fletcher.[22] Fletcher advocates the contention that by drawing clear lines between justifications and excuses, one would achieve some level of conceptual clarity, making for a more structured and comprehensive approach to the teaching and investigation of complex legal theories, as well as having the practical effect of accommodating a more straight-forward and accurate resolution of hard cases.[23] He professes that the criminal defences fit exhaustively and comfortably within the enclosures of the justification and excuse categories. A proper exploration of the distinction yields a structured approach towards an accurate application of legal concepts to practical cases.[24]

Kent Greenawalt is of a very different opinion; in fact one could say his approach to the justification-excuse distinction is diametrically opposed[25] to Fletcher's

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[21] According to Dwyer, the abolition of forfeiture under the Offences against the Person Act 1828 brought with it the demise of any practical distinction between justifiable and excusable homicide with regard to self-defence. A justifiable homicide was a killing committed in the execution of justice, crime prevention or in self-defence from a felonious attack and resulted in an acquittal. An excusable homicide occurred by misadventure or by self-defence during an altercation, where the actor was not entirely without fault. In such event, the actor would avoid imprisonment due to a royal pardon but would forfeit his property. Following the 1828 Act, there was no practical difference between the two types of homicide. Dwyer, Padraig. *Homicide and the Plea of Self-Defence.* [1992] Irish Criminal Law Journal 73 at pg. 74. Also, Alldridge refers to Stephen's assertion in History of the Criminal Law of England. (1883) Vol III at pg. 1, that the justification-excuse distinction *"no longer involves any legal consequence."* Alldridge. Op cit at pg. 665.

[22] Fletcher, George. *The Individualisation of Excusing Conditions.* (1974) Vol. 47 Southern California Law Review 1269; Rethinking Criminal Law. Little, Brown & Co. Boston. 1978; *The Right and the Reasonable.* [1985] Harward Law Review 949.

[23] Morawetz, op cit at pgs. 279-285.

[24] See Fletcher. Rethinking Criminal Law. op cit, at pgs. 817-835 for further discussion.

[25] Greenawalt, Kent. *The Perplexing Borders of Justification and Excuse.* [1984] Columbia Law Review 1897.

contention. Greenawalt argues that any attempt to define a clear distinction is futile. According to him, there will always be some divergence in moral standards and since, as Morawetz says, "*criminal defences mirror and amplify what is arguably a criterion for moral blameworthiness"*[26], how can one expect to pigeon-hole the defences into definitive categories, when morality itself is not cast in stone. Without a constant yardstick of morality from which to measure reliable grounds for distinction between the categories of defences and, more basically, between behaviour to be classified as acceptable or as criminal, Fletcher would appear to be searching for the pot of gold at the end of the rainbow. Greenawalt maintains that, even if one could conceivably base the distinction between the defence categories on grounds such as warranted versus unwarranted wrongful conduct[27] or the general-objective versus the individual-subjective[28], the fact that the labels 'justification' and 'excuse' do not stand for a persistent or precise division between the defences, means any attempt at structuring a constant and reliable distinction is no more than a fool's errand. These are labels, which will ebb and flow with the tides of morality and its dictates regarding what constitutes punishable criminal behaviour.

Compounding the theoretical difficulties of establishing a clear authoritative distinction is the phenomenon of the general verdict.[29] With the sole exception of the special insanity verdict, which arguably only occurs due to the consequence of civil commitment, the criminal justice system itself militates against any attempt at a clear distinction. Without a jury specifying the grounds for not imposing liability, one of the criminal law's most basic functions is sabotaged. Expressing a verdict in terms of justificatory or excusatory grounds would fulfil the law's duty to inform whether or not certain conduct is wrongful, where a justification would indicate conduct that is socially encouraged, or at the very least tolerated and an excuse would represent wrongful conduct, with this actor, however avoiding punishment. How can one know whether conduct is justified or wrongful if the reasons for liability not being imposed are not explained? In this way, the system itself conspires against Fletcher's

