Dishonour, Provocation and Culture: Through the Beholder’s Eye?

Pascale Fournier,* Pascal McDougall** and Anna R. Dekker***

In Canada, as throughout most of the geopolitical West, honour crimes have recently been the object of growing hostility from politicians and media pundits. In many ways, the projection of a “civilized” Canada simultaneously reifies the notion of Islamic and/or “Eastern” law as inherently contrary, even antithetical, to Canadian law. Yet honour is no foreign notion to Western law, including Canadian law. In this article, we outline how socio-legal hybridity manifests itself in the notion of honour in law, and sketch a definition and history of honour crimes, a category which existed in the West and often travelled to the East. Then, we explore the (Western) “provocation defence,” an institution which is historically rooted in male honour and whose concrete operation in Canada has sometimes been to uphold homicidal schemes that are no stranger to notions of bruised honour. We aim to outline that honour is found intertwined with many other emotions in violent crimes in both the “East” and the “West.”

Au Canada, tout comme dans plusieurs pays occidentaux, les crimes d’honneur ont récemment fait l’objet d’une hostilité croissante de la part des classes politiques et médiatiques. Au cœur de ces discours se trouve souvent l’idée d’un
Occident civilisé qui répond à une conception figée des droits musulmans et/ou orientaux. Or, la violence au nom de l’honneur n’est pas étrangère aux systèmes juridiques occidentaux, dont le droit canadien. Dans cet article, nous tentons de retracer les manifestations juridiques de l’honneur dans divers pays et la migration de ce concept de l’Occident à l’Orient et vice-versa. Ensuite, nous nous attardons à la défense de provocation, une institution juridique occidentale qui fait parfois resurgir l’honneur comme motif d’homicide, à l’occasion de crimes dits passionnels. Cela nous permet de conclure que l’honneur se retrouve sous différentes formes tant en Orient qu’en Occident et de dresser plusieurs pistes de réflexion essentielles à quiconque s’intéresse à l’élimination de la violence faite aux femmes.

Rather than a dividing line separating them, “East” and “West” seem to meet in a circular movement where one becomes the other. The “honor” of nineteenth-century America is the very “passion” incorporated in the Arab Codes to diffuse and decenter the other legal sensibility lurking in the structure of the Codes — Arab “honor.” . . . The twain East and West, when it comes to violence against women, meet.

Lama Abu-Odeh

1. INTRODUCTION

In recent years, honour crimes have undeniably struck the imagination of many citizens, politicians, and media pundits in Europe and North America. Public discourse on the subject is often framed in ideological terms which establish boundaries between “foreign” honour crimes and the “West.”2 A recent public policy report thus underlined that honour crimes are “proliferating without regards to Canada’s criminal code or Canadians’ deep cultural revulsion from the very concept.”3 Likewise, an editorial from a major Canadian newspaper stressed that honour crimes are “anathema to Western culture.”4 Professor Shahrzad Mojab, expert witness in the Shafia trial, wrote in an article on the independent news website The Mark News that she feels her testimony before the Ontario Superior Court of Justice was misinterpreted by the media, who wrongfully attributed to her a quote that the crown prosecutor asked her to read to the jury. The quote was to the effect that honour crimes take root in Arab culture and popular sayings. Prof. Mojab wrote that it is “regrettable that our mainstream media do not hesitate to identify ‘honour’

1 “Comparatively Speaking: The ‘Honor’ of the ‘East’ and the ‘Passion’ of the ‘West’” (1997) 2 Utah L. Rev 287 at 305 [“Comparatively Speaking”]. We are indebted to Lama Abu-Odeh for her brilliant analysis of the tensions between passion and honour in Eastern and Western legal systems.


3 Aruna Papp, Culturally Driven Violence Against Women: A Growing Problem in Canada’s Immigrant Communities (Winnipeg, MB: Frontier Centre for Public Policy, 2010) at 10 [emphasis added].

4 Barbara Kay, “Communities Must Speak Out Against Brutal Traditions”, National Post (26 January 2011).
killing with ‘Arabness,’ Arab culture, and — through another misidentification — Islam.”

Despite this aggressive political and media campaigning, there has been remarkably little domestic policy guidance on honour crimes in Canada. Furthermore, notwithstanding talks of incorporating in the Criminal Code a distinct “honour crime” offence, such crimes are, rightly or wrongly, still managed through the conventional legal tools related to the general offences of homicide such as the partial defence of provocation, which applies only to murder and is often invoked in cases of “honour crimes.”

This article will analyze how Canadian courts translate honour crimes within the framework of existing legal tools, with special reference to the provocation defence, as it intersects with honour violence. Drawing inspiration from Lila Abu-Lughod’s ground-breaking work on honour crimes, the analysis will attempt to uncover the “work of the [honour crimes] category in distinct projects and scales of power, and to untangle its effects in different spheres and locales.” We will endeavour to trace some forgotten Western origins of honour crimes and compare Western passion crimes and Eastern honour crimes in order to critically engage media coverage and judicial treatment of honour crimes.

Part II will sketch a definition and history of honour crimes, focusing on two case studies which have been extensively debated: Jordan and Pakistan. By presenting a panorama of worldwide honour crimes legislation and practices, this part aims to understand the historical roots of honour crimes, with a special emphasis on their legal regulation. Uncovering the partly Western origins of this phenomenon will help us set aside the conception of honour violence as a fixed, culturally-determined practice. Instead, it will outline that gender violence has travelled through inter-cultural encounters and that cultural boundaries are, in this regard, porous. After having traced the (Western) provocation defence’s genesis in honour-based medieval British law, Part III will expose some of the defence’s concrete implica-


6 Tellingly, one of the only mentions of this phenomenon was in a new study guide for immigrants, which mentions that “Canada’s openness and generosity do not extend to barbaric cultural practices that tolerate spousal abuse, ‘honour killings,’ female genital mutilation, forced marriage or other gender-based violence.” Study Guide — Discover Canada: The Rights and Responsibilities of Citizenship, emphasis added, online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/resources/publications/discover/section-04.asp>.


8 Criminal Code, RSC 1985, c C-46, ss. 222–240.

tions for honour as a discursive practice. We will outline how femicides committed by both Westerners and Non-Westerners have been processed through the channel of the provocation defence. We will argue that the provocation defence is historically rooted in male honour, and that its concrete operation in Canada, notably in domestic femicide cases committed by Canadians, has been to uphold some machist schemes that are no stranger to notions of bruised honour. We aim to outline that passion and honour, while often presented as polar opposites, are found intertwined in violent crimes in both the East and the West. However, our use of the concepts of “East” and “West” should not be taken to suggest that there is anything tangible about such a distinction. Rather, we invoke this often used category to map the socio-legal implications and the “constitutive effects” of the East/West binary on Canadians’ conception of themselves as individuals, as a nation and/or as a part of Western civilization. Finally, Part IV will present a quantitative analysis of Canadian cases involving the provocation defence in contexts of intimate femicides, classifying them according to the “ethnicity” of the defendants. We will present the success rate of both categories and elaborate hypotheses as to why defendants identifiable as non-Western seem to have less success in raising the provocation defence. In so doing, we hope to shed some light on the ways in which “the practices of legal reasoning, textualism, and decision making assemble the world, both retrospectively and for future use.” We will argue that courts’ translation of honour violence through the language of the provocation defence has the effect of negating the similarity between Western and Eastern legal institutions, thus considerably impairing our understanding of gendered violence, obscuring the

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10 This article uses the term “femicide” to broadly refer to the “killing of women, regardless of motive or perpetrator status” (Jacquelyn Campbell & Carol W. Runyan, “Femicide: Guest Editors’ Introduction” (1998) 2: 4 Homicide Studies 347 at 348). Though many feminist scholars have linked this term to a specific discriminatory intent, the killing of a woman because she is a woman, we propose to suspend this otherwise important discussion to examine the continuum of gendered homicides and the variety of cultural motives it can accommodate.

