Chapter Three

HOMICIDE AND THE FRAMEWORK OF THE DEFENCES TO MURDER

3.1 INTRODUCTION

In Chapter One, the fundamental difference in the circumstances in which men and women kill in the domestic context was highlighted.¹ Men kill their partners as a response to possessiveness, jealousy, and control. Women kill their partners in response to a history of violence. In this thesis, my interest is to explore the ability of the criminal law to have proper regard to the circumstances in which women kill in the domestic context. The argument that I develop is that the circumstances in which women (as opposed to men) kill in the domestic context need to be better recognised within the framework of the criminal law. In advancing my argument, I examine the application of the defences to murder that are relevant in cases where women kill their male partners.² However, before examining the operation of the defences in the context of women who kill their male partners, this discussion needs to be placed in its broader theoretical context. This chapter lays the foundation for the discussion in subsequent chapters by outlining the doctrinal and conceptual framework of the law of homicide, as well as the defences to murder.

This chapter is divided into three parts. The first part provides a brief overview of the structure of the law of homicide. In this section, I provide an overview of the history of homicide, the evolution of the defences to murder and the current operation of the law of homicide. The second part examines the relationship between intent, criminal responsibility and motivation in the criminal law. The final part outlines the theoretical basis for the defences to murder. This discussion considers the justification/excuse dichotomy as a means to account

¹ See 1.3.
² These defences are diminished responsibility (Chapter Four), lack of the requisite intent for murder (Chapter Four), insanity (Chapter Four), automatism (Chapter Four), provocation (Chapter Five) and self-defence (Chapter Six).
for the proper role (and rationale) of the defences of provocation, diminished responsibility and insanity, and self-defence. As an alternative framework, I consider whether the 'reasons view' provides a more promising framework in which to examine the defences to murder. In my discussion of the 'reasons view', the concept of 'agent-relative permission' is employed to provide a rationale for the defence of self-defence.

3.2 THE STRUCTURE OF HOMICIDE

3.2.1 A BRIEF HISTORY OF HOMICIDE AND THE DEFENCES

While a detailed history of the law of homicide is beyond the scope of my research, this brief overview serves to highlight the gendered origins of the law's regulation of homicide, particularly, the gendered origins of the defences of provocation and self-defence. This overview also shows the harshness with which the law historically has treated women who killed their husbands.

The law of homicide has long recognised that different degrees of culpability may attach to those who kill. Even before the development of the formal categories of murder and manslaughter in the early sixteenth century, the harshness created by a single offence of felonious homicide punishable by death was alleviated by the categories of justified and excusable homicide. Justified homicide resulted in an acquittal. It was a category restricted to instances, such as the enforcement of lawful arrests, and the protection of property and person within a man's home. Excusable homicide was punishable by forfeiture of goods and imprisonment until the killer received a pardon.

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3 In this thesis, I rely on the association of self-defence and 'agent-relative permission' developed by Leader-Elliott, see I Leader-Elliott, 'Battered But Not Beaten: Women Who Kill in Self Defence' (1993) 15 Sydney Law Review 403. 'Agent-relative permission' focuses on the value that each person attaches to his or her own life. This is explained in more detail at 3.4.2.


5 B Brown, 'Emergence of the Physical Test of Guilt in Homicide' (1959) 1 Tasmanian University Law Review 231 at 235; J Ames, 'Law and Morals' (1908) 22 Harvard Law Review 97 at 98. It is noted that by 1390 pardons became a formality and by the first half of the sixteenth century the practice was to return acquittals. B Brown, 'Self-Defence in Homicide', ibid at 588.
3.2.1.1 *Excusable homicide*

Excusable homicide was divided into two categories: homicide *se defendendo* and homicide *per infortunium*. Homicide *per infortunium* was an accidental killing: 'where a man doing a lawful act, without any intention of hurt, unfortunately kills another'. 6 Homicide *se defendendo* was an intentional killing in self-defence, where defensive force was excused if it was the last available option to save a person's life. 7 The law required an immediate threat and imposed a duty to retreat as far as possible. 8 However, the jury's dominion over facts meant that the category of self-defence was used as a catchall for homicides considered by the jury to be less serious. 9 Sudden killings in response to a violent quarrel were constructed by the jury as killings in self-defence. The circumstances of a case on occasions required manipulation to 'fit' the requirements of self-defence. As Green comments, 'nearly every act of self-defence was said to have been undertaken by a cornered defendant; ditches, walls, and hedges had constrained fleeing defendants at every turn'. 10

3.2.1.2 *Enter provocation*

While the operation of the jury system informally distinguished between premeditated and sudden killing, it was not until the early sixteenth century that the legal distinction between murder and manslaughter was formally recognised. 11 Provocation developed from the recognition of the formal

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9 T Green, *Verdict According to Conscience, ibid* at 99.

10 T Green, 'The Jury and the English Law of Homicide', above n 4 at 429.

11 J Kaye, 'The Early History of Murder and Manslaughter' (1967) 83 *Law Quarterly Review* 365 at 369. See also R Dresser, 'Culpability and Other Minds' (1992) 2 *Southern Californian*
distinction between premeditated and unpredisitated killing. Murder was the deliberate killing with 'malice aforethought'. Malice was implied where 'one voluntarily kills another without provocation' and manslaughter came to mean a provoked killing committed in the 'heat of passion'. The early defence of provocation was not extended to all killings in response to allegedly provocative acts. Angry words followed by an assault, witnessing an assault on a friend or kinsman, witnessing an Englishman being unlawfully deprived of his liberty, and a man witnessing another man in adultery with the accused's wife were recognised as categories of sufficient provocation. And as Wells observes, '[i]t does not require a rabid feminist to spot the gendered tenor of these examples'.

Although provocation was traditionally premised on the notion of anger as outrage, the concern to limit the availability of self-help saw the mitigatory role of the defence of provocation shift more towards 'loss of self-control' in the eighteenth century. The emphasis on loss of self-control was to limit the bounds of revenge, as it created a distinction between revenge and provoked killing. In the nineteenth century, the concept of the 'reasonable man' was imported into the law of provocation as the standard against which juries might access the sufficiency of the provocation and the actions of the accused.

The examples of self-defence and provocation provided by legal writers in the eighteenth and nineteenth centuries abound with the various legal complexities

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Interdisciplinary Law Journal 41; T Green, 'The Jury and the English Law of Homicide', ibid; T Green, Verdict According to Conscience, above n 8; J Horder, Provocation and Responsibility, above n 7.


13 B Brown, 'Emergence of the Physical Test of Guilt in Homicide' above n 5 at 238 – 239.

14 Mawbridge (1707) 84 ER 1107 at 1114 – 1115 per Lord Hold CJ. See also J Horder, Provocation and Responsibility, above n 7 at 24.


16 See J Horder, Provocation and Responsibility, above n 7.


19 Welsh (1869) 11 Cox CC 336.
of men meeting, quarrelling and resorting to arms.\textsuperscript{20} The laws of self-defence and provocation were predominately concerned with the regulation of violence in the public sphere at a time when men commonly wore weapons.\textsuperscript{21} The law was concerned to regulate the conduct of people involved in drunken brawls\textsuperscript{22} and the responses of men who were quick to anger, especially in matters of honour.\textsuperscript{23} A further significant category of conduct regulated by the defence of provocation was killing in response to infidelity.

