

A Tale of Two Cultures: Intimate Femicide, Cultural Defences  
and the Law of Provocation

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Paper prepared for presentation to the Annual Meeting of the Canadian Political Science  
Association, Ottawa, Ontario  
27 May 2009

Draft Copy: Do not cite without the permission of the author.

In pluralistic societies such as Canada's, the issue of cultural defences receives significant scholarly attention. Much of this scholarship focusses on the concern that allowing individuals to offer cultural arguments to excuse illegal behaviour inevitably will serve to discount the rights of women by offering judicial sanction to the patriarchal values that characterize minority cultural communities. On this view, the greatest danger of using culture in the courtroom is the prospect that violence against women, including femicide, will go unpunished or inadequately punished. Of course, this is not the only concern raised by students of cultural defences. Critical race feminists, for example, argue that women will not be the only casualties of culture in the courtroom. Minority group cultures will be similarly victimized by the colonial discourses that are certain to emerge where the courts of the dominant society encounter cultural arguments.

In Canada, the anticipated outcomes of considering cultural claims is not merely a theoretical exercise. Canadian criminal courts already have been faced with cultural arguments, raised in support of the defence of provocation. Provocation defences, which, if successful, reduce murder to manslaughter, are no stranger to controversy themselves, and have long been the subject of feminist criticism for their patriarchal basis and application. Indeed, in many cases, men have succeeded in claiming provocation where they killed a female partner in the 'heat of passion' upon realizing (or merely suspecting) that their partner had been unfaithful or where the female partner had decided to terminate their romantic relationship. The law of provocation is a particularly appealing candidate for assessing cultural defences because recent changes to the legal test for establishing the defence have seemingly opened the door to cultural claims. Indeed, Canadian courts already have been asked to accept cultural arguments in cases of intimate femicide to support an accused's claim of provocation.

For feminist scholars who study cultural defences, the combination of these two dynamics is cause for great concern. Indeed, many feminists contend that aligning a defence that has long excused male violence against women with the ability of an accused to lead evidence regarding the patriarchal values of his culture is likely to produce judicial outcomes that are governed by the logic of 'race before gender'. This paper seeks to test this and other hypotheses regarding cultural defences by examining the small, but important, body of case law where cultural defences were raised as part of a provocation defence in the context of intimate femicide where the claimed provocative act was infidelity or romantic rejection. The results of this examination are mixed. While some of the common assumptions about culture in the courtroom are affirmed, others are not. Notably, the fear that introducing culture to the courtroom will put race before gender is not borne out. Instead, the Canadian jurisprudence is better represented by a different ordering principle - that of colonialism before patriarchy.

This discussion will proceed in three parts. The first part of the paper focusses on the history of the provocation defence and its patriarchal roots, as well as its contemporary application in the context of intimate femicide. The defence has long been relied on to excuse men who murder women and continues to be invoked by men who kill their female partners in the context of romantic rejection. The second part of the paper turns its attention to the evolution of the law of provocation and the way that changes to the principles of the defence have opened

the door for the introduction of cultural arguments. The dangers and concerns identified about using culture in the courtroom also are addressed here, paying particular attention to the various hypotheses students of cultural defences advance about the likely outcomes of considering cultural arguments where violence against women is at issue. The final part of the paper assesses these hypotheses by examining the judicial record of Canadian courts in cases of intimate femicide where cultural arguments were advanced by the accused to support a provocation defence.

### ***Anger as Moral Outrage: Provocation and the Honourable Man of Virtue***

The law of provocation is said to exist as a concession to human frailty. It does so by providing a partial defence to murder for those who kill in ‘the heat of passion’.<sup>1</sup> The law of provocation seeks to recognize that even reasonable people may find themselves in circumstances that prompt them to kill in the midst of a homicidal rage.<sup>2</sup> The defence, as it presently is conceived, reduces murder to manslaughter in cases where a killing was the result of a loss of self-control by an accused who was “temporarily carried off into the kind of frenzy” that is capable of putting a person “beyond the control of reason.”<sup>3</sup> Accordingly, provocation defences are premised on the idea that an excess of anger can rob a person of her faculty of reason, leaving passion “unbridled or ‘ungoverned’.”<sup>4</sup>

However, as Jeremy Horder explains, the history of the defence tells a different story. Rather than setting passion and reason against one another to explain a person’s loss of self-control, the modern law of provocation, whose foundations were laid in the 17<sup>th</sup> Century, was based on the notion of honour and a very different conception of anger. The early modern notion of anger was not connected to a lack of reason or self-control; anger was associated with the moral outrage that was experienced by “the honourable man of virtue” who was wronged, whose self-worth and honour were threatened.<sup>5</sup> Upon such an affront, the honourable man of virtue had but one choice - “to show himself to be a man of spirit and honour by revenging the offence.”<sup>6</sup> On this view, a vengeful act in the face of provocation was not a reflection of reason’s absence or a loss of self-control. What was honourable and what was reasonable were one and the same. As Jeremy Horder explains, “in the honourable man of virtue, the desire for a certain retaliatory

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<sup>1</sup>Isabel Grant, Dorothy Chunn and Christine Boyle, *The Law of Homicide* (Scarborough: Carswell, 1994) at 6-3.

<sup>2</sup>A. J. Ashworth, “The Doctrine of Provocation”(1976) *Cambridge Law Journal* 292 at 292. The defence also provided a way for judges to avoid the mandatory death penalty for homicide. Joshua Dressler, “Rethinking Heat of Passion: A Defense in Search of a Rationale” (1982) *Journal of Criminal Law and Criminology* 421 at 422-23.

<sup>3</sup>Jeremy Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992) at 75.

<sup>4</sup>*Ibid.* at 74.

<sup>5</sup>*Ibid.* at 72 and 192.

<sup>6</sup>*Ibid.* at 39.

suffering and the amount of retaliation reason dictates as appropriate are the same; for in him, passions speak with the same voice as reason.”<sup>7</sup>

As the law developed, judges sought to limit the kinds of provocative acts that an accused could rely on to invoke provocation. Not all provocative or unlawful acts could reduce murder to manslaughter and not all killings, such as those that were the result of “pure cold-blooded revenge,” were considered deserving of leniency.<sup>8</sup> There had to be a wrongful, provocative act that was sufficiently grave to warrant invoking the defence and, thus, there had to be some objective criteria for setting the parameters of “socially-adequate provocation.”<sup>9</sup> Four categories of provocation emerged, one of which was a husband seeing a man in the act of adultery with his wife.<sup>10</sup> Early provocation cases almost always involved the killing of the husband’s male rival, not the man’s wife, undoubtedly reflecting the view that wives were the property of their husbands and should not be blamed for having been seduced since they were not capable of rational decision making.<sup>11</sup> That the adultery category of the defence accepted this proprietary rationale is beyond dispute. As explained in *Mawgridge*, discussing adultery as one of the four categories of sufficient provocation, the court had this to say on the matter: “Fourthly, when a man is taken in adultery with another man’s wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of the man, and adultery is the highest invasion of property.”<sup>12</sup>

Based on the conceptualization of wives as property, the defence was neither available to wives who might kill in the heat of passion, because a husband’s sexual infidelity was not considered wrongful at law,<sup>13</sup> nor to a man who killed upon finding his fiancée with another, because he could have no legal claim over the unmarried woman.<sup>14</sup> The seduction of another

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<sup>7</sup>*Ibid.* at 72-73.

<sup>8</sup>*Ibid.* at 23.

<sup>9</sup>Grant, Chunn and Boyle, *supra* note 1 at 6-21.

<sup>10</sup>Ashworth, *supra* note 2 at 293; Horder, *supra* note 3 at 24. The other categories of provocation were mutual combat, false arrest and violent assault. *R. v. Mawgridge* (1707) Kel. 119 [*Mawgridge*].

<sup>11</sup>Horder, *ibid.* at 24, n. 8.

<sup>12</sup>*Mawgridge*, *supra* note 10 at 137.

<sup>13</sup>Andrée Côté, Diana Majury and Elizabeth Sheehy, *Stop Excusing Violence Against Women: NAWL’s Position Paper on the Defence of Provocation* (April 2000) at 10, online: National Association of Women and the Law (NAWL) (2008), <[http://www.nawl.ca/ns/en/documents/Pub\\_Report\\_Provoc00\\_en.pdf](http://www.nawl.ca/ns/en/documents/Pub_Report_Provoc00_en.pdf).