11 One can think of the famous call by Samuel P. Huntington, former counter-insurrection expert for the Lyndon Johnson administration during the Vietnam war, to distinguish the “West and the Rest” on the basis of their “values” (“The Clash of Civilizations?” (1993) 72: 3 Foreign Affairs 23). For a similar, if slightly more sophisticated, argument on the peculiar cultural and political “inventions” of the liberal West which are called upon to justify its political and economic dominance, see Niall Ferguson, Civilization: The West and the Rest (London: Penguin Books, 2011).

12 For a succinct presentation of the “constitutive theory” from which we take our cue, see Patricia Ewick, “Penetration of Law” in David Scott Clark, ed., Encyclopedia of Law and Society: American and Global Perspectives (Thousand Oaks, CA: SAGE, 2007) 1102 at 1103. This article also draws inspiration from a strand of socio-legal studies which attempts to combine an “instrumental” and a “constitutive” look on law: see Austin Sarat & Thomas R Kearns, “Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life” in Austin Sarat & Thomas R Kearns, eds, Law in Everyday Life (Ann Arbor: University of Michigan Press, 1993) 21 at 27.

internal flaws of Western law, and hampering pressing law reform projects.

2. GENEALOGIES OF HONOUR

(a) Definition and Overview of Worldwide Occurrences

This section aims to sketch out the genesis of the legal concept of honour crimes as it lives and exists in various countries of the East, which are now associated with honour crimes in Western media and parliamentary debates. After presenting a definition of honour crimes, we will assess the cases of Jordan and Pakistan. Because of the immensely complex evolution of the legislative regimes surrounding honour crimes, we will limit ourselves to sketching out a handful of interesting facts on the origins and evolution of the concept. We can only hope to spark interest for further research that traces the historical roots of honour crimes on a case-by-case basis, and that takes into account the complexities the globalization of legal systems has brought upon us.

It is difficult to define what an honour crime entails, its scope, and its limits. It has been defined by one scholar as “a murder carried out in order to restore honor, not just for a single person but a collective, [which] presupposes the approval of a supportive audience, ready to reward murder with honor.” Furthermore, certain significant hallmarks of honour crimes can be identified: a woman is murdered by members of her birth family (usually not her family by marriage); the killer is a father, brother, cousin, paternal uncle or husband; and other women are often involved in either the planning or cover-up of the crime. The UN special Rapporteur on violence against women, giving insight as to what can be considered an infringement on collective honour, wrote in a 1999 report:

Honour is defined in terms of women’s assigned sexual and familial roles as dictated by traditional family ideology. Thus, adultery, premarital relationships (which may or may not include sexual relations), rape and falling in love with an “inappropriate” person may constitute violations of family honour.

Nowadays, honour crimes are committed in a wide array of countries of the East, in war-torn, “failed states” like Afghanistan but also in secular, democratic

15 Though women are most generally the victims, men are sometimes targeted: Katherine Ewing, Stolen Honor: Stigmatizing Muslim Men in Berlin (Palo Alto, CA: Stanford University Press, 2008).
16 Terman, supra note 14 at 9.
18 See IRIN: humanitarian news and analysis, a service of the UN Office for Coordination of Humanitarian Affairs, “Afghanistan: honour killings on the rise”, <http://www.irinnews.org/report.aspx?reportid=61698>; Palwasha Kakar, "Tribal Law of Pashtunwali and Women’s Legislative Authority"; paper sponsored by the Afghan
states like Turkey. Statutory honour defences and their correlative cultural attitudes have also been reported as widespread occurrences in countries as diverse as contemporary Brazil and parts of Russia, notably Chechnya.

The notion of lawful killing to restore honour goes back to the codes of Hammurabi, Nessilim, and Assura. Honour crimes were also frequent in ancient Rome, the cradle of “Western civilization,” and Roman law penalized men who abstained from killing their adulterous sisters or wives. Furthermore, there are significant contemporary instances of Western legal provisions that encouraged honour crimes. The Italian Penal Code allowed for greatly reduced sentences for men who murdered their adulterous “wives, daughters or sisters” until the provision in question was repealed, as late as 1981. Likewise, the penal codes of Spain, Portugal and France have long contained provisions excusing honour crimes. These legislations seem to have been grounded in cultural realities, as


19 In Turkey, despite some political leadership being shown on the issue of honour crimes, women’s rights activist Leyla Pervizat reports that policy responses have been reluctant and insufficient: “Men’s Violence and Women’s Responsibility: Mothers’ Stories About Honour Violence” in Mazher Idriss & Tahir Abbas, Honour Violence, Women and Islam (New York: Routledge, 2010) 142 at 152.


25 Ibid. at 237.

honour is an important trait of many Euro-Mediterranean societies.\textsuperscript{27} As put by anthropologist Mojca Ramšak:

Certain similarities in the notion of honour are found in various societies that border on the Mediterranean. The people of southern Europe, especially the rural peoples, more resemble in some ways to those in the Near East and North Africa than they do those of northern Europe.\textsuperscript{28}

Finally, in the United States, “until the 1960’s and 1970’s, statutes in four states [Georgia, New Mexico, Texas and Utah] made it justifiable for the husband to kill his wife’s lover.”\textsuperscript{29} These all-American examples were paradigmatic of honour crimes since they did not depend on spur-of-the-moment passion and could be carried out to prevent adultery.\textsuperscript{30} Here again, the law was informed by cultural constructions of male honour. In their empirical study of contemporary Southern Anglo-American perceptions of femicide, Vandello and Cohen report that the idea of resorting to domestic violence in order to restore honour in the face of female infidelity had deep cultural resonance, leading to widespread perceptions according to which adulterous women should endure domestic violence and stay in abusive relationships to redeem family “honour.”\textsuperscript{31}

The multiple instances of Western sanctioning of honour crimes serve to outline that this concept also inhabits “Western culture.” Moreover, in most Oriental countries where honour crimes are openly perpetrated, they are a part of the social mores of multiple religious communities beyond Islam, Sikhism, Hinduism, and other religions traditionally associated with this practice. The example of Lebanon is revealing. Article 562 of the Lebanese Penal Code remained for decades an exculpatory excuse for murder of adulterous female relatives, before being amended into a commutation of sentences following pressures from human rights activists.\textsuperscript{32}

Despite Lebanon being a multi-confessional state with denominational personal sta-

\textsuperscript{28} Mojca Ramšak, “On Tragic Contemporary Honour Cultures” in Christopher Hamilton et al, eds, Facing Tragedies (Berlin: Lit Verlag, 2009) 89 at 100.
\textsuperscript{30} Taylor, ibid. at 1695, n 87.
criminal law with regards to honour crimes and courts of criminal jurisdiction are common to the country’s eighteen different Christian, Jewish, Druze, and Muslim communities. The honour crime excuse thus exists among many religious communities and was notably applied by the Christian Maronite community, historically considered a Middle-Eastern counterpart and ally of the West.

(b) Perspectives from the East: Jordan and Pakistan

This section presents perspectives on the practices of two countries of the East: Jordan and Pakistan. Rather than exhaustive descriptions of the positive law applicable to honour crimes, our evocation of these two countries is intended to serve as an introduction to the complex issues raised by honour’s travel through these two polities’ postcolonial legalities. The case of Jordan will serve to outline that some honour crimes legislations of the East have been directly transplanted from the West as part of colonial codification processes. The case of Pakistan will subsequently serve to outline some more subtle forms of legal transplantation which have shaped Eastern honour crimes through the colonial relationship.

Jordan is a most relevant case study, seeing as it has, according to some accounts, the highest rate of honour crimes per capita in the world. Article 340 of the Jordanian Penal Code reads:

1. He who surprises his wife or one of his [female] marhams (‘unlawfuls’) in the act of committing unlawful sexual intercourse with somebody and kills, wounds or injures one or both of them, shall benefit from the exonerating/exempting excuse (’udhr muhill);
2. He who surprises his wife or one of his ascendants or descendants or siblings with another in an unlawful bed, and kills or wounds or injures one or both of them, shall benefit from the mitigating excuse (’udhr mukhaffat).


