

Article

# Amor Fati: On ‘Crimes of Passion’ in Portuguese Law

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**Abstract:** The timelessness of the matters of love and heartbreak is evident from the place that these themes have historically held in the literature. Fictional representations of love and estrangement are frequently recovered within legal reasoning, because of the nature of the stories portrayed, or the ethical-normative judgements and frames of reference on which their literary enunciation is based. In the field of law, the formal structuring of these matters and its penal relevance draw on ‘crimes of passion’ as an example and a sign of the legal conditions, interpretative constructs, and sociological conceptions that organize and give meaning to subjects, facts, and norms. Whether it is the cause that justifies the fact, a mitigating factor that modifies the crime or punishment, or a particularly reprehensible and perverse circumstance, this ‘crazy little thing called love’ has provoked and shaped different levels of censure and comprehension throughout history. That very elasticity is the starting point for this article, which examines the legal frameworks and the legal, literary, and historical imaginations that circulate and connect diverse interpretative communities, as well as the discursive debates over authority and normativity, in the different fictions and functions linked by their aspiration to truth and justice.

**Keywords:** crimes of passion; law and literature; Portuguese law



**Citation:** Oliveira, Ana. 2022. Amor Fati: On ‘Crimes of Passion’ in Portuguese Law. *Laws* 11: 66. <https://doi.org/10.3390/laws11050066>

Academic Editor: Patricia Eastael

Received: 30 June 2022

Accepted: 19 August 2022

Published: 25 August 2022

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## 1. Introduction

This great love story [...] started on the same bright spring day Colonel Jesuíno Mendonça shot and killed his dark-haired, slightly overweight wife, Dona Sinhazinha Guedes Mendonça, and the elegant young Dr. Osmundo Pimentel. News of this tragedy, involving three prominent members of the community, shocked the entire town of Ilhéus. [...] The colonel owned a large cacao plantation, his wife was a leader of local society and a conspicuous figure at church functions, and the doctor, although he had lived in Ilhéus only a few months, had already attained a fine reputation as a dentist and, within a relatively narrow circle, as a poet. [...] At precisely two in the afternoon he surprised the lovely Sinhazinha and her seducer and dispatched them with two well-aimed bullets each. [...] The echo of the last shots in the struggle for the cacao lands was fading away, but those heroic years left the people of Ilhéus with a taste for bloodshed. And with certain customs: gambling, drinking, flaunting one’s courage, carrying a revolver. And with certain laws of conduct, one of the most binding of which was observed on this fateful day: the law that required a deceived husband to avenge his honor by killing the deceivers. It came down from the old days, from the strong men who razed the forests and planted the first cacao. It was engraved in the collective conscience of the people—even now, in 1925, when plantations were flourishing on the land fertilized with corpses and blood, when fortunes were being multiplied, and when progress was changing the face of the town. (Amado [1958] 1962, pp. 9–10)

The citation above opens the novel *Gabriela, Clove and Cinnamon* (1958) by the Brazilian writer Jorge Amado. The widely studied novel is set in the 1920s in Ilhéus, in the Brazilian state of Bahia, and is a chronicle of the customs of the golden era of cocoa. The owners of

the cocoa plantations—the ‘colonels’—had full political, economic, and social control over the region: they directed the local government administration, they employed a significant proportion of the population, and they managed a network of loyalties built around mutual interests, favors, and nepotistic relationships. The historical plot of cultural and political antagonism is played out in the novel against a backdrop of plutocracy, of the emerging forces of modernization brought about by the opening of the port to large ships for the exportation of cocoa (as personified by Mundinho Falcão, a rich young man from Rio de Janeiro), and of existential angst personified by the irrepressible Gabriela.