[26] Morawetz, op cit at pg. 278.
[27] Greenawalt, op cit at pgs.1903-1915.
[28] Ibid at pgs.1915-1918. Justifications could be said to be affiliated with the general and objective – they refer to the conduct itself, rather than the more subjective excuses, which focus on the individual actor.
[29] Greenawalt, op cit at pg.1900. Also Williams, Glanville. *The Theory of Excuses.* [1982] Criminal Law Review 732 at pgs. 741.

endeavour, which Greenawalt concedes *"is a laudatory goal, deserving the serious attention of scholars,"* before reiterating *"a fully comprehensive system 'could' divide up all instances of justification and excuse, but it could do so only by the distorting of ordinary concepts or by employing some complicated subcategories reflecting significant policy judgments. A program to achieve that objective is not an appropriate one for Anglo-American penal law."*[30]

Morawetz prides himself in occupying a middle ground between the positions advocated by Fletcher and Greenawalt. While Fletcher envisions a state of clear structured legal thinking and the straightforward application of clarified legal concepts to 'hard cases', Greenawalt remains dubious of the rewards of such a conceptual analysis of justification and excuse. Morawetz, on the other hand, maintains that perhaps we should not force the criminal defences into the categories of justification and excuse. He suggests a third classification known as 'justified wrongs'[31] to house those wayward defences, which fail to comply comfortably with the criteria of justification or excuse.[32] He denies Fletcher's assertion that the absence of a clear division of defences between justification and excuse leads to unstructured and 'flat' legal thinking. He argues that Fletcher's holy grail of clarification is an ambiguous goal, yet unlike Greenawalt, he does accepts that an attempt to delineate between the classifications of defences will achieve some form of definition. While it may not render an easy answer to the 'hard case', it will explain why hard cases are hard.[33] Morawetz merits this analysis with the success of describing the uses of the concepts of justification and excuse and explaining how they rely on other concepts such as 'reasonableness' and 'good reason', which in turn could prove useful in *"recommending different use with harder edges, rendering the concepts independent*

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[30] Ibid at pg. 1927.
[31] Morawetz defines a 'justified wrong' as occurring where *"the actor has good reason for acting, but at the same time takes action that society (for utilitarian reasons) is anxious to discourage."* Op cit at pg. 297. Utilitarian reasons could be interpreted as meaning 'on balance for the greater good'.
[32] This would perhaps solve Alldridge's concern about defences fitting within either category whenever suits. According to him, *"a coherent defence cannot contain elements whose rationale is that D was a responsible actor, together with elements whose rationale is that D was not…there is apparent in some defences internal inconsistency which comes from failure to appreciate the excuse/justification dichotomy."* Alldridge, op cit at pg. 666.
[33] There will always be hard cases, especially when there are notions such as reasonable mistake. Different people have different moral standards and different people are held to different moral standards. Morawetz gives the comparison of the medical intern and the consultant, who will be held to different standards of reasonableness. Op cit at pg. 304.

of such notions as 'good reasons.'"[34] Though this conceptual analysis may not provide a quick fix, it may perhaps cast light on the way forward towards easier answers.

The pertinent question now is where does this leave the battered woman? Does a conceptual analysis of the justification-excuse dichotomy or any variant thereof have a practical effect on her predicament? For the victim of domestic violence who kills her abuser, possibly the most important consequence of the distinction lies in the different perceptions of her conduct. The availability of justificatory defences to these women infers that though their actions caused harm, they are not necessarily wrongs and constitute actions encouraged, or at least tolerated, by society. It means vindication. Excusatory defences indicate that the woman's actions were harmful and wrong, but due to grounds personal to her, she does not deserve punishment. Her actions are not condoned, but they are forgiven. As the law stands, various defences are 'available' to such a defendant.[35] By addressing the accessibility of these defences to battered women, one can assess the attitudes society holds towards an abuse victim, who escapes her plight through domestic homicide.

