Comparatively Speaking: The Honor of the East and the Passion of the West

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Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West*

Lama Abu-Odeh**

I. INTRODUCTION

In a previously published work,¹ I discussed crimes of honor in the Arab world. A paradigmatic example of a crime of honor is the killing of a woman by her father or brother for engaging in, or being suspected of engaging in, sexual practices before or outside marriage. On a simple and immediate level, I called for an end to these crimes because of their obvious cruelty. All Arab laws or judicial practices that legitimize or sanction these crimes should be abolished.

On a more complicated level, I attempted to identify the role that these crimes play in the production and reproduction of gender relations in contemporary Arab life. I contended that these relations are the outcome of a complex triangular interaction between social violence (the crime of honor itself), state violence (the attempt to regulate this crime), and the response by contemporary men and women to the balance between these two types of violence.

I argued that in the past, the crimes have gone largely unregulated, practiced as a means of controlling the violators by punishing them for vice and deviancy from the prescribed sexual rules. However, despite the fact that crimes of honor continue to exist to this day and do so on a significant scale, I argued that their social function has become different.

The intervention of the Arab nationalist elite in the social field (by desegregating gendered social space) has rendered the concept of sexual honor ambiguous. Their intervention in the legal field,

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through codification, had the purpose of modernizing a traditional practice (crimes of honor) by defining the limits of its practice (sanctioning it by penalizing the violators in certain cases). The legal move that they made could be seen as a means of containing the practice of crimes of honor.

The mushrooming of diverse sexual types (the sexy virgin, the virgin of love, the "slut") and sexual practices among women and men are a response, I argued, to the interaction between the social violence and its regulation by means of state violence. There is an added complexity due to the fact that the judicial practice through the Arab world of judging incidents of honor has served a double function: trying to contain the practice of the crimes while also attempting to co-opt the emergence of new subversive sexual types. The end picture has the complicated appearance of the crimes being a response to the new sexual practices (their contemporary function), the state regulation and judicial practice being a response to the violence and the sexual practices, and the resistant sexual types being a response to the balance between the two types of violence, both social and state.

If indeed the demand to completely abolish crimes of honor is unrealistic, I argued that these crimes, insofar as their legal sanction is concerned, should be reduced to those of passion. This is a viable move because the spectrum of codification of crimes of honor in the Arab world already has within its parameters the legal construct of a crime of passion, as in the cases of Algeria and Egypt.² What seems to preempt the full development of the idea of passion in these two respective countries is judicial practice which uses alternative legal means to reintroduce the idea of a crime of honor.³

². In Egypt, for instance, the only killing that is considered to be partially excused (manslaughter) in such a context is when the wife is caught red-handed by her husband committing adultery. See EGYPTIAN PENAL CODE art. 237 (No. 58, 1937). The Egyptian crime of passion is thus defined in almost exactly the same terms as the one nineteenth-century U.S. common law treated as a crime of passion committed on account of the wife's adultery. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 477 (1987) (noting "observation by a husband of his wife committing adultery" constituted adequate provocation under common law); see also WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW 575 (1972) ("It is the law practically everywhere that a husband who discovers his wife in the act of committing adultery is reasonably provoked.").

³. When I wrote my previous article, what I had in mind as constituting the crime of passion that I thought was the more desirable option to a crime of honor was the one defined as "killing the wife (and/or paramour) when caught committing adultery" such as the one recognized by the American common law. See Abu-Odeh, supra note 1. I had argued that the move from crimes of honor to this kind of crime resulted in narrowing the pool of the female victims of such crimes from wife, moth-
In this Article, I will attempt a comparative review by examining in the United States the crime that has the most affinity with the crime of honor in the Arab World: the killing of women in the heat of passion for sexual or intimate reasons, which is seen in the United States as one of many instances in which the more generic crime of passion can occur. For the purposes of this Article, I will use the term "crime of passion" as it is so specifically defined. The reason for the exercise is to locate precisely the meaning of the proposition historically circulated in the orientalist tradition but also shared by Euro-American popular culture that while the West has "passion" the East has "Honor." What is the meaning of this difference? Where can we locate it exactly? What does it mean that a legal system, such as the one in the United States, is purportedly invested purely in the idea of passion? Can the United States be seen as a progressive ideal where the idea of passion has been incorporated more successfully than it has been in the Arab World? Is the passion of the United States legal system one that Arab women should aspire to reign in the legal system of their own countries? Are American women better off, worse than, or simply situated differently from Arab women? How do the two respective legal systems, when it comes to the passion/honor of men, intersect with and/or depart from each other? How is the Arab judiciary's relation-er, sister, and daughter to wife only. See id. at 142.

4. For a definition of "orientalism" as discourse and system of knowledge and power, see EDWARD W. SAID, ORIENTALISM 31–46 (1978).

Orientalism was a library or archive of information commonly, and in some of its aspects, unanimously held. What bound the archive together was a family of ideas and a unifying set of values proven in various ways to be effective. These ideas explained the behavior of Orientals; they supplied Orientals with a mentality, a genealogy, an atmosphere; most important, they allowed Europeans to deal with and even to see Orientals as a phenomenon possessing regular characteristics. But like any set of durable ideas, Orientalist notions influenced the people who were called Orientals as well as those called Occidental, European or Western... If the essence of Orientalism is the ineradicable distinction between Western superiority and Oriental inferiority, then we must be prepared to note how in its development and subsequent history Orientalism deepened and even hardened the distinction.