The adaptation of the novel for the Brazilian TV series (*telenovela*) *Gabriela* was a landmark on the Portuguese cultural scene. *Gabriela* was the first *telenovela* to be shown on Portuguese television. It aired in May 1977, in the aftermath of the period of political instability following the 25 April 1974 revolution that had overthrown a long and deeply conservative dictatorship. The success of the series with the Portuguese audience was such that there are countless reports of large gatherings of people to watch the program in cafés, neighborhood associations, and cooperatives (the number of televisions in Portugal at the time was very low); of the interruption or postponement of meetings in parliament until after the program had aired; of institutional delays and cancellations; or of the warm reception of two of the actors on the series when they visited Portugal in November of that year—Mário Soares, the Portuguese prime minister at the time, was among the hundreds of people who greeted them at the Lisbon airport. Media coverage of the time further reveals the success of the series (*Gabrielamania*). In her analysis of the reception of *Gabriela* in the printed press, Isabel Ferin Cunha (2003) argues that news about the series tended to invert the narrative structure of press discourse, which was characterized by the presentation of the event/occurrence, followed by the journalist’s interpretation: ‘In the case of news about this series, it is its approximation by journalists to the socio-political facts of daily life that seeks to turn the ‘stories’ of the *telenovela* into a history of the revolutionary years, and in particular of the History of the year 1977’ (Cunha 2003, p. 48).

*Gabriela* was thus both an object of consumption (entertainment) and an object of political—and partisan—swordplay. On the one hand, the series came to mark aesthetic trends (Malvina’s haircut, the dapper style of Tonico Bastos, idiomatic expressions, the names of children, etc.). On the other, characters, scenes, and actions—and the expectations arising from such references—were used in political discourse to project new interpretative frameworks associated with other events and/or phenomena in the social, economic, and political context of postrevolutionary Portugal.

The small screen adaptation of the novel by the director Walter Avancini involved a significant alteration to the order of scenes: Dona Sinhazinha and *her lover* are not assassinated in the act of adultery by the betrayed husband at the start of the story; rather, this scene was placed later in the plotline, thus allowing for the characters to be fleshed out and relationships to materialize—and be justified. There are no news items recording the Portuguese public response to the assassination or to the adultery (which at the time was a crime in Portugal). There is only a reference to the ‘scandalous black stockings’ that Dona Sinhazinha is wearing when she is shot (Gobern 2017). Equally, there is no reference to the moral and criminal censure that looms over Colonel Jesuíno Mendonça, whose downfall closes the story:

Some time afterwards, Colonel Jesuíno Mendonça stood before a jury, accused of having shot to death his wife, Sinhazinha Guedes Mendonça, and the dental surgeon, Osmundo Pimentel, for reasons of jealousy. The lawyers talked, all in all, for twenty-eight hours. Dr. Maurício Caires quoted the Bible and referred to scandalous black stockings, morality, and depravity. Dr. Ezequiel Prado said that Ilhéus was no longer a land of bandits, a paradise of assassins; his theme was civilization and progress. With a sob he pointed to Osmundo’s father and mother, in mourning and tears. For the first time in the history of Ilhéus, a cacao colonel found himself sentenced to prison for having murdered his adulterous wife and her lover. (Amado [1958] 1962, pp. 399–400)

Within the structure of *Gabriela*, the narratives of the collective and the individual converge to symbolize the triumph of political, legal, and civilizational modernization: (the defense of) honor no longer legitimizes the right to kill an adulterous spouse (and her lover), and the (rule of) law is no longer obstructed by the power of the landowners. The series makes the punishment of the colonel explicit—he is sentenced to 30 years in prison, the maximum punishment for murder (*homicídio qualificado*)<sup>1</sup> under the Brazilian Penal Code (Decree-Law 2848 of 7 December 1940). Although there is no record of such an item, this would have been an excellent starting point for a journalistic piece on the legal framework in force in Portugal at the time, which was closer to the ‘law of the colonels’ than to the modern law that prevails in the novel.

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History of law—a branch of social history that is concerned with the analysis, critique, and demystification of legal institutions, norms, thought, and knowledge—combines historical and legal sciences, whether in its examination of the specificities and the dynamics that make law or of law as a social phenomenon. The history of penal codification is one of the most thoroughly covered areas, given its relevance for and the insight it provides into society and politics, whether that comes from the polemics that arise from the application of the Penal Code—and the transformative or conformist potential that is attributed to it—or because it provides a narrative that ‘renders possible a hermeneutics (i.e., a reconstitution of meanings) of the past and a heuristics (i.e., a suggestion of meanings) for the future’ (Hespanha 1991, p. 16). This same pertinence is revealed by and conferred onto *Gabriela*.