<sup>14</sup>Joshua Dressler, “Provocation: Partial Justification or Partial Excuse?” (1988) 51 *Modern Law Review* 467 at 474. As explained by Côté, Majury and Sheehy, “until the First World War only married men could ‘justifiably’ be provoked by a spouse’s infidelity; that ‘right’ was not granted to men in relation to mistresses or girlfriends over whom they had no legal ‘claim’.” Côté, Majury and Sheehy, *ibid.* at 5.

man's *wife*, however, was considered the highest form of provocation. That being said, it was not enough that a husband know of his wife's infidelity for the purposes of the defence. Adequate provocation required an element of suddenness. A husband only could rely on the defence if he first learned of the affair by actually witnessing the adultery. Accordingly, a husband could not avail himself of the defence if he killed his wife's lover upon merely hearing of the relationship. Nor could a husband invoke the defence where he knew of the affair and later killed his wife or her lover, even upon finding the two in the act of adultery.<sup>15</sup>

Despite its origins, the partial defence of provocation<sup>16</sup> has come to be associated with a sudden and temporary loss of self-control that deprives a person of the ability to control his or her passion. It is this understanding of the law that is codified in s.232 of Canada's *Criminal Code*.<sup>17</sup> As Victoria Nourse explains in her groundbreaking work on provocation, the curious thing about the defence in its contemporary form is that its parameters have been expanded in ways that place women at greater jeopardy than was the case when the defence only was available to husbands who learned of a wife's infidelity by witnessing the adultery. While, in general terms, law reform has affirmed the rights of women as equal citizens and eschewed notions of women as property, the terrain covered by the law of provocation has expanded to cover jealous boyfriends and simple acts of relationship termination where there is no infidelity

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<sup>15</sup>Ashworth, *supra* note 2 at 294.

<sup>16</sup>R.S.C. 1985, c. C-46 [*Criminal Code*]. Section 232 of the *Criminal Code* reads as follows:

- (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
- (2) 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.
- (3) For the purposes of this section, the questions
  - (a) whether a particular wrongful act or insult amounted to provocation, and
  - (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received, are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.
- (4) [Omitted]

<sup>17</sup>While it is open to an accused to raise the defence of provocation, s.232 does not guarantee that the defence will be left with the jury. The court must determine whether there is an 'air of reality' to the defence; which requires that the trial judge be "satisfied (a) that there is some evidence to suggest that the particular wrongful act or insult alleged by the accused would have caused an ordinary person to be deprived of self-control and (b) that there is some evidence showing that the accused was actually deprived of his or her self-control by that act or insult." Where there is "any evidence upon which a reasonable jury acting judicially and properly instructed could find that the defence of provocation could be applicable in the circumstances," the defence must be left with the jury. *R. v. Thibert*, [1996] 1 S.C.R. 37 at para. 6 and para. 21 [*Thibert*].

involved, or where infidelity merely is suspected.<sup>18</sup>

As one would expect, the defence of provocation has been the target of considerable criticism as a gendered defence that ‘invites compassion’ for male violence against women. The statistics on the use of the defence in the context of spousal homicide certainly bear this out,<sup>19</sup> as do the statistics on spousal homicide in general. Indeed, data based on 2600 spousal homicides recorded in Canada between 1974 and 2000 show that women were the victims in more than 3/4 of those killings.<sup>20</sup> Interesting, too, is the fact that the risk of spousal homicide to women increases significantly upon deciding to terminate a relationship, with actual or imminent separation being highly relevant to risk.<sup>21</sup> Thus, in many cases, it is not infidelity, but the mere act of leaving a relationship that prompts male rage. Here, intimate femicide emerges as “the final assertion of control over the woman”<sup>22</sup> who has decided to exercise her autonomy, “sexual or otherwise.”<sup>23</sup> Thus, mirroring the proprietary norms of old, intimate femicide often is motivated by sexual jealousy and the enduring conception of “partner-as-property.”<sup>24</sup> Women who kill their spouses, on the other hand, usually do so out of out of fear and in response to male

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<sup>18</sup>Victoria Nourse, “Passion’s Progress: Modern Law Reform and the Provocation Defence”(1997) 106 Yale Law Journal 1331.

<sup>19</sup>For example, a Quebec study on spousal homicide found that at least one-third of the men tried for killing their female partners raised the defence, usually during plea-bargaining. The study also indicated that “while 90% of the men who killed their intimate partners were charged with murder, only 18% were convicted of this offence: the majority were instead convicted of manslaughter.” See Côté, Majury and Sheehy, *supra* note 13 at 5.

<sup>20</sup>Valerie Pottie Bunge, “National Trends in Intimate Partner Homicides, 1974-2000” (2002) 22(5) Juristat 1 at 3.

<sup>21</sup>For example, in their 1993 study, Wilson and Daly found that Canadian wives in registered unions “incurred substantially elevated risk” when separated as compared to when coresiding, reporting a ratio of female to male victims in coresiding versus estranged couples of 3.77 to 9.00. Margo Wilson and Martin Daly, “Spousal Homicide Risk and Estrangement” (1993) 8(1) Violence and Victims 3 at 7. This holds true in other jurisdictions. For example, a 2002 U.S. study of actual and attempted femicide found that the victim had chosen to terminate the relationship in 70% of the cases. Annegret F. Hannawa, Brian H. Spitzberg, Liesbeth Wiering and Christy Teranishi, “‘If I Can’t Have You, No One Can’: Development of a Relational Entitlement and Proprietariness Scale (REPS)” (2006) 21(5) Violence and Victims 539 at 539-40. See also Nourse, *supra* note 18.

<sup>22</sup>Côté, Majury and Sheehy, *supra* note 13 at 5. Margo Wilson and Martin Daly similarly conclude, on the basis of their empirical work on spousal homicide, that jealousy and male control are the predominant issues in the spousal homicides of female victims, stating that “violence against wives can best be understood as one outcome of a sexually proprietary masculine psychology, which treats wives as valued sexual and reproductive commodities that might be usurped by rivals. Violence against wives functions to deter wives from pursuing alternative relationships or opportunities that are not in the interests of the husband, whereas violence against male rivals functions to “protect” wives from their attentions, both courtly and coercive.” Wilson and Daly, *ibid.* at 13. See also Pottie Bunge, *supra* note 20 at 7.

<sup>23</sup>Caroline Forrell, “The Meaning of Equality: Sexual Harassment, Stalking, and Provocation in Canada, Australia and the United States” (2005) 28 Thomas Jefferson Law Review 151 at 166.

<sup>24</sup>Hannawa, Spitzberg, Wiering and Teranishi, *supra* note 21 at 541.

violence.<sup>25</sup>

### ***Provocation and Cultural Defences***

The contradiction between the legal affirmation of female personhood and the existence of a partial defence to murder whose roots lie in the conception of women as property continues to confound judicial decision makers who, on the one hand, explicitly refuse to accept that female rejection in the context of a romantic relationship ever can constitute adequate provocation for the purposes of s.232, while arriving at decisions that do just this, on the other.<sup>26</sup> Complicating the landscape of the provocation defence further is the emerging issue of ‘cultural defences’ and, more specifically, the question of whether the cultural background of an accused should be taken into account in considering provocation. The defence of provocation, as codified

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<sup>25</sup>Côté, Majury and Sheehy, *supra* note 13 at 5. While the defence of provocation is identified as a gendered defence in the context of who is most likely to invoke the defence and derive benefit from it, critics also contend that the availability of the defence for hot-blooded killings that occur ‘on the sudden’ codifies a “stereotypically male view of provocation” that “presupposes a sudden flashpoint after an isolated instance of provocative conduct” and, thus, works against the successful application of the defence in spousal homicides committed by battered women. Tim Quigley, “Battered Women and the Defence of Provocation” (1991) 55 Saskatchewan Law Review 223 at 249. See also Laurie J. Taylor, “Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense” (1986) 33 UCLA Law Review 1679.