Id. at 41–42. For an example of the internalization of orientalist ideas while reversing their meanings, see Richard Fox, East of Said, in EDWARD SAID: A CRITICAL READER 152 (Michael Sprinkler ed., 1992) ("What appeared in pejorative Orientalism as India's ugliness now became India's beauty; her so-called weaknesses tuned out to be her strengths. Other worldliness became spirituality, an Indian cultural essential that promised her a future cultural perfection unattained in the West. Passiveness became at first passive resistance and later nonviolent resistance.").

5. The comparison with the Arab context will obviously mean that Arab will be a stand-in for the Oriental in this instance.
ship to the “rage” of the dishonored Arab man different from or similar to that of the American judiciary’s relationship to the rage of the jealous American man?

In this Article, I will argue that a comparative analysis of the legally sanctioned violence against women (for intimate or sexual reasons), of both the Arab legal system and that of the American, reveals the fallacy of both the orientalist construction that the East is different from the West and the almost contradictory idea of international feminism that all violence against women all over the world is the same. I will argue that there are deep similarities between the internal tensions within each legal system as to what constitutes a killing of women that is legally tolerated (either fully or partially), and that these tensions, although sometimes defined differently, have been surprisingly resolved in the same way. Or put differently, the Arab judiciary has resorted to alternative legal concepts available in the various Arab Penal Codes, the most important of which is that of killing in a fit of fury, to release the honor crime from the shackles of some passion requirements (surprise and flagrante delicto) attached to it and redeem for it its earlier traditional integrity and coherence. This Arab killing in a fit of fury is in fact uncannily similar to the American category of extreme emotional distress (“EED”) (enshrined in the Model Penal Codes (“MPC”)). EED represents the most extreme instance in the United States legal system of a historical progression towards “subjectifying” the test according to which a killing is considered to have been committed while the actor (mostly man) was in a state of passion. The coming to the scene of the EED in its American and Arab garb (fit


7. These legal concepts include “killing in a fit of fury” in Jordan, see JORDANIAN PENAL CODE art. 98 (No. 16, 1960); “the provocation rule” and “the honorable motive rule” in Syria, see SYRIAN PENAL CODE arts. 192, 242 (No. 148, 1949); and the “extenuating circumstances rule” in Egypt, see EGYPTIAN PENAL CODE art. 17 (No. 58, 1937). See Abu-Odeh, supra note 1, at 165–66.

8. What I mean by “subjectifying” the test is the idea that the passion of the violent man becomes this particular man’s subjective experience which nobody else is capable of challenging or contradicting. In other words, there are no objective standards (pre-defined categories of provocation, or alternatively the standard of the “reasonable man” to be used to judge the validity of the passion of this man). See Victoria Nourse, Passion’s Progress: Modern Law Reform and the Provocation Defense, 106 YALE L.J. 1331, 1340 (1997) (arguing that EED applied in the MPC jurisdictions allows increased legal tolerance of violence against women and ties women to men in emotional unity).

9. EED, in whole or in part, is applied in 11 states and two territories. See id. at 1340 n.52, 1345 n.88.
of fury), has led to the tolerance in both places of an increasing variety of violence against women (American and Arab). 10

I say this, while contending at the same time that there remains a sharp cultural cleavage between the Arab and the American legal systems: the killing of daughters, sisters, and mothers, for their sexual conduct, seems to be rarely ever tolerated in the American system (as opposed to wives, ex-wives, girlfriends, and ex-girlfriends). While the legal radical feminist line that there is violence against women all over the world is correct, it reveals its own Eurocentric bias by arguing that "international action is needed to protect wives around the world" 11 because "the . . . analysis suggests . . . internationally shared attitudes about women's worth, their proper role and men's ownership rights in their wives." 12 My analysis will reveal that the killing of "wives" is more of a cultural projection by these feminists on other parts of the world. In the Arab world, unlike in the United States, it is mostly "daughters" and "sisters" that are getting killed.

In Part I of this Article, I will try to delineate what I believe to be the differences between a regime of honor and that of passion as forms of violence against women. I will do that by representing each as an ideal type. In Part II I will show how when embodied culturally, elements of both ideal types coexist together in one legal system albeit in tension with each other. I will first show how in the Arab Penal Codes the tension between passion and honor is a feature of these Codes both as they compare with each other and inherently in the very construction of each one of these Codes. In Part III I will argue that a similar tension, between passion and honor, exists in the United States criminal legal system. An example of this is the division of jurisdictions into those applying the common-law categories of what constitutes adequate provocation 13 and those that use the EED defense adopted by the Model Penal Code(s). 14 One is led to treat the common-law categories as representing American honor legally constructed in criminal matters (tracing back to the nineteenth century), and EED as the competing idea of passion, a more recent phenomenon historically, with deep affinity to the move to liberalize legal defenses in American crimi-