Along with the great popularity achieved by the discipline of history, as António Manuel Hespanha argues, the history of criminal law brings together an ambition or aspiration to disclose historical truth and the laws that preside over ‘historical process’ (Hespanha 1991, p. 10). This revelation allows for the proclamation of a political dimension of knowledge and power ‘due to legal meaning in time and space, [and] due to the conditions of possibility from which the law results and to which it gives rise’ (Ribeiro 2019a, p. 168). As such, a critical history of law implies discontinuing or coping with the illusion that the history of law is less a history of discourse than it is a history of legal modernization (Ribeiro 2019a, p. 169), that is to say, of the ‘use of history as a chronicle of the ‘progress’ of law’ (Hespanha 1993, p. 7). It is precisely this historical archetype of legal modernization that enables *Gabriela* to reconstitute and attribute meanings to sociopolitical facts of the revolutionary years and to the so-called ‘historical process’ of the 1970s. Furthermore, a reading of *Gabriela* allows for a reconstruction of the social mores of the time and their legal meaning within the historical development of homicide driven by adultery in the Portuguese Penal Code.

Following on from the arguments made by the authors cited above, I seek to employ the law as a means of questioning historical sources (what is the *past*, how is it represented, and how is it manifested?) and the history as a means of questioning legal sources (what is the *norm*, how is it represented, and how is it manifested?) (Ribeiro 2019a, p. 170). At the same time, I view literary prose—with all the associated historical, social, political, ethical, and aesthetic factors that condition it—as having the capacity to recreate and reflect the meanings of law and history in (and for) the community. This triangle of law, literature, and history frames a return to the legal forms and to the (legal, literary, historical) *dispositifs* and imaginations that circulate and connect different interpretative communities, as well

<sup>1</sup> Portuguese (and Brazilian) legal terminology does not necessarily have a direct and literal correspondence in English. Throughout this text, the Portuguese term is indicated in parentheses at the first mention, after the nearest UK English equivalent. Briefly, in Portuguese criminal law, the grounding legal type of crimes against life is described in article 131 of the Penal Code, under the title ‘homicide’ (often called ‘simple homicide’); a UK English equivalent would be voluntary or culpable homicide. It is from this precept of ‘homicide’ that Portuguese law sets out, in the following rules, an aggravated form of homicide (article 132), titled ‘*homicídio qualificado*’ (UK English equivalent: ‘murder’), and an attenuated form of homicide (article 133), titled ‘*homicídio privilegiado*’ (UK English equivalent: ‘voluntary manslaughter’). Murder (‘qualified homicide’) and voluntary manslaughter (‘privileged homicide’) are thus typification conditions concerning the fundamental legal type, presuming a greater or lesser wicked intention on the part of the agent, which correspond to aggravated or mitigated degrees of guilt and of worthiness of punishment.

as to the discursive disputes relating to authority and normativity in the various fictions and functions that are tied to an aspiration to truth and justice.<sup>2</sup>

In this frame of reference, the article is divided into two (albeit unequal) parts: the first is dedicated to mapping a genealogy of ‘crimes of passion’ in the Portuguese Penal Code. Tracing back to the first Portuguese Penal Code (19th century), I look for figures of provocation, or *wrongful fact* generated by a victim (specifically, sexual infidelity), as justifying or mitigating factors of homicide, to point out the metamorphoses and vestiges of legal principles (as proportionality, nonliability, nonenforceability) and legal expedients (as ‘heat of passion’) in the normative frameworks and legal reasoning. Then, I outline the understandable heat of passion, established under voluntary manslaughter (*homicídio privilegiado*), and the particular reprehensibility or perversity, which frames murder. In the second part, confronting the two ways of looking at the relevance of ‘passion’ as a mitigating or an aggravating factor in the framework of homicide, I focus on a specific qualifying circumstance of murder: to be considered a ‘petty motive’. Here, the central figure is no longer that of provocation (namely, infidelity), but a setting (impending or materialized) of separation, of a resentful end (for the agent) of the romantic relationship. Drawing on the normative intentions and on the sociolegal tensions, I explore how popular culture representations may reflect and/or influence legal understandings (and support the so-called rules of experience) and judgements, namely, concerning motivation, and its conversion into guilt. The invocation of pettiness, or frivolousness, which motivated the fact and impelled the agent, allows both to face and discuss the meaning, the relevance, and the plausibility of love and heartbreak, and to reveal the constitutive and inevitable interpretive condition of law. In the end, this is not an article on the comprehensive cultural and legal history of homicide; it is an essay struggling with the use of *law* as a chronicle of the ‘progress’ and the ‘unprogress’ of *history*.