This provision has caused great worldwide concern and has been decried by Human Rights Watch researcher Nada Khalife as “nothing less than an endorsement for murdering women and girls.”

A bill was introduced in 2001 to eliminate the possibility of exoneration for honour crimes, but it was subsequently rejected by Parliament and article 340 remained as is. There is strong scholarly consensus that this legislation was directly inspired by the French Penal Code of 1810. As put by Janin & Kahlmeyer, this provision “springs from French, i.e., Napoleonic, penal law, not from Islamic law itself.”

Article 340 of the Jordanian Penal Code received the influence of French Napoleonic law through various channels, notably through the regional influence of French Lebanese and Syrian penal codes’ honour crime excuses, from which article 340 “derived most of its language.” French law also greatly influenced the codification processes in the Ottoman Empire between 1869 and 1877, which have contributed to spreading the transplantation of the French honour crime excuse in the Middle-East generally. As a result, the similarities between French honour crimes law and the Jordanian provision were glaring. Article 324 of the French Penal Code of 1810, a provision which was repealed only in 1975, read:

Whoever catches his spouse, female ascendant, descendant or his sister red-handed in the act of adultery or in an illegitimate sexual encounter with another person and commits homicide or causes injury can benefit from an

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The author of the homicide or injury can benefit from an excuse of reduction if he catches red-handed his spouse, female ascendant, descendant, or his sister in an ‘attitude equivoque.’

This direct transfer of one legal institution from the West to the East can be analyzed as a form of “legal transplant,” one which has contributed to the “globalizations of law and legal thought” described by Duncan Kennedy. The importance of legal transplantation in the shaping of colonial legal systems cannot be underscored, and this influence is especially striking in the case of honour crimes.

Finally, the Jordanian law also contains elements of “crimes of passion,” such as article 98 of the Jordanian Penal Code, which excuses murders committed in a “fit of fury.” This provision is said to have been “much more useful” to honour killers than article 340, though it has attracted less media attention than the latter provision. Jordanian courts often apply article 98 of the Penal Code to honour crimes, effectively treating them as a form of “crime of passion.” Thus, Jordan, “the country most intensely under the international spotlight when issues of ‘honour’ are discussed, perhaps along with Pakistan,” appears to have crafted its honour crimes legislation at the confluence of Western and Oriental traditions.

We now briefly turn to the case of Pakistan, which presents a more complicated case of legal transplantation. Substantively, there is no denying that Pakistani honour crimes are rooted in indigenous “tribal codes,” as modified and shaped by the evolution of Pakistani criminal law. We leave to others the detailed analysis of important indigenous legal processes such as the “Qisas and Diyat Ordinance” of 1990, its subsequent reforms, and Pakistani judicial attitudes towards honour crimes.

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47 The term “legal transplant” was first proposed by Alan Watson in the 1970s to describe what he saw as the migration of legal rules or practices “from one country to another, or from one people to another.”: Alan Watson, Legal Transplants, 2d ed (Atlanta: University of Georgia Press, 1993) at 21.


52 Christina Madek, “Killing Dishonor: Effective Eradication of Honor Killing” 29: 1 Suffolk Transnat’l L Rev 53 at 62. See our discussion of Western “crimes of passion”, infra part II.

53 Abu-Hassan & Welchman, supra note 37 at 199.

crimes, all of which have undeniably conditioned the development of honour crimes in Pakistan. Instead, we present a study of the interaction between British colonial law and the Pakistani legal system, which reveals some underground influences at play. Despite the absence of a direct “cut-and-paste” transplantation of honour crimes legislation such as in Jordan, a more subtle form of inter-legal dialogue between British and Pakistani traditions of honour emerges. As put by David Westbrook, “the diffusion of law cannot be separated from those social processes discussed under the rubric of globalization.” Among these processes was the nineteenth-century wave of legal codifications in Pakistan, then part of the “British Indian Empire.” Numerous reforms were implemented in various legal sectors, to the exception of personal status law, which was seen as too “interconnected with religious feelings” and tied to South Asian spirituality and identity. In matters of public law and criminal law, however, the codifiers have “transplant[ed] law from Europe, and conveniently shunt aside God’s law.”

The processes have had significant influence on the social realities surrounding crimes of honour. For instance, just as was the case in Jordan, Pakistani honour crimes have often been treated through the channel of “grave and sudden provocation,” a (Western) principle introduced by the Pakistan Criminal Code of 1860.

Moreover, the codification processes have had deep cultural repercussions. Let us

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60 See Cheema, supra note 55.

consider for instance one of the social beliefs that underpin honour crimes, according to which “women serve their male guardians and families as vessels of honor [and] do not possess any honor of their own.”

This legal discourse was strengthened and enshrined in colonial British law. Warraich writes that:

The 1860 British Penal Code introduced the notion of ‘modesty’, and related concepts of ‘chastity’, ‘enticement’ and ‘abduction’, as part of a framework of collective ‘honour’. Rather than safeguarding the rights of the affected individual woman, the law upheld the rights of third parties, be it the state, community or immediate family members. Effectively, in matters of legal adjudication, women became passive objects whose sexuality was to be controlled. [...] Women were not considered individuals — each crime in the Penal Code was classified in relation to the lawful protector or guardian.

Likewise, the British common law rules which applied until the Hudood Ordinance’s “Islamization” of Pakistani law in 1979 treated rape as “a crime punishable against men, to be lodged by the husband of the woman raped against the man who violated her.” These legal institutions transplanted themselves to ancient Pakistani “tribal codes,” in turn shaping new hybrid social mores. This led some scholars to argue that the roots of honour crimes “may be found in the parallel justice system made up of the criminal law inherited from the British and the Sharia law that exists in Pakistan.” This “uneven marriage” between the common law and Islamic law left by the British in 1947 continues to shape various Pakistani legal institutions in myriad ways. Thus, in analyzing Pakistan, one must not put excessive emphasis on the contemporary “Islamization” of Pakistan and its aftermath. Islamic “revolutions” have not worked on a tabula rasa, and they have often been conditioned by the unique ways in which the past colonial laws and tribal customs had interacted for centuries to produce hybrid legal institutions.

63 Warraich, supra note 54 at 81.
Various scholars have also emphasized the role that local tribal practices and “traditional justice” play in shaping the phenomenon of honour crimes, sometimes in total independence from State law. Accordingly, immigration expert Rachel Ruane stressed that honour crimes are carried out very differently depending on the Pakistani province concerned. In some cases, instead of husbands, fathers, and brothers spilling the blood, “tribal councils or jirgas decide that the woman should be killed and send out men to do the deed,” often with the approval of mothers. Thus, Pakistani honour crimes appear as more of an informal customary practice than a clear statutory creation. In addition, while the central British colonial State had carried out a “replacement of local criminal justice systems by British law,” Pakistani “local legal structures remained strong” up to today. This may be attributable to the English approach to colonialism, a form of “decentralized despotism” which empowered local adjudicators and which can be traced back at least to the East India Company’s loose-but-effective rule over South Asia. These socio-legal processes, having contributed to reinforcing local parallel justice systems and substantive patriarchal notions, outline that honour crimes are not peculiar to Oriental legal systems, but rather originate in complex multi-centennial globalization processes magnified by the colonial experience and its aftermath.

3. PROVOKING ANGLO-CANADIAN DISHONOUR

This section takes us back to the West and explores the Canadian homicide doctrines applicable to honour crimes committed in Canada. Part (a) outlines the legal framework relating to homicide and part (b) sheds light on the gendered kill-

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70 Ruane, supra note 55 at 1533.


74 See Pearl & Menski, supra note 58 at 37.
ings committed in the West. The defence of provocation will be the focus of our 
 enquiry into Western law, providing us with insights as to the ways in which hon-
our resurfaces in Western violence against women.

