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

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The prospect of raising cultural arguments in criminal cases has drawn criticism from a diverse group of scholars. While many feminists argue that the greatest danger of using culture in the courtroom is that it will result in judicial outcomes that put “race before gender,” critical race scholars maintain that minority cultural communities will be victimized by the colonial discourses that are certain to emerge when courts engage with cultural arguments. Liberal critics, on the other hand, argue that the move violates the principle of equal treatment before the law by providing cultural defences to some citizens but not to others and succumbing to...
cultural relativism. This article tests these hypotheses by examining the small, but important, body of case law where cultural arguments were raised in sexual provocation cases where the claimed provocative act was a woman’s infidelity or romantic rejection. This jurisprudence is an apt candidate for testing the competing propositions both because provocation is a gendered defence and because recent changes to the law have opened up space for cultural argumentation. The results of this examination are mixed. The liberal contention that refusing to take the culture of the accused into account will result in the equal application of the law is not borne out, nor is the feminist contention that introducing culture into the courtroom will place race before gender. Instead, the Canadian jurisprudence is better represented by a different ordering principle—that of colonialism before patriarchy.

In pluralistic societies such as Canada’s, the issue of cultural defences receives significant scholarly attention.¹ Much of this scholarship focuses on the concern that allowing individuals to raise cultural arguments to excuse illegal behaviour will serve to discount the rights of women by offering judicial sanction to the patriarchal values that are said to characterize minority cultural communities. Thus, many feminists argue that the greatest danger of using culture in the courtroom is the prospect that violence against women will go unpunished or inadequately punished. In Canada, anticipating the possible outcomes where courts consider 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.² Indeed, many men have


succeeded in claiming provocation where they have killed a female partner in the “heat of passion” upon realizing, or merely suspecting, that their partner has been unfaithful or where the female partner has decided to terminate the relationship. The law of provocation is a particularly appealing candidate for assessing cultural defences because recent changes to the law have seemingly opened the door to cultural claims. In fact, Canadian courts have been asked to accept cultural arguments in cases of sexual provocation to support an accused’s claim in four cases that have reached three different courts of appeal. Only one appeal court has directly tackled the issue of whether the culture of the accused should be taken into account in assessing provocation defences, finding in the affirmative. While two other courts of appeal chose to sidestep the question, a Supreme Court of Canada decision on the issue is forthcoming.

For feminist scholars, combining cultural argumentation with the law of provocation 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 minority cultural communities is likely to produce judicial outcomes that are governed by the logic of “race before gender.” Of course, this is not the only concern raised by students of cultural defences. Critical race theorists, 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. Liberal critics take a different tack, arguing that allowing cultural evidence to partially excuse the behaviour of the accused violates the principle of equal treatment before the law by providing cultural defences to some citizens, but not others, and engaging in cultural relativism.

This article seeks to test these hypotheses by examining the small, but important, body of case law in which cultural defences were raised in sexual provocation cases where the claimed provocative act was a female partner’s infidelity or romantic rejection of her male partner. The results of this examination are mixed. While some of the common assumptions about culture in the courtroom are affirmed,

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3. See notes 24 and 31 in this article.
4. The term “sexual provocation” is wider than “intimate femicide” insofar as the former includes instances where infidelity or romantic rejection lead to the murder of a sexual rival. Ian Leader-Elliott, “Passion and Insurrection in the Law of Sexual Provocation,” in Ngaire Naffine and Rosemary Owens, eds., Sexing the Subject of Law (North Ryde, New South Wales: LBC Information Services, 1997) 149 at 151. Discussion in this article is limited to cases where a male accused killed his female partner or sexual rival.
others are not. Notably, the liberal contention that refusing to take into account the culture of the accused will result in the equal application of the law is not borne out; nor is the feminist contention that introducing culture into the courtroom will result in judicial outcomes that place race before gender. Instead, and in keeping with critical race critiques, the emerging trend in the Canadian jurisprudence reflects a different ordering—that of colonialism before patriarchy.

This discussion will proceed in three parts. The first part of the article focuses 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 article turns its attention to the evolution of the law 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 offered by students of cultural defences. The final part of the article assesses these hypotheses by examining the judicial record of Canadian courts in cases of sexual provocation 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” in recognition of the fact that even reasonable people may find themselves in circumstances that prompt them to kill in the midst of a homicidal rage. 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.” Accordingly, provocation defences are premised on the idea that an excess of anger can rob a person of his faculty of reason, leaving passion “unbridled or ‘ungoverned.’”

However, as Jeremy Horder explains, the history of the defence tells a different story. Rather than setting passion and reason against one another, the modern law of provocation, whose foundations were laid in the seventeenth century, was based on the notion of honour and a very different conception of anger. The early modern

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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. On such an affront, this man had but one choice, namely “to show himself to be a man of spirit and honour by revenging the offence.” 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 the law developed, judges sought to limit the kinds of provocative acts that an accused could rely on to invoke provocation. Not all provocative 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. 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.” Four categories of provocation emerged, one recognizing cases where a husband witnessed a man in the act of adultery with his wife.

Early provocation cases almost always involved the killing of the husband’s male rival, not the man’s wife, 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. The fact that the adultery category of the defence accepted this proprietary rationale is beyond dispute. In discussing adultery as one of the four provocation categories, the court in R. v. Mawgridge had this to say: “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.”