## 2. A Brief Historical Review of Homicide in the Portuguese Penal Code

The ‘bloody scene in a bar’ that the singer Maria Bethânia anticipates ‘will have its premiere’ when she finally finds that the person she is looking for in her rounds of the city could easily have been reported in the newspapers under the headline: ‘crime of passion on the ‘Avenida São João’.<sup>3</sup> The term ‘crime of passion’, as it is so often called in the media, is no longer widely used in the (Portuguese) legal world. It has been criticized and demonized for its adjectival load, which implies a framework that in various ways seems to justify the action and motivation of a subject and attribute the crime (often murder or attempted murder) to the person’s emotional state—sudden rage (namely, when faced with evidence of a betrayal) or heartbreak (e.g., caused by abandonment or the anticipation of it)—so as to rule out the element of premeditation. Contrary to the idea of an ill-timed, rash, hot-headed event reaction, premeditation is historically one of the aggravating circumstances of a crime, because it reveals a planned contravention of protected values (which it is thus able to affect more forcefully) and of law and order itself (thus challenging institutional power).<sup>4</sup>

In turn, provocation has long since been a mitigating circumstance for a crime. The earliest Portuguese Penal Codes<sup>5</sup> maintain various regulatory norms dating from the

<sup>2</sup> These communities and disputes are inscribed and described based on their distinct and situated intersections, importations, and exportations, as much as on the basis of the stylistic and pragmatic divergences between them. For a further discussion of this topic: on the benefits of the love triangle or *ménage à trois* between law, literature, and history, see Meyler (2017); and on this disciplinary (ad)venture, see Ward (2021).

<sup>3</sup> From the song ‘Ronda’ performed by Maria Bethânia, with lyrics by Paulo Vanzolini.

<sup>4</sup> During the period when the first Portuguese penal code was in force (it was brought into law in 1852), and in addition to premeditation, aggravating circumstances included, among other things, that the victim was a relative up to the second degree of civil law (reserved for cases of parricide and infanticide), that the crime was committed at home and during the night, and even the use of poison. In this penal code, premeditated murder or murder by poisoning were punishable by death. Parricide and infanticide also carried the death penalty, with the exception of infanticide committed by the mother or the maternal grandparents to conceal dishonor.

<sup>5</sup> After successive reforms—which included the abolition of the death penalty for civil crimes, approved on 1 July 1867—the 1852 Penal Code was revoked when the 1886 Penal Code was passed into law. This was the longest-lasting penal code in Portuguese history, and it remained in force for almost a hundred years

Portuguese Ordinances (royal laws) that were in force from the 15th to the 19th centuries,<sup>6</sup> with regard to the acts of ‘sleeping with’, sodomy, and adultery, or the permission granted to a husband to kill his wife (and her paramour, unless he were a knight or nobleman) if she or they were caught in the act of infidelity. Those Penal Codes state that a married man who catches his wife in the act of adultery and kills her or the person that she is with, or both, will be punished with 6 months’ exile from the district.<sup>7</sup> The same punishment is applicable to a married woman who catches her husband in the act with his ‘concubine, kept woman’ in the marital home and kills him or both of them.

Within the Portuguese legal system, and in the Penal Codes of 1852 and 1886 (this latter remained in force until 1982), the model of provocation was evident in three forms: (1) as a general mitigating factor—in situations where the agent acted in a state of fury or intense agitation motivated by an illicit aggression or unjust offense (such as a direct offense against her or his honor), then the punishment for her or his conduct (and therefore, her or his criminal responsibility) would be alleviated (according to the sentencing framework for the crime); (2) as a modifying mitigating factor—in situations where the agent acted in a nonpremeditated way and in response to a violent and unjust act of substantial importance, then a different sentencing framework would apply, with reduced terms; or (3) as a justification for the fact—provocation arising from adultery in *flagrante delicto* fell within this category and gave rise to a justification of the fact (the killing) by means of a mechanism of nonliability (that is to say, the agent could not reasonably be expected to have acted differently). This last form would correspond to the sexual infidelity exception (under the plea of provocation), discussed by authors, such as Claire [McDiarmid \(2019\)](#).