3.2.1.3 Women who killed their partners

Although the law of homicide was not largely concerned with regulating the conduct of women, a notable exception was the crime of 'petit treason', which existed until 1828.\textsuperscript{24} The killing of a husband by a wife was petit treason, and it was a form of murder considered more serious than other unlawful killings. If a woman killed her husband, it was petit treason as it was a 'species of treason, on account of the violation of private allegiance'.\textsuperscript{25} The punishment provided for petit treason was for the offender to be drawn and quartered, but as a respect for their gender women were burnt.\textsuperscript{26} Women who were charged with petit treason faced several legal difficulties. The defences of provocation or self-defence were not available to a charge of petit treason.\textsuperscript{27} Further, women were not able


\textsuperscript{21} B Brown, 'The Demise of the Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law' (1963) 7 \textit{American Journal of Legal History} 310 at 312.


\textsuperscript{26} P Aldridge, \textit{Relocating Criminal Law, ibid.} See W Blackstone, above n 4 at 203. The category of petit treason also included cases where a servant killed his/her master, T Green, 'The Jury and the English Law of Homicide', above n 4 at 421.

\textsuperscript{27} P Aldridge, \textit{Relocating Criminal Law, ibid.}
to call witnesses to give evidence for their defence and they were prevented from giving evidence.\textsuperscript{28}

Apart from petit treason, there was relative silence about women who killed their partners and particularly any possible exonerating impact of domestic violence in relation to women who killed their husbands. As Leader-Elliott comments, 'there are no comparable histories of the development of doctrines allowing an exculpatory effect to domestic violence or the oppression suffered by women who kill men'.\textsuperscript{29} It is not surprising that laws developed to regulate isolated incidents in the public sphere have been ill equipped to deal with the situation of a woman who kills her partner in response to a history of domestic violence. The rules developed to regulate immediate reactions to a sudden altercation or the discovery of adultery, as envisaged by the defences of provocation and self-defence, are not readily transferable to the experiences of a woman who kills following domestic violence.\textsuperscript{30}

3.2.1.4 \textit{Mental impairment}

The criminal law has also long recognised 'the notion that the insane lack the ability to reason' and this is reflected in 'laws excusing them from responsibility for their criminal acts'.\textsuperscript{31} While the defence of insanity has a long history, the defence of diminished responsibility is a relatively recent statutory creation in Australia.\textsuperscript{32} The defence of diminished responsibility originated in the common

\textsuperscript{28} W Chan, above n 25 at 11 – 12.
\textsuperscript{29} I Leader-Elliott, 'Battered But Not Beaten', above n 3 at 405.
\textsuperscript{30} \textit{Ibid.}
\textsuperscript{32} The defence of diminished responsibility was introduced as a defence in 1974 in New South Wales (\textit{Crimes Act 1900} (NSW) s 23A introduced by the \textit{Crimes and Other Acts (Amendments) Act 1974} (NSW) s5(b)) and in 1961 in Queensland (\textit{Criminal Code} (Qld) s 304A), see New South Wales Law Reform Commission, \textit{Provocation, Diminished Responsibility and Infanticide}, Discussion Paper 31, 1993 at 79 – 81, 95 - 96. Diminished responsibility is also a defence in the Northern Territory (\textit{Criminal Code} (NT) s 37) and the ACT (\textit{Crimes Act 1900} (ACT) s 14). The defence of diminished responsibility has been amended in New South Wales and is now called 'substantial impairment by abnormality of mind', see 4.3.1. In this chapter, I will refer to the defence as the defence of diminished responsibility, as this is the nomenclature used in the majority of jurisdictions.
law of Scotland in the mid-19th century.\textsuperscript{33} The inadequacy of the law concerning insanity, together with mandatory sentencing for murder, account for the existence of the defence of diminished responsibility.\textsuperscript{34} It was considered unduly harsh for a person whose criminal responsibility was impaired by a mental impairment falling short of insanity to be sentenced to the mandatory penalty for murder (initially the death penalty and on the abolition of the death penalty - life imprisonment). The accused’s impaired mental condition at the time of the killing ‘rendered [the accused]... less criminally responsible than a murderer’\textsuperscript{35} and the defence of diminished responsibility was seen to recognise this reduced culpability.

3.2.2 OVERVIEW OF CURRENT FRAMEWORK

The current law of homicide reflects the traditional common law division between the offence categories of murder and manslaughter. A person is liable for murder if death is caused by an act or omission, and the accused possessed the requisite mental state.\textsuperscript{36} Manslaughter is a lesser offence than murder, and can be divided into the categories of ‘voluntary’ and ‘involuntary’ manslaughter. ‘Involuntary manslaughter’ recognises that culpability is reduced when the offender does not possess the requisite mental state for murder, but as Yeo says, ‘[the] offender ... is nevertheless considered sufficiently culpable to justify a manslaughter conviction’.\textsuperscript{37} The distinguishing feature between murder and involuntary manslaughter is the fault element – ‘a guilty mind’ being the ‘fundamental criterion of fault’.\textsuperscript{38} ‘Voluntary manslaughter’ recognises the reduced culpability that attaches to those who kill with the requisite intention for


\textsuperscript{35} Halsbury's Laws of Australia, vol 9, CRIMINAL LAW, 1998 at [130-3475].

\textsuperscript{36} See 4.4.1 for a discussion of the mental element for murder.


\textsuperscript{38} Model Criminal Code Officers Committee, above n 34 at 2.
murder but while under the influence of provocation (defence of provocation)\textsuperscript{39} or a substantial impairment of mind (diminished responsibility).\textsuperscript{40} The defences of provocation and diminished responsibility operate as partial defences that are available only to reduce the offence of murder to manslaughter.

Self-defence is a general defence, which is available in respect of all offences. A successful plea of self-defence entitles an accused to an acquittal.\textsuperscript{41} The defence of self-defence limits the circumstances in which a person can use force in defence of themselves or others, as well as in defence of property.

Similarly, automatism is a ‘defence’ of general application.\textsuperscript{42} An accused is entitled to an acquittal if he or she successfully relies on automatism. Automatism is concerned with the voluntariness of the accused’s act. A fundamental principle of criminal law is that an accused is not criminally responsible for an act that is not a voluntary or ‘willed’ act. If an accused relies on automatism, the argument is that the accused is not guilty, as the criminal act ‘was not done in exercise of his will to act’.\textsuperscript{43}

The defence of mental impairment (or insanity) is concerned with the accused’s mental state at the time the offence is committed.\textsuperscript{44} If the defence of mental impairment is successfully raised, the accused is entitled to a conditional acquittal – the verdict is not guilty on the ground of mental illness or insanity.\textsuperscript{45}

3.3 MOTIVE, INTENTION AND CRIMINAL RESPONSIBILITY

Chapter Four examines the relationship between motive and intention, and the gendered implications of the construction of intention in cases where women kill their male partners. The argument I advance is that while the law at a doctrinal

\textsuperscript{39} See Chapter Five.
\textsuperscript{40} See 4.3.
\textsuperscript{41} See Chapter Six.
\textsuperscript{42} Although automatism is referred to as a ‘defence’, it not a defence in the conventional sense as it relates to the burden of proof upon the prosecution to prove that the act was voluntary, see 4.5.
\textsuperscript{43} Ryan (1967) 121 CLR 205 at 216 per Barwick CJ cited in Radford (1985) 42 SASR 266 at 272 per King CJ. See also Falconer (1990) 171 CLR 30.
\textsuperscript{44} P Gillies, Criminal Law, 4th ed, Sydney: Law Book Company of Australia, 1997 at 218. See also S Bronitt & B McSherry, above n 31 at 200 - 203.
\textsuperscript{45} See 4.5.
level insists on the irrelevance of motive, at a practical level, there is not such a clear dichotomy between motive and intention evident in the judicial treatment of cases where women kill their violent partners. This section, as a precursor to this discussion, provides an overview of the concept of criminal responsibility, in particular the centrality of intention in the criminal law, and also the relationship between motive and intention.