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

11. Ibid. at 72 and 192.
12. Ibid. at 39.
13. Ibid. at 72-3.
14. Ibid. at 23.
15. Grant, Chunn, and Boyle, supra note 7 at 6-21.
16. Ashworth, supra note 8 at 293; Horder, supra note 9 at 24. The other categories of provocation were mutual combat, false arrest, and violent assault. R. v. Mawgridge (1707) Kel. 119, 84 English Reports 1107 [Mawgridge].
17. Horder, supra note 9 at 24, n. 8.
18. Mawgridge, supra note 16 at 137.
unmarried woman. The seduction of another man’s wife, however, was considered the highest form of provocation. That 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 he invoke the defence where he knew of the affair and later killed his wife or her lover, even upon finding the two committing adultery.

Despite its origins, the partial defence of provocation has come to be associated with a sudden and temporary loss of self-control. It is this understanding of the law that is codified in section 232 of Canada’s Criminal Code. As Victoria Nourse explains in her groundbreaking work on provocation, the curious thing about the defence is that its parameters have been expanded in ways that place women at greater jeopardy than was the case when the defence was only available to husbands who first 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 involved or where infidelity merely is suspected.

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, as do the statistics on spousal homicide in

21. Ashworth, supra note 8 at 294.
22. Criminal Code, R.S.C. 1985, c. C-46. S. 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.
24. 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
general. Indeed, data based on 2,600 spousal homicides recorded in Canada between 1974 and 2000 show that women were the victims in more than three-quarters of those killings.25 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.26 Thus, in many cases, it is not infidelity but, rather, the mere act of leaving a relationship that prompts male rage. In this case, intimate femicide emerges as “the final assertion of control over the woman” who has decided to exercise her autonomy—sexual or otherwise.27 Thus, mirroring the proprietary norms of old, intimate femicide often is motivated by sexual jealousy and the enduring conception of “partner-as-property.”28 Women who kill their spouses, on the other hand, usually do so out of fear and in response to male violence.29

**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

murder, only 18% were convicted of this offence: the majority were instead convicted of manslaughter.” See Côté, Majury, and Sheehy, supra note 19 at 5.


26. For example, in their 1993 study, Margo Wilson and Martin 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 co-residing versus estranged couples of 3.77 to 9.00. Margo Wilson and Martin Daly, “Spousal Homicide Risk and Estrangement” (1993) 8 Violence and Victims 3 at 7. This holds true in other jurisdictions. For example, a 2002 US study of actual and attempted femicide found that the victim had chosen to terminate the relationship in 70 percent of the cases. Annegret F. Hannawa et al., “‘If I Can’t Have You, No One Can’: Development of a Relational Entitlement and Proprietaryness Scale (REPS)” (2006) 21 Violence and Victims 539 at 539-40. See also Nourse, supra note 23.

27. Côté, Majury, and Sheehy, supra note 19 at 5.

28. Forrell, supra note 2 at 162.

29. Hannawa et al., supra note 26 at 541. Wilson and 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.” Wilson and Daly, supra note 26 at 13. See also Pottie Bunge, supra note 25 at 7.

30. Côté, Majury, and Sheehy, supra note 19 at 5. In addition to being criticized as a gendered defence in the context of who is most likely to invoke the defence and derive benefit from it, critics 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 Jenny Morgan, Who Kills Whom and Why: Looking beyond Legal Categories (Melbourne: Victorian Law Reform Commission, 2002), online: Victorian Law Reform Commission, <http://www.lawreform.vic.gov.au/wps/wcm/connect/35e4f600404a0e789c32f5f2791d4a/Homicide_OP.03.pdf?MOD=AJPERES>.
as property continues to confound judicial decision makers who, on the one hand, explicitly refuse to accept that romantic rejection can ever constitute adequate provocation for the purposes of section 232, while arriving at decisions that do just that, on the other hand.\textsuperscript{31} Complicating the landscape of the provocation defence further is the emerging issue of “cultural defences” and the question of whether the cultural background of an accused should be taken into account in considering provocation. The defence of provocation, as codified in section 232, includes both objective and subjective elements. The objective element of the test is found in the standard of the “ordinary person” and the \textit{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.”\textsuperscript{32} 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 that the accused’s 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

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\textsuperscript{31} For example, in \textit{R. v. Thibert}, discussed at length later in this article, 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 left with 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 to convince her to return to him. \textit{R. v. Thibert}, [1996] 1 S.C.R. 37 [\textit{Thibert}]. In \textit{R. v. Cairns}, a husband was acquitted by a jury of second-degree murder and convicted of manslaughter where he came to believe that his wife had “married him for his money” to support her gambling activities. In \textit{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.” \textit{R. v. Cairns}, 2004 BCCA 219 at paras. 7 and 10. In \textit{R. v. Cudjoe}, while the accused was convicted of second-degree murder, Ontario’s Court of Appeal confirmed that provocation could be left with the jury where the accused’s wife told him she was leaving him for a woman with whom the pair had been having a sexual relationship, adding that he had not satisfied her sexually. \textit{R. v. Cudjoe}, 2009 ONCA 543, 68 C.R. (6th) 86 [\textit{Cudjoe}]. 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, \textit{R. v. Krawchuk}, [1941] 2 D.L.R. 353 (S.C.C.) (where the accused shot his wife who he believed was having an affair and who had decided to leave her husband); \textit{R. v. Puchalski}, [1962] O.J. No. 162 (C.A.) (QL) (where a wife decided to leave her husband for another man); \textit{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); \textit{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); \textit{R. v. McNeil} (1998), 125 C.C.C. (3d) 71 (N.S.C.A.) (where the accused killed the new boyfriend of his common law wife ten days after she had terminated her relationship with the accused and upon the accused seeing his wife lying in bed with the man, clothed); \textit{R. v. Archibald} (1992), 15 B.C.A.C. 301 (B.C.C.A.) (where a man killed his common law wife during an argument about her relationships with other men).
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\textsuperscript{32} \textit{Criminal Code}, supra note 22, s. 232(2).
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categories of provocation.\textsuperscript{33} 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 measure 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 society’s 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.\textsuperscript{34} 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 revised approach to the ordinary person test was unveiled by the Supreme Court of Canada in its 1986 decision in \textit{R. v. Hill}.\textsuperscript{35} In \textit{Hill}, the Court stated that characteristics particular to the accused could be taken into account in formulating the requisite “ordinary person,” if those 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.”\textsuperscript{36} 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 physical characteristics of the accused.”\textsuperscript{37} That 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.”\textsuperscript{38} The principle set out in \textit{Hill} was affirmed in 1996 in \textit{R. v. Thibert},\textsuperscript{39} 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