As such, the conduct of the agent would have fallen into one of these categories depending on the seriousness of the *wrongful fact* generated by the victim. The cultural elasticity of the law must, therefore, be understood within the context of historical fluctuations of this criterion of proportionality between the wrongful fact of the provoker and the unlawful fact of the person provoked, and of the conceptualization of the criminal fact. Coming back to the episode between Dona Sinhazinha, Dr. Osmundo, and Colonel Jesuíno, whether at the time when the action of *Gabriela* takes place (1925), when the novel was published (1958), or when the television series was broadcast in Portugal (1977), not only did adultery in *flagrante delicto* function as a justification for the criminal fact (punishable by exile from the district for 6 months), but adultery itself was a crime. Furthermore, adultery carried a different penalty depending on the sex of the agent: in the 1852 Penal Code, ‘adultery by a woman’ was punishable with temporary exile (the same penalty was applicable to her lover, if he knew that she was married), while a ‘married man who kept a mistress in the marital home’ could be condemned to a custodial penalty of between 3 months and 3 years. In the 1886 Penal Code, the crime of adultery by a woman carried a custodial sentence of 2 to 8 years or temporary exile, while a custodial penalty of 3 months to 3 years was maintained for married men who kept a mistress in the marital home. The crime of adultery—which depended on the complaint of the betrayed spouse, who could withdraw his or her accusation and pardon his or her adulterous partner—would remain in the Portuguese legal system until 1982.

In a judicial context, thus, not only would Dona Sinhazinha’s adultery be understood as the wrongful fact that provoked the unlawful action by Colonel Jesuíno, but in an

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and through multiple revisions until it was replaced by the current Penal Code of 1982 (which underwent a consolidated version after 1995).

<sup>6</sup> The Portuguese Ordinances were compilations of the royal laws that were in force in the country. The objective of the Ordinances was to select and systematize the legal diplomas issued by successive monarchs, in order to disseminate the approved legislation, and/or to provide clarification on the status and validity of the rules of the usual law. The Afonsine Ordinances were promulgated and published in the 15th century (1446–1448), and were succeeded by the Manueline Ordinances of 1521 and the Filipine Ordinances of 1603. These Ordinances remained in force until they were replaced by the Penal Code of 1852.

<sup>7</sup> The same punishment is applicable in the case of daughters under the age of 25 who live with their parents, and “their corrupters”, if caught in the act of a moral crime. The 1886 Penal Code limits this to cases of daughters under 21 years old.

alternative outcome (that would not culminate in her death), it could be considered a criminal fact. Furthermore, the Civil Procedure Rules of 1939, which revoked the 1910 Family Laws, had re-established the husband's right to demand that his wife return to the marital home, with recourse to force if necessary; and the 1940 Concordat between the Portuguese State and the Holy See had prohibited divorce between couples who had been married in the church—that prohibition remained in force until 1975. Since the 1974 revolution, legal methods have been altered and have changed, but the conditions of possibility that gave both form and content to those methods have left their mark on jurisprudence and case law.

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In the aftermath of the 25 April 1974 Revolution, the promulgation of Decree-Law 262/75 on 27 May 1975 sought to 'put an end to such an aberration', 'an authentic 'right to kill''. The law revoked the provision of article 372 of the Penal Code and made acts by persons who have suffered 'an emotional shock that leads them to violence' subject to the framework of the general section of the Penal Code. While the Portuguese legal system thus maintained provocation in the emotional state of the agent or as the motive for the action (as a mitigating factor), it moved away from the premise of the 1852 and 1886 legislations, which were based on the seriousness of the wrongful fact. The disappearance of this latter legal form did not translate into the automatic correction or expurgation of the traditionalist values of the 19th-century legislators. Quite the contrary, the legal memory of those values continued to constitute, or at least be inflected in, the (deductive, technical) forms and formulas that followed. Among those various jurisprudential traces, the reasoning of the Supreme Court that is cited below recognizes the revocation of that provision and reveals the interpretative and methodological conundrum that has been intensifying ever since:

We should reject the interpretation according to which Decree-Law 262/75 of 27 May, in its revocation of article 372 of the Penal Code, has sought to deprive the married man of the benefit of the modifying mitigating factor of provocation stipulated in the special section of the Penal Code if he catches his wife in the act of adultery [...] This was intended to avoid a situation in which 'without a heat of passion' 'that leads to violence', and dispassionately, the defendant could benefit from the factor of provocation by adultery or the corruption of an underage daughter and from the symbolic punishment—exile from the district for six months—stipulated in article 372, which would confer on him an authentic 'right to kill', as can be read in the report of the above-mentioned decree-law. (Supreme Court of Justice, ruling of 6 April 1980)

The revocation of the justifying (or exculpatory) factor that was triggered by adultery or the corruption of an underage daughter meant instead that the elements of the (modifying or general) mitigating factor had to be verified, as was the case for other crimes of homicide or bodily harm with intent. In other words, the agent would be subject to the general regime and would not benefit from a special regime: he or she would have to have acted without premeditation, and the criminal act would have to be provoked by beatings or other serious violence (a modifying mitigating factor for the crime of homicide)—a direct offense to honor could, in this context, be considered serious violence (general mitigating factor). This notion of provocation resulted in the formulation of a mitigating factor for the agent's conduct in terms of moral and legal censure (reflected in criminal responsibility), and has aroused controversy within legal reasoning and sentencing, just as the concept of adultery did in its wake. More specifically, it came to constitute the substratum of the legal expedient of 'heat of passion'. In the same 1980 ruling, according to the Panel of the Supreme Court, the legal impossibility of mitigation in cases where the serious offense that caused a degree of passion that affected the mental faculties was adultery would be unfair. As that panel went on to explain in the summary ruling, this was because:

The State recognizes and protects the family unit—article 67 of the Constitution of the Republic—and the right to a good name is recognized for all—article 33. Spouses are reciprocally bound by their duties of respect and fidelity above all

else—article 1672 of the Civil Code. The violation of these duties may constitute grounds for divorce—articles 1773 and 1779 of the same document, which seriously affects or may affect the family. When one spouse has sexual relations with another person who is not their spouse, s/he is not faithful and, in violation of that duty, commits adultery, which constitutes the gravest form of violation of the reciprocal duty of fidelity that binds the couple. Under our law, and in certain conditions, adultery is considered a criminal unlawful fact punishable under the terms of articles 401 (adultery by a woman will be punished with a jail term of two to eight years) and 404 (a married man who keeps his mistress in the marital home will be punished with a penalty of three months to three years) of the Penal Code, with the modifications introduced by article 61 of the Divorce Law. (Supreme Court of Justice, ruling of 6 April 1980)

Although adultery had lost its criminal weight, as the panel recognizes, it remained a punishable offense until the revocation of the 1886 Penal Code. It had also lost its civil force, for after Decree-Law 496/77 of 25 November 1977, it could no longer constitute the primary grounds for a litigious separation.<sup>8</sup> Just over a year after the drafting of the previous Decree-Law of 1976, the 1977 Act responded to what was understood as a constitutional imperative (in the wake of the new Constitution of the Portuguese Republic, also dated 1976) that the Civil Code be matched to the Constitution in terms of rights, freedoms, and guarantees, and especially in respect of family law.<sup>9</sup> Article 1779 of this version of the Civil Code eliminated the provision for adultery and established the right to petition for divorce on the grounds of wrongful violation of conjugal responsibilities (the seriousness of which would be examined in light of the ‘level of education and moral sensitivity of the spouses’ or a recurrence that compromised the possibility of life in common).

The assessment of the violation of conjugal duties and of guilt and the inventorying, declaration, and translation of guilt into the division of wealth in the litigious divorce courts would give rise to much popular fiction. This torrent of inspiration was only interrupted more than 30 years later with the passing of Law 61/2008 (31 October 2008), which introduced a new legal regime for divorce. Guilt was made an irrelevant factor in the dissolution of marriage, and the new regime thus brought about a change in the legal paradigm as part of a ‘tendency to downplay divorce’ (Oliveira 2010, p. 6).