<sup>26</sup>For example, in *R. v. Thibert*, discussed at length below, the Supreme Court of Canada expressed approval for the principle that an affair does not constitute a wrongful act or insult as contemplated by the defence, yet found that provocation should have been put to the jury where Thibert killed his estranged wife’s lover because the man was interfering with Thibert’s ability to speak privately to his wife so that he could convince her to return to the marriage. *Thibert*, *supra* note 17 at para.64. In *R. v. Cairns*, the accused husband was acquitted by a jury of second degree murder and convicted of manslaughter where Cairns came to believe that his wife had ‘married him for his money’ to support her gambling activities. In *Cairns*, counsel for the accused successfully argued that the “contemptuous rejection of Mr. Cairns’ adoration of his much younger wife” constituted adequate provocation. Cairns, who struck his wife’s head with a hammer and strangled her with a cord, was characterized by the trial judge as a “stalwart member of his community.” *R. v. Cairns* (2004), 62 W.C.B. (2d) 387 (B.C.C.A.) at paras. 7 and 10. There are numerous cases where men have been convicted of manslaughter upon raising provocation where the insult in question was a female partner’s choice to leave the relationship, to embark on a relationship with another man or where the accused believed his partner was consorting with other men. See, for example, *R. v. Krawchuk* (1941), 75 C.C.C. 219 (S.C.C.) (where the accused shot his wife who he believed was having an affair and who had decided to leave her husband); *R. v. Puchalski*, [1962] O.J. No. 162 (C.A.) (QL) (where a wife decided to leave her husband for another man); *R. v. Galgay*, [1972] 2 O.R. 630 (C.A.) (where the accused, who had unlawfully left a reformatory where he was to spend the next year, killed his girlfriend when she told him that she would not wait for him and was seeing another man); *R. v. Eklund*, [1985] B.C.J No. 2415 (C.A.) (QL) (where the accused saw his common law wife’s truck parked outside a biker clubhouse after she had told the accused that she would be home soon); *R. v. McNeil* (1998), C.C.C. (3d) 71 (N.S.C.A.) (where the accused killed the new boyfriend of his common law wife 10 days after she had terminated her relationship with the accused and upon the accused seeing his wife lying in bed with the man, clothed); *R. v. Archibald* (1992), 15 W.C.B. (2d) 522 (B.C.C.A.) (where a man killed his common law wife during an argument about her relationships with other men).

in s.232, includes both objective and subjective<sup>27</sup> elements. The objective element of the test is found in the standard of the ‘ordinary person’ and the Criminal Code provision that defines provocation as “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.”<sup>28</sup> While the propriety of taking the cultural background of an accused into account in assessing the defence’s subjective elements is widely accepted, the role cultural background should play in assessing the ordinary person component of the defence is far more controversial because this objective element of the defence is akin to the original four categories of provocation. It is meant to limit the circumstances under which a person can claim provocation and ensure that the defence is available only where ‘adequate provocation’ exists.

Initially, English and Canadian courts eschewed the particular characteristics of the accused in applying the ordinary person test. Instead, the ordinary person was held out as an abstract, universal standard whose content was neutral respecting issues of race, gender and the like. Subjected to criticism for institutionalizing an allegedly neutral standard that, in reality, reflected the race, gender, religion, sexual identity and culture of the dominant social groups, the ‘neutral’ standard of the ordinary person was charged with failing “to respond to the social realities of each individual” and subjecting “systemically unequal individuals” to a common standard.<sup>29</sup> In the wake of such criticism, courts began to amend the test to include those characteristics of the accused considered relevant to the provocation claim under review.

The new approach to the ordinary person test was first unveiled by the Supreme Court of Canada in its 1986 decision in *R. v. Hill*.<sup>30</sup> In *Hill*, the court stated that characteristics particular to the accused could be taken into account in formulating the requisite ‘ordinary person’, if said characteristics were relevant to the provocative act or insult. As the court explained, where the provocation in question involves a racial slur made to a racial minority accused, “the jury will think of an ordinary person with the racial background that forms the substance of the insult.”<sup>31</sup> In the court’s view, to refuse to consider the accused’s race in the face of a racial slur would “narrow unduly the conception of the ordinary person and rigidly prohibit a consideration of the

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<sup>27</sup>In determining whether the killing was committed ‘on the sudden’ in response to the provocative act or insult and whether the accused committed the killing while he was out of control, before having returned to a controlled state, all of the characteristics of the accused are taken into account. Grant, Chunn and Boyle, *supra* note 1 at 6-21.

<sup>28</sup>*Criminal Code*, *supra* note 16, ss.232(2) .

<sup>29</sup>Grant, Chunn and Boyle, *supra* note 1 at 6-14.

<sup>30</sup>*R. v. Hill*, [1986], 1 S.C.R. 313 [*Hill*].

<sup>31</sup>*Ibid.* at para. 35.



physical characteristics of the accused”.<sup>32</sup> That being said, the court was clear that not every personal characteristic will be relevant when determining if adequate provocation exists; relevance will be dictated by the circumstances. As explained by the court, “the race of a person will be irrelevant if the provocation involves an insult regarding a physical disability. Similarly, the sex of an accused will be irrelevant if the provocation relates to a racial insult. Thus the central criterion is the relevance of the particular feature to the provocation in question.”<sup>33</sup> The principle set out in *Hill* was affirmed by the court in 1996 in *R. v. Thibert*, where the court stated that “if the test is to be applied sensibly and with sensitivity, then the ordinary person must be taken to be of the same age, and sex, and must share with the accused such other factors *as would give the act or insult in question a special significance*. In other words, all relevant background factors should be considered. It is how such an ‘ordinary’ person with those characteristics would react to the situation which confronted the accused that should be used as the basis for considering the objective element.”<sup>34</sup>

This move to vest the ordinary person with the relevant characteristics of the accused has not been uncontroversial, and significant concern has been raised about whether an accused’s cultural background should be considered a ‘factor of special significance’ for the purposes of the ordinary person test. Indeed, concern has emanated from a number of different camps about the possibility of transforming the provocation defence into a cultural defence. While liberal critics criticize the move as a threat to fundamental liberal values and an unacceptable concession to “moral agnosticism and “cultural relativism,”<sup>35</sup> many feminists argue that taking account of culture will jeopardize the rights of women by judicially sanctioning the patriarchal norms that inform minority cultural communities.<sup>36</sup> The concern raised here is that cultural sensitivity will devalue the lives of women who belong to minority cultural communities by excusing violence against them and allowing male perpetrators to invoke culture either to escape responsibility for their wrongdoing or to lessen their punishment.<sup>37</sup>

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<sup>32</sup>*Ibid.* at para. 32. This comment was made by the court in reference to the decision of the Saskatchewan Court of Appeal in *R. v. Parnerkar* (1971), 5 C.C.C. (2d) 11, where the cultural and religious background of the accused was found to be irrelevant to the ordinary person standard. In that case, the accused, who was born in India, alleged that the deceased’s refusal to marry him because he was Black resulted in his loss of self-control.

<sup>33</sup>*Hill, ibid.* at para. 36

<sup>34</sup>*Thibert, supra* note 17 at para. 14, emphasis added.

<sup>35</sup>Horder, *supra* note 3 at 145.

<sup>36</sup>See, for example, Susan Moller Okin, “Is Multiculturalism Bad for Women?” in Joshuan Cohen, Matthew Howard, and Martha C. Nussbaum eds., *Is Multiculturalism Bad for Women?* (Princeton, New Jersey: Princeton University Press, 1999) 9; Doriane Lambelet Coleman, “Individualizing Justice Through Multiculturalism: The Liberals’ Dilemma” (1996) 96 *Columbia Law Review* 1093.

<sup>37</sup>Charmaine M. Wong, “Good Intentions, Troublesome Applications: The Cultural Defence and Other Uses of Cultural Evidence in Canada” (1999) 42 *Criminal Law Quarterly* 367; Pascale Fournier, “The Ghettoisation of Difference in Canada: ‘Rape by Culture’ and the Danger of a ‘Cultural Defence’ in Criminal Law Trials” (2002-

Other scholars who are concerned with the advent of cultural defences, like critical race feminists,<sup>38</sup> are plagued by a different sort of “feminist cultural anxiety.”<sup>39</sup> While they share the concern that cultural sensitivity may negatively impact female victims of intimate violence,<sup>40</sup> they also raise concerns about the potential for the courts of the dominant society to conceptualize minority cultural communities in ways that “reproduce colonial discourses about non-Western people.”<sup>41</sup> Critical race scholars contend that debates about using culture in the courtroom are misplaced; they rest on the mistaken belief that the laws of the dominant society are not culturally informed.<sup>42</sup> Accordingly, problems emerge where the law is taken to be neutral, objective and culture-free and where judicial attention only turns to the role culture plays in shaping human behaviour and the laws that delineate its acceptable legal limits where cases involve members of minority cultural communities.<sup>43</sup> Indeed, as courts consider the cultural contexts of ‘Others’, similar behaviour taken under similar circumstances is assigned very different explanations.

Cases involving intimate violence illustrate this point well. As Leti Volpp explains, when the accused is a member of the dominant cultural community, a husband’s violence is presented as an individual act of aberrant behaviour that is explained by psychology, rather than culture. Yet where the accused is a member of a minority cultural community, his identical behaviour is attributed to his patriarchal culture.<sup>44</sup> Furthermore, at the same time as the accused from the minority cultural community is presented as more “culturally determined”<sup>45</sup> and less capable of

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2003) 29 Manitoba Law Journal 81; Daina C. Chiu, “Cultural Defense: Beyond Exclusion, Assimilation and Guilty Liberalism”(1994) 82 California Law Review 1053; Sarah Song, “Majority Norms, Multiculturalism, and Gender Equality” (2005) 99(4) American Political Science Review 473.