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\item \textsuperscript{33} In determining whether the killing was committed “on the sudden” and in response to the provocative act or insult and whether the killing occurred while the accused was out of control, all of the accused’s characteristics are taken into account. Grant, Chunn, and Boyle, \textit{supra} note 7 at 6-21.
\item \textsuperscript{34} \textit{Ibid.} at 6-14.
\item \textsuperscript{35} \textit{R. v. Hill}, [1986] 1 S.C.R. 313 [\textit{Hill}].
\item \textsuperscript{36} \textit{Ibid.} at para. 35.
\item \textsuperscript{37} \textit{Ibid.} at para. 32.
\item \textsuperscript{38} \textit{Ibid.} at para. 36.
\item \textsuperscript{39} \textit{Thibert, supra} note 31.
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with the accused such other factors as would give the act or insult in question a special significance.”

The 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, criticism has emanated from a number of different camps about efforts to introduce considerations of culture into criminal law in general. Liberal critics attack the move as a threat to fundamental liberal values and an unacceptable concession to “moral agnosticism” and “cultural relativism.” Taking into account the cultural background of the accused violates the principle of equal treatment before the law by wrongly offering cultural concessions to some accused, but not others. The presumption is that rejecting cultural arguments will result in an undifferentiated application of the law that avoids differential treatment based on culture.

Feminist critics object on different grounds, arguing that cultural sensitivity will devalue the lives of women by excusing violence against them and allowing male perpetrators to invoke culture either to escape responsibility for their wrongdoing or lessen their punishment. The claim made here is that raising culture in the courtroom will result in judicial decisions that place “race before gender,” offering little protection to the rights of women. However, feminists follow different paths in reaching this conclusion. Some argue that bringing culture into the courtroom

40. Ibid. at para. 14 [emphasis added].
41. This controversy has not been limited to Canada, of course. For example, in R. v. Stingel (1990), 171 C.L.R. 312, the High Court of Australia determined that cultural considerations could be taken into account in assessing the gravity of the provocative act but not in determining whether the ordinary person would have lost self-control. This principle has been followed in most Australian jurisdictions, though not in the Northern Territory, which allows cultural considerations to be taken into account when assessing both gravity and self-control. Kumaralingam Amirthalingam, “Culture, Crime, and Culpability: Perspectives on the Defence of Provocation,” in Foblets and Dundes Renteln, supra note 1, 35. Three Australian states, Tasmania, Victoria, and Western Australia, have abolished the defence of provocation as a partial defence to murder. Ramsey, supra note 2 at 34-5.
42. Horder, supra note 9 at 145.
will encourage courts to offer judicial sanction to the patriarchal norms of minority cultural communities, denying women the full protection of the law. Critical race feminists, on the other hand, suggest that a different dynamic is at play. While they share the concern that cultural sensitivity may negatively impact female victims of intimate violence, they question whether patriarchal values lying outside the dominant cultural community will be the lone source of these decisions, arguing, instead, that where cultural defences succeed they will do so because the dominant society accepts male violence against women. Characterizing decisions that offer inadequate protection to women as concessions to the patriarchal values of minority cultural communities simply reflects the tendency of courts and critics alike to conceptualize minority cultures in ways that “reproduce colonial discourses about non-Western people” while ignoring the cultural content of the law.

On this view, 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. 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. It is this dynamic that explains why, 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.


46. Adopting Maneesha Deckha’s definition, I use the term to refer to feminist scholars who attend both to race and gender in their analyses. Maneesha Deckha, “The Paradox of the Cultural Defence: Gender and Cultural Othering in Canada,” in Foblets and Dundes Renteln, supra note 1, 261 at 262, n. 4.

47. Ibid. at 271.

48. See notes 61-2 in this article and accompanying text.

49. Deckha, supra note 46 at 262. See also Lawrence, supra note 1.


51. See, for example, Volpp, “(Mis)Identifying Culture,” supra note 50 at 61-2.

Furthermore, at the same time that the accused from the minority cultural community is presented as more “culturally determined” and less capable of 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. Of course, the accused very well may encourage patriarchal characterizations of his culture. There would be little sense in the defence depicting the accused’s culture in ways that challenge male privilege when trying to justify violent behaviour towards a woman. However, a more general problem exists, which stems from the tendency of courts to conceive of culture in homogeneous and essentialized terms. Too often, culture is taken to be a fixed, bounded entity that is tantamount to race or ethnicity, excluding considerations of gender or cultural dissent among group members. Indeed, courts rarely ask how women from minority cultural communities understand their cultures or the cultural significance of infidelity and violence against women. They rarely address the fact that cultures and their practices are internally contested. Cultural difference is both reified and exaggerated as a result. And despite the fact that violence against women is commonplace across communities, the minority culture is presented in stark contrast to the dominant society. 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, enlightened, superior, and egalitarian but also as a beacon of hope for women trapped in patriarchy-ridden minority cultural communities.