The first defence is provocation[36]. Alldridge contends this defence can be either a partial justification, insofar as the deceased's action provided the woman with a right to act the way she did, or a partial excuse as the actor lost her self control and should not be punished for a wrong outside her control.[37] Alternatively, one could class provocation under the 'justified wrong' category suggested by Morawetz. Though the battered woman had good reason to act, her actions were nonetheless not encouraged by society. This classification would be dependant on how 'good reason' would be interpreted, however it is submitted that where a woman has incurred repeated and severe beatings and abuse and sees herself as trapped, it would be her view that she had 'good reason' for her act of killing. Morawetz highlights a possible flaw in this reasoning. Regarding his example of mistake, he points out *"only good reasons in the*

[34] Ibid at pg. 305.
[35] Despite being 'available', none of these defences are entirely accommodating to the battered woman's plight, as will be discussed briefly later in this piece.
[36] Provocation is not a full defence; rather it acts as a mitigator to reduce a charge of murder to one of manslaughter.
[37] Alldridge, op cit at pg. 669.

senses required by law will do…this is captured by the requirement that the mistake be reasonable."[38]

Reasonableness, despite purporting to be a neutral and objective standard, can prove a formidable foe for the battered woman, being a concept distilled through centuries of male orientated case law. On the other hand, when considering the case of D.P.P. v. Camplin[39], one can see that reasonableness may not necessarily close the door entirely on these defendants. Even with the watering-down of the inherently male element of reasonableness, the concept of provocation itself is cast in a gender-biased light. The vitality of the 'sudden and temporary' requirement is symptomatic of provocation's failure *"to emerge from its male honour-vindicating base".*[40] Nicolson & Sanghvi concur with this assertion and propound that provocation is so rooted in "*male standards of behaviour as to cause considerable injustice to battered women who kill."*[41] Despite the initial attraction of provocation, this defence is inherently male and suffers from such theoretical inconsistencies and uncertainties, that a second glance leads one to question its suitability to the battered woman's cause.

The second defence at hand for these defendants is self-defence. This was once classified as an excuse as the defender was seen as having no choice, but to use violence leaving the result outside his control. It was later reclassified as a justificatory defence for various policy reasons. The defender is now seen as

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[38] Morawetz, op cit at pg. 288. One may well ask whether this is objectively reasonable from the reasonable man's point of view or subjectively reasonable as the battered woman saw it.

[39] [1978] 2 All E.R. 168. Here an element of subjectivity was injected in to the objective test and allowed for the reasonable man to share the characteristics of the defendant, which would affect the impact off the provocation on him. In Ireland, the adoption of a subjective test in People (D.P.P.) v. MacEoin [1978] I.R. 27 and the subsequent case of People (D.P.P.) v. Mullane Court of Criminal Appeal, March 11, 1997, relegated objectivity to an evidentiary matter, meaning the Irish test now asks, was there provocation and did the defendant lose self-control?

[40] Wells, Celia. *Provocation: The Case for Abolition* in Ashworth & Mitchell, Rethinking English Homicide Law. (Oxford, 2000) at pg. 89. Even though the ideas of 'slow-burn rages' and 'cumulative provocation' are hesitantly percolating into consideration in battered women trials, they tend to be ushered in through expert evidence regarding Battered Woman Syndrome. The difficulty with this is that if a battered woman does not fit comfortably within the template of the stereotypical battered woman, as constructed by Dr. Lenore Walker, then the likelihood is that the experts and the jury are not disposed to considering the woman's conduct in light of the syndrome and instead hold her up to the standard of the 'reasonable' woman, who has not been abused. See Nicolson, Donald & Sanghvi, Rohit. *Battered Women and Provocation: The Implications of R. v. Ahluwalia.* [1993] Criminal Law Review 728.