<sup>38</sup>Adopting Maneesha Deckha’s definition, I use the term to refer to feminist scholars, legal and otherwise, who attend both to race and gender in their analyses. See Maneesha Deckha, “The Paradox of the Cultural Defence: Gender and Cultural Othering in Canada,” in Marie-Claire Foblets and Alison Dundes Renteln eds., *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Portland, Oregon: Hart Publishing, 2009) 261 at 262, n. 4.

<sup>39</sup>*Ibid.* at 261.

<sup>40</sup>*Ibid.* at 271.

<sup>41</sup>*Ibid.* at 262.

<sup>42</sup>Leti Volpp, “(Mis)Identifying Culture: Asian Women and the ‘Cultural Defense’” (1994) 17 Harvard Women’s Law Journal 57 at 62.

<sup>43</sup>*Ibid.* at 61-62.

<sup>44</sup>Leti Volpp, “On Culture, Difference and Domestic Violence” (2003) 11(2) American University Journal of Gender, Social Policy and the Law 393 at 395; Leti Volpp, “Blaming Culture for Bad Behavior” (2000) 12 Yale Journal of Law and the Humanities 89 at 90.

<sup>45</sup>Volpp, “Blaming Culture,” *ibid.* at 96.

allowing reason to overcome his cultural biases, his culture is presented as primitive, backward and illiberal, especially in regard to the position it assigns to women.<sup>46</sup> Despite the fact that violence against women is commonplace in both communities, the minority culture is presented in stark contrast to the dominant society. Cultural difference is both reified and exaggerated as a result.<sup>47</sup> Completing the work of the courts' colonial discourse, the culture and legal norms of the dominant society are left unscathed; they are held out not only as progressive, liberal, enlightened, superior and egalitarian but as a beacon of hope for women trapped in patriarchy ridden minority cultural communities.<sup>48</sup>

With the patriarchal practices of the dominant society safe from view, the two sources of critical race feminists' cultural anxiety collide. Patriarchy and colonialism combine to ensure that any cultural accommodation afforded by courts in cases involving violence against women is seen solely as an accommodation to the patriarchal values of the accused's cultural community. This theme receives significant attention by students of cultural defences. Indeed, much of the literature suggests that cultural defences are most likely to succeed where the behaviour of the accused accords with the mainstream norms of the dominant cultural community, even if the cross-cultural similarities involved are not emphasized in the proceedings. This makes cases involving violence against women particularly susceptible to cultural defences, not because of the patriarchal values of the accused, but because the dominant culture accepts male violence against women.<sup>49</sup> Thus, while the court, in accepting a cultural defence, may present the accused's cultural beliefs as foreign, exotic and primitive, in truth, the accused's cultural defence succeeds only because it corresponds to patterns of behaviour in the dominant culture.<sup>50</sup> It is sameness, not difference, that wins the day as the values of the dominant society are reinforced under the banner of sensitivity to cultural difference.<sup>51</sup>

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<sup>46</sup>Deckha, *supra* note 38 at 267.

<sup>47</sup>Fournier, *supra* note 37 note at 82; Volpp, "Blaming Culture," *supra* note 44 at 104; Deckha, *supra* note 38 at 273.

<sup>48</sup>Volpp, "Blaming Culture," *ibid.* at 113; Deckha, *ibid.* at 278; Wong, *supra* note 37 at 377. Sarah Song refers to this interaction between majority and minority cultures as the "diversionary effect," where "rejection and vilification of minority claims for accommodation . . . serve to divert attention from the majority culture's own cultural practices, and "fuel discourses of cultural and racial superiority within the dominant culture." Song, *supra* note 37 at 483 and 486. Doriane Lambelet Coleman's work, on the other hand, provides an example of the problem itself. She argues that taking into account the cultural background of an accused likely will convince "potential victims" from minority cultural communities "that the United States is not a place where they can hope to be protected from discriminatory culture-based crimes." Coleman, *supra* note 36 at 1160.

<sup>49</sup>Anne Phillips, "When Culture Means Gender: Issues of Cultural Defence in the English Courts" (2003) 66 *Modern Law Review* 510 at 529.

<sup>50</sup>Nancy S. Kim, "Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants" (2006) 17(2) *University of Florida Journal of Law and Public Policy* 199 at 208-209.

<sup>51</sup>Chiu, *supra* note 37 at 1114.

## ***The Success of Cultural Defences: Predictions and Outcomes***

Scholars who study the topic agree that, with a few notable exceptions, courts have been quite resistant to cultural defences. This holds true for cases involving violence against women where defendants ask that their cultural understandings of premarital sex, infidelity, honour and shame be taken into account to excuse their behaviour.<sup>52</sup> Some scholars have interpreted the judicial record on cultural defences as a sign of formal equality or equal treatment. For example, Anne Phillips, upon noting the reluctance of English courts to accept cultural defences in murder trials, concludes that the case law does not “suggest a pattern of differential treatment for defendants from minority cultures.”<sup>53</sup> Similarly, Gabriel Hallevy concludes, after surveying relevant case law in Canada, the United States, Australia and England, that “despite a few cases that largely go to mitigation, the principal approach of courts dealing with defence arguments based on cultural difference is to reject the arguments and to ignore any cultural differentiation between accused. The main reason for this is the general attitude of the courts that, in so doing, they are obliged to apply existing law to all of the people who come before them . . . the criminal law will not allow him relief based on cultural difference.”<sup>54</sup>

Taken as a whole, then, the literature on cultural defences suggests the following. First, in disposing of cultural claims, courts will ignore the cultural content of the law and describe the behaviour of members of the dominant society in non-cultural terms. The behaviour of members of minority cultural communities, however, will be attributed to their culture. Second, courts will eschew cross-cultural similarities and emphasize the differences among cultures. More specifically, courts will characterize minority cultures as backward, illiberal and primitive and, thus, inferior to the dominant cultural community, especially in terms of the treatment of women. Third, cultural defences will be best received by courts where the behaviour of the accused and his cultural values accord with mainstream norms and values. Given that violence against women is commonplace in the dominant society and has been treated compassionately according to the law of provocation, the provocation defence represents an area of law that will be particularly susceptible to cultural arguments because they accord with gendered mainstream values and the patriarchal roots of the defence. Finally, where courts refuse to allow cultural evidence to excuse or mitigate the behaviour of an accused, differential treatment has been avoided. The question that remains is are these observations borne out by the Canadian jurisprudence on the law of provocation in the context of intimate femicide?

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<sup>52</sup>See generally, Phillips, *supra* note 49; Gabriel Hallevy, “The Impact of Defence Arguments Based on the Cultural Difference of the Accused in the Criminal Law of Immigrant Countries and Societies” (2009) 5(1) *Journal of Migration and Refugee Issues* 13; Foblets and Renteln, *supra* note 38.

<sup>53</sup>Phillips, *ibid.* at 528.

<sup>54</sup>Hallevy, *ibid.* at 20-21.

## *The Canadian Jurisprudence*

Canada's jurisprudence on the defence of provocation accepts that the proper application of the 'ordinary person' test for the purposes of s.232(2) requires that the ordinary person "be of the same age, and sex, and must share with the accused such other factors *as would give the act or insult in question a special significance*."<sup>55</sup> Relevant characteristics of the accused must be taken into account in determining whether an 'ordinary person' would have lost control having experienced the provocation experienced by the accused. Exactly which 'other factors' courts will deem relevant to the provocation defence remains to be seen; the test requires judicial development. That being said, the question of whether the cultural background of a male accused may be taken into account to explain the killing of a female partner in the context of romantic rejection has been put before Canadian courts.

In *R. v. Ly*,<sup>56</sup> a case decided post *Hill*, but before the Supreme Court's ruling in *Thibert*, the British Columbia Court of Appeal was asked to consider the accused's response to his common law wife's infidelity in light of his cultural background. Ly was born and raised in Vietnam and had been in Canada for 3 years. Three or four weeks before the killing, Ly suspected that his wife had commenced a relationship with another man and confronted her. Ly testified that he spoke to his wife about his suspicions, raising the loss of honour her infidelity would bring in the eyes of their community. In fact, Ly was so distraught by his wife's affair that he attempted suicide. On the night of the murder, Ly expected his wife home at 6:00 p.m., but she did not arrive until 2:00 a.m. When Ly asked his wife where she had been, she replied "Don't ask me. It is none of your business."<sup>57</sup> Ly strangled his wife and attempted again to commit suicide, after leaving a note explaining that he had killed his wife because of her infidelity.