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 is seen solely as an accommodation to the patriarchal values of the accused’s cultural community. Yet, for critical race feminists, it is cross-cultural similarities that explain why cultural defences succeed in cases involving violence against women. These cases will be particularly susceptible to cultural defences, not because of the

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53. Volpp, “Blaming Culture,” supra note 52 at 96.
55. Volpp, “(Mis)Identifying Culture,” supra note 50 at 75-6.
58. Fournier, supra note 1 at 82; Volpp, “Blaming Culture,” supra note 52 at 104; Deckha, supra note 46 at 273.
59. Volpp, “Blaming Culture,” supra note 52 at 113; Deckha, supra note 46 at 278; Wong, supra note 44 at 377; Song, supra note 44 at 483 and 486.
60. Deckha, supra note 46 at 261.
patriarchal values of the accused but, rather, because the accused’s cultural defence corresponds to patterns of behaviour in the dominant culture.\textsuperscript{61} In such cases, 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.\textsuperscript{62}

\textit{The Success of Cultural Defences: Predictions and Outcomes}

Scholars who study the topic agree that 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.\textsuperscript{63} In keeping with liberal critiques, some scholars have interpreted the judicial record on cultural defences as tantamount to equal treatment under the law, where the accused are similarly treated regardless of culture.\textsuperscript{64} 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.”\textsuperscript{65} Similarly, Gabriel Hallevy, after surveying relevant case law in Canada, the United States, Australia, and the United Kingdom, concludes as follows:

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


\textsuperscript{62} Chiu, \textit{supra} note 44 at 1114; Sing, \textit{supra} note 61 at 1877.


\textsuperscript{64} See all of the texts listed under note 43.

\textsuperscript{65} Phillips, \textit{supra} note 61 at 528.
people who come before them . . . In accordance with this approach . . . the criminal law will not allow him relief based on cultural difference.66

Taken as a whole, then, the literature on cultural defences presents a number of interesting and conflicting propositions. Feminists contend that cultural considerations will generate legal outcomes that privilege race over gender, with some suggesting that this outcome will occur as courts make concessions to the patriarchal values of minority cultural communities. Critical race feminists share the concern that women’s rights will be placed at risk but argue that cultural defences will be best received by courts where the behaviour of the accused accords 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, provocation defences should be particularly susceptible to cultural arguments. In addition to these claims, critical race scholars offer several others. 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 their treatment of women. In doing so, courts will describe cultures in essential terms where culture is tantamount to race or ethnicity, ignoring sex-based, in-group differences and the existence of cultural dissent. Finally, liberal critics who focus on the equal application of the law suggest that where courts refuse to allow cultural evidence to excuse or mitigate the behaviour of an accused, differential treatment based on culture has been avoided. The question that remains is, are these observations borne out by the Canadian jurisprudence?

The Jurisprudence

Canada’s provocation jurisprudence accepts that the proper application of the “ordinary person” test 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.” 67 Relevant characteristics of the accused must be taken into account in determining whether an “ordinary person” would have lost self-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

66. Hallevy, supra note 63 at 20-1.
67. Thibert, supra note 31 at para. 14 [emphasis added].
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*, a case decided post-*Hill* but before the Supreme Court of Canada’s ruling in *Thibert*, British Columbia’s Court of Appeal was asked to consider the accused’s response to his common law wife’s infidelity in light of his cultural background.\(^{68}\) Ly, who was raised in Vietnam, suspected his wife of being unfaithful. On the night of the murder, Ly’s wife did not arrive home until 2:00 a.m. When Ly asked her where she had been, she replied: “Don’t ask me. It is none of your business.”\(^{69}\) Ly strangled his wife and attempted suicide.

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 cultural background should not be taken into account in applying the ordinary person test. The defence argued, on appeal, 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.”\(^{70}\) Citing *Hill*, the BC 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 accused’s Vietnamese background only would have been relevant if the insult that provoked Ly had been a racial slur.\(^{71}\) 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. Instead, culture was taken to be synonymous with race or ethnicity, which, according to the court’s reasoning, is separate from gender. As critical race scholars predict, the court relied on an essentialized notion of culture that excluded considerations of gender or intra-cultural dissent, equating culture with “ethnic” culture. However, the consequence of doing so did not elevate race over gender in terms of the result. Instead, culture was excluded from consideration on the ground that the provocative act did not target Ly’s ancestry, protecting the female victim, albeit posthumously, from the patriarchal principles said to inhere in the accused’s culture. What of the liberal critique? Given that Ly’s provocation defence failed “in circumstances where many white men have successfully argued it,” the result

\(^{68}\) *Ly*, supra note 5.

\(^{69}\) *Ibid.* at 33.

\(^{70}\) *Ibid.* at 35.

\(^{71}\) *Ibid.* at 38.
renders suspect the claim that similar treatment will flow where the accused’s cultural background is excluded from consideration.\textsuperscript{72}

In 2004, the BC 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. \textit{R. v. Nahar} involved a Sikh man who immigrated to Canada in 1995 and later entered into an arranged marriage.\textsuperscript{73} The marriage was turbulent, with Mrs. Nahar having taken her own apartment. Nahar claimed that his wife was consorting with 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.”\textsuperscript{74} When Nahar confronted his wife about her behaviour, she confessed to associating with other men and told Nahar that she could behave as she liked and that he could not stop her.\textsuperscript{75} Nahar stabbed his wife in the chest and neck with a knife, cutting her jugular veins.