A fundamental principle of the modern criminal law is the ‘notion of individual responsibility’. As Bronitt and McSherry observe, ‘the modern criminal law is stamped throughout with liberal assumptions about “freewill” and “rationality” as measures of culpability’. Individual responsibility is seen to be dependent on ‘the principle of capacity and a fair opportunity to act otherwise’. The notion of individual responsibility has led to the centrality of mens rea as the basis of criminal responsibility. Generally, a person is not criminally responsible for an act unless the act is accompanied by a guilty mind. In the context of homicide, the crimes of murder and manslaughter involve the same harm - death - but the accused’s mental state distinguishes murder from manslaughter. Criminal responsibility for murder is dependent on the existence of a ‘guilty mind’ - the requisite mental state (mens rea) for murder - at the time of the act causing death.

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47 S Bronitt & B McSherry, above n 31 at 29.

48 C Wells, above n 15 at 105. See H L A Hart, Punishment and Responsibility, Oxford: Clarendon Press, 1984. Bronitt & McSherry write that '[t]he principles that underlie the criminal law are dependent on the idea of a person as a rational being, capable of making choices between right and wrong and the ability to control conscious actions', S Bronitt & B McSherry, ibid at 147.

49 For further discussion of the concept of mens rea, see N Lacey & C Wells, above n 46 at 39 – 47. See 4.4.1 for an outline of the mental states necessary for murder in the various Australian jurisdictions.
The centrality of intention as a fundamental aspect of criminal responsibility is linked with the rejection of motive as a matter relevant to responsibility. Motive and intention are separate concepts. Motive can be understood as the reasons for action – 'an emotion prompting action'. Intention relates to the accused's 'purpose' to bring about the results or consequences of the conduct. This distinction between motive and intention is clearly seen in the judgment of Lord Hailsham in *Hyam*:

The motive for murder may be jealousy, fear, hatred, desire for money, perverted lust, or even, as in so-called “mercy killings”, compassion or love. In this sense, motive is entirely distinct from intention or purpose. It is the emotion which gives rise to the intention and it is the latter and not the former which converts the *actus reus* into a criminal act.

It is intention (and not motive) that forms part of the legal requirement for guilt – the mental element. As Kirby J said in *Cutter*, it is necessary 'to draw a distinction between the intention of the accused and his or her motives, desires, wishes or hopes in doing the act alleged to constitute the crime charged'.

Although a distinct division between intention and motive may be correct as a statement of principle, its practical application is more problematical. An appreciation of an accused's intention invariably requires an understanding of the emotions that motivated the accused's action. The link between intention and motivation remains (whatever the law might say), for as Norrie argues 'motive remains central to human agency and to broader moral and political claims about the nature of fault'. Criminal responsibility for murder depends on subjective fault requirements, and so it is necessary to 'get into the mind of the accused' to determine the accused's subjective state of mind at the time of the killing. If the accused does not make an admission, it is necessary to draw inferences from the circumstances of the case and on this basis attribute a state of mind to the

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50 See A Norrie, above n 46.
51 Ibid at 225.
52 S Bronitt & B McSherry, above n 31 at 176.
53 Ibid at 175 (emphasis in original).
54 [1975] AC 55 at 73.
56 A Norrie, above n 46 at 225.
57 Peters (1998) 151 ALR 51 at 93 per Kirby J.
accused.\(^\text{58}\) The accused’s motive (the reason for acting) may be relevant as circumstantial evidence that enables inferences to be drawn as to his/her intention. It appears that, much as the law seeks to remove motive from the law, ‘[s]uppressed, it persistently erupts within legal discourse’.\(^\text{59}\)

Further, the division between intention and motive is not as immutable as the statement of general principle would suggest. Although it may be easy to state that intention is the central focus and motivation is a peripheral issue, these concepts can be slippery. There appears to be room to manoeuvre between the classification of intent and motive in cases that are considered ‘worthy’. This idea is explored in detail at 4.4.2. However, to foreshadow this discussion, the observation of Lacey and Wells is useful. Lacey and Wells assert that:

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\text{Doctrinal insistence on the irrelevance of motive can be at once maintained and by-passed by conceptualising motive as an aspect of intent where this is thought by judges or commentators to achieve the ‘right’ result.}^{\text{60}}
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The flexibility in the construction of the concepts of ‘intent’ and ‘motive’ means that ‘courts have ample opportunity to take account of the motives of those with whom they sympathise at the same time as they pronounce motive legally irrelevant.’\(^\text{61}\)

3.4 **THEORETICAL FRAMEWORK OF THE DEFENCES**

The practical limitations of the defences of provocation and self-defence, as they apply to women who kill their abusive partners, have prompted a re-examination of the doctrinal basis of the defences in an attempt to better equip the criminal law to deal with the reality of the lives of these women. Although there is a modern tendency (and a temptation) to ignore the general rationale of these defences, a focus on their moral basis raises important and interesting questions.

\(^{58}\) S Bronitt & B McSherry, above n 31 at 173. See *Peters* (1998) 151 ALR 51 at 93 per Kirby J; *Shepherd* (1990) 170 CLR 573 at 580 per Dawson J (with the concurrence of Mason CJ, Toohey and Gaudron JJ).

\(^{59}\) A Norrie, above n 46 at 40.

\(^{60}\) N Lacey & C Wells, above n 46 at 42.

\(^{61}\) *Ibid* at 43. See also M Rollinson, above n 46 at 104 – 105.
in relation to the scope of defences to murder. It is essential to consider the values that the law is seeking to protect and the circumstances in which a person is permitted to use force, possibly fatal force, against another person. What types of killings are considered less blameworthy so as to warrant a partial or a complete defence? Such a focus enables consideration of whether the existing defences give effect to a socially determined conception of the less blameworthy killer.

In a 'civilised' society, an important aim of the criminal law should be to minimise the level of violence that occurs in society. The laws of homicide are concerned to limit the availability of violent self-help and aim to uphold the sanctity of human life. While it is indisputable that the laws of homicide should ascribe a high value to human life, it is important to bear in mind that the value of human life is not immutable. Despite the importance placed on the sanctity of human life, it is recognised that in some circumstances it is lawful for a person to act in defence of his/herself or another person by using defensive force. Other values such as the preservation of human life and the protection of individual autonomy have been considered sufficiently worthy of protection so as to permit the taking of human life. Some writers have suggested that the right to self-protection is without limit: for example, that there is 'an absolute natural right

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63 This is reflected in the recent reforms to gun laws in Australia. Although see J Jerrard, 'Conceptualising Domestic Violence in the Criminal Law' 14 Social Alternatives 23, for a consideration of whether Australia can be said to be a 'civilised society'. See Chapter Five fn 164.