Counsel for the accused raised the defence of provocation and led evidence detailing the grievous nature of a wife's infidelity in the context of Vietnamese culture, explaining that the infidelity caused Ly to lose face and honour. At trial, Ly was convicted of second degree murder, the trial judge finding that Ly's ancestry and cultural background should not be taken into account in applying the ordinary person test. The defence argued, on appeal, that the trial judge erred in this regard and that in determining whether an ordinary person would have lost self-control, the jury should have been instructed to consider "the reaction that an average Vietnamese male would have as a result of his cultural background to infidelity on the part of his wife."<sup>58</sup> Citing *Hill*, the Court of Appeal acknowledged that an accused's cultural background may be relevant to the ordinary person test, but determined that Ly's was not. The court

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<sup>55</sup>*Thibert*, *supra* note 17 at para.14.

<sup>56</sup>*R. v. Ly* (1987), 33 C.C.C. (3d) 31 (B.C.C.A).

<sup>57</sup>*Ibid.* at 33.

<sup>58</sup>*Ibid.* at 35.

explained that in its view, the fact that the accused was Vietnamese only would have been relevant if the insult that provoked Ly had been a racial slur.<sup>59</sup> Ly's second degree murder conviction was affirmed as a result.

In *Ly*, while the court affirmed the principle that an accused's cultural background may be relevant to the defence of provocation, culture was construed in the narrowest of fashions to defeat the claim. On the view advanced by the court, Ly's culture was not relevant to his conceptions of gender roles and behaviour. Culture was taken to be synonymous with ethnicity, which, according to the court's reasoning, is separate from gender. The result of denying the relationship between culture and gender was a decision that protected the female victim, albeit posthumously, from the patriarchal principles said to inhere in the accused's culture, but denied Ly's claim of provocation "in circumstances where many white men have successfully argued it."<sup>60</sup>

In 2004, the British Columbia Court of Appeal again faced the question of whether an accused's cultural background should be taken into account in applying the ordinary person standard where the accused killed his wife in the context of romantic rejection. *R. v. Nahar* involved a Sikh man who was born in 1977 in Moga, Punjab and who emigrated to Canada in 1995. In 1998, Nahar entered into an arranged marriage with Kanwaljeet Kaur Nahar. The marriage was turbulent, with Mrs. Nahar, having run away from the home of her in-laws and taking an apartment. The accused moved into the apartment with his wife, but problems continued. Nahar claimed that his wife was receiving phone calls from other men, drinking alcohol and smoking, all of which violated "the shared expectations among the Sikh community, and the Indo-Canadian community at large, as to the proper conduct of a married woman and as to the importance attached to these expectations."<sup>61</sup> On the night of the killing, Nahar, who no longer was coresiding with his wife, went to the apartment to discuss her behaviour, as he had done on numerous occasions. When Nahar asked Kanwaljeet why she persisted in her unacceptable behaviour, she replied that it was not his concern, that she did not need him and that she needed other men. She told Nahar that she could behave as she liked and that he could not stop her.<sup>62</sup> Nahar stabbed Kanwaljeet in the chest and neck with a knife, cutting her jugular veins.

At trial, Nahar claimed provocation, but was convicted of second degree murder by British Columbia's Supreme Court. The decision of Fraser J. did not explore the relevance of the accused's cultural background in any detail. While the court made note of Sikh community values, it also cast doubt on the accused's commitment to those values, noting that while Nahar

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<sup>59</sup>*Ibid.* at 38.

<sup>60</sup>Côté, Majury and Sheehy, *supra* note 13 at 16.

<sup>61</sup>*R. v. Nahar* (2002), 55 W.C.B. (2d) 70 (B.C.S.C.) at para. 4.

<sup>62</sup>*Ibid.* at para. 25.

came from a family of “observant Sikhs,” his sporadic attendance at temple suggested that he “was not, at least not entirely.”<sup>63</sup> Ultimately, the trial court simply stated that “an ordinary person sharing the characteristics of the accused . . . would not have been raised to a heat of passion” by the events Nahar described.<sup>64</sup>

On appeal, counsel for the defence argued that the trial court erred in failing to take Nahar’s cultural background into account in disposing of his provocation claim. The appeal court refused to find that the trial court erred in failing to take into account the cultural background of the accused, stating simply that it was not clear whether or not the trial judge had taken into account Nahar’s “Sikh culture.”<sup>65</sup> Unlike the decision in *Ly*, however, the court acknowledged that Nahar’s cultural background was relevant to the ordinary person test. Applying *Thibert*, the court stated that “the ordinary person must have been one who shared Mr. Nahar’s cultural background so that the implications of his being a Sikh, and having been raised in the Sikh tradition, were to be taken into account in measuring the gravity of the insult which is said to have caused him to stab his wife.”<sup>66</sup> Accordingly, the standard the trial judge should have used in determining the ordinary person test was “whether, having regard for the cause and duration of the couple’s troubled relationship, an insult that carried the same emotional impact for an ordinary young married man of the same cultural background as it apparently carried for Mr. Nahar, would cause such a man to lose his power of self-control.”<sup>67</sup> Applying the ordinary person test in light of Nahar’s cultural background, the court nonetheless found that the ordinary person of the accused’s cultural background would not have lost the power of self-control in the circumstances faced by Nahar. This outcome, said the court, was “the only sound conclusion.”<sup>68</sup> Thus, while the decision in *Nahar* is notable because the accused’s cultural background was deemed relevant to the ordinary person test, it made no difference to the outcome of the case. *Nahar*, like *Ly*, was unable to succeed on provocation.

In 2006, the question of taking into account the cultural background of the accused in the context of romantic rejection and alleged infidelity was put before the Ontario Court of Appeal in *R. v. Humaid*.<sup>69</sup> The deceased, Aysar Abbas married the accused in 1979. They became

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<sup>63</sup>*Ibid.* at para. 8.

<sup>64</sup>*Ibid.* at para. 33.

<sup>65</sup>*R. v. Nahar* (2004), 60 W.C.B. (2d) 497 (B.C.C.A.) at para. 30.

<sup>66</sup>*Ibid.* at para. 37.

<sup>67</sup>*Ibid.* at para. 38. In this respect, the decision is at odds with the result in *Ly*, where the court refused to consider the cultural background of the accused because the insult, his common law wife’s infidelity, did not target the accused’s ethnicity or race.

<sup>68</sup>*Ibid.* at para. 39.

<sup>69</sup>*R. v. Humaid* (2006), 81 O.R. (3d) 456 (C.A.). Leave to appeal refused [2006] S.C.C.A. No. 232 (QL).

Canadian citizens in 1998, though they continued to live in the United Arab Emirates. Aysar was in Canada on a business trip with a male associate. She intended to finish her trip with a visit to her son, who was a university student in Ottawa. Two days after his wife flew to Canada, Humaid unexpectedly made arrangements to join her in Ottawa. He claimed that he made the decision upon learning that their son was taking drugs and that his intention was to join his wife so that the two of them could deal with their son. While in Ottawa, Humaid spent time with his wife and her business associate Hussein. During that time, Humaid became concerned about the relationship between his wife and Hussein. Humaid claimed that when he later confronted Aysar with his suspicions, she acknowledged that she “admired Hussein” and made a comment about birth control pills that led Humaid to believe that his wife was having a sexual relationship with her business associate.<sup>70</sup> Humaid stabbed his wife in the neck 19 times, claiming that he ‘blacked out’ upon hearing his wife’s words.

The defence raised Humaid’s cultural and religious background and led opinion evidence on Islamic culture, which was characterized as “male-dominated” and placing “great significance on the concept of family honour.”<sup>71</sup> Accordingly, “infidelity, particularly infidelity by a female member of a family, was a very serious violation of the family’s honour and worthy of harsh punishment by the male members of the family.”<sup>72</sup> While the trial judge put the defence of provocation before the jury, jury members were instructed not to take Humaid’s cultural or racial background into account in applying the ordinary person test. Humaid was convicted of first degree murder and appealed, in part, on the basis of the jury instruction.

Ontario’s Court of Appeal found that while an accused’s cultural and religious beliefs may be relevant to the ordinary person test, the defence should not have been left with the jury in the first instance, there being no ‘air of reality’ to the defence. Thus, any improper provocation instructions given to the jury at trial “could not have affected the verdict.”<sup>73</sup> The defence of provocation was unavailable to Humaid. Despite its ruling, the court went on to discuss the defence’s argument at length, making clear that had there been an air of reality to the defence, it would not have taken Humaid’s religious and cultural beliefs into account for the purposes of the ordinary person test. Several reasons were offered by the court in support of its position.