10. See id. at 1334.
11. See Spatz, supra note 6, at 638.
12. Id.
13. See id. at 1346.
14. See supra text accompanying note 9. There are also jurisdictions that use a combination of both. See Spatz, supra note 6, at 1346.
nal law.\textsuperscript{15}

In Part IV, I will try to show how the attempt to resolve the tension between the elements of honor and those of passion in the Arab criminal legal system by the Arab judiciary, to force it to be more honor-based, leads to more legal tolerance of violence against women.\textsuperscript{16} In like manner, the move in the American legal system, this time to be more passion-based, leads equally to more legal tolerance of violence against women in the United States. Interestingly, it will turn out that the honor of one (the American) is the passion of the other (the Arab), while the passion of one (the American) echoes the norms of the honor of the other (the Arab). In Part V, I will argue that the fluidity of this picture goes against the grain of the construction of difference between the East and the West both by orientalism\textsuperscript{17} and reverse-orientalism,\textsuperscript{18} as well as the construction of similarity between them by international radical feminism.\textsuperscript{19}

II. HONOR AND PASSION AS IDEAL TYPES

At first, I will attempt to delineate what I believe to be the differences between a regime of honor and that of passion as forms of violence against women. I will do that by representing each as an ideal type.

The idea of honor is based on the notion of justification, where the stress is on the nature of the act, rightful or not, not the actor.\textsuperscript{20} Self-defense is the paradigmatic example of an act that is justified.\textsuperscript{21} Alternatively, the idea of passion is based on the notion of excuse. "It is always actors who are excused, not acts. The act may be harmful, wrong, and even illegal, but it might not tell us what kind of person the actor is."\textsuperscript{22} It appeals to our sense of compassion for human weakness in the face of unexpected, overwhelming circumstances.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{15} See Spatz, supra note 6, at 1379–84.
\item \textsuperscript{16} See supra text accompanying note 7.
\item \textsuperscript{17} See supra text accompanying note 4.
\item \textsuperscript{18} See supra text accompanying note 4.
\item \textsuperscript{19} See supra note 6.
\item \textsuperscript{20} See Joshua Dressler, Rethinking Heat of Passion: A Defense in Search of a Rationale, 73 J. CRIM. L. & CRIMINOLOGY 421, 436–37 (1982) ("[W]ith homicide . . . the existence of justification implies that under the circumstances, society either does not believe that the death of the human being was undesirable, or that it at least represents a lesser harm than if the defendant had not acted as he did.").
\item \textsuperscript{21} See id. at 437.
\item \textsuperscript{22} George P. Fletcher, The Individualization of Excusing Conditions, 47 S. CAL. L. REV. 1269, 1271 (1974).
\item \textsuperscript{23} "To partially excuse homicide is to recognize that external forces and human
Flagrante delicto\textsuperscript{24} is not an absolute requirement in a regime of honor, whereas it is in the case of passion. Since in the former situation what is most crucial is the “dishonorability” of the act committed by the victim,\textsuperscript{25} whether the actor is caught red-handed is irrelevant.\textsuperscript{26} In the latter situation, however, the actor commits the crime in a fit of fury having lost control over his reason.\textsuperscript{27} The element of flagrante delicto is therefore key, since it supports the context in which the actor has “flipped.”\textsuperscript{28} This is less a moral judgment and more a recognition of, and sympathy with, the actor’s jealousy when confronted with the act of sexual betrayal. Whereas the idea of fit of fury is also acknowledged in the case of honor (a dishonored man also flips), the necessity to avenge the dishonor survives the initial moment of fury, so that the crime is conceivable after that. There is, however, no excuse in the case of passion for action that occurs after the initial moment of rage has elapsed.

Anyone dishonored can commit a crime of honor, which means that more than one man may be implicated in the incident of dishonor, including a father, brother, son, husband—and sometimes—even an uncle or cousin.\textsuperscript{29} Therefore any one of these individuals could commit the crime. Dishonoring is a collective injury. In contrast, only somebody sexually connected to the woman, primarily her husband, can be excused for committing a crime of passion; passion is an individual injury.\textsuperscript{30}

Any dishonorable action justifies intervention by the one who is dishonored.\textsuperscript{31} This could cover a case of flagrante delicto adultery, attitude equivoque, or “unlawful bed.” The idea of honor embraces a broad spectrum of actions by the dishonoring party far exceeding that of sexual betrayal. Only incidents of sexual betrayal can occasion a crime of passion, since it is only the person sexually connected to the woman who can be excused.

In sum, honor is based on ideas of kin, status, honor, and collectivity, while passion is based on ideas of individualism, roman-}

\begin{footnotes}

25. It is based on a moral judgment on that act.
26. See Abu-Odeh, supra note 1, at 155.
27. See id.
28. See id.
29. See id. at 154.
30. See id. at 155.
31. See id. at 148–51.
\end{footnotes}
tic fusion, and sexual jealousy.

III. HONOR AND PASSION IN THE ARAB CRIMINAL LEGAL SYSTEM

In this part I will try to show the particular legal cross-existence of honor and passion in the Arab legal system, both comparatively between the various codes and internally within the code itself, taking as my example the Jordanian Penal Code.