(a) The Defence of Provocation in Canadian Law

A defendant indicted on murder charges may raise the defence of provocation, 
which is defined in section 232 of the Criminal Code. This partial defence is only 
applicable to a charge of murder and has the effect of reducing the conviction to 
manslaughter. Subsection 232(1) outlines the availability of the defence of provo-
cation, stating that “Culpable homicide that otherwise would be murder may be 
reduced to manslaughter if the person who committed it did so in the heat of pas-
sion caused by sudden provocation.” While provocation chiefly concerns verdict 
mitigation, it also has significant repercussions on sentencing. For instance, the Su-
preme Court has confirmed in R. v. Stone that provocation may be used as a sen-
tencing mitigating factor in addition to having served to reduce the verdict. 
Moreover, reduction of the verdict from murder to manslaughter carries in itself 
significant consequences for sentencing, as it allows the defendant to escape the 
strict sentencing rules imposed to defendants convicted of murder. The Criminal 
Code indeed imposes a mandatory term of life imprisonment for both first- and 
second-degree murder. Furthermore, first-degree murder generally carries a 
mandatory period of parole ineligibility of 25 years. For second-degree murder, 
the period of parole ineligibility is set by the trial judge (with a recommendation 
from the jury, where applicable) for a period ranging from 10 to 25 years. By 
contrast, except when a firearm is used, the Code imposes no minimum punishment 
for manslaughter. Upon conviction for manslaughter, the judge must use his or 
her discretion, in accordance with the guidelines provided in the Criminal Code, to 
formulate a sentence that is commensurate with the crime, ranging from a sus-
pended sentence to life imprisonment.

The defence of provocation is a British legal institution which can be traced 
back at least to the 17th century, and whose pre-modern articulation was grounded 
in honour-tainted value codes. The defence was applied in pre-determined sets of 
circumstances, such as the defendant having suffered the humiliating gesture of 
“filliping on the forehead.” More paradigmatically, the defence was also invoked 
when the defendant, having been a witness to his wife’s adultery, killed her par-

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75 Except where a firearm was used, in which case a minimum four-year sentence is re-
quired as per s. 236 of the Criminal Code, RSC 1985, c C-46 [Criminal Code].
353 at para. 237.
77 Criminal Code, s 235(1).
78 Ibid. s. 745(a).
79 Ibid. s. 745(c).
80 Ibid. s. 236.
81 UK, Law Commission, Partial Defences to Murder (Consultation Paper No 173) 
amour. The rationale behind the defence was thus worded in 1707 by the Chief Justice of the King’s Bench, Lord Holt: “jealousy is the rage of a man, and adultery is the highest invasion of property.” As put by British criminal law scholar G. R. Sullivan, early provocation defence amounted to a “hot-blooded yet controlled vindication of one’s honour rather than spontaneous, uncontrolled fury.” Thus, the very foundations of this legal institution seem tainted with notions of male honour upheld by violence.

However, the contemporary forms of the defence of provocation have been presented as possessing a wholly different normative foundation. The defence was defined by the Supreme Court of Canada as driven by compassion towards “human frailties which sometimes lead people to act irrationally and impulsively.” Likewise, the British Royal Commission on Capital Punishment once linked the provocation defence to compassion to “natural human weakness.” The defence’s contemporary raison d’être is thus said to have completely shifted from upholding a machistic Western honour code to accounting for the universal human weakness of momentary “irrationality.” This reasoning is still adopted by many scholars in the common law world as a valid justification for the maintenance of the partial defence today. In keeping with this universal, individualistic rationale, Canada’s Criminal Code outlines that murder may be reduced to manslaughter “if the person who committed it did so in the heat of passion caused by sudden provocation.” The Code further establishes that “[a] wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.” Courts have established a two-part subjective and objective test to ascertain whether the defendant had in fact “lost control” and whether an “ordinary person” would have done the

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83 Ibid. at 1115.
89 Criminal Code, s. 232(1).
90 Ibid. s. 232(2).
Let us now inquire into how this test plays out in cases of homicide.

(b) What Passion? Some Canadian Cases

This part outlines some Canadian jurisprudential extensions of the provocation defence which are particularly concerning. In the 1996 case *R. v. Thibert*, the Supreme Court ordered a new trial on the basis of the provocation defence for a defendant who had killed his ex-wife’s new partner. The defendant had been following his ex-wife at her place of work with a loaded rifle in his car, trying to convince her to go “some place private to talk.” The new partner interfered with the defendant, who had “told Mrs. Thibert that he had a high powered rifle in his car [and] suggested that he would have to go into Mrs. Thibert’s workplace and use the gun.” Over the course of the ensuing argument, the victim began to shout at the defendant to “go ahead and shoot me,” at which point Mr. Thibert did shoot him. According to the majority on the bench, “the deceased was mocking him [Mr. Thibert] and preventing him from having the private conversation with his wife which was so vitally important to him.” This led the Court to order a new trial for the provocation defence to be evaluated by a jury, because there was an “air of reality” to the claim.

Similarly, in a series of other cases, Canadian defendants have successfully raised the defence of provocation in situations where their sexual ascendance over their wives was called into question. In *R. v. Stone*, the Supreme Court did not question the leaving of the provocation defence to the jury for defendant Bert Thomas Stone who had stabbed his wife 47 times and stored her body in a toolbox. To provoke this reaction, she had insulted his virility, questioned the paternity of his children, and announced she wanted to divorce him. In *R. v. Kimpe*, the Ontario Superior Court of Justice accepted the defence of provocation for a defendant who had choked his common-law partner to death “for about five minutes” and set the house and her dead body on fire. While they were having an argument, the victim had “taunted him about his poor sexual performance[,] declared that she was going to bring home another man who could satisfy her sexual needs [and] suggested that the appellant could listen to them having sex.” The trial judge accepted the defence of provocation, stating that the victim’s words “went beyond a

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92 *Supra* note 85.


95 *Ibid.* at para. 23 [our emphasis].


98 2010 ONCA 812, 2010 CarswellOnt 8960.


100 *Ibid.* at para. 5.
repudiation of their relationship.” In R. v. Cairns, the British Columbia Court of Appeal found that there was “evidentiary foundation” to warrant presenting the defence of provocation to the jury. In that case, the defendant beat his wife on the head with a hammer and strangled her with a bathrobe tie after a sour dispute pertaining to their respective gambling problems, over the course of which the victim told Mr. Cairns that she would refuse sexual intercourse unless he paid her a sum of money. In R. v. Moïse, the defendant attempted to burn his wife alive after she told him, over the course of a stormy argument over eventual divorce procedures, that he was impotent and declared that she had another lover. The Québec Court of Appeal held that there was evidence that rendered the provocation defence plausible. In R. v. Archibald, a defendant murdered his wife with a kitchen knife after she mentioned her new boyfriend would be visiting her and told the defendant to go away from their residence. The defendant was said to be prone to alcohol abuse and had previously found the victim in bed with another man, at a time when the relationship was said to be under “severe stress.” The Supreme Court of British Columbia allowed the defence of provocation.

Cases like these have been harshly criticized for their regressive impact on gender equality. Some noted scholars deplored the “widening concept of sexual provocation in ‘the West’” and its repercussions on women. Caroline Forell has argued that the Canadian law of provocation “has remained distinctly traditional and masculine” and denounces its “disproportionate impact . . . on men and women.” Other scholars have denounced the defence as being built upon “a stereotype that is profoundly male” and which makes a woman “responsible for her husband’s murderous outbursts.” The Government of Canada has also recognized the flaws of the provocation defence in a 1998 consultation paper which con-

101 Quoted in ibid. at para. 10.
103 Ibid. at para. 62.
104 Ibid. at para. 9.
105 1999 CarswellQue 2102 (Que. C.A.).
106 Ibid. at para. 42.
107 Ibid. at para. 53.
111 Ibid. at 49.
templated its abolition or amendment. But what exactly is so troubling about the defence of provocation? Do the ways in which the defence plays out sometimes amount to the reintroduction of some unstated intimate honour code? Are “provoked” Western femicides themselves hybrid mixes of honour and passion? One could argue that honour and passion are two different concepts; while the latter focuses on private relationships and emotions, the former involves a public, collective framework of repression. Here, the typology exposed by Abu-Odeh comes to mind:

The idea of passion, in its pure form, involves a private relationship between a man and a woman, as opposed to a collective one that involves several men related to the woman deeply engaged in defending the public image of their masculinity. In the model of passion, female sexuality is not fetishized as the locus of reputation, but seen more as a libidinal goal and the locus of complicated human emotions. Passion reduces the relationship to two people who are sexually involved with each other (especially man and wife), for whom the sexual misbehavior of one is an assault on the other’s feelings, not his public reputation.