In the first place, Humaid’s case faltered because while evidence was led to show that many Muslims accept the views offered regarding female infidelity and family honour, the defence had not led evidence to show that Humaid himself shared these views. Further, the court noted that the expert witness himself had acknowledged that different Muslims hold varying views on these matters, necessitating that Humaid illustrate that he shared the views attributed by

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<sup>70</sup>*Ibid.* at para. 29.

<sup>71</sup>*Ibid.* at para. 67.

<sup>72</sup>*Ibid.* at para. 67.

<sup>73</sup>*Ibid.* at para. 91.



the expert to his culture.<sup>74</sup> Second, the court questioned whether the beliefs of the accused could be taken into account under the ordinary person test because their sexist nature rendered them “antithetical to fundamental Canadian values such as the equality of men and women.”<sup>75</sup> The court reasoned as follows:

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. It is arguable that as a matter of criminal law policy, the ‘ordinary person’ cannot be fixed with beliefs that are irreconcilable with fundamental Canadian values. Criminal law may simply not accept that a belief system which is contrary to those fundamental values should somehow provide a basis for a partial defence to murder.<sup>76</sup>

The third reason offered by the court rested on the nature of the alleged insult. Here, the court took the position adopted in *Ly*, that Humaid’s cultural beliefs were not targeted by the insult under consideration.<sup>77</sup> Strangely, however, having stated that the accused’s cultural beliefs were not targeted by Aysar’s alleged infidelity, the court went on to characterize the accused’s actions not as the product of a loss of self-control, but of a “culturally driven sense of the appropriate response to someone else’s misconduct.”<sup>78</sup> In the words of the court, “an accused who acts out of a sense of retribution fuelled by a belief system that entitles a husband to punish his wife’s perceived infidelity has not lost control, but has taken action that, according to his belief system, is a justified response to a situation.”<sup>79</sup> Accordingly, Humaid’s conviction of first degree murder was affirmed.

The decision in *Humaid* speaks to many of the concerns raised in the literature on the use of culture in the courtroom. First, and of particular note, is the way that the court presents Humaid as culturally (over)determined. Humaid kills his wife not out of a loss of self-control, but out of a culturally derived sense of revenge. It is the accused’s culture and its notion of

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<sup>74</sup>*Ibid.* at paras. 68-82. If we accept the fact that cultures and their practices are contested and varied, then the ordinary person standard is problematic, no matter what the culture or religious background of the accused. The question that necessarily emerges is why are accused from the dominant society not asked to prove that they share the values of the ‘ordinary person’ in order to avail themselves of the defence of provocation?

<sup>75</sup>*Ibid.* at para. 82.

<sup>76</sup>*Ibid.* at para. 93. For a discussion of reforming the provocation defence to accord with the *Charter’s* gender equality provisions, see Côté, Majury and Sheehy, *supra* note 13 at 25.

<sup>77</sup>*Ibid.* at para. 92.

<sup>78</sup>*Ibid.* at para. 85.

<sup>79</sup>*Ibid.* at para. 85.

women's inferiority that are to blame for the killing. Second, the culture of the accused is set in stark relief to the dominant culture and its superior values. There are no cross-cultural similarities to be found. Instead, the accused's argument is characterized as antithetical to fundamental Canadian values, which do not allow for gender inequality or for patriarchal beliefs and culturally derived notions of appropriate behaviour to provide a partial defence to murder. The great irony, of course, is that this is exactly what the law of provocation does. It provides a cultural defence to murder whose roots, application and effects invite compassion for male violence against women based on long-held beliefs and expectations concerning men's entitlement to women's attention, love and fidelity. Here, we return to the original, yet troubling, rationale for the adultery category of the defence - the conception of women as the property of men. Sadly, this proprietary conception of women still carries some currency with Canadian courts when it comes to the defence of provocation.

### ***Colonial and Patriarchal Discourses: Comparing Thibert and Tran***

The most recent case that considers the relevance of an accused's cultural background to the ordinary person phase of the provocation defence in the context of romantic rejection is the 2008 case of *R. v. Tran*. *Tran* differs from the cases discussed above because in *Tran*, it is the male lover, not the wife, who is the deceased. However, while *Tran* differs, in this respect, from the cases discussed thus far, it is strikingly similar to the 1996 case *R. v. Thibert*, except, that is, for the cultural backgrounds of the two accused and the outcomes of the two cases.

*R. v. Thibert* involved a charge of first degree murder where the accused, Thibert, killed his estranged wife's lover. Thibert and his wife had married in 1970, though their relationship had its share of rocky moments, Thibert having confessed to three extramarital affairs early on in the marriage. In 1990, Joan Thibert began an affair with co-worker Alan Sherren, a fact that she disclosed to her husband in April 1991, two months before the killing. Despite his wife's disclosure, Thibert convinced her to stay and try to make their marriage work. However, in early July, Joan decided to leave her husband. She took a hotel room and telephoned Thibert late that evening to inform him of her decision. Thibert searched the city for his wife that night, but failed to find her. He did, however, persuade her to meet him the following morning at an Edmonton restaurant, a meeting that she attended with Alan Sherren. At that meeting, Thibert tried to convince his wife to return home and failed. He promised, in return for a promise from Joan to consider meeting with him again, to refrain from bothering Joan at her place of work. Thibert also had words with the deceased, stating to Sherren, "as long as I have got breath in my body I am not going to give up trying to get my wife back from you, and I will find you wherever you go."<sup>80</sup>

After the meeting and despite his promise, Thibert proceeded to call his wife at work, trying to convince her to return to him. During one of the calls, Joan told Thibert to stop calling and said that she would be leaving work to make a bank deposit. Thibert decided to drive into

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<sup>80</sup>*Thibert*, *supra* note 17 at para. 41.

the city to find his wife so that he could speak to her “away from the influence of the deceased.”<sup>81</sup> Before leaving, he loaded a shotgun and ammunition into his car “thinking that he might have to kill the deceased,”<sup>82</sup> though he claimed that he abandoned this idea en route, deciding that he would use the gun only as a “final bluff” to convince his wife to speak with him privately.<sup>83</sup>

When Joan left her workplace to go to the bank, Thibert followed her there and insisted that they speak privately. Joan told her husband that she would meet him in a vacant lot, but returned, instead, to her place of work because she was afraid. Thibert followed his wife back to her workplace and confronted her again in the parking lot, repeating his request for a private conversation. Joan again refused. Thibert proceeded to tell his wife that he had a high powered rifle in his car and suggested that he might need to enter her workplace and use the gun. Around this time, Alan Sherren came out of the building and began to lead Joan back inside, prompting Thibert to get the gun from his car. Thibert testified that Sherren walked towards him with his hands on Joan’s shoulders, moving her back and forth and saying “‘You want to shoot me? Go ahead and shoot me.’ and ‘Come on big fellow, shoot me. You want to shoot me? Go ahead and shoot me’.”<sup>84</sup> Thibert testified that the deceased continued walking towards him, despite Thibert’s direction to stop advancing. Thibert shot Sherren. He then “entered the office building, and calmly said he wanted to talk to his wife.”<sup>85</sup>

At trial, provocation was left with the jury, but Thibert was convicted of second degree murder. Thibert appealed the decision on the basis of the provocation instruction given to the jury.<sup>86</sup> The Alberta Court of Appeal found that provocation should not have been left with the jury at all, and thus any error in the jury charge had not prejudiced the accused. However, the Supreme Court of Canada disagreed, and ordered a new trial on the charge of second degree murder. Writing for the majority, Cory J. found that the conduct of the deceased would have provoked the ordinary married man who was faced with the break-up of his marriage to lose self-control. In the court’s view the provocative insult that satisfied the Criminal Code provision was the deceased’s assertion of proprietary control over Thibert’s wife. In the words of Cory J., “In light of the past history, possessive or affectionate behaviour by the deceased towards the appellants wife coupled with his taunting remarks could be considered to be insulting. . . . A jury could infer that it was the taunting of the appellant by the deceased who was preventing him from talking privately to his wife which was the last straw that led him to fire the rifle suddenly before

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<sup>81</sup>*Ibid.* at para. 44.

<sup>82</sup>*Ibid.* at para. 45.

<sup>83</sup>*Ibid.* at para. 46.

<sup>84</sup>*Ibid.* at para. 48.

<sup>85</sup>*Ibid.* at para. 49.