Arab Penal Codes differ among themselves, I have argued elsewhere, on three issues: (1) the scope of application of the excuse in terms of the act committed by the woman; (2) the kind of excuse granted to the man committing the killing, whether total or partial; and (3) who benefits from the excuse. I noted that some codes—the Egyptian, Tunisian, Libyan, and the Kuwaiti—limited the application of the excuse to situations of adultery, where the excuse was only partial. Others expanded the application of the excuse beyond adultery to include situations of “unlawful bed” (Jordanian) or “attitude equivoque” (Syrian and Lebanese), where the excuse was partial. The Iraqi Code was unique in that it covered both the situation of adultery and what it called “her presence in one bed with her lover” and the excuse granted was partial in both cases. As to “who benefits from the excuse,” I noted that the Syrian and Lebanese Codes adopted the French terminology “wife, female ascendants, descendants, and sister” so that the husband, the son, the father, and the brother benefited from the excuse. The Jordanian Code, on the other hand, used the French terminology as well as the Ottoman expression “wife or female unlawfals,” thereby expanding to a large degree the number of beneficiaries of the excuse. The Iraqi Code used an expression similar to that of the Jordanian one, namely, “his wife or one of his female unlawfals” to cover both cases of adultery and “one bed.” The Egyptian, Kuwaiti, and Tunisian Codes limited the beneficiaries to that of the husband, and the Libyan Code to that of the husband, father, and brother. The Algerian Code was unique in that it treated both husband and wife as beneficiaries of the excuse, which it limited to situations of

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32. Either exemption from punishment (total excuse) or reduction in penalty (partial excuse). See id. at 144–45.
33. See id.
34. Where the excuse granted was total.
35. This expands the beneficiaries to a considerable degree (at least formally speaking) since a female unlawful includes every woman that the man cannot marry either for blood, marriage (in-law), or nursing reasons (which makes the disparity between the first and second section of the article quite significant and almost mysterious).
adultery.\textsuperscript{36}

Therefore I have argued that, comparatively speaking (among themselves), these codes seem to be distributed on a spectrum with two opposite poles. The first is best exemplified by the Algerian Code, where both husband and wife benefit from a reduction of penalty when s/he catches the other committing adultery. The opposite pole is best exemplified by the Jordanian Code, where many men benefit from both a reduction and an exemption of penalty if they catch one of their female unlawfults committing adultery or in an unlawful bed with her lover. The difference between these two ends, I argued, may very well be the difference between the idea of a crime of passion (the former) and a crime of honor (the latter).\textsuperscript{37}

Such incorporation of diverse elements also exists in the codes themselves, I have argued, as part of their inherent construction, which is best exemplified by the Jordanian Penal Code.\textsuperscript{38} In that code, the locus of the crime of honor is Article 340. The first article of three in a section entitled “Excuse in Murder,” Article 340 provides:

(1) He who catches his wife, or one of his (female) unlawfults committing adultery with another, and he kills, wounds, or injures one or both of them, is exempt from any penalty.

(2) He who catches his wife, or one of his (female) ascendants, descendants or sisters with another in an unlawful bed, and he kills or wounds or injures one or both of them, benefits from a reduction of penalty.\textsuperscript{39}

Article 340 owes its historical origin to two legal sources when it comes to the issue of “crimes of honor.” These two sources are the Ottoman Penal Code of 1858 and the French Penal Code of 1810.

From the Ottoman Code, Article 340 of the Jordanian Penal Code adopted the expressions “female unlawfults” and “unlawful bed.” From the French Code, the article borrowed the expression “ascendante, descendante” and the idea of a partial excuse as stated in the second section of the article, “une excuse attenuante.”\textsuperscript{40}

An article such as Article 340, with its cultural hybridity as legal construct, exists in almost every other Arab Penal Code. The internal tension between passion and honor is reflected in the cohabitation in the article above, of elements that seem to belong to the world of passion (flagrante delicto, partial excuse) with those

\textsuperscript{36} See Abu-Odeh, supra note 1, at 189 n.6.
\textsuperscript{37} See supra note 32.
\textsuperscript{38} See supra note 7.
\textsuperscript{39} JORDANIAN PENAL CODE art. 340 (No. 16, 1960).
\textsuperscript{40} See Abu-Odeh, supra note 1, at 143–44.
that belong to the world of honor (unlawful bed, total excuse). Such hybridity/tension is inherent in the system requiring the Arab judiciary to constantly negotiate these conflictual and contradictory elements to try to achieve a semblance of stability in the system.

IV. HONOR AND PASSION IN THE AMERICAN CRIMINAL LEGAL SYSTEM

One way of representing honor and passion in the United States context is through historical narrative. The narrative would look something like this: A crime of passion in the United States is usually included in the legal literature under the doctrinal concept of "provocation." This is so because "[a]n intentional homicide committed in a sudden rage of passion engendered by adequate provocation, and not the result of malice conceived before the provocation, is voluntary manslaughter." Provocation is a judicial construction that developed in England at a time when all homicides were punishable by death. The idea was that homicides committed as a result of provocation should be treated differently from other homicides, and it therefore developed that provocation reduced a charge from murder to manslaughter.