At trial, Nahar claimed provocation but was convicted of second-degree murder. The decision of Justice Peter Fraser 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 came from a family of “observant Sikhs,” his sporadic attendance at temple suggested that he “was not, at least not entirely.”\textsuperscript{76} 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.\textsuperscript{77}

On appeal, the defence argued that the trial court erred in failing to take Nahar’s cultural background into account. The appeal court refused to so find, stating that it was not clear whether or not the trial judge had taken account of Nahar’s “Sikh culture.”\textsuperscript{78} Unlike the decision in \textit{Ly}, however, the BC Court of Appeal acknowledged that Nahar’s cultural background was relevant to the ordinary person test, even though the provocative insult was not an ethnic slur. Applying \textit{Thibert}, the court concluded that “the implications” of Nahar “being a Sikh, and having been raised in the Sikh tradition”\textsuperscript{79} were to be taken into account when measuring both the gravity of the provocative insult and the issue of self-control.\textsuperscript{80}

\begin{thebibliography}{99}
\bibitem{72} Côté, Majury, and Sheehy, \textit{supra} note 19 at 16. See also all of the texts listed under note 31.
\bibitem{73} \textit{Nahar}, \textit{supra} note 5.
\bibitem{74} \textit{R. v. Nahar}, 2002 BCSC 928 at para. 4.
\bibitem{75} \textit{Ibid.} at para. 25.
\bibitem{76} \textit{Ibid.} at para. 8.
\bibitem{77} \textit{Ibid.} at para. 33.
\bibitem{78} \textit{Nahar}, \textit{supra} note 5 at para. 30.
\bibitem{79} \textit{Ibid.} at para. 37.
\bibitem{80} \textit{Ibid.} at para. 38. The dangers of suggesting that different groups have different capacities for self-control have been discussed extensively in the Australian literature. See Morgan, \textit{supra} note 2 at 264-70; Ian Leader-Elliott, “Sex, Race and Provocation: In Defence of Stingel” (1996) 20
\end{thebibliography}
Nonetheless, the court found that the ordinary person of the accused’s cultural background would not have lost self-control in the circumstances faced by Nahar.

While the decision in Nahar is notable because the accused’s cultural background was deemed relevant to the ordinary person test in the context of infidelity, it made no difference to the outcome of the case. Nahar, like Ly, was unable to succeed on provocation. The consideration of Nahar’s cultural background by the court did not produce the race-before-gender outcome that many feminists have predicted. And while culture was construed more broadly in Nahar than in Ly, Nahar’s defence failed where other “non-cultural” accuseds have succeeded.

Nahar was followed in 2006 by R. v. Humaid. Aysar Abbas, the deceased, and her husband Humaid were Canadian citizens but were living in the United Arab Emirates. Aysar was in Canada on a business trip with a male associate, Hussein, when Humaid unexpectedly made arrangements to join her. Humaid was concerned about Aysar’s relationship with Hussein and claimed that when he confronted her she made a comment that he understood to be about birth control pills, leading him to believe that she was having an affair. Humaid stabbed Aysar in the neck nineteen 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.” Accordingly, “infidelity, particularly infidelity by a female member of a family, was considered a very serious violation of the family’s honour and worthy of harsh punishment by the male members of the family.” While the trial judge left the defence of provocation with 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 “could not have affected the verdict.” The court also concluded that it was “unnecessary...
to reach the merits of the claim that the appellant’s religious and cultural beliefs should have been factored into the ‘ordinary person’ test.”87 Yet, 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. Several reasons were offered by the court in support of its position.

First, Humaid’s case faltered because, while the defence led evidence to show that many Muslims accept the views of female infidelity and family honour cited by the expert witness, evidence had not been led to show that Humaid himself shared these views. The expert had acknowledged that different Muslims hold varying views on these matters,88 necessitating that Humaid illustrate his adherence to the views attributed by the expert to his culture.89 Second, the court questioned the nature of the alleged insult. Like the position adopted in Ly, the court asserted that Humaid’s cultural beliefs were not relevant because they were not the subject matter of the insult under consideration.90 Here, the court tried to draw a distinction between provocative insults that target the accused’s religious or cultural beliefs and words that are deemed to be provocative because of the accused’s religious or cultural beliefs. As the court explained, “the appellant’s religious and cultural beliefs are not the target of the alleged insult. Rather, the appellant’s religious and cultural beliefs are said to render the words spoken by Aysar highly insulting.”91 Like the decision in Ly, culture was construed narrowly, without reference to gender norms and values. However, the distinction drawn was one that even the court could not maintain. Having stated that the accused’s cultural beliefs were not targeted by Aysar’s infidelity, it went on to characterize the accused’s actions not as the product of a loss of self-control but, rather, of a “culturally driven sense of the appropriate response to someone else’s misconduct.”92 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.”93

86. *Humaid, supra* note 6 at para. 91.
88. This admission might have prompted the court to consider whether gender was an important factor in explaining the divergence in views.
89. *Humaid, supra* note 6 at paras. 68-82. If we accept 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?
The third reason offered by the court focused on the objectionable nature of the accused’s beliefs concerning women. Even if evidence had been led establishing that Humaid shared the patriarchal beliefs attributed to Islamic culture, the court questioned whether it could take such beliefs into account. On this point, 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.94

The decision in *Humaid* speaks to many of the concerns raised by critical race scholars. First, and of particular note, is the way in which the court presents Humaid as culturally (over)determined. Humaid kills his wife not out of a loss of self-control but, rather, out of a culturally derived sense of revenge. It is the accused’s culture and its notion of women’s inferiority that is to blame for the killing. The defence of provocation, by way of contrast, knows no such connection between culture and the kinds of provocative insults that cause ordinary men to lose self-control.95 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 position 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 about 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 property. Sadly,

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94. *Ibid.* at para. 93
this proprietary conception of women still carries some currency with Canadian courts when it comes to provocation.