65 See Chapter Six.

66 G Mousourakis, Criminal Responsibility and Partial Excuses, England: Ashgate Publishing Ltd, 1998 at 9; S Yeo, Compulsion in the Criminal Law, above n 7 at 32. The use of force in defence of property is more limited, see S Bronitt & B McSherry, above n 31 at 296. The discussion of defence of property is beyond the scope of this thesis. See Criminal Code (NT) s 29; Criminal Code (Qld) ss 267, 274 – 278; Criminal Code (Tas) ss 40 – 44; Criminal Code (WA) ss 244, 251 – 255; Criminal Law Consolidation Act 1935 (SA) s 15A(1)(b)(i). In New South Wales, the Home Invasion (Occupants Protection) Act 1998 (NSW) is in force until the commencement of the Crimes Amendment (Self-Defence) Act 2001 (NSW). This Act is likely to commence on 22 February 2002.
and duty to defend ourselves by any means necessary, at whatever cost to others, irrespective of the nature of the threat to us. However, the legal principles of self-defence do not encompass this extreme view.

There is an unavoidable conflict between society's high regard for human life and its unique nature and the necessity of allowing an individual to use force to protect individual autonomy and integrity. Clearly, the value an individual may place on his or her life or autonomy may conflict with the interests of another individual. As Kandish says:

> Although we value our own lives pre-eminently, it does not follow that we equally value other people's lives; their lives may conflict with rights we claim or with goods we value, including our own lives. Hence, any society must face the problem of deciding when the life of some should yield to the claims or interests of others.

The law of self-defence regulates when it is lawful for an individual to place his or her own interests above the interests of another person. Thus, the crucial issue for the law of self-defence is the identification of the circumstances in which a killing is recognised as lawful: when does a person's claim to life or the protection of physical integrity override another person's claim to life?

The law of provocation is also influenced by the need to respect the value placed on human life. The doctrine of provocation serves to balance the interest of society in preserving human life, while recognising that in some circumstances a person may kill but should not be classified as a murderer. While it may readily be conceded that some killings are less blameworthy than others, the fundamental question that needs to be addressed in the context of provocation is: why is the law willing to hold that certain accuseds who kill under the influence of provocation are less culpable than others when they respond to impulses to kill?

In the law of homicide, the basic moral question is, as Fletcher asserts,

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69 As Gibbs J observed in Johnson (1976) 136 CLR 619, 'the law as to provocation obviously embodies a compromise between a concession to human weakness on the one hand and the necessity on the other hand for society to maintain objective standards of behaviour for the protection of human life', at 656. See also J Greene, above n 23 at 145.
‘distinguishing between those impulses to kill as to which we as a society demand self-control, and those as to which we relax our inhibitions’.  

In seeking to address these questions, in the jurisprudential debate about the rationale of the defences, there are ‘two main traditions in theorizing about defences’: the ‘capacity view’ and the ‘reasons view’.

3.4.1 THE ‘CAPACITY VIEW’: JUSTIFICATION AND EXCUSE

The ‘capacity view’ of defences draws a distinction between justifying and excusing defences. A justifying defence ‘marks out conduct which criminal law does not regard as wrongful’. A justification focuses on the act of the accused and operates to negate the ‘social harm of an offence’ by arguing it was the ‘lesser of two evils’ in the circumstances. In contrast, an excuse focuses on the personal characteristics of the accused and negates the culpability or blameworthiness of the accused. The essence of an excuse is that the defendant admits that the conduct is wrongful but pleads that he or she is not morally blameworthy. An excuse ‘marks out situations in which the internal or external conditions under which a defendant acts are such as to displace ... the attribution of responsibility for an admittedly wrongful act’.

3.4.1.1 Self-defence

The prevalent view in the contemporary American jurisprudential debate holds that self-defence is a justification rather than an excuse. This would also appear

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71 N Lacey, above n 62 at 114.
72 Ibid.
74 See G Fletcher, *Rethinking Criminal Law*, above n 70 at 857 - 858.
75 See generally ibid.
76 N Lacey, above n 62 at 114. See also J Dressler, 'Rethinking Heat of Passion: A Defence in Search of a Rationale' (1982) 73 *Journal of Criminal Law and Criminology* 421 at 437; G Fletcher, *ibid* at 798.
to be the position in England. In contrast, in Australia it appears that self-defence has generally been regarded as an excuse.

More recently, there has been a revival of the interest in the distinction between justified and excused homicide as it relates to the availability of self-defence to women who kill their abusive partners. Although self-defence produces the same result (an acquittal) whether viewed as a justification or an excuse, the argument is that its classification as justification or excuse is important in terms of the law’s role in creating and reinforcing norms. The argument is that the law should openly acknowledge that the behaviour of battered women who kill is an appropriate and justified response in the circumstances (justified self-defence), rather than an aberrant but excused response (excused self-defence). Self-defence as a justification recognises that others in the same situation would do the same thing, while an excuse holds that others would not do the same thing, but the circumstances explain or mitigate the accused’s responsibility.

The concepts of justification and excuse have been employed in attempts to argue for the recognition of the rationality and reasonableness of the battered woman’s conduct in self-defence. For example, Crocker argues that ‘whether society justifies a woman for taking a man’s life while defending herself or excuses her for thinking she was worth defending is crucial for battered

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80 I Leader-Elliott, 'Battered But Not Beaten', ibid at 430. See J Dressler, 'Justification and Excuses', above n 73 at 1159 – 1160 n 16.

women'. The recognition that a woman’s conduct is ‘justified’ self-defence would recognise the rationality of her actions. In contrast, if a woman’s act of killing her violent partner is viewed as ‘excused’ self-defence, then it implies that ‘the woman could not have been rational in assessing the danger and that the legal system must compensate for her mental and physical weaknesses’.

Although I strongly agree that the rationality of a battered woman’s actions in self-defence needs to be recognised, I am not convinced that the justification/excuse framework is the appropriate vehicle to achieve this end. The argument that the actions of women who kill in self-defence are justified (rather than excused) creates difficulties for those who argue that self-defence needs an expanded operation to take into account the circumstances of women who kill their violent partners. The classification of self-defence as a justification has been a means by which the availability of the defence is restricted. As Leader-Elliott asserts, the operation of self-defence is narrowly restricted if it ‘requires the accused to show that killing the aggressor was the right and proper thing to do, a socially desirable thing or the lesser of two evils’. If a killing needs to be justified, then the standard appears to be set very high.

Further, if self-defence is cast as a justification, ‘there is every reason for concern over the question what is to count as a justification for killing another human being’. There is reason for alarm at judicial comments that ‘there is no doubt that the North Carolina court determined that the sleeping husband was an evil man who deserved the justice that he received from his battered wife’.

3.4.1.2 Provocation

In relation to provocation, the academic discussion has been concerned to identify a rationale for the partial defence that has evolved as a concession to ‘human frailty’. Although there are commentators who recognise the two-fold

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82 P Crocker, above n 77 at 131.
83 Ibid.
84 I Leader-Elliott, ‘Battered But Not Beaten’, above n 3 at 432.
85 Ibid.
86 State v Stewart 763 P 2d 572 at 579 per Lockett J (1988).
87 R v Voukelatos [1990] VR 1 at 15 per Murphy J.
nature of provocation as a partial defence possessing elements of both justification and excuse, ‘most commentators would agree that the partial defences tend more to the nature of excuse than justification’.