[41] Nicolson & Sanghvi. *Battered Women and Provocation: The Implications of R. v. Ahluwalia.* [1993] Criminal Law Review 728.

possessing a moral right to defend his autonomy, which is rendered superior to the assailant's right by the assailant's aggression.[42] Also, the fact that the aggressor was recognised as the instigator of the trouble and in an attempt to quell such aggression, self-defence was reassigned the role of justification, whereby the act of defending oneself is seen as socially encouraged.[43]

As with provocation, self-defence does not welcome the battered woman with open arms. The elusive concept of reasonableness similarly plays an important role here. The success of this defence rests on the reasonableness and necessity of the force used. Whether it is the defendant herself or the reasonable man, who must deem the force reasonable in the circumstances, the fact of the matter is that reasonableness was an abstract legal concept distilled through male case law. Despite assertions that it is an objective standard, reasonableness has been groomed as a male standard and its application demands meeting this male standard. How can reasonableness be employed as an objective and neutral standard, whether objectively or subjectively applied, when by its nature it is a biased entity? Self-defence is steeped in male tradition and values - this would first have to be addressed before this defence could ever look kindly on the abused woman, who kills.

The third defence considered in this work is diminished responsibility. As an offshoot of insanity, this defence would clearly fall within the principles of excuse theory. To avail of diminished responsibility, the defendant must suffer from a mental abnormality that is sufficient to adversely affect her capacity to be mentally responsible for her actions. Under Dressler's personhood theory of excuse, the defendant's abnormality of mind could substantially compromise her control over her actions and inhibit her ability to resist impulses. Diminished responsibility appears most promising to the battered woman, when combined with provocation. This tactic fuses an excuse with a partial excuse-partial justification to provide battered women with quite a synergetic defence.

[42] Ashworth, Andrew. *Self-Defence and the Right to Life.* [1975] Vol. 34, No. 2 Cambridge Law Journal 282 at pgs. 288 –289.
[43] Williams, op cit at pgs. 738-739.

The fusion of provocation and diminished responsibility allows for the introduction of expert psychological evidence regarding the effects of continuous battering on the woman's perception and behaviour. Ordinarily such evidence would be excluded in regard to provocation, however through this alliance with diminished responsibility, expert evidence is bound to carry weight in considering the plea of provocation. Many see this as a clever ploy or ruse by defence counsel to get their client off.[44] The strategy of combining provocation and diminished responsibility is criticised as confusing the jury and artificially warping the criminal defences to effect a favourable verdict. Why is this such an unsavoury development? How is it any different from the courts accepting the concepts of cumulative provocation and slow-burn rages? While it may appear underhanded, this hybrid defence strategy does offer hope for the battered woman who kills. After all, if the system fails to positively accommodate the battered defendant, then why should she be condemned for using it in an unorthodox manner to suit her needs? Despite its potential, the greatest problem with this in Ireland is that as of yet diminished responsibility has not been recognised as part of Irish criminal law.[45]

While the distinction between justification and excuse may be said to facilitate a greater understanding and ease of application of the criminal defences, as well as revealing how society views harmful conduct, it may be assumed that battered women facing homicide charges are not overly concerned with the conceptual analysis of the theories of justification and excuse. Their priority is the availability of defences and despite our willingness to bestow mercy upon those, who do us wrong, the inability of even one of the criminal law defences to comfortably accommodate the predicament of the battered woman suggests she is not deserving of our understanding and compassion. Is this really how we, as a society, wish to exercise *"our passion for justice and our tendency towards compassion?"*[46]

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[44] Eastman, Nigel. *Abused Women and Legal Excuses.* [1992] New Law Journal 1549 at pg. 1550.
[45] Section 5 of the Criminal Law (Insanity) Bill 2002 does propose the introduction of diminished responsibility into Irish Law. The Bill was introduced to the Seanad on December 10th, 2002 and went to the second stage on February 19th, 2003. This is the extent of its progress through the Oireachtas.
[46] Dressler, op cit at pg. 674.

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