Provocation has undergone many changes since its original formulation. It initially stressed the subjective state of mind of the accused; therefore, a defendant was required to prove loss of self-control to show that the homicide was committed without malice. Eventually the courts established categories of events considered sufficiently provocative to confute the presumption of malice and thereby objectified the standard of provocation. These categories are known as the "common-law categories of adequate provocation" and they were few and specific: serious battery, aggravated assault, mutual combat, commission of a serious crime against a close relative, unlawful arrest, and the observation by a husband of his wife committing adultery. This view held that the adequacy of the provocation was a matter of law to be determined by the courts.

43. See Taylor, supra note 23, at 1684–85.
44. See id. at 1685.
45. See id.
46. See Dressler, supra note 2, at 477.
47. See id.
However, it has come to be considered over the years that such a view was not feasible "because provocation may be given under an infinite variety of circumstances." Judges have therefore developed the "reasonable man" standard as an "objective" formula to determine whether there were events or circumstances sufficient to have provoked a reasonable man. The task of the court is to explain the standard to the jury, and the task of the jury is to apply the standard to the facts. In *State v. Watkins,* a case in which a man killed another man after his lover of eight years abandoned him to marry the latter, the court described the reasonable man in the following way:

> Reasonableness is the test. The law contemplates the case of a reasonable man—an ordinary, reasonable man—and requires that the provocation shall be such as might naturally induce such a man, in the anger of the moment, to commit the deed. The rule is that reason should at the time of the act be disturbed by passion to an extent which might render ordinary men, of fair, average disposition, liable to act rashly and without reflection, and from passion rather than judgment.

The category of the reasonable man has been subjected to a great deal of discussion over the years about who exactly this reasonable man is and what individual peculiarities should be taken into account when judging the adequacy of provocation. This then, the narrative continues, leads to the Model Penal Code formulation which introduces a significant amount of subjective consideration to the test of the reasonable man without giving it up completely. These formulations include ones such as a person who in-

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48. PERKINS & BOYCE, supra note 41, at 86.
50. 127 N.W. 691 (Iowa 1910).
51. *Id.* at 692. Following is an example of the way legal doctrine has expounded on this standard:

(1) There must have been a reasonable provocation. (2) The defendant must have been in fact provoked. (3) A reasonable man so provoked would not have cooled off in the interval of time between the provocation and the delivery of the fatal blow. (4) The defendant must not in fact have cooled off during that interval.

LAFAVE & SCOTT, *supra* note 2, at 573.
52. *See id.* at 578.
53. Whether the provocative act is defined objectively by the court as a question of law or whether it is the reasonable man standard, provocation as a defense in criminal law treatises typically has the following requirements: (1) killing committed in a heat of passion; (2) in response to an adequately provocative act; (3) the killing must be sudden and no cooling time has passed; and (4) a causal relation between provocation, passion, and fatal act is established. *See, e.g.,* PERKINS & BOYCE, *supra* note 40, at 85.
tentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes circumstances to be such that, if they existed, would justify the killing, but his belief is unreasonable. 54 Others provide that a homicide which would otherwise be considered murder is only manslaughter if "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse," the reasonableness of which is to be "determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." 55

It is notable that when killing women in a heat of passion was a common-law category, it was tolerated only under very strict conditions defined as such. These conditions "required proof that the defendant actually witnessed the physical act of intercourse between his wife and the paramour." 56 However, and corresponding with the progressive subjectifying of the provocation defense, these requirements came to be given more "liberal" meanings. This had already started to take place with Price v. State. 57

As a crime, adultery itself may be established and proven by circumstantial testimony. Should the law hold the husband to a greater or higher degree of proof than itself requires to establish a given fact? . . .

... As to a proper construction of the expression taken in the act, we cannot believe that the law requires or restricts the right of the husband to the fact that he must be an eye-witness to physical coition of his wife with the other party. 58

In State v. Yanz, 59 the court decided to displace the strict requirements of the category—"on finding his wife in the act of adultery"—for the idea of what the defendant actually believes has happened. It is still provocation even if the defendant's belief was mistaken. 60

The excitement is the effect of a belief, from ocular evidence, of the actual commission of adultery. It is the belief, so reasonably formed, that excites the uncontrollable passion. Such a belief, though a mistaken one, is calculated to induce the same emotions

54. See id. at 104.
55. DRESSLER, supra note 2, at 579 n.55 (citing various statutes adopting MPC formulations) (emphasis added).
57. 18 Tex. Ct. App. 474 (1885).
58. Id. at 481–83.
59. 74 Conn. 177, 50 A. 37 (1901).
60. See KAPLAN & WEISBERG, supra note 56, at 259.
as would be felt were the wrongful act in fact committed.61

People v. Berry62 offered an expansive interpretation of “taken in the act of adultery” by treating an admission by the wife of her own adultery as sufficient and relaxed the definition of the “cooling period” by treating twenty hours of waiting by the defendant before the actual act of killing as within the “heat of passion” requirement.63

I find that the best way to translate the development of these doctrinal concepts into the terms of passion and honor is to cite at some length Victoria Nourse's Passion’s Progress:

In early modern law, passion was defined by a set of categories derived from an older social order, indeed, a code of honor .... Adultery was at the center of the categories, the classic source of adequate provocation, enforcing rules of gender relations grounded in an older idea of property.