Provocation as an excuse focuses on the accused’s loss of self-control as a central requirement of the defence. The mitigatory effect of provocation is said to arise as a person who kills while ‘out of control’ has ‘his choice capabilities ... partially undermined’. An act committed in the heat of passion caused by sudden provocation ‘is less than fully volitional’, as the effect of the provocation is to reduce freedom of choice. This view is reflected in the judicial understanding of the mitigatory role of loss of self-control:

The concept of loss of self-control reflects the idea, fundamental to the criminal law, and related historically to religious doctrine, that mankind is invested with free will, and that culpability consists in the abuse of that faculty. The capacity to distinguish between right and

91 J Dressler, ‘Rethinking Heat of Passion’, above n 76 at 467.
93 See G Fletcher, *Rethinking Criminal Law*, above n 70, who asserts that ‘excuses arise in cases in which the actor’s freedom of choice is constricted. His conduct is not strictly involuntary as if he suffered a seizure or if someone pushed his knife-holding hand down on the victim’s throat. In these cases there is no act at all, no wrongdoing and therefore no need for an excuse. The notion of involuntariness at play is that we should call moral or normative involuntariness. Were it not for the external pressure, the actor would not have performed the deed’, at 802 – 803.
wrong, and to choose between actions, or between action and inaction, is central to our notions of moral and criminal responsibility.  

Thus, the modern law of provocation attributes the reduction in an accused's blameworthiness to an impaired capacity to choose morally appropriate actions.  

This current focus on loss of self-control appears to be 'a concession to the equivocal virtues associated with the capacity for quick and unreflective aggression'.  

The understanding of the loss of self-control encapsulated in the provocation defence is that of a hasty and unreflective response. On occasion under the influence of provocation, emotions take charge and a person is unable to control his or her actions. The view of emotion as a thing separate from reason, and as something a person must seek to control by reason, has captivated the judicial imagination when considering the limits of the defence of provocation. In R v Kirkham, Lord Coleridge described the effect of provocation in the following terms:

As it is well known that there are certain things which so stir up man's blood that he can no longer be his own master, the law makes allowance for them ... [in order to rely on the defence of provocation it must be shown] that what he did was done in a moment of overpowering passion, which prevented the exercise of reason.

This view of 'loss of self-control' is still seen in recent judicial descriptions of the effect of a loss of self-control as 'a state in which the blood is boiling or a state of fear or terror ... to the point where reason has been temporarily suspended'.  

It has been said that the accused 'might not be considered at the moment the master of his own understanding' if the accused acted before there 'had been time for the blood to cool, and for reason to resume its seat'; or that the provocation 'render[ed] the accused so subject to passion as to make him or

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95 J Leader-Elliott, 'Battered But Not Beaten', above n 3 at 161.  
96 See A Ashworth, 'The Doctrine of Provocation', above n 88 at 302. In describing this view, Ashworth relies on Hume's aphorism that 'reason is ... the slave of the passions, and can never pretend to any other office than to serve and obey them' in his discussion of the defence of provocation, at 302.  
97 (1837) 173 ER 422 at 423.  
98 Peisley (1990) 54 A Crim R 42 at 48 per Wood J.  
99 Hayward (1833) 172 ER 1188 at 1189 per Tindal CJ.
her for the moment not master of his mind; or in the words of Othello that ‘passion having (his) best judgment collied assayed to lead the way’. Other commentators have adopted the position, as expressed by Gough, that ‘the simple response is ... that provocation is neither justification nor excuse’. In Gough’s view, the function of the defence of provocation is to mitigate the ‘harshness’ of the law by separating provoked killers from those who are truly ‘murderers’. Gough writes:

What truly matters is whether the defendant meets a standard that is much (much) lower than that of either justification or excuse, namely, the standard of being a manslaughterer rather than a murderer.

In this thesis, I rely upon this approach to provocation, and argue that the ‘reasons’ approach assists in the determination of this standard.

3.4.1.3 Diminished responsibility and insanity

Diminished responsibility and insanity are generally classified as excuses. The defences operate to excuse the accused as a result of ‘some attribute or disability which wholly or partially diminished the person’s moral responsibility’. The accused’s mental disorder operates so as to ‘block an attribution of liability’. In the case of diminished responsibility, the accused’s mental disorder operates as a partial excuse. In the context of diminished responsibility, debate has concentrated on its positioning in the ‘contradictory middle ground between responsibility and non-responsibility’. In the case of insanity, the accused’s mental disorder provides a complete excuse.

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100 Duffy [1949] 1 All ER 932 per Devlin J cited with approval by the English Court of Appeal in Aitken (1992) 4 All ER 889 at 894 per Lord Taylor CJ.
101 Parker (1963) 111 CLR 610 at 628 – 629 per Dixon CJ.
102 S Gough, above n 17 at 492 n 74. See also N Lacey & C Wells, above n 46 at 50. Cf G Mousourakis, above n 66 at 114.
103 S Gough, ibid.
105 N Lacey, above n 62 at 114.
3.4.1.4 Beyond justification and excuse

The dichotomy of justification and excuse has been the framework within which debates concerned with the rationale of the defences to murder have taken place, and the focus on the rationale of the defences visited by the justification/excuse debate has raised significant issues in relation to the defences of self-defence and provocation (and their application to battered women who kill). However, more recently, there have been some significant criticisms directed at the capacity view and the justification/excuse framework.\(^{107}\) In my view, a significant problem of the ‘capacity view’ is that it does not accord with the modern operation of the defences. As Lacey has observed, the focus on capacity diverts ‘attention away from the substantive evaluation of “fairness” which is being made (notably in the application of “reasonableness” criteria) and [by] failing to provide any analysis or rationalisation of that evaluation’.\(^{108}\) ‘The existence of the criterion of reasonableness in the defence of self-defence and the threshold standard of the ordinary person in the defence of provocation mean that the concepts of justification and excuse are not particularly helpful in attempting to ascertain the rationale of these defences.\(^{109}\)

The claim of the defences of provocation and self-defence is not that they mitigate or exonerate conduct according to an assessment of the requirements of the conceptual categories of excuse or justification. Rather, the claim is that an accused has met a socially acceptable standard. The measure of reasonableness ‘expresses a primary concern with the social acceptability of behaviour rather than its moral correctness. The issue becomes, not what is right and wrong, but rather what is permissible’.\(^{110}\) A similar statement could be made about the

\(^{107}\) See discussion in N Lacey, above n 62 at 115 – 117. Lacey isolated three criticisms: (1) difficulty created by contextual judgments made in application of defences and offence definitions; (2) reliance on determinism that threatens the traditional normative nature of the laws judgments and evaluations; (3) difficulty of assessment of genuine capacities, choices and opportunities.

\(^{108}\) Ibid at 116 – 117.

\(^{109}\) See I Lender-Elliott, ‘Battered But Not Beaten’, above n 3 at 431 and E Colvin, above n 89 at 389.

\(^{110}\) E Colvin, ibid at 395.
ordinary person standard in provocation: that is, the concern is whether the accused has met the socially acceptable standard of a 'manslaughterer'.