Indeed, the existence in Canada of a collective framework of honour such as that found in many countries of the East is hard to fathom, as the sociological organization of gender violence within the family is based on different foundations. For the period from 1978–1998 in Canada, 66% of family femicides were perpetrated by the woman’s partner, while 26% were perpetrated by parents, siblings, and other relatives. There does not seem to be a dominant trend of collective femicides as there is in certain countries of the East. Nevertheless, scholars like Nancy V. Baker, Peter R. Gregware, and Margery A. Cassidy note that “in the English-speaking West, including the United States, the locus of honor has shifted from the traditional extended family to the individual man.” What form does this


115 Abu-Odeh, “Construction of Gender” supra note 26 at 922.


private honour take? Do “provoked” passion crimes constitute a form of sanctioning similarly based on (cultural) assumptions of honour, severely regulating and punishing the sexual behaviour of women? For the concept of “honour,” which is deeply rooted in many Western cultures, it would be a fitting resurgence, well-tailored to the sociology of gender violence in contemporary Western countries. In this context, “honour” may well be based on the immediate couple and their individual obligations to each other, upon break-up for example. As put by Jeremy Horder:

> [P]rovoked anger is understood in law to involve the desire for retaliatory suffering by the victim inflicted by the wronged person. This conception of anger involves an important and hitherto taken-for-granted assumption which must now be examined. Why does anger take the form of a desire for retaliatory suffering? . . . The infliction of retaliatory suffering is understood to negate a threat, inherent in the provocation, to the self-worth of the wronged person, to the values central to his self-conception.118

Thus, violent retaliation, rather than a mere retributive senseless gesture, can thus be lived by some as a restorative social process, as further described by Donna Coker:

> By turning his humiliation into rage, the attacker is able to transcend his feelings of humiliation. He can then transform rage into violence by viewing himself as a defender of “the [social] Good” (e.g., his role as husband, father, competent lover). Through the violent act, the attacker is able, at least for a moment, to recapture his social sense of self, a self that he believed to be threatened or annihilated by the humiliating event.119 [references omitted]

Once passion’s “natural” aspirations are dismantled, how do we analyze the murderous outbursts of defendants such as Thibert and Stone? What are the “values” central to their conceptions of themselves? What “threat” was posed to their self-worth? What lies behind their claims to have “lost control”? Thibert was refused a conversation in a (public) parking lot with his wife, who sought the help of her new boyfriend. Stone and others were subject to disparaging comments by their wives on sexual satisfaction and fidelity. How can we deny that these examples are (at least partly) tied to conceptions of male honour? As put by social anthropologist Julian Pitt-Rivers:

> Honour is the value of a person in his own eyes, but also in the eyes of his society. It is his estimation of his own worth, his claim to pride, but it is also the acknowledgement of that claim, his excellence recognised by society, his right to pride.120

Thus, the ability to be reasonable, to “work things out” with one’s estranged wife, may be considered part of the post-modern figure of the honourable man and

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husband. And perhaps it was this marital honour that Thibert sought to reclaim with a gun. Likewise, the cases outlined above all deal with “provocative” claims of sexual dissatisfaction or female adultery. Are these libidinal passions signs that “sexual prowess and assertiveness are often central to the male role in [honor] cultures”? While this individual figure of the sexually potent husband needs to be distinguished from the chaste collective entity concerned by honour crimes, it is interesting to note that in both instances, “honor is the desire to control women’s sexuality,” as the Crown attorney had Professor Shahrzad Mojab testify in the Shafia trial. In all the above-mentioned Canadian cases, what seemed to be at play is nothing less than “the right to be treated as a full or equal member of the honor group,” a defining characteristic of honour crimes.

In addition to the figure of the sexually potent and reasonable, collected husband, there are other layers of male honour worth exploring. For instance, Victoria Nourse, in a description of the provocation defence as a “partial defence of honour,” links provoked anger with a vision of the family as male property:

To maintain a legal defence of reasonable passion in these circumstances [where a woman was murdered while trying to end her relationship], the criminal law supports, even if only in a partial way, the killer’s sense of entitlement to maintain a connection she has severed. What has passion become but an odd yet resilient version of an older regime of marital unity?

The provocation claims put forward by defendants like Thibert thus emerge as cultural claims tied to male dominion of the family. No-fault divorce being a fairly recent legal innovation in Canada, family life has been profoundly shaped by the cultural figure of the male dominator, long fostered by restrictive divorce laws and the influence of the marital unity doctrine, which essentially entailed for wo-

122 Vandello & Cohen, supra note 31 at 998.
126 In 1968, the Divorce Act, RSC 1970 c D-8 replaced the “patchwork of regimes that included received colonial law and the declaration in the Civil Code of Lower Canada of 1866 that marriage was dissolved only by death.”: Robert Leckey, “What Is Left of Pelech?” in Jamie Cameron, ed., Reflections on the Legacy of Justice Bertha Wilson (Markham: LexisNexis Canada, 2008) 103 at 104.
men the loss of most property and civil rights upon marriage. These claims to property over the wife and the family “allow men to dictate which of their wives’ actions are and are not acceptable.” This may entail differentiated attitudes towards male and female infidelity, which may portray the latter as a greater affront to the proprietary view of the family. This is dramatically illustrated by the figure of Mr. Samson, the estranged (Canadian) husband kicking the door open in a women’s shelter with a gun in one hand and a gas tank in the other, demanding to be told where his wife is.

Undoubtedly, passion exists not in the abstract but is conditioned by the culturally situated and socially constructed “loyalties created by intimacy.” Given the West’s historically patriarchal vision of the family, it is not surprising that provocation has often been found in “trivial acts or insults or when women tell men they are leaving a relationship.” Thus, there is strong evidence that courts, in applying the defence of provocation, have at times sanctioned deeply cultural notions of marital unity and (individual) male honour. Furthermore, they have sometimes “elevated jealous husbands to a class or group with special characteristics that must be considered when determining if murder was a reasonable response to a deceased’s words.” This seems to belie the claim that “honor values are exclusive and particularist and stand in sharp contrast to the universal and inclusive val-

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135 The defence has also been exposed as promoting homophobic violence, a critique which we are not able to fully address here. See Robert B Mison, “Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation” (1992) 80:1 Cal L Rev 133; Kathleen Banks, “The ‘Homosexual Panic’ Defence in Canadian Criminal Law” (1997) 1:5 Criminal Reports 371. This underlines the defence’s permeability to notions of heterosexual male honour.

136 Wayne Gorman, “Provocation: The Jealous Husband Defence” 42 Crim LQ 478 at 499 [emphasis added].
ues of the West.” As we have argued, the defence may promote the particularist claims of honour, which are rooted in cultural notions of male dominion over the family. Viewed in this light, the objective “ordinary person” component of the defence is nothing but an “anthropomorphic expression of the standard of conduct that our society expects of its members.” The “ordinary person” test highlights courts’ role as a “cultural apparatus,” in that it forces them to give context to their legal conception of “ordinary.” Moreover, it is “social and cultural norms [that] determine the acceptances of violence in certain situations.” It should not come as a surprise, then, that cultural notions of male honour should resurface in the adjudication of femicides. This led some authors to describe the provocation defence as an “Anglo-American cultural defense” and as a “dominant cultural defence.”