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Still in the aftermath of the long dictatorial regime, the new Penal Code in 1982 was hailed as a sign of legal modernization. As the preamble stated, the understanding that the punishment must necessarily be based, in axiological and normative terms, on a concrete form of guilt is one of the foundational principles of this legal diploma, which would guide the reform of the criminal system. As a principle of justice, as a basis for punishment, and as a limiting factor for sentencing, guilt has long since been the object of extensive philosophical, juridical, and criminological analysis. The legal understanding of guilt is deeply rooted in the moral idea of guilt (and its moral economy of good and evil), whereby the social order is developed, reflected, and assessed in the individual conscience/consciousness (as a criterion of the relationship between agent and community). As Michel Foucault formulates it, the legal machinery ‘has turned the assertion of guilt into a strange scientifico-juridical complex’ (Foucault [1977] 1995, p. 19). From the almost sickening guilt experienced by Fyodor Dostoevsky’s Raskolnikov, to his feverish confession, or from the radical indemonstrability of guilt to the credible demonstration of it, to the expert analysis of guilt (in psychology and psychiatry), to the quantification of guilt and the

<sup>8</sup> Adultery was mentioned in the still-recent Decree-Law 561/76 (17 July 1976) regarding the grounds for legal separation and divorce as being on a par with other grounds, such as ‘contraceptive practices or sexual aberration exercised against the will of the petitioner’ or the ‘dishonorable life and habits of the other spouse’.

<sup>9</sup> As stated in the 1977 Decree-Law, spouses shared equal rights and responsibilities, especially regarding the maintenance and education of their children (article 36, number 3 of the Constitution), and the principle was established that children born outside of marriage must not be subject to any discrimination as a result of this fact (article 36, number 4). This demanded the revision of large parts of the section on marital law, and practically all of the chapter on affiliation.

presumption of legal-criminal responsibility, to its punitive corollary, and aim of eventual resocialization—the various configurations of the formulation of guilt and legal-criminal procedure are composed of myriad dogmatic constructions and politico-criminal intentions, especially in terms of projects or experiences of justice (e.g., restorative postsentence justice).

This legal framework, and the idea of justice on which it is founded, is clearly subordinate to the judgement of ethical censure of a defendant (hence, the recognition of guilt as the source of philosophy of criminal law). Within this framework, the criminal statement (article 73) provides for the exceptional mitigation of the penalty when there are circumstances prior to, contemporaneous with, or subsequent to the crime that significantly diminish the criminal nature of the fact, the guilt of the agent, or the requirement of a penalty. Among other circumstances (such as having acted in response to a serious threat, or demonstrable acts of remorse that make repair for the damage caused), there is provision for ‘the conduct of the agent having been determined by a motive relating to honor, in response to a strong appeal or temptation by the victim, or unjust provocation or unmerited offence’. Provocation by the victim, thus, continued to guide, frame, and justify much legal reasoning, which would be a trigger for social denunciation—some of which would ultimately enter Portuguese popular culture (such as the famous expression ‘right in the hunting reserve of the Iberian male’, or resorting to the Bible as a reference to the punishment foreseen for adulterous women: death<sup>10</sup>).

### 2.1. An Understandable Heat of Passion

The new Penal Code of 1982 does not specifically provide for provocation, but it does establish a type of homicide for which the permissible grounds for mitigation consist of an intense emotional state that may as easily be caused by provocation as by another circumstance (the modifying mitigating factor for the crime). Voluntary manslaughter (*homicídio privilegiado*) is described in article 133 as follows: ‘Whoever kills another person when overcome by an understandable heat of passion, compassion, desperation, or another motive with relevant social or moral value, which appreciably diminishes their guilt’.<sup>11</sup> This unlawful fact justifies a reduced custodial sentence of 1 to 5 years. Since 1982, this ‘understandable heat of passion’ and the evaluation of it for the purposes of (1) the identification of the crime as a form of voluntary manslaughter or (2) the mitigation of guilt in general under the crime of culpable homicide (*homicídio ‘simples’* [article 131]) has come to be a central issue for legal scholarship and case law.