Today in the United States, the law of provocation stands at a crossroads .... The doctrine is in extraordinary disarray .... Although most jurisdictions have adopted what appears to be a similar “reasonable man” standard, that standard has been applied in dramatically different ways, with jurisdictions borrowing from both liberal and traditional theories. Some states require a “sudden” passion, others allow emotion to build up over time; some reject claims based on “mere words,” others embrace them. Today we are only safe in saying that in the law of passion, there lie two poles—one exemplified by the most liberal MPC reforms and the other by the most traditional categorical view of the common law. In between these poles, a majority of states borrow liberally from both traditions.64

The code of “honor” that Nourse refers to above, and which she argues exists in the common-law category of “adultery,” is perhaps even better exemplified by what is known as the unwritten law,65 which when it was written as statute or rule allowed the acquittal of husbands for such crimes, which it treated as justified. Such statutes/rules existed in Texas,66 Georgia,67 and New Mexico.68

61. Yanz, 50 A. at 39.
63. See Kaplan & Weisberg, supra note 56, at 264.
64. Nourse, supra note 8, at 1340–42 (footnotes omitted) (emphasis added).
65. In some common-law jurisdictions where the adultery-provocation was the principle, juries chose nevertheless to acquit the husband who killed to protect his honor based on a plea of insanity. See Kaplan & Weisberg, supra note 56, at 257.
67. See Cloud v. State, 7 S.E. 641, 641–42 (Ga. 1888) (holding that failure to charge jury that homicide is justifiable when preventing criminal intercourse with defendant’s wife was reversible error). This defense, however, is no longer available.
until the early seventies when they were all repealed. It is noteworthy that in these statutes/rules, the one committing the killing is usually the husband, sometimes even the father,69 and the victim is the *paramour*, not the wife, to stop or prevent adultery.

Another way of looking at honor and passion in the American criminal legal system is to note the tensions inherent in the doctrine *structurally*. One side of the following structural pairings, I would argue, represents “honor” and the other “passion,” existing as elements of the *same* legal system:70 justification vs. excuse, objective standard vs. subjective standard, and judges/laws vs. jury.

### A. Justification vs. Excuse

In the justification versus excuse doctrinal discussion, writers struggle with the fact that judges mix and confuse the language of both justification *and* excuse in deciding cases of passion where murder is held to be manslaughter. On one hand, there is enough “talk” in court decisions to indicate that various courts have viewed the issue as one of justification.71 All common-law forms of “adequate provocation” can be regarded as justification based since this approach concentrates on the unlawful conduct of the provoker.72 The conclusion thus is that the violent response by the provoked party was less socially undesirable than the provocation by the victim—the idea of justification. The attacker in this model is merely restoring the balance of justice.73 The use of this language is particularly predominant in cases of adultery where sexual unfaithfulness is seen as “the highest invasion of [a husband’s] property.”74

On the other hand, there is a great deal of “excuse” talk in these decisions, where the idea is that the harm is the same as in murder but the accused’s personal blameworthiness is less than that of the murderer. Talk such as “blind and unreasoning fury”75

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*See* GA. CODE ANN. §§ 16-3-20 to -40 (1996) (defining defense to criminal prosecution); Chancellor v. State, 301 S.E.2d 294, 297 (Ga. Ct. App. 1983) (“Contrary to appellant’s repeated assertion, the slaying of an illicit lover by a wronged spouse in order to prevent adultery is not justifiable homicide.”).

69. *See supra* note 67.
70. This argument is based on comparing these pairings with the ideal types of honor and passion referred to in Part II of this Article.
73. *See id.*
75. Disney v. State, 73 So. 598, 601 (Fla. 1916).
and "excite the passion in a reasonable person," puts the stress on the actor rather than the act. In Maher v. People, a man attempted to kill another in a saloon shortly after the victim committed adultery with the attacker's wife. The language of the judgment was such that the blameworthiness of the attacker was significantly suspended:

[If the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition; [the offense is manslaughter only, and not murder].

Fletcher, in his article The Individualization of Excusing Conditions, argues that there is a tendency in the common-law system, in contrast with the civil law system, to seek justifications for acts committed. Judges, according to Fletcher, need to feel that the act was morally right or socially utilitarian. The judicial construction of the "reasonable man," which, according to him, need not exist, is an indication of the "common law's aversion to excusing conditions."

The stark contradiction in the courts' language is put to challenge by Dressler in the following way:

Society [should be required] to directly confront the moral implications of justifying killings on the basis of the victim's nonhomicidal wrongdoing. The moral question would not be "hidden" in the provocation doctrine. It would be necessary to draft a law that says, in effect:

a homicide which would otherwise be murder is manslaughter if the victim committed an injustice or wrongdoing for which he deserved to be the subject of a severe, but not homicidal, response by another.