Admittedly, the forms that femicides take in different parts of the globe cannot be perfectly equated. For instance, the discursive functions of “honour” vary greatly across cultures and may be more explicitly tied to women’s sexual conduct in certain cultures and languages. Moreover, most honour crimes defences applied throughout the generally non-Western world are exculpatory justifications and not mere excuses that serve to substitute manslaughter for murder. Their legitimization of violence is thus certainly more effective. Nonetheless, the private forms that honour takes and the violence that is sometimes unleashed under the guise of universalistic passion must not be eluded. These phenomena are also concerned with some form of honour, however ignored and pushed to the “private” sphere. Intimate passion crimes are thus a particularly important locus of public policy and gender equality concerns. After all, the often denounced subjectivization

138 Macklem, supra note 86 at 130, n 22.
143 Such seems to be the case in Turkey, where the discursive figure of honour is rooted in complex linguistic schemes: Aysan Sev’er & Gökçeçeyçek Yurdakul, “Culture of Honour, Culture of Change: A Feminist Analysis of Honour Killings in Rural Turkey” (2001) 7: 9 Violence against Women 964 at 973.
144 Goldstein, supra note 22 at 31.
of the defence in cases like *R. v. Thibert*\(^{145}\) arguably offers women no more protection than the honour codes of the British medieval provocation defence.\(^{146}\) Furthermore, Western “crimes of passion” may sometimes be even more dangerous than traditional Oriental honour crimes, based as they are on unstated private honour codes, which are not mediated by the “community” and whose requirements are not openly stated.\(^ {147}\) If it is true that honour and passion are two different realities, it is only by acknowledging the West’s own cultural demons that we will be able to begin to understand the ways in which both passion and honour have been mixed and articulated in myriad ways across the East/West divide.

### 4. ADJUDICATING PASSION AND HONOUR IN CANADA

This section assesses the reception and legal treatment of honour crimes and femicide in Canada. We have collected and analyzed a series of Canadian cases of intimate femicide in which the male defendants (the victim’s spouse,\(^ {148}\) brother, or father) raised the provocation defence.\(^ {149}\) We have classified 56 cases, whose citations are included in Appendix A, according to the ethnic background of the defendants and the success or failure of the defence.\(^ {150}\) In so doing, we hoped to test out whether Canadian courts generally register and take into account the hybridity of honour outlined in this article, and whether the media emphasis on the otherness of honour translated into differential treatment of defendants based on their ethnic background.

Our sample spans the period from January 1990 to January 2010, and includes only the cases which have been appealed to provincial courts of appeal or to the Supreme Court of Canada, which are more widely reported and less numerous than uncontested trial decisions.\(^ {151}\) With regards to the criterion of ethnicity, we considered as “other”(ed) defendants of Asian, Middle-Eastern, and Aboriginal back-

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\(^ {146}\) As argued by Abu-Odeh, “Comparatively Speaking” supra note 1 at 305.

\(^ {147}\) As argued by Baker, Gregware & Cassidy, supra note 117 at 179.

\(^ {148}\) We adopted a large definition of “spouse”, including men who killed not only their wives but also their common law partners and even their girlfriends. We did not include the many cases in which an angry/dishonoured man kills his paramour, or any other man for that matter. However, this was neither due to lack of interest nor of relevance to the ideas of honour and passion. As mentioned above, the phenomenon of men killing other men over the body of a woman was at the core of Canadian provocation law, most notably in the seminal *Thibert* case. A study that incorporates these killings, while falling outside the ambit of this article, is necessary.

\(^ {149}\) Cases were researched using Quicklaw, Westlaw Canada and CanLII databases.

\(^ {150}\) We did not include cases where the accused raised not the provocation defence but only the *anger defence*. The latter was accepted by courts to negate the criminal intent for murder until the Supreme Court rejected it in 2001’s *R. v. Parent*, 1 SCR 761. See Gary T Trotter, “Anger, Provocation, and the Intent for Murder: A Comment on *R. v. Parent*” (2002) 47 McGill LJ 669.

\(^ {151}\) As argued by Cynthia Lee, “‘Murder and the Reasonable Man’ Revisited: A Response to Victoria Nourse” (2005) 3: 1 Ohio St J Crim L 301 at 303, n 10.
ground. Perhaps more debatable is our inclusion in this category of defendants of Slovakian, Hungarian and (southern) Italian background, who may be neighbouring the constructed border between East and West but nevertheless reflect a tangible pattern of social marginalization. Relying on the names of the parties and the information given on them, we classified those who presented no “foreign” element by default in the “Western”/Canadian category. As far as the outcome of the raising of the defence, given that we dealt with cases that have been appealed, we relied on the appellate court’s decision on whether the defence should have been submitted to the jury (and thus of whether there was an “air of reality” to it). When the appeal concerned other aspects of the case, we relied on the trial court’s untouched original decision on the merits of the provocation claim.

<table>
<thead>
<tr>
<th>Ethnic Background</th>
<th>Number of Cases</th>
<th>Defence Allowed</th>
<th>Defence Dismissed</th>
<th>Success Rate of Defence</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Western”</td>
<td>36</td>
<td>9</td>
<td>27</td>
<td>25%</td>
</tr>
<tr>
<td>“Other”(ed)</td>
<td>18</td>
<td>2</td>
<td>16</td>
<td>11%</td>
</tr>
<tr>
<td>Total</td>
<td>54</td>
<td>11</td>
<td>43</td>
<td>20%</td>
</tr>
</tbody>
</table>

The data seems to confirm Isabel Grant’s empirical finding that “judges following that decision [R. v. Thibert] have applied the defence cautiously, and juries do not often accept the defence.” This is reflected in our low success rates for both Western and Other(ed) defendants. Our global success rate of 20% mirrors the 19% Grant has found in her study of 37 provocation cases spanning approximately the period of 1990–2010. However, and most importantly, our success rate is differentiated and significantly higher for defendants identifiable as Western. This study thus concurs with Côté, Sheehy & Majury that there seems to be among Canadian courts “a pattern of withholding ‘compassion’ for a certain category of accused.” This disparity of treatment is of particular concern in Canada, where as

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152 Ethnic background has been analyzed from the information contained in the judicial reasons, and further researched through internet newspaper databases and media coverage of the cases. Websites dedicated to publicizing the situation of missing/murdered women in Canada were also useful to gather further information on some of the cases.


154 Ibid. at 809.

in some other Western countries “racialized minorities” have particular access to justice issues which pertain to insufficient “internalization of the social structure of that society.” Furthermore, members of racialized communities have been found to be overrepresented in the criminal justice system in part because of racial profiling. This differentiation should be a great cause of concern, especially since there is some evidence that “immigrants” are statistically less prone to crime than “nationals.”

For a number of reasons, caution is required when interpreting this data. For one, our pool of cases is quite small, and the decision to focus on appeals may favour dismissals of the defence because of the relatively wide appeal rights defendants have that the Crown lacks. Furthermore, the multiple re-trials that go unreported and shifting case-law on diverse uses of the provocation defence as a sentencing principle and as an autonomous “anger” defence can influence the results. That being said, these caveats apply equally to both categories of defendants. Thus, they do not have the potential to significantly alter the relative success and failure rates we have. Moreover, the correlation between ethnicity and success rate is most likely to actually be stronger than what we have found. Indeed, by default, cases where no mention was made of a particular “other” ethnic origin, and about which we could not find media coverage, were included in the “Western” category. The mere names of the parties often have no “foreign” connotation yet their ethnic background might draw “othering” stigma. Therefore, some might pick up our research where we left it and further dissect the cases in order to test out this correlation. This article is intended as a contribution to the empirical study of the legal phenomena of passion and honour. If we have indeed only touched the tip of the iceberg, the results we bring nevertheless underline the existence of a pressing problem for further study. Our conclusion for the time being is that, probably because of the discourse denying the persistence of honour-tainted gender violence in the West, the defence of provocation has been applied differentially on Canadians and “foreigners,” reinforcing the portrayal of East and West as mutually exclusive entities.