<sup>86</sup>More specifically, Thibert argued that the trial judge erred in failing to instruct the jury that the Crown had the onus of establishing that there had been no provocation.

his passion had cooled.”<sup>87</sup>

While the court noted that a wife’s infidelity never can justify murder, it went on to find that it did. The court’s own words are instructive here:

In this case, there is no doubt that the relationship of the wife of the accused with the deceased was the dominating factor in the tragic killing. Obviously, events leading to the break-up of the marriage can never warrant taking the life of another. Affairs cannot justify murder. Yet the provocation defence section has always been and is presently a part of the *Criminal Code*. Any recognition of human frailties must take into account that these very situations may lead to insults that could give rise to provocation.”<sup>88</sup>

Among the troubling aspects of the *Thibert* decision is the way that the court’s narrative constructed Joan Thibert as the property of the accused, as an entity without agency, who was the possession of her husband and whose refusals to speak to him were not the product of her agency, but of the influence of another man. Much of the problem, it seems, is that Alan Sherren was preventing Thibert from speaking to his wife. Joan was under Sherren’s influence; but for the deceased, Thibert could have convinced his wife to return to him because he previously had succeeded in convincing her to stay. As her husband, he had a right to speak to her privately, something with which the deceased was interfering. Worse still, the deceased had put his hands on the wife of the accused. As noted by the court, “it was when the deceased put his arm around the wife’s waist and started leading her back towards the building that the appellant removed the shotgun from the car.”<sup>89</sup>

Rather than rejecting the accused’s belief that he was entitled to speak to his wife, the court not only accepted Thibert’s perspective, but used the language of property to characterize the nature of the provocation that Thibert endured. Consider the following passage from the court’s decision:

In this case, it is appropriate to take into account the history of the relationship between the accused and the deceased. The accused’s wife had, on a prior occasion, planned to leave him for the deceased but he had managed to convince her to return to him. He hoped to accomplish this same result when his wife left him for the deceased on this second occasion. At the time of the shooting he was distraught and had been without sleep for some 34 hours. When he turned into the parking lot of his wife’s employer he still wished to talk to her in private. Later, when the deceased held his wife by her shoulders *in a proprietary and possessive manner* and moved her back and forth in front of him while he taunted the accused to shoot him, a situation was created in which the

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<sup>87</sup>*Ibid.* at para. 30.

<sup>88</sup>*Ibid.* at para. 22.

<sup>89</sup>*Ibid.* at para. 26.

accused could have believed that the deceased was mocking him and preventing him from his having the private conversation with his wife which was so vitally important to him.<sup>90</sup>

While the court's conception of adequate provocation is highly questionable, its application of the subjective aspect of the provocation defence is similarly problematic. Indeed, the fact that the court found the killing to meet the "on the sudden" requirement of the *Code* is rather astonishing. The court insisted that Thibert had "sought to avoid the deceased in order to talk privately with his wife," and that the evidence indicated "that the confrontation with the deceased in the parking lot was unexpected."<sup>91</sup> However, as noted by Major J., in dissent, there was no suddenness to the accused's actions. Thibert had known of his wife's affair for months. He knew of her desire to leave him and be with the deceased and had seen his wife with Sherren at their meeting earlier in the day.<sup>92</sup> Moreover, Thibert sought out his wife at the deceased's place of work. There was nothing unexpected about the situation that Thibert encountered. Nonetheless, his provocation claim succeeded.

There are significant similarities between the *Thibert* case and the facts surrounding *R. v. Tran*, a 2008 decision of Alberta's Court of Appeal. Thieu Kham Tran and his wife, Hoa Lu Duong, married in Canada in 1989. In the summer of 2005, after 15 years of marriage and after occupying separate bedrooms for some six years, Lu Duong developed feelings for An Tran, the deceased. Despite this, "she tried harder at her marriage that summer."<sup>93</sup> In November 2003, Tran and his wife quarrelled after Tran overheard an affectionate conversation between the deceased and his wife. Lu Duong left Tran after the argument, though she later took up residence in their marital apartment with the couple's children, Tran having moved elsewhere. During their separation, Tran would visit his children at the apartment, which Lu Duong would vacate before his arrival. Though he had returned his keys and building security access cards to Lu Duong, Tran continued to receive mail at the apartment and would gain access to the building by having the building manager let him in or following tenants. Although the couple was separated, Tran was hopeful that his wife would return to the marriage.<sup>94</sup> Nonetheless, in December 2004, Lu Duong asked for a divorce.

On February 9, 2004, Tran visited the apartment to visit his children, after calling the apartment and being told by his son that Lu Duong was not there. Tran told his godmother that during that visit he checked the incoming numbers on the apartment's telephone and saw a number that he suspected was the deceased's. The following day, Tran called the apartment and

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<sup>90</sup>*Ibid.* at para. 23, emphasis added.

<sup>91</sup>*Ibid.* at para. 27.

<sup>92</sup>*Ibid.* at para. 67.

<sup>93</sup>*R. v. Tran*, [2008] A.J. No. 587 (C.A.) at para. 25 (QL) [*Tran*].

<sup>94</sup>*Ibid.* at para. 25.

when he received no reply, proceeded there. He said that the purpose of his visit was to collect his mail. No longer having a key to the building, Tran was admitted by the building manager, who testified that Tran did not seem to be angry, disturbed or agitated. Upon entering the apartment, Tran proceeded to a bedroom where he found his wife and the deceased, in bed, nude. Tran retrieved two knives from the kitchen, killed his estranged wife's lover by stabbing him 37 times and assaulted his wife, slicing her face. The killing occurred some two and a half months after the couple's separation and upon Tran finding his estranged wife in bed with another man.

While Tran was charged with second degree murder, at trial, he was convicted of manslaughter. The trial court made reference to the accused's culture and commented on the "dim view" of adultery taken by individuals from the accused's ethnic community who testified before the court. Indeed, the trial judge noted that Lu Duong and the deceased hid their relationship because in the absence of a divorce, the relationship would be viewed unfavourably by Edmonton's community of ethnic Chinese from Vietnam. That being said, the trial judge also noted that taking wedding vows seriously was not unique to the culture of the accused.<sup>95</sup> Very much like the decision in *Thibert*, the trial judge concluded that Tran was a "jealous and possessive husband . . . who wanted very much to save his marriage, and he had some reason to hope that his marriage could be saved. He saw An Tran as interfering where he ought not to interfere and was both desperate and angry at his persistence."<sup>96</sup> Ultimately, the trial judge found that "the ordinary man of the accused's age and culture would be greatly offended, shamed and moved to reaction of some sort by the insult presented to him by his wife and her boyfriend nude in her bed. When I say culture, I am not necessarily referring to ethnic culture, although it may be so. Rather it is the seriousness with which the witnesses in this trial, all of whom are Vietnamese or ethnic Chinese from Vietnam take their marriage vows."<sup>97</sup>

Alberta's Court of Appeal took a very different view than the trial court, finding that provocation should not have been put to the jury and convicting Tran of second degree murder. The Court of Appeal took the position that no insult occurred within the meaning of s.232 and that the trial judge had erred in looking at the insult almost exclusively from the subjective perspective of the accused. In the words of Watson J.A., "nothing done by the complainant or the victim comes close to meeting the definition of insult. Their behaviour was not only lawful, it was discreet and private and entirely passive vis-à-vis the respondent. They took pains to keep their relationship hidden."<sup>98</sup> Furthermore, while the trial judge found that there was doubt as to whether Tran even knew his wife was at home, the Court of Appeal found that Tran's actions did not meet the standard of "on the sudden" because he suspected that Lu Duong was having an

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<sup>95</sup>*Ibid.* at para. 51.

<sup>96</sup>*Ibid.* at para. 33.

<sup>97</sup>*Ibid.* at para. 53.