77. 10 Mich. 212 (1862).
78. See id. at 213–14.
79. Id. at 218–19.
80. See Fletcher, supra note 22, at 1288.
81. See id. at 1280–87.
82. German law, for example, focuses on excusing conditions rather than on the reasonable man standard. See id. at 1290.
83. Id.
84. Dressler, supra note 20, at 459 (citation omitted). Dressler argues that passion crimes should be based squarely on excuse, and he seeks to cleanse all ideas of justification from judicial constructions.
B. Objective vs. Subjective Standards

The modern law of provocation is based on the following formulation, which is an attempt at mediating the subjective and objective: "the defendant must show (i) reasonable provocation, (ii) that did in fact provoke, (iii) that a reasonable man would not have cooled off in the interval between the provocation and the fatal blow, and (iv) that the defendant actually did not cool off." 85

The debate here takes one of two forms: the first is a critique of the objective standard, and the second is an attempt to abolish the objective standard and adhere to the subjective alone. The critique of the objective standard argues that the standard is too limited; it posits that the reasonable man is limited to the idealized male. 86 "Commentators have criticized the reasonable man standard for its inconsistency, vagueness, dependence on social convention, and classbound nature." 87

There are also those who want the standard abolished altogether. They argue that the "reasonable man" is a judicial fiction that fails to adequately encapsulate the real "physiology" of a man in a situation of provocation (the fight or flight situation), and that deterrence by punishment therefore does not work. 88 Alternatively, others argue that the objective standard, though expedient, is inherently weak—a weakness that is bound to be exposed when certain difficult cases arise. 89 Those who defend the objective standard do so because "[i]t requires of the jury an assessment of the seriousness of the provocation, and a judgment as to whether the provocation was grave enough to warrant a reduction of the crime from murder to manslaughter." 90 In other words, the objective standard is viewed as an attempt to control the category of "passion," so that not everybody who "flips" can invoke it.

In section 210.3(1)(b), under the title "Manslaughter," the Model Penal Code attempts to mediate between the subjective and the objective standards in the following way:

   [Manslaughter includes] a homicide which would otherwise be

85. Taylor, supra note 23, at 1687 (citing LAFAVE & SCOTT, supra note 2).
86. See id.
87. See id. at 1688 (citations omitted).
C. Judge/Law vs. Jury

In this debate, juries are characterized as lenient and freewheeling in their treatment of provocation cases, where they tend to acquit defendants as opposed to merely reducing the sentence. This is based on juries' acceptance of defenses (such as an insanity plea) that judges would never accept as a matter of law because the strict standards of provocation do not prevail. Also, where juries concentrate on subjective elements in situations of provocation with little regard for objective considerations applied by judges, the characterization finds support.

In State v. Remus, the defendant, who killed his wife while divorce proceedings were pending, managed to convince a jury that he was insane when he committed the crime. He did so by soliciting the jury's sympathy for him on the basis of evidence he introduced proving that his wife was cheating on him and that she and her lover were conspiring to deprive him of his property. In this case, the defendant was unable to plead provocation.

Some commentators argue that to curb and control the jury's sloppiness, legislatures should codify the "unwritten law," thereby reducing the jury's room to maneuver. Codification would also allow the state to later change the law:

There are advantages for a state willing to commit the "unwritten law" to writing. . . . If the state asserts that it is the source of the legality of a practice, that assertion may gradually be accepted, and the state, as source of the law, may be able to change it. Further, if an act of violence must be tolerated, it is better for the

93. See Comment, Recognition of the Honor Defense Under the Insanity Plea, 43 Yale L.J. 809, 811–12 (1934) (advocating legislative acceptance of honor defense to eliminate its use as insanity defense).
94. See id. at 812 (citing State v. Remus, No. 29969 (Ohio Com. Pleas 1927)).
95. See id. (citing State v. Remus, No. 29969 (Ohio Com. Pleas 1927)).
96. See id. (citing State v. Remus, No. 29969 (Ohio Com. Pleas 1927)).
97. See id.
state if the act is seen as conforming with the law of the state. 99

V. WHEN THE HONOR OF THE EAST IS THE PASSION OF THE WEST

One way the Jordanian courts chose to resolve the tension between passion and honor inherent in Article 340 of the Jordanian Penal Code 100 was to resort to Article 98 101 in the Code to avoid the restrictions of flagrante delicto and that the killing should be immediate—those being necessary elements of the classical crime of passion. 102 The effect of this judicial “detour” was to waive these requirements, thereby allowing a crime of honor in the more classical sense to be tolerated. 103 In other words, the Jordanian Judiciary decided to unshackle the crime of honor from the “passion” requirements that the legislature had included in the complicated structure of Article 340/2 of the Code. Thus, fathers could kill their daughters after hearing that they were pregnant, and brothers could kill sisters two days after hearing that they were committing adultery 104 and still manage to be granted total excuse. The Egyptian and Syrian judiciary followed different judicial detours producing similar effects. 105

In the United States, in the jurisdictions applying the EED defense—one that is committed to protecting the “choosing self” 106 whereby defendants are presumed to be less culpable when they lose “self-control” 107—manslaughter verdicts were returned in situations that would never be legally tolerated if the traditional common-law category of adultery were the standard. Thus, Nourse states:

A significant number of the reform cases I studied involve no sexual infidelity whatsoever, but only the desire of the killer’s victim to leave a miserable relationship. Reform 108 has permitted juries to return a manslaughter verdict in cases where the defendant claims passion because the victim left, moved the furniture out, planned a

99. Id.
100. See Abu-Odeh, supra note 1, at 143–44.
101. Article 98 of the Jordanian Penal Code provides: “He who commits a crime in a fit of fury caused by an unrightful and dangerous act on the part of the victim benefits from a reduction of penalty.” JORDANIAN PENAL CODE art. 98 (No. 16, 1960).
102. See supra Part II.
103. See supra Part II.
104. See Abu-Odeh, supra note 1, at 159–60.
105. See id.
106. Nourse, supra note 8, at 1336.
107. Id. at 1333.
108. Nourse refers to reforms that promise greater humanity and consistency that have moved lawyers to reject the older talk of heat of passion in favor of the more modern one of emotional distress. See id. at 1332.
divorce, or sought a protective order. Even infidelity has been transformed under reform's gaze into something quite different from the sexual betrayal we might expect—it is the infidelity of a fiancée who danced with another, of a girlfriend who decided to date someone else, and of the divorcee found pursuing a new relationship months after the final decree. In the end, reform has transformed passion from the classical adultery to the modern dating moving and leaving.109

In a movement quite the reverse of what happened in the Arab world, self-understood as a move from honor to passion, the tight embrace of the various elements constituting the provocation defense according to the common law—killing committed in a heat of passion as a result of adequate provocation when no cooling time has elapsed—has been relaxed. The result is the dim picture skillfully painted by Nourse in the quote above. On the face of it, the move is “liberal.” It aims at delegitimating the code of honor of the nineteenth century, whereby women were seen as the property of men, in favor of a more humanizing world where people’s emotions are taken into account. Ironically, Nourse argues, this humanizing move has effectively changed the relationship of women to men from that of property to that of “emotional unity” therewith. It ties women to relationships they seek to abandon and punishes them for leaving miserable arrangements.110 Nourse then makes the striking conclusion that “it should not be surprising to learn that the common law approach toward the provocation defense, deemed an antique by most legal scholars, provides greater protection for women than do purportedly liberal versions of the defense.”111 Even more striking is the fact that it was the paramour that was getting killed during the days of honor. Now it’s women—wives, ex-wives, girlfriends, ex-girlfriends.

Rather than a dividing line separating them, “East” and “West” seem to meet in a circular movement where one becomes the other. The “honor” of nineteenth-century America is the very “passion” incorporated in the Arab Codes to diffuse and decenter the other legal sensibility lurking in the structure of the Codes—Arab “honor.” This legislative strategy seemed to fail due to the Arab judiciary’s effort to recenter Arab “honor.” The reverse movement in the US, whereby the effort of reform to decenter American “honor” has been largely successful, American “passion” unleashed merges with Arab honor released: more women are killed, for “provocative”

109. Id. at 1332–33 (footnotes omitted).
110. See id. at 1335.
111. Id. at 1334.
acts more numerous, after more time has passed, based on evidence more tentative. The *twain* East and West, when it comes to violence against women, *meet*.

**VI. CONCLUSION**

One basic difference, however, remains: most women killed in the Arab world are daughters and sisters, and in the United States it's wives and girlfriends. This *actual cultural difference* makes incomprehensible the title of Melissa Spatz's article: *A Lesser Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives.* Using a radical feminist perspective, Spatz discusses legislation and precedent in various Arab and Islamic countries as well as Brazil, India, and the United States, dealing with the defenses permitted to men who kill their wives. What is anomalous about the case of the Arab countries is that the legal locus of these crimes is less the immediate legislation and more the general provocation rule found in almost every Arab Penal Code. Also of significance, in the Arab world, husbands killing their wives, as I indicated above, is a rare phenomenon compared to the killing of daughters and sisters. This fact is dealt with by Spatz only marginally in a footnote. Spatz seems to project the United States context (men killing wives) onto what happens in the Arab world by using an “internationalistic” radical feminist approach, thereby revealing a blindness to cultural differences.

An even more anomalous aspect of Spatz's article is that her discussion of the United States mentions only cases involving immigrants in the United States who have killed their wives or daughters, and who use the "cultural defense," instead of discussing the classical cases of provocation or heat of passion. By failing to discuss passion crimes in the United States, Spatz seems to presume the superiority of the American judicial system. In other words, she seems to say "these things simply don't happen in this country unless immigrants bring it in with them." This is an orientalist position par excellence. And so, in this article, although the United States is strongly present through the writer's

113. *See id.* at 598–627.
114. *See id.* at 602 (using direct legislative provisions as material for study).
115. *See id.* at 599 n.4.
116. Spatz discusses two cases: a New York case involving a Chinese man who murdered his wife when she confessed to having an affair and a Florida case involving a Greek man who murdered his daughter's rapist. *See id.* at 621–27.
117. *See supra* text accompanying note 4.
projections on other parts of the world (in assuming that the problem everywhere is that men kill their wives), the United States itself is insulated from discussion and critique because of the writer's orientalist assumptions of American superiority.