Let us now take as a case-study one of the cases of our sample, the Court of Appeal for Ontario’s ruling in R. v. Humaid. This much-commented case will


159 For instance, the lower success rate of non-Western defendants may be in part due to other factors unrelated to judges’ predispositions, such as comparatively poorer legal representation.

allow us to outline how Canadian courts deal with honour crimes. Abdel Humaid was convicted by a jury of first-degree murder in the stabbing death of his wife, Aysar Abbas. Both lived in the United Arab Emirates, but were visiting Canada at the time of the murder. A business woman, Aysar traveled frequently for her work. Knowing that Aysar would be in Ottawa on business and also to visit their son, who was attending the University of Ottawa, Abdel Humaid planned a trip to Ottawa without telling anyone. According to the evidence put before the court, Mr. Humaid suspected that his wife had an intimate relationship with a male business associate in Ottawa, and the prosecution maintained that Mr. Humaid traveled to Ottawa unannounced with the specific intention of committing the murder. Mr. Humaid claimed that he made the last-minute decision to take the trip when he learned that his son was using marijuana, and that he lied to friends and relatives in the UAE because he did not want the word about his son’s drug use to spread.

Mr. Humaid and Ms. Abbas went for a drive together to run some errands and eventually ended up on a deserted country road. Mr. Humaid claimed that they got lost. A witness called the police after he saw the two along the road, first with Ms. Abbas running away from Mr. Humaid, and then with Mr. Humaid sitting astride her prone body. Mr. Humaid stabbed her at least 19 times. He was arrested when he attempted to return the rental car on his way to the airport. He unsuccessfully raised the defence of provocation with marked “cultural” overtones, and assigned Dr. Ayoub, “an expert on the Islamic religion and culture,” to support his provocation claim. Dr Ayoub “testified that the Islamic culture was male dominated and placed great significance on the concept of family honour” and that this contributed to provoking Mr. Humaid’s violent outburst. The Court of Appeal found that there was no air of reality to the defence and maintained the verdict of murder, refusing to grant consideration to Mr. Humaid’s “beliefs” to reduce the verdict to manslaughter. As put by Doherty J.A.:

The difficult problem, as I see it, is that the alleged beliefs which give the insult added gravity are premised on the notion that women are inferior to men and that violence against women is in some circumstances accepted, if not encouraged. These beliefs are antithetical to fundamental Canadian values, including gender equality.

Although it is too early to say with certainty, this pronouncement from an appellate court sounds much like the decisive closing of the door on the possibility of raising a successful defence of provocation in cases of honour crimes. Mr.

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161 Ibid. at para. 67.
162 Ibid.
163 Ibid. at para. 93.
164 There is more and more evidence that such a defence will not succeed. For instance, the defence was not accepted in in R. v. Sadiqi, 2009 CarswellOnt 4140, 68 C.R. (6th) 346 (Ont. S.C.J.), in which the defendant was charged with first degree murder in the deaths of his sister, Khatera, and her fiancé, Feroz Mangal, who had been engaged in a way that violated Mr. Sadiqi’s conception of family honour. Similarly, in R. v. Nahar, upon convicting the defendant guilty of second degree murder of his wife because she spoke to men, smoked, and consumed alcohol, Justice Fraser stated that it was ‘not clear to me what kind of familiar insult offered up one last time might provoke the
Humaid was sentenced to life imprisonment with no eligibility for parole for 25 years, as required by the Criminal Code. While we wholeheartedly agree with the Court of Appeal on the outcome of the case and unequivocally condemn such oppressive gendered violence, we are concerned about the reasoning behind the judgement, in contrast with other cases such as R. v. Thibert and R. v. Stone. As argued by Isabel Grant:

The Court of Appeal in Humaid is recognizing the importance of gender equality in attributing qualities and characteristics to the ordinary person. One would be hard pressed to argue that the kind of stereotypical misogyny, depicted in Humaid’s evidence as ordinary in his culture, should be incorporated into an objective test in order to excuse spousal murder. What is not mentioned, however, is how courts assume the ordinariness of the values demonstrated in cases like Thibert and Stone. Thibert did not need to argue that his proprietary view of his wife was consistent with typical Canadian cultural beliefs or with gender equality. Stone’s reaction, losing his control, and stabbing his wife over 40 times after verbal provocation regarding the paternity of his children, is never examined in light of whether such a defence is consistent with gender equality in Canada.

This selective insistence on gender equality is problematic in that, as argued by Anna Korteweg in this special issue, it has the potential to considerably impair our ability to advance this very notion, by harvesting the idea that the solution lies merely in better affirmation of “Canadian values” through immigration law and criminal law, instead of large-sale, grassroots policies of women empowerment. Thus, as argued by Boaventura De Sousa Santos, we should be attentive not only to what a given discourse reveals but, most importantly, to what it conceals and displaces. Moreover, the recurrent phenomenon of immigrants bringing expert witnesses to court to explain their behaviour reveals but, most importantly, to what it conceals and displaces. For instance, in Sadiqi, the trial judge admitted expert evidence from Prof. Shahrzad Mojab, who testified on “the concept of ‘honour killings’ and its reality in Afghanistan and elsewhere in the world.” Justice Rutherford stated that “the understanding of why the killing was done may render this kind of expert evidence very important” and characterized ordinary person, but what Mr. Nahar described does not measure up to it.” (2002 BCSC 928, 2002 CarswellBC 1459 at para. 33) The Court of Appeal unanimously affirmed the decision (2004 BCCA 77, 2004 CarswellBC 299, 181 C.C.C. (3d) 449, 20 C.R. (6th) 30). On the state of the provocation defence in Canadian law, see our discussion of R. v. Tran, infra note 187 and accompanying text.

165 Grant, supra note 153 at 813.
168 Sadiqi, supra note 164 at para 29.
169 Ibid. at para. 43.
Prof. Mojab’s evidence as “relevant social context knowledge.” While this is undoubtedly the case, why is it that almost none of the provocation claims by white Canadians presented in Appendix A benefitted from the testimony of experts on femicide and homicidal violence? Perhaps this negation of the cultural nature of Western homicides can be tied to Leti Volpp’s critique of the idea of “pathological cultures,” which implies that some cultures are somehow more prone to violence than others. Furthermore, Sonia Lawrence’s analysis reveals that cultural information is often “considered only against the unarticulated, unexamined norm of North American mainstream culture.” As we have seen, however right the harsh punishment of honour crimes may be, this has the potential to conceal Western femicidal behaviour, an unintended consequence we should be wary of.

Our argument should not be mistaken to advocate a so-called “cultural defence” in criminal trials. Resorting to such a defence in the context of honour violence would not only promote essentialist views of the barbarism supposedly inherent to “other” cultures, but it would also amount to condoning repulsing acts of gendered violence. We have also purposely abstained from contributing to the debate on whether the provocation defence should be applied in consideration

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170 Ibid. at para. 47.
173 This option, whereby a person could take advantage of this defence if he or she could prove the act was committed because it was necessary according to their cultural or religious practices or beliefs, was once considered by Canadian policy makers: see Canada, Department of Justice, Proposals to Amend the Criminal Code (General Principles) (Ottawa: Department of Justice, 1993); Parliamentary Sub-Committee on Recodification of the General Part of the Criminal Code, First Principles: Recodifying the General Part of the Criminal Code of Canada (Ottawa, 1993); Canada, Department of Justice, Reforming the General Part of the Criminal Code: A Consultation Paper (Ottawa: Department of Justice Canada, 1994) at 23-4. Fortunately, Parliament did not accept this oft-suggested reform: Charmaine M Wong, “Good Intentions, Troublesome Applications: The Cultural Defence and Other Uses of Cultural Evidence in Canada” (1999) 42 Crim LQ 367 at 368.
of the defendant’s cultural background as part of the objective standard test. Instead of the characteristics courts are said to consciously consider, we have attempted to shed light on the unstated assumptions that sometimes guide judicial reasoning, following what the Supreme Court of Canada called the “sage common law adage that it is wise to look at what the courts do as distinguished from what they say.”