My argument is that the dichotomy of justification/_excuse (the 'capacity view') should be put to one side in considering the defences of provocation and self-defence. In my view, the 'reasons view' provides a more promising framework to examine the rationale of the defences of provocation and self-defence, as well as to enable a determination of the circumstances in which society is willing to exonerate (self-defence) or mitigate (provocation) a person who has used force (possibly fatal force) against another person. In this regard, I adopt the view put forward by other writers that the defences of provocation and self-defence are 'inextricably bound up with an evaluation of the defendant's ... reasons (as opposed to an assessment of his or her capacity or opportunities').

3.4.2 THE 'REASONS VIEW'

The 'reasons-based' view is an alternative approach that has been developed to analyse the defences to murder. On the 'reasons-based view' of defences, a distinction is often drawn between 'exculpatory' defences and 'exemptions'. Insanity and diminished responsibility are exemptions that 'mark out subjects who are beyond the purview of criminal law's proscriptions and other communications'. In contrast, provocation and self-defence are viewed as exculpatory defences. The rationale of the defences for the 'reasons view' is 'to provide for a more sensitive evaluation of the defendant's conduct' by placing the accused's motive as the central focus. The accused's culpability is assessed according to the reasons for their actions being 'within the range which would be expected of a normal, socially responsible person'.

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111 See S Gough, above n 17 at 492 n 74.
113 N Lacey, ibid at 117.
114 Ibid.
115 Ibid.
116 Ibid at 117 – 118.
Chapter Three

holds that it is possible to evaluate the defendant’s reason for action, and this includes ‘an evaluation of the emotions which motivated his or her conduct’.

It is important to note that the ‘reasons-based’ view of defences is not a global assessment of the accused’s character. As Lacey observes, a controversial feature of the ‘reasons view’ is that the ‘courts are essentially engaged in making evaluative judgments which relate to assessments not so much of the defendant’s capacities but of her character’. However, Lacey is correct to emphasise that we need to be ‘clear about the very specific sense in which the reasons approach relates to character’. It is not a ‘globalised evaluation of the person’s character’. Rather, the reasons approach is ‘[focussed] upon the quality of the attitude manifested in the defendant’s conduct, evaluated in the light of (a generous interpretation of) the context in which it occurred’.

In order to assess an accused’s motivation and reasons, the accused’s emotions must be susceptible to assessment. The ‘reasons’ approach relies on an evaluative conception of emotion, for as Lacey comments, ‘the evaluation of the defendant’s reasons includes, crucially an evaluation of the emotions which motivate his or her conduct’. This conception of emotions maintains that emotions reflect a person’s value system and way of seeing the world, that emotions ‘embody beliefs and ways of seeing, which include appraisals or evaluations of the importance or significance of objects and events’. Further, ‘these appraisals can ... be evaluated for their appropriateness or inappropriateness’. This accords with an intuitive view that people experience emotions for reasons according to an individual’s beliefs and value system.

The evaluative concept of emotion is contrasted with a mechanistic conception of emotion. Tension exists between those who consider emotions to be impulsive

117 Ibid at 118.
118 Ibid.
119 Ibid at 119.
120 Ibid.
121 Ibid. Emphasis in original.
122 Ibid at 118.
123 D Kahan & M Nussbaum, above n 112 at 278. See also A Reilly, The Heart of the Matter’, above n 90, for a discussion of the role of emotions in the provocation defence.
124 D Kahan & M Nussbaum, ibid.
and unrelated to thought (mechanistic) and those who consider emotions to be shaped by beliefs and reflective of values (evaluative). The mechanistic conception of emotion reflects the intuitive view that 'emotions feel like things that sweep over us, or sweep us away, or invade us'. If emotions are forces devoid of thought or perception, it makes no sense to say that the inappropriate emotion reflects an inappropriate value system. In this way, the mechanistic concept of emotion and the evaluative concept of emotion fundamentally diverge in their assessment of the relationship between emotions and the thought process (cognition).

3.4.2.1 Self-defence

My argument is that the 'reasons' approach (the evaluation of the motivation and emotions of an accused) does reflect the operation of the defence of self-defence in Australia. The 'reasons' approach corresponds with the concept of 'agent-relative permission' that, in my argument, provides the basis for the defence of self-defence. Further, if an evaluative conception of emotion is employed it is possible to re-conceptualise self-defence to more readily recognise the reality of the lives of those people who live in battering relationships.

Motive is central to the application of self-defence, for as Gardner asserts 'it was not for want of intent to kill that persons acting in self-defence avoided punishment'. The crucial issue is the reason why the accused formed the intention to kill. The application of the defence of self-defence involves a two stage process: first, there is a consideration of whether the accused intended to kill the deceased; and second, whether the accused's 'purposes or motives for so acting render her ...[or him] blameworthy'. The question of why a person

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125 See generally ibid.
126 Ibid at 279.
127 Ibid at 277.
128 See ibid at 299.
130 Or any of the other requisite states of mind for murder.
131 M Gardner, 'The Mens Rea Enigma', above n 129 at 661 n 125. See discussion in S Pillsbury, above n 129 at 461.
wants to kill is a question of motive. An assessment of an accused’s claim of self-defence is an assessment of his or her motive - the use of force must be motivated by the perceived need for self-defence. The reasons for the accused’s actions are central to the defence of self-defence, as there must be a belief in the need to use defensive force and a belief that the amount of force used was necessary.

Further, the reasons for the actor’s choice to use deadly force can be evaluated to determine whether or not it was appropriate according to whether or not there existed reasonable grounds for the accused’s beliefs. The criterion of reasonableness is the means by which the accused’s actions can be measured against the standard expected of good citizens.

In addition, an evaluative conception of emotion (linked with the ‘reasons view’) accepts that fatal force may be used in circumstances other than where the actual life of the defender is at stake. For example, in the American context, Kahan and Nussbaum argue that the defence of self-defence should be extended to women in situations of ongoing domestic violence in the absence of life threatening situations ‘because demanding such as person forego violence is to insist that she endure an experience of degradation and humiliation inconsistent with human flourishing’. Similarly, in the law of self-defence in Australia, it is not necessary that a person be confronted with a life-threatening situation before a person is permitted to respond with deadly force.

The ‘reasons view’ and the evaluative concept of emotion fit neatly with the concept of ‘agent relative permission’. In this thesis, my argument is that the basis for the defence of self-defence is found in the concept of ‘agent relative permission’, which focuses on the value that each person attaches to his or her

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132 S Pillsbury, *ibid.*
133 However, it is noted that it may be difficult to establish the absence of such beliefs, if the objective circumstances reveal a situation in which the degree of force used corresponded to the situation that confronted the accused. See Chapter Six for detail in relation to the law of self-defence in Australia.
134 See N Lacey, above n 62 at 119. See also A Reilly, ‘The Heart of the Matter’, above n 90, for a consideration of the role of emotion in self-defence.
135 D Kahan & M Nussbaum, above n 112 at 332.
136 See Chapter Six
own life. In exploring the relationship between self-defence and ‘agent-relative permission’, Davis explains that:

I am not claiming that my life has, or should be thought to have, greater value than that of my attacker. Nor am I claiming that it would be (more) unjust if I am the one who is killed. I am, instead, merely calling for other peoples' recognition of the fact that (by my lights) my life has the greater value to me ... Because of the greater value that each of us understandably attaches to the continuation of his or her life, we are (in certain circumstances) permitted to kill another person to preserve our life.137