Colonial and Patriarchal Discourses: Comparing Thibert and R. v. Tran

The most recent case to consider the relevance of an accused’s cultural background in the context of romantic rejection is the 2008 case R. v. Tran. Tran differs from the cases discussed earlier because in Tran it is the male lover, not the wife, who is the deceased. However, the case has some striking similarities to the 1996 case of Thibert. That said, Thibert and Tran are markedly different when it comes to the cultural background of the accused and the success of the provocation claims advanced.

Norman Thibert’s wife, Joan, was having an affair with co-worker Alan Sherren and had disclosed this fact to her husband. Despite the disclosure, Thibert convinced Joan to try and make their marriage work. However, two months later, Joan left Thibert. When she telephoned him to announce her decision, Thibert persuaded Joan to meet him the following morning at a restaurant, a meeting she attended with Sherren. At that meeting, Thibert tried to convince Joan to return home but failed. He then proceeded to call his wife at work, trying to convince her to return to him and later decided to find Joan so that he could speak to her “away from the influence” of Sherren. When Joan left her workplace to go to the bank, Thibert followed her there and insisted that they speak privately. Fearing Thibert, Joan agreed to meet him in a vacant lot but returned, instead, to her workplace. Thibert followed and confronted Joan in the parking lot, repeating his request for a private conversation. Joan again refused. Around this time, Sherren came out of the building to lead Joan back inside, prompting Thibert to get a shotgun 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.’” When Sherren advanced despite Thibert’s instructions to stay back, Thibert shot Sherren. Thibert was charged with first-degree murder.

At trial, provocation was left with the jury, but Thibert was convicted of second-degree murder. He appealed the decision based on the provocation instruction given to the jury. Alberta’s Court of Appeal found that provocation should not have been left with the jury, and thus any error in the jury charge had not prejudiced

96. Tran, supra note 6.
97. Thibert, supra note 31.
98. Ibid. at para. 44.
99. Ibid. at para. 48.
100. 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.
the accused. However, the Supreme Court of Canada disagreed and ordered a new trial. Writing for the majority, Justice Peter Cory found that the conduct of the deceased would have provoked the ordinary married man to lose self-control and that the provocative insult that satisfied section 232 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 appellant’s 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 with his wife which was the last straw that led him to fire the rifle suddenly before his passion had cooled.”\footnote{101} 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 \textit{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.\footnote{102}

Among the troubling aspects of the \textit{Thibert} decision is the way in which 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 choice but, rather, the result of the influence of another man. Much of the problem, it seems, was 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 accused’s wife. 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 rifle from the car.”\footnote{103} 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 also used the language of property to characterize the nature of the provocation that Thibert endured. Consider the following passage from the decision:

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\begin{itemize}
\item[101.] \textit{Thibert, supra} note 31 at para. 30.
\item[102.] \textit{Ibid.} at para. 22.
\item[103.] \textit{Ibid.} at para. 26.
\end{itemize}
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... 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 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.\(^{104}\)

While the Court’s finding of adequate provocation in Thibert is highly questionable, its assessment of the subjective component of the provocation defence is equally problematic. Indeed, the fact that the Court found the killing to meet the “on the sudden” element of the defence is rather astonishing. The majority insisted that Thibert had “sought to avoid the deceased in order to talk privately with his wife” and that the confrontation in the parking lot was “unexpected.”\(^{105}\) However, as argued by Justice John Major 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 that very morning.\(^{106}\) Moreover, Thibert sought out his wife at the deceased’s place of work. There was nothing unexpected about the situation Thibert encountered.\(^{107}\) Nonetheless, his provocation claim succeeded.

Thieu Kham Tran had suspected since 2003 that his wife, Hoa Le Duong, was having an affair with the deceased, An Tran. By 2004, Duong was living alone with the couple’s children in the apartment she formerly had shared with Tran. Although Tran had returned his keys and access cards, he continued to receive mail at the apartment and would gain access to the building by having the building manager let him in or by following tenants. Despite their separation, Tran was hopeful that his wife would return to the marriage.\(^{108}\) However, Duong asked for a divorce. On the day of the murder, Tran went to the apartment after phoning there and receiving no answer. He said that the purpose of his visit was to collect his mail. Tran was admitted by the building manager, who testified that Tran did not seem to be angry, disturbed, or agitated. Once in the apartment,

\(^{104}\) Ibid. at para. 23 [emphasis added].
\(^{105}\) Ibid. at para. 27.
\(^{106}\) Ibid. at para. 67.
\(^{107}\) For a discussion of whether the defence should be available in cases of “self-induced provocation” where an accused engineered the confrontation that led to the killing, see Morgan, supra note 2 at 250-5.
\(^{108}\) Tran, supra note 6 at para. 25.
Tran proceeded to a bedroom where he found his wife and the deceased in bed, nude. Tran retrieved two knives from the kitchen and killed An Tran.