<sup>98</sup>*Ibid.* at para. 17.

affair.<sup>99</sup>

In discussing the trial court's comments about Tran's cultural background, the Court of Appeal stated that it was not necessary to offer an opinion on "the controversy about ethnicity factors in relation to provocation" because, as noted by the trial judge, the cultural values of the accused were consistent with the traditional views of other cultures in Canadian society.<sup>100</sup> However, the cultural background of the accused was very much on the mind of the court when it rendered its decision, which juxtaposed the culture of the accused - as imagined by the court - with the culture of the dominant society - as similarly imagined by the court. Consider the following passage regarding the proposition that Tran's cultural background should have been deemed relevant for the purposes of the ordinary person test:

More broadly, the respondent's submission would eliminate any significance of the maturity of Canadian social norms regarding the only two acceptable responses to adultery: forgiveness and family rehabilitation, or civilized termination of the marriage. There is no justification for rolling social standards back to the era of coverture. . . . Adultery is not outlawry. No support exists for clawing back legal opprobrium for adultery by the declaratory effect of adding it to the legal definition of provocation. At the very least, no explosion of intentional killing should be excusable by the mere fact of discovering 'adultery' done by a person who has elected to live separate and apart from her spouse. The 'ordinary person' should not be fixed with beliefs that are irreconcilable with fundamental Canadian values.<sup>101</sup>

With this discourse, the court clearly set the accused's culture, that of the 'ethnically Chinese from Vietnam' as uncivilized and primitive relative to the dominant society and its adherence to progressive, liberal values. The idea that a man might be partially excused for killing his adulterous wife plainly has no currency with the court in *Tran*, despite the holding of the Supreme Court in *Thibert*. *Thibert*, who hunted down his wife at the workplace of the deceased was credited with meeting the "on the sudden" standard set out in s.232. *Tran*, who may have had no idea his wife, let alone the deceased, were at the apartment, failed to meet that same standard. Here again, the court seemed unable to disconnect its reasoning from its perception of *Tran*'s actions in the context of his more primitive cultural sensibilities. While *Thibert*'s expectations regarding his wife went unchallenged, *Tran*'s similar expectations were characterized in this way: "In 21<sup>st</sup> Century Canada, it is not realistic for a separated man, particularly one who knows that his wife is seeing another man, not to expect to see them together. It is not realistic for that man to assume that they will not be together at her residence. It is not realistic for the man to assume that his estranged wife, who does not want to answer his

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<sup>99</sup>*Ibid.* at para. 18.

<sup>100</sup>*Ibid.* at para. 52.

<sup>101</sup>*Ibid.* at para. 63.

phone calls, will nonetheless want him back in her life.”<sup>102</sup>

Thibert’s behaviour was partially excused as a concession to human frailty. It was the result of a provocative insult capable of causing the ‘ordinary husband’ to lose the power of self-control. Tran’s behaviour found no excuse. Indeed, rather than characterizing Tran’s behaviour as a loss of self-control, it was taken to be an affront “to the characteristics and values of modern society and to human nature as our evolving society understands it.”<sup>103</sup> That the court considered Tran’s behaviour to be socially primitive could not have been made more clear. It was characterized as conflicting with “current social mores”<sup>104</sup> and the “acceptable limitations of human self-control as recognized in 21<sup>st</sup> Century society – though not as might have been thought acceptable in 19<sup>th</sup> Century society.”<sup>105</sup> While in this respect, and contra *Humaid*, the court acknowledged that the defence of provocation is cultural in nature insofar as the acts and insults that will constitute adequate provocation change over time. However, this admission seems to be made with one purpose in mind: to make clear that the accused’s ‘cultural’ vantage point is backward, primitive and based on precepts that have long been discarded by Canadian society.

### ***Conclusions***

The literature on cultural defences raises significant concerns about the likely outcome of bringing culture into the courtroom and offers a number of propositions in turn. The jurisprudence on the defence of provocation in cases where cultural claims are advanced in the context of romantic rejection provides an opportunity to test these propositions. Indeed, the evolution of the ordinary person element of the defence, coupled with provocation’s history of partially excusing violence against women, suggest that the jurisprudence is a sound candidate for evaluating the literature’s claims.

The first proposition offered by the literature on cultural defences suggests that in disposing of cultural claims, courts will ignore the cultural content of the law and describe the behaviour of members of the dominant society in non-cultural terms. The behaviour of members of minority cultural communities, on the other hand, will be attributed to their culture. The first proposition is clearly borne out by the jurisprudence. While the law focuses on provocative acts that cause individuals to lose self-control, the defence of provocation is, in essence, a cultural defence. Its roots and evolution attest to this fact. Originally based on cultural norms about women as property and the honourable reactions of men whose wives committed adultery, the contours of the defence, like its rationale, have been altered and expanded to reflect changes in

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<sup>102</sup>*Ibid.* at para. 70.

<sup>103</sup>*Ibid.* at para. 45.

<sup>104</sup>*Ibid.* at para. 74.

<sup>105</sup>*Ibid.* at para. 45.



Anglo-Saxon cultural beliefs.<sup>106</sup> Indeed, legal scholars and judges alike acknowledge the fact that the defence must evolve to reflect the ‘social mores of the day’.<sup>107</sup> Consider, too, how provocation defences are assessed. There can be no doubt that when jury members consider whether a specific insult or wrongful behaviour would cause an ‘ordinary person’ to lose self-control, their determinations are based on culturally informed norms and values about appropriate behaviour and the limits of tolerance. On what other basis could they possibly make their decision? Nonetheless, where the accused is a member of the dominant cultural community, his behaviour will be assessed in terms of a loss of self-control, rather than being associated with his cultural beliefs. However, as illustrated by *Tran* and *Humaid*, where the accused belongs to a minority cultural community and leads evidence regarding his cultural background, it is likely that the accused’s behaviour will be attributed to his culture. *Tran* and *Humaid* suggest that the acts of the accused are likely to be depicted as the result of culturally determined behaviour, rather than a loss of self-control.

The second proposition, that courts will eschew cross-cultural similarities and emphasize differences among cultures, also rings true. In *Humaid* and *Tran* in particular, the cultural communities of the accused are presented as backward, illiberal, primitive and clearly inferior to the dominant cultural community. Despite the fact that violence against women and intimate femicide is a gendered crime in both communities and that more than one male accused from the dominant society has succeeded on provocation in similar circumstances, the suggestion that a husband’s jealousy could warrant legal compassion was met with complete disdain and presented as antithetical to Canada’s fundamental values when raised by an accused from a minority cultural community. Yet as illustrated by cases like *Thibert*, Canadian courts have not been unreceptive to these kinds of arguments in cases involving accused from the dominant society.

The third proposition set out in the literature is that cultural defences will be best received by courts where the behaviour of the accused and his cultural values accord with mainstream norms and values. Given that violence against women is commonplace in the dominant society and has been treated compassionately according to the law of provocation, the defence should be particularly susceptible to cultural arguments because they accord with gendered mainstream values, as well as the patriarchal roots of the defence. Yet, despite the congruence of values across minority and majority cultures, the third proposition has not been borne out by the Canadian jurisprudence surveyed here. That being said, judicial opinion on whether and when the cultural background of the accused should be taken into consideration in applying the ordinary person test clearly is divided, with some courts suggesting that an accused’s cultural background is relevant to a provocation claim involving romantic rejection and others arguing that any characteristic of an accused that fails to accord with fundamental liberal values, including gender equality, never may be taken into account when formulating the ordinary person for the purposes of s.233.

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<sup>106</sup>Consider the fact that women who kill can claim provocation, though they originally had no recourse to the defence, a fact attributable to changes in cultural conceptions about women, citizenship and personhood.

<sup>107</sup>Holder, *supra* note 3 at 25; *Tran*, *supra* note 93 at para. 74.

The final proposition concerns the conclusions that can be drawn about judicial records, like Canada's, that illustrate a reluctance to allow cultural evidence to excuse or mitigate the behaviour of an accused. Is it the case that where cultural evidence is omitted, or has been accepted but has failed to produce a successful provocation defence, differential treatment has been avoided? The Canadian case law on cultural defences in the context of intimate femicide suggests that, for some courts, refusing to take into account the cultural background of the accused amounts to doing little else but taking into account the cultural background of the accused. The decision in *Tran* is particularly telling in this regard, where the court, having stated both that the accused's cultural values were not uncommon in Canadian society and that the accused's background was irrelevant to the provocation claim, proceeded, quite relentlessly, to characterize Tran's assertions as vestiges of 19<sup>th</sup> Century society - a particularly tall tale in light of cases like *Thibert*. Clearly, rejecting the use of cultural evidence to characterize the ordinary person is not tantamount to ignoring cultural differentiation, eschewing differential treatment because of cultural difference or refusing to base relief or dispose of cases based on one's cultural beliefs.

In the end and without question, the defence of provocation in the context of intimate femicide is exceedingly troubling, and the proposition that a woman's choice to end a romantic relationship or begin a new one never may partially excuse murder should be received as welcomed news. Yet, the decisions in *Ly*, *Nahar*, *Humaid*, and *Tran* are problematic in their own way. Successful provocation claims in the context of infidelity and romantic rejection are not unheard of in Canada. They may not even be rare.<sup>108</sup> Yet, in all four cases where provocation defences involved cultural claims, the accused was convicted of murder. Indeed, in *Humaid* and *Tran*, the two most recent decisions, two Canadian courts of appeal found that the defence never should have been left with the jury. Thus, while Canada's move towards using 'culture in the courtroom' has not exacted a toll on female members of minority cultural communities as victims of violence, the same cannot be said of its consequences for their cultures or their male counterparts.

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<sup>108</sup>See *supra* notes 19, 21, 26 and accompanying text.