The concept of ‘agent-relative permission’ reflects the self-interest of the individual in his or her own survival and thus cannot be measured from the viewpoint of the impartial observer.138 Thus, an advantage of ‘agent-relative permission’ is that it avoids the utilitarian calculations that are evident in American literature,139 as it is not concerned with discounting or weighing the value of respective lives.140

Similarly, the concept of ‘agent relative permission’ avoids comparisons between the circumstances in which the state can inflict punishment as compared to the individual. In American jurisprudence, it has been thought that to allow the battered woman to kill her sleeping husband was to allow ‘capital punishment’ whereas ‘our legislature has not provided for capital punishment for even the most heinous crimes’.141 The Kansas Court of Appeal considered that to allow a successful plea of self-defence was to sanction ‘execution’.142 It is

138 See J Leader-Elliott, 'Battered But Not Beaten', above n 3 at 436 – 439; N Davis, ibid; K Greenawalt, 'Violence - Legal Justification and Moral Appraisal' (1983) 32 Emory Law Journal 437 at 460. Leader-Elliott observes that 'we have no right to expect anyone subjected to violent attack to judge their own conduct [as a disinterested intervener would]... Each of us is entitled to put a higher value on our own lives and our own integrity than the impartial observer will do', J Leader-Elliott, 'Battered But Not Beaten' at 437.
139 Leader-Elliott notes that the 'utilitarian calculations' include 'are the value of their respective lives to be compared? Is the value of his life to be discounted because he initiated the attack? Does one take into account the risk that condoning her conduct might encourage other women to fatal violence', ibid.
140 The concept of agent-relative permission may also be useful in respect of sentencing battered women who kill, see 8.4.
141 State v Stewart 763 P 2d 572 at 579 per Lockett J (1988).
142 State v Stewart 763 P 2d 572 at 579 per Lockett J (1988). It is noted that the stricter approach to self-defence evident in this decision is the more common approach of the US courts, see A
undesirable to employ the language of a State-authorised execution in circumstances of domestic violence. The justification for a State to use fatal force against a citizen and the circumstances in which this can occur are clearly not the same as the circumstances in which and the reasons why a private citizen may be permitted to do so. The person who kills in self-defence is not attempting to usurp the State’s interest in punishing those who commit offences: the battered woman who kills her violent partner is not meting out punishment. The reasons that battered women use force against violent partners are those of self-interest: the protection of herself (and her children) from violence and alleviation of an intolerable existence.

In the application of the concept of ‘agent-relative permission’ to the defence of self-defence, the claim of a person who acts in self-defence is that ‘[his/her] decision to put [his/her] own interest first should be respected’. In attempting to remedy the deficiencies of the defence of self-defence, the concept of ‘agent-relative permission’ is able to recognise the rationality of a woman’s decision to respond with force against her violent partner. As Leader-Elliott has argued:

[Self-defence] is available because no human agency has the right to demand further sacrifices for the sake of the aggressor. In cases of self-defence against domestic violence, a woman is entitled to defend herself, by deadly force if necessary, well short of the break-even point of utilitarian calculations. She is not required to plead or pretend incapacity, weakness or moral breakdown... The law of homicide, as it applies in cases of defensive force against domestic violence, is not the place to enforce moralities of self-less sacrifice.

This approach achieves the objective of recognising the rationality of a battered woman’s conduct without requiring the high standard necessitated by the classification of self-defence as a justification.

However, ‘agent relative permission’ and the ability to protect self-interest necessarily have limits. It is not in every case that a person should be entitled to

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143 Leader-Elliott, 'Battered But Not Beaten', above n 3 at 437.
144 Ibid.
put his or her own self-interest before that of another person.145 There is an expectation that a person will endure a degree of sacrifice before responding with violence, and particularly fatal violence.146 The criterion of reasonableness limits the circumstances in which a person is entitled to have their own interest respected:

Deadly force used in self-defence is excused when it is reasonable to say that no-one – neither the aggressor not the disinterested observer – is entitled to ask her for a further sacrifice of her own interests to those of the aggressor.147

Therefore, the claim is that the conduct is permissible because it occurs in circumstances where it would be unreasonable to require further self-sacrifice.148 The balance between the high value attached to human life and the recognition of circumstances in which the human life is not the ultimate value can be worked out within the flexible criteria of reasonableness.149

3.4.2.2 Provocation

The ‘reasons’ approach is also a useful tool in an analysis of the rationale of the defence of provocation. The concern of the defence of provocation, as explained at 3.4.1, is to enable an assessment to be made of whether the accused has reached the standard of a manslaughterer, rather than a murderer. The remaining issue is to identify the circumstances in which society demands control in the face of provocation, as opposed to the circumstances in which leniency is extended. In assessing the ability of provocation to address this issue, my argument is two fold. First, if a rational basis for the defence of provocation is to be found, it is necessary to look at the reasons for the loss of self-control and consequently the killing. Second, the continued existence of the defence of provocation should depend on its ability to distinguish between ‘good’ and ‘bad’

145 See D Parfit, 'Innumerate Ethics' (1978) 7 Philosophy and Public Affairs 285 who observes that 'we believe that we may give priority to our own welfare. This priority should not be absolute. Perhaps Y should save his arm rather than X's life; but he ought to save X rather than his own umbrella' at 287.
146 I Leader-Elliott, 'Battered But Not Beaten', above n 3 at 436.
147 Ibid at 437.
148 S Unicke, above n 67 at 73.
reasons for loss of self-control. If provocation cannot fulfil this role, then it ought to be abolished.\textsuperscript{150}

The ‘reasons’ approach could be used to inform an assessment of an accused’s emotional response to provocative conduct according to community standards, by shifting the focus of the judicial inquiry from the centrality of loss of self-control to the reason for the loss of self-control. The association of loss of self-control with voluntariness (the capacity view), together with the dichotomous construction of emotion and reason, obscure an evaluation of the circumstances in which the law is willing to partially exonerate a killing in response to provocation. However, the concept of loss of self-control can be understood in another way. An alternative view considers that loss of self-control relates to values.\textsuperscript{151} By focusing on the reason for the loss of self-control, the concern to identify when the law does (or should) partially exonerate may be thrown into sharper relief. As Reilly observes, the focus on loss of self-control ‘begs the question why it was lost’.\textsuperscript{152} The answer to the question why self-control was lost ‘focuses on an alternative narrative, which though it might include an acknowledgement of responsibility and self-incrimination, may be more deserving of a partial excuse’.\textsuperscript{153} In short, the law should only allow a mitigatory role for the defence of provocation in cases where the accused had good reasons to do what he or she did.\textsuperscript{154}

The historical approach to provocation, before the rise of loss of self-control, accorded with a ‘reasons’ approach, in that it accepted that responses in anger were capable of evaluation for their appropriateness. The historical doctrine of provocation ‘embod[ied] judgments about what kinds of goods [were]

\textsuperscript{150} This argument is developed in Chapter Five.
\textsuperscript{151} See A Reilly, ‘Loss of Self-Control in Provocation’, above n 90 at 321.
\textsuperscript{152} Ibid at 335.
\textsuperscript{153} Ibid.
\textsuperscript{154} See A Von Hirsh & N Jareborg, above n 92 at 248, 251. It is important to note the comment of Lacey who questions our ability to articulate ‘“socially approved” motivations of emotional and instrumental reasons’, N Lacey, above n 62 at 126. Lacey says, ‘in the late twentieth and early twenty-first century, can these socially approved motivations or standards of practical reasonableness be assumed to be sufficiently clear, sufficiently widely agreed upon, to generate a predictable structure for the operation of defences?’, at 126. However, despite the difficulty of identifying shared moral values in a pluralist society, the ‘criminal law’s job is to fix with reasonable specificity a standard which it applies as even-handedly as possible’, at 131.
appropriately valued and by whom. In Gough’s consideration of the historical basis of provocation, he has argued that the ‘quality of the defendant’s reasons for killing’ was critical in the earliest provocation cases:

Provocative conduct simply gives others reason to respond in some way, and it is an interest in the reasons for which the defendants reacted rather than their emotional state that characterises many of the earliest provocation cases. ... Doubtless emotions had been running high amongst the protagonists in these cases, but the reports do not mention the fact. Let alone imply that legal issues turned on it. A simpler explanation is that these defendants were convicted of moderately serious homicide offences because their victims had created moderately powerful reasons to respond violently.