Tran was charged with second-degree murder but was convicted of manslaughter. Much like the decision in *Thibert*, the trial judge, Justice L.J. Smith, when deciding Tran’s sentence concluded that Tran “wanted very much to save his marriage, and he had some reason for 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.” 109 The trial court made reference to the accused’s culture, commenting on the “dim view” of adultery taken by members of the accused’s ethnic community who testified before the court. Indeed, the trial judge noted that 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. 110 However, the trial judge was hesitant to affirm the idea that it was Tran’s “ethnic” culture that was being taken into account. Noting that taking wedding vows seriously was not unique to the culture of the accused, the trial judge ultimately had this to say about the relationship between Tran’s culture and provocation:

I accept 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. 111

Thus, while Tran’s provocation defence succeeded, the role that his “culture” played in applying the ordinary person test was unclear.

Alberta’s Court of Appeal took a very different view, finding that provocation should not have been left with the jury and convicting Tran of second-degree murder. The appeal court took the position that no insult occurred within the meaning of section 232 and that the trial judge erred by looking at the insult almost exclusively from the subjective perspective of the accused. 112 Furthermore, while the trial judge found that there was doubt as to whether Tran even knew his wife was at home, the Alberta Court of Appeal found that Tran’s actions did not meet the standard of “on the sudden” because he suspected that Duong was having an affair. 113

110. Tran, supra note 6 at para. 51.
111. Ibid. at para. 53.
112. Ibid. at para. 17.
113. Ibid. at para. 18.
In discussing the trial court’s comments about Tran’s cultural background, the court stated that it was not necessary to offer an opinion on “the controversy about ethnicity factors in relation to provocation” because the cultural values of the accused were consistent with the traditional views of other cultures in Canadian society. Moreover, 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.

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 had no currency with the court in Tran, despite the holding of the Supreme Court of Canada in Thibert. Thibert, who hunted down his wife at the workplace of the deceased, was credited with meeting the “on the sudden” standard. Tran, who may have had no idea that his wife, let alone the deceased, was at the apartment, failed to meet this same standard. Thibert’s behaviour was partially excused as a concession to human frailty. The rage he felt at seeing Sherren with his hands on his wife was understandable. Tran’s rage found no excuse. Instead, the court had this to say:

In 21st Century Canada, it is not realistic for a separated man, particularly one who knows that his wife is seeing another man, to not expect to see them together . . . It is not realistic for the man to assume that his estranged

114. Ibid. at para. 52.
115. Ibid. at para. 63.
wife, who does not want to answer his phone calls, will nonetheless want
him back in her life.\footnote{Ibid. at para. 71.}

My purpose in raising these discrepancies is not to argue that Canadian courts
should accept romantic rejection or infidelity as adequate provocation. It is to
examine the way in which Tran’s claim was rejected. Rather than characterizing
Tran’s behaviour as a loss of self-control, the court found that it failed to meet
the standards of section 232, which “accord to the characteristics and values of
modern society and to human nature as our evolving society understands it.”\footnote{Ibid. at para. 45.}
The fact that the court considered Tran’s behaviour to be socially primitive could
not have been made more clear. Since it conflicted with “current social
mores,”\footnote{Ibid. at para. 74.} it could find no excuse under section 232, which recognizes the “accep-
table limitations of human self-control as recognized in 21st Century society—
though not as might have been thought acceptable in 19th Century society.”\footnote{Ibid. at para. 45.}
While in this respect, and contra \textit{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, this admission seems to
have been made with one purpose in mind—to make clear that the accused’s “cul-
tural” vantage point was backward, primitive, and based on precepts long discarded
by Canadian society.

\section*{Conclusions}

Liberals, feminists, and critical race scholars all raise significant concerns
about the likely outcome of bringing culture into the courtroom, offering a
number of propositions in turn. Canada’s provocation jurisprudence 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 candi-
date for evaluating the literature’s claims.

With \textit{Ly}, \textit{Nahar}, \textit{Humaid}, and \textit{Tran} all failing to succeed on provocation, the
feminist proposition that cultural considerations will generate legal outcomes that
privilege race over gender has not been realized. Canadian courts have not been
receptive to arguments detailing the patriarchal values of an accused’s culture.
What of the predictions of critical race feminists? They argue 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. Yet, despite the congruence of values across minority and majority cultures, this proposition has not been borne out by the Canadian jurisprudence. That 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 the accused’s cultural background is relevant to a provocation claim involving romantic rejection and others arguing that any characteristic of the accused that fails to accord with fundamental liberal values, including gender equality, never may be taken into account when formulating the ordinary person.

The second proposition offered by critical race scholars is 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. This proposition clearly is 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 have committed adultery, the contours of the defence, like its rationale, have been altered and expanded to reflect changes in Anglo-Saxon cultural beliefs, with both legal scholars and judges acknowledging that the defence must evolve to reflect contemporary values and social mores.\footnote{120}

Consider, too, how provocation defences are assessed. There can be no doubt that when jury members consider whether a specific insult 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 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. Yet, as is so aptly illustrated by \textit{Tran} and \textit{Humaid}, where the accused belongs to a minority cultural community and provides evidence regarding his cultural background, his behaviour is likely to be attributed to his culture.\footnote{121}

The third proposition offered by critical race feminists—that courts will eschew cross-cultural similarities and emphasize differences among cultures—also rings true. Domestic violence and intimate homicide are gendered crimes in both dominant and minority cultural communities, and, as illustrated by cases such as \textit{Thibert}, Canadian courts have not been unreceptive to the provocation claims of jealous husbands and boyfriends who hail from the dominant society.\footnote{121} However, in \textit{Humaid}}
and \textit{Tran}, the cultural communities of the accused and their very similar reactions to romantic rejection were presented as backward, illiberal, and primitive. In fact, the suggestion that a husband’s jealousy could warrant legal compassion was met with complete disdain and characterized as antithetical to Canada’s fundamental values. This juxtaposition of dominant and minority cultural communities was accomplished, in part, by invoking an essentialized understanding of culture as a homogenous entity that is akin to race, ethnicity, or religion—a caricature that not only excludes considerations of sex-based, in-group differences and cultural dissent but also imposes standards of authenticity that the accused must strive to meet before his cultural context can be taken into account.\textsuperscript{122}