We are inspired by Brenda Cossman’s endeavour of “turning the gaze back on itself” to grasp the intertwining of cultures and identities, all the while acknowledging the profoundly condemnable nature of honour crimes. Like Cossman, we aim to position ourselves “somewhere in between un-self critical ethnocentrism and hyper-self critical cultural relativism.” This stance led us to disbelief and awe towards some politicians and columnists’ aggressive campaigning against honour violence. If the hypotheses we have explored in this article are even remotely accurate, then we should examine more closely, in addition to the horrifying honour practices which our legal concepts have shed light on, the equally horrifying practices which our “ordinary person” seems to accommodate. This critique of law’s constitutive effects on the West’s perception of itself must go hand-in-hand with any policy work towards the prevention and elimination of femicides, honour crimes, and violence against women.

5. CONCLUSION

Crimes of honour may well be a decisive issue in the encounter between East and West. This phenomenon critically engages our ability to grasp the ways in which legal discourse on honour crimes has functioned as “a site for contestations that succeed in displacing the place of violence in such spaces of law.” This displacement of violence from the West to the East seems to have taken hold in some parts of the Canadian judiciary. In this context, we agree that the assumption of a “monoculturalism of transcendent values with a ‘we’ or ‘us’ at an unwavering center of rationality [is] historically inaccurate, relying upon distortions and marginalizations for its narrative coherence.” We have attempted to uncover the latent manifestations of honour in universal norms of rational behaviour, elements which have been to some degree downplayed by Canadian courts. This is of concern to us, not only because it impairs our understanding of pressing social problems, but also for the practical reason that it could diminish the credibility of

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the all-important global campaign against honour crimes and gender violence.\textsuperscript{180} Thus, instead of artificial binaries, there seems to be a “passion/honour continuum”\textsuperscript{181} in need of uncovering. However, acknowledging this continuum does not mean that we can spare ourselves the sociological ideal-typing of honour crimes. As Korteweg and Yurdakul argue, crimes of honour present unique sociological characteristics which must be acknowledged for tailored, efficient prevention policies to be established.\textsuperscript{182} Nevertheless, taking into account the sociological distinctness of Eastern honour violence “need not mean belittling other forms of abuse against women, including those taking place in the West.”\textsuperscript{183}

In our discussion, we have not examined the possibility of abolishing the provocation defence, a topic which lies beyond the scope of this article. We note in passing that the costs and benefits of this move would have to be examined closely.\textsuperscript{184} Such an enquiry would have to take into account the possibility that the problems raised by the defence could also be found in other legal institutions which have recourse to an objective “reasonable person” standard, such as negligence and tort law.\textsuperscript{185} This defence may turn out to be symptomatic of deeper contradictions which cannot be abolished and must be explored, acknowledged, and met with the “contextual analysis of the quality of the normative choice that particular interactions reveal.”\textsuperscript{186} We also note that the recent Supreme Court decision \textit{R. v. Tran}\textsuperscript{187} may well lead us towards a further reduced role for the provocation defence. After a recap of the Supreme Court case-law pertaining to the defence of provocation, Madame Justice Charron established with the unanimous agreement of the Court a newfound stringency for the objective part of the provocation test:

\begin{quote}
[The] criminal law is concerned with setting standards of human behaviour.
\end{quote}

\textsuperscript{180} This campaign is sometimes denounced as lacking “cultural sensitivity” (Yolanda Asamoah-Wade, “Women’s Human Rights and ‘Honor Killings’ in Islamic Cultures” (1999-2000) 8 Buff Women’s LJ 21 at 22).

\textsuperscript{181} Welchman & Hossain, \textit{supra} note 109 at 12.


\textsuperscript{186} \textit{Ibid.} at 316.

. . . It follows that the ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the Canadian Charter of Rights and Freedoms. . . . [T]here can be no place in this objective standard for antiquated beliefs such as “adultery is the highest invasion of property”, nor indeed for any form of killing based on such inappropriate conceptualizations of “honour.”188

This development does not indicate a bright future for the provocation defence. Hopefully, this judgement echoes the paradigmatic shift of incorporating equality in the law of criminal responsibility advocated by scholars such as Rosemary Cairns Way.189 On a deeper level, perhaps it can also help us come to terms with the dark sides of “Western culture.” The role of the expert witness of revealing “the premises which underlay the behavior of the persons whose actions are being explored in the course of the proceedings”190 could be useful in this regard, both in Western and foreign contexts. Recently, the Court of Appeal for Ontario issued an interesting ruling on the admissibility of expert evidence to understand the honour badges and practices of the (Canadian) biker culture of the criminal underworld.191 Such attempts to better understand violent social contexts in Canada are certainly to be welcome. Let us hope that this trend will be reinforced by the Tran ruling, allowing Canadian courts to “turn the gaze back on itself” and to grasp the far-reaching implications of globalization, colonialism, and socio-legal métissage for the Western Self and its many “Others.”

188 Ibid. at para. 34 [references omitted].
Appendix A: — Cases Involving Femicide and the
Provocation Defence

A. Successful Claims by Defendants of “Western” backgrounds

CarswellOnt 1178, 83 C.C.C. (3d) 193 (Ont. C.A.); R. v. Montgomery, 1997
CarswellAlta 745 (Alta. C.A.); R. v. Stone, 1999 CarswellBC 1064, 1999
Moïse, 1999 CarswellQue 2102 (Que. C.A.); R. v. Edgar, 2000 CarswellOnt 120,
142 C.C.C. (3d) 401 (Ont. C.A.); R. v. Cairns, 2004 BCCA 219, 2004 CarswellBC
828; leave to appeal refused 2005 CarswellBC 469, 2005 CarswellBC 470 (S.C.C.);
2010 ONCA 812, 2010 CarswellOnt 8960.

Total: 9 cases
Success Rate: 25%

B. Unsuccessful Claims by Defendants of “Western” backgrounds

CarswellOnt 1049 (Ont. C.A.); R. v. Young, 1993 CarswellNS 139 (N.S. C.A.); R.
v. Hanna, 1993 CarswellBC 1138 (B.C. C.A.); leave to appeal refused 91 C.C.C.
(3d) vi (S.C.C.); R. v. Allegratti, 1994 CarswellOnt 2438 (Ont. C.A.); leave to
appeal refused 77 O.A.C. 319 (note) (S.C.C.); R. v. Laporte, 1994 CarswellMan 231,
89 C.C.C. (3d) 486 (Man. C.A.); affirmed 1995 CarswellMan 316, 1995 Carswell-
Man 316F, 94 C.C.C. (3d) 480 (S.C.C.); R. v. Svereda (November 1, 1995),
Ont 1765 (Ont. C.A.); R. v. Munroe, 1995 CarswellOnt 19, 38 C.R. (4th) 68, 96
C.C.C. (3d) 431 (Ont. C.A.); affirmed 1995 CarswellOnt 989, 1995 CarswellOnt
1995 CarswellNB 481 (N.B. C.A.); affirmed 1995 CarswellNB 191, 1995 Carswell-
CarswellYukon 11 (Y.T. S.C.); R. v. MacRae, 2000 BCCA 149, 2000 CarswellBC
CarswellBC 442, 156 C.C.C. (3d) 421, 44 C.R. (3rd) 190; leave to appeal refused
30, 2001 CarswellQue 851, 2001 CarswellQue 852, [2001] 1 S.C.R. 761, 154
C.C.C. (3d) 1, 41 C.R. (5th) 199; new trial ordered (November 23, 2001), Doc.
200-01-019736-960, [2001] J.Q. No. 6833 (Q.C. C.S.); affirmed (November 1,
CarswellBC 1391, 176 C.C.C. (3d) 408; R. c. Bilodeau, 2003 CarswellQue 1401
(Que. C.A.); leave to appeal refused 2004 CarswellQue 4, 2004 CarswellQue 5
(S.C.C.); R. v. McDonald, 2007 BCCA 224, 2007 CarswellBC 1750; R. c.
Gosselin,

Total: 27 cases

C. Successful Claims by “Other”(ed) Defendants


Total: 2 cases

Success Rate: 11%

D. Unsuccessful Claims by “Other”(ed) Defendants


Total: 16 cases