In determining whether the provocative conduct relied on by the accused was sufficient to claim the law’s compassion, traditionally the law made allowance only for those who killed for a good reason.

The origins of the defence of provocation reflect concepts of honour and outrage. In Horder’s account of provocation, he asserts that the underlying basis of the early categories of sufficient provocation was the concept of honour:

Those who took their natural honour seriously were known as ‘men of honour’. What was meant to be the response of the man of honour in the face of a deliberate affront, an attempt to undermine his natural honour? Men of honour were expected to retaliate in the face of an affront ... The need to avenge an affront was thought to be one of the most important ‘laws’ of honour. What is more, the man of honour was not expected to retaliate reluctantly, out of a sense of duty or a fear of shame, ... He was expected to resent the affront and to retaliate in anger.

The appropriate response of a ‘man of honour’ to an affront was to respond in anger. However, the concept of anger encapsulated by the law of provocation was not the notion of anger as currently understood by the law but the concept of

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155 D Kahan & M Nussbaum, above n 112 at 308.
156 S Gough, above n 17.
157 Ibid at 481 – 482. As Leader-Elliot notes, in the context of sexual provocation, ‘it was the magnitude of the wrong done to the husband, not the intensity of his rage, which palliated homicide in the eighteenth century’. I Leader-Elliot, ‘Passion and Insurrection in the Law of Sexual Provocation’, in N Naffine & R Owens (eds), Sexing the Subject of Law, NSW: LBC Information Services Sweet and Maxwell, 1997 at 157. Contrast with R Singer, above n 89 at 258 - 259.
158 See J Horder, Provocation and Responsibility, above n 7.
159 Ibid at 26 - 27.
anger as outrage. Anger as outrage was the 'connection ... between anger, virtue, and the right and proportionate response in both feeling and action' and 'to display anger in a mean or proper way requires the use of reason in the sense of moral judgments'.

However, the difficulty in relying on the 'reasons' approach, as elucidated by a consideration of the history of provocation, to provide as a basis for determining the standard of a 'manslaughterer' is the inherent masculinity of the reasons that have been considered to provide adequate provocation. As Chapter Five contends, although women have relied upon the defence of provocation, the reasons that the law privileges are the responses of men who are quick to anger, especially in matters of honour. This preference is evident in the expansion of provocation to killings in the context of sexual jealousy, unfaithfulness and rejection and the recognition of the 'homosexual advance defence' in relation to male victims. Male sexual integrity is a value protected by the defence of provocation.

Although the 'reasons' approach provides a better basis than the 'capacity' view (with the centrality of impulsive and unreflective loss of self-control) to explore the rationale of the defence of provocation, it is itself inadequate. As an historical doctrine, provocation 'unashamedly reflected a male view of status, property,
and the place of violence’.\textsuperscript{167} In the modern context, the argument developed in Chapter Five is that the defence of provocation should be abolished as it is too steeped in its masculinist history to have a legitimate role in the contemporary criminal law. In this regard, Wells makes an insightful comparison between the acceptance of evidence of battered woman syndrome (BWS) and the acceptance of the ‘homosexual advance defence’ (HAD) within the framework of provocation:

It is not being argued that women who kill their violent partners after enduring years of abuse and fear are comparable with those who seek to justify violence against homosexual men on the grounds that they were in fear, or suffered a ‘normal’ reaction to the advance. The argument is that the \textit{provocation defence cannot discriminate between excusable violence and blind prejudice}.\textsuperscript{168}

As a doctrine that must reflect the lesser culpability that attaches according to different (less blameworthy) circumstances in which people kill, my argument is that provocation should be rejected as it is incapable of discriminating between good and bad reasons.\textsuperscript{169}

\section*{3.5 CONCLUSION}

This chapter lays the foundation for the arguments developed in subsequent chapters of my thesis. It provides the structural and conceptual framework within which my discussion of the issues associated with reliance on the defences to murder by women who kill their partners is positioned, and in particular, highlights three key points.

First, by tracing the history of the defences of provocation and self-defence, this chapter shows the extent to which the origins of both defences are embedded in male experience. As I argue in subsequent chapters, this masculinist history continues to influence the operation of the criminal defences of provocation and self-defence. In the context of self-defence, my argument is that the principles of the defence are premised on an assumption that the danger that a person faces is

\textsuperscript{167} C Wells, above n 15 at 88.
\textsuperscript{168} \textit{Ibid} at 95 (emphasis added).
\textsuperscript{169} See 5.4. See also C Wells, \textit{ibid} at 85.
danger from outside the protective realm of the home and the family. This is recognised by Chamallas, who observes:

Implicit in the standard account [of self-defence] is the paradigm of the random stranger-versus-stranger power play. This recognition is critically important. The law as currently constructed envisions danger coming from an outside aggressor on a discrete occasion. It conjures up the familiar scenario of one man picking a fight with another man in a bar. ... As the phrase 'power play' suggests, the parties in the standard scenario are presumed to be roughly equal in their capacity to inflict harm.¹⁷⁰

As I argue in Chapter Six, the difficulty that battered women currently face in relying on self-defence is that their experiences and reactions do not readily fit into the legally acceptable model of what it is to kill in self-defence.

Secondly, my examination of the relationship between intention, motive and criminal responsibility reveals that despite the law’s insistence that motive is irrelevant to the issue of criminal responsibility, there is a close association between questions of motive and questions of intention. Further, this overview highlighted the flexibility of the concept of intention. It provides the basis for my analysis in Chapter Four of cases where battered women are convicted of manslaughter on the ground that the accused lacked the requisite intent for murder.

Thirdly, this chapter provides a theoretical framework for the defences to murder, in particular the defences of provocation and self-defence. I have shown the deficiencies of the 'capacity view' (the justification/excuse dichotomy) in explaining the current operation of provocation and self-defence. In seeking to challenge the masculinist paradigm of self-defence and in offering a rationale for self-defence that could allow greater acknowledgment of the mitigatory nature of the circumstances in which women kill, I advocated a recognition of the concept of 'agent-relative permission' in conjunction with the utilisation of the 'reasons view' as the basis of the defence. Chapter Three begins my case for the abolition of provocation (developed in Chapter Five) by considering the rationale of the

defence of provocation. In this context, I argued that the ‘reasons view’ should provide the means by which the ability of the defence to assess accused’s actions according to community standards should be determined.