The final proposition, which flows out of the liberal critique, concerns the conclusions that can be drawn about judicial records, such as Canada’s, that illustrate a reluctance to allow cultural evidence to excuse or mitigate the behaviour of an accused. Is it the case, where cultural evidence is omitted or has been accepted but has failed to produce a successful provocation defence, that differential treatment based on culture has been avoided? The Canadian case law 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 \textit{Tran} is particularly telling in this regard, where the Alberta Court of Appeal, 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 \textit{Tran}’s assertions as vestiges of nineteenth-century society—\textit{a particularly tall tale in light of cases such as \textit{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 cultural beliefs.

In the end, there can be no question that the defence of provocation in the context of intimate femicide is exceedingly troubling, and the proposition, advanced so forcefully in \textit{Tran}, that a woman’s choice to end a romantic relationship or begin a new one may never partially excuse murder should be received as welcome news. Legal scholar Rosemary Cairns Way agrees that this aspect of the jurisprudence has the potential to limit the defences’ availability, but she notes that the decision in \textit{Thibert} remains problematic.\textsuperscript{123} In \textit{Thibert}, while the Court maintained that romantic rejection cannot justify murder, it still managed to find in \textit{Thibert}’s favour. By

\textsuperscript{122} Volpp, “(Mis)Identifying Culture,” \textit{supra} note 50 at 90-1. This dynamic is illustrated well by the trial court’s decision in \textit{Nahar}, where the accused’s sporadic attendance at temple disqualified him from qualifying as an “observant Sikh.” See \textit{Nahar}, \textit{supra} note 5 and the text accompanying notes 73-80 in this article. For a discussion of how authenticity standards have been used in Australia to reject an accused’s claim to have his culture taken into account in assessing provocation, see Heather Douglas, “Assimilation and Authenticity: The ‘Ordinary Aboriginal Person’ and the Provocation Defence” (2006) 27 Adelaide Law Review 199.

\textsuperscript{123} Cairns Way, \textit{supra} note 95 at 13.
emphasizing the deceased’s taunting remarks and interference with Thibert’s ability to speak privately to his wife, rather than Joan Thibert’s choice to end their relationship, the majority constructed the facts in a way that supported, rather than undermined, Thibert’s provocation claim. As Cairns Way notes, this approach is particularly problematic given that “admissions of infidelity within a relationship are rarely singular, stand alone events.”

What, then, are the prospects that the decisions in Humaid and Tran signal a movement away from Thibert and a commitment by Canadian courts to reject the idea that romantic rejection or infidelity can amount to adequate provocation? Only time will tell, but a 2009 decision by Ontario’s Court of Appeal casts doubt on whether Canadian courts have embarked on a new path, at least in those cases where the accused is from the dominant cultural community. In R. v. Cudjoe, while the accused was convicted of second-degree murder, the Ontario Court of Appeal confirmed that provocation could be left with the jury where the accused killed his wife when she told him that she was leaving him for a woman with whom the pair had been having a sexual relationship, adding that he was a bad parent and had not satisfied her sexually.

Leaving the result in Cudjoe aside, even if the jurisprudence in the “cultural cases” affirms the right of women to terminate relationships without retribution, 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. 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 should not even have been left with the jury. Thus, while Canada’s move towards using “culture in the courtroom” has not exacted a judicial toll on female members of minority cultural

124. Rosemary Cairns Way, “Developments in Criminal Law: The 1995-1996 Term” (1997) 8 (2d) Supreme Court Law Review 181 at 189. Jenny Morgan similarly argues that the likelihood of a provocation defence succeeding will be affected by how the court construes the facts of the case and whether it chooses to emphasize a woman’s choice to end a relationship or some other factor. Morgan, supra note 2 at 255.


126. These kinds of results are not limited to Canada. The Queensland Law Reform Commission has noted similarly inconsistent outcomes. For example, in R. v. Sebo, [2007] QCA 426, a twenty-eight-year-old man who killed his teenaged girlfriend when she taunted him about her relationships with other men succeeded in raising provocation and received a ten-year sentence for manslaughter. Compare this to the 2004 sentence handed down in R. v. Poonkamelya, where an indigenous man who came home to find his wife having intercourse with his friend was convicted of murder and sentenced to life in prison for killing her. The accused raised cultural factors and the importance of “loss of face” in his kinship system at sentencing. Queensland Law Reform Commission, A Review of the Defence of Provocation (August 2008) at 56-63 and 69-70, online: Queensland Law Reform Commission <http://www.qld.gov.au/reports/R%2064.pdf>.

127. Cudjoe, supra note 31 at paras. 31-6.

128. See all of the sources contained in notes 24 and 31.
communities as victims of violence, the same cannot be said of its consequences for their cultures or their male counterparts. Colonial discourses of cultural inferiority figure prominently in the jurisprudence, casting the behaviour of members of minority cultures as both socially primitive and culturally determined. And while the patriarchal values cited by the accused in these cases should not be discounted nor should their relevance to the dominant society. They are the same values that underpin the defence of provocation and have served men from the dominant community so well. Nonetheless, and despite these cross-cultural similarities, the fear that culture in the courtroom will privilege race over gender has not held sway. Instead, the emerging trend in the Canadian jurisprudence suggests a different ordering principle—that of colonialism before patriarchy.