As a legal expedient, ‘understandable heat of passion’ continues to draw divergent interpretation in what concerns the influence of certain internal or external factors, concepts such as psychological anomalies or abnormalities of the mind, and—of specific relevance for this paper—the assessment of the legal-criminal importance of heightened (provoked) emotional states. An example of this legal reasoning may be read in the following ruling by the Supreme Court of Justice:

I—For the purposes of article 133 of the Penal Code, ‘an understandable heat of passion’ is relevant if the defendant was ‘overcome’ when faced with the suspicion of his wife’s adultery with a man who was his friend and when faced with the abandonment of children who so badly needed their mother. II—When

<sup>10</sup> In 1989, the Portuguese Supreme Court of Justice stated that two young tourists, kidnapped and raped in the Algarve, had contributed to the crime, for having asked for a ride ‘right in the hunting reserve of the Iberian male’ (legal case no. 040268). More recently, in 2017, the Oporto Court of Appeal (legal case no. 355/15.2 GAFLG.P1) justified the maintenance of a suspended sentence for a defendant who violently attacked his wife with a wooden club with nails based on her adultery. To explain that ‘women’s adultery is a very serious offense to the honor and dignity of men’, the judges pointed out ‘societies in which the adulterous woman is stoned to death’; the Bible, where “we can read that the adulterous woman is to be punished by death”; and the 1886 Penal Code, which punished with a symbolic penalty the man who, finding his wife in adultery, killed her in that act. According to this ruling, ‘women’s adultery is a behavior that society has always condemned [...] and therefore sees the violence exercised by the betrayed, vexed and humiliated man against his wife with some understanding’.

<sup>11</sup> After the consolidated version of 1995, with the wording of Decree-Law 48/95 of 15 March.



there exists an intimate connection between strong, violent emotions on the part of the defendant and the consummation of homicide, and, on the other hand, a significant diminution in his judgement, there can be no doubt that the emotional-passionate state that overcame the defendant must have a marked effect on his guilt, and as such, must mitigate the individual penalty even where there is a desire to apply the provision of article 131 [crime of culpable homicide] of that same legal charter. III—In this way, even when the defendant's behavior as described falls within article 131, the proof of circumstances prior to, contemporaneous with, and after the crime assume such force that, by means of exceptional mitigation [...] a penalty may be found that is largely equivalent to that which is fixed in the afore-cited article 133. (Supreme Court of Justice, ruling of 28 May 1986)

This hesitation about whether an emotional-passionate state produces a mitigating factor that modifies the crime or a general mitigating factor (that reduces the penalty) can be found in several subsequent rulings, in which the tendency is to exclude voluntary manslaughter (modifying mitigating factor), but with the understanding that the affront of adultery, nevertheless, constitutes a 'provocation that placed the agent in a nervous state to the extent that it demonstrably diminishes the criminal fact and his guilt' (Supreme Court of Justice, ruling of 28 July 1987), or as the grounds for the 'state of profound exasperation of the defendant, whose guilt was diminished considerably [by the victim's behavior]' (Supreme Court of Justice, ruling of 20 January 1998). In this way, an exceptional mitigation of the punishment for the crime of culpable (or *simple*) homicide is imposed—and this is largely equivalent to that which is stipulated for voluntary manslaughter in the sentencing framework.

The approach of the new millennium saw a convergence of legal reasoning and case law, which started to move away from the criterion of proportionality—between the unjust fact of the victim (such as adultery) and the unlawful fact of the agent—and increasingly adopt the criteria of the 'reasonable person' standard and the nonenforceability. The interpretation and fulfillment of the 'understandable heat of passion' has also shifted, and the automatic mechanism of jealousy as a motive with relevant social and moral value—even when *justifiably* present, such as in the case of infidelity—has been progressively abandoned. Even so, its weighting may be reflected in sentencing, taking into account the legal requirements of specific prevention and social reintegration, as we see in the Supreme Court of Justice ruling of 18 September 1996: 'In terms of personality, we have no reason to think that this is a man with a tendency to commit violent crime; rather it seems to us that he is a casual criminal who succumbed to the pressure of circumstances [...], and who was driven by jealousy and sorrow on feeling betrayed by his unfaithful spouse'. Therefore, as Myrna Dawson also pointed out, these psychosociological propositions, as such (*hot-headed*) behaviors constitute an isolated act/event, trigger normative propositions or legal-conclusive judgments on the lesser need of the deterrent role of criminal law (Dawson 2016).

It is not the aim of this article to identify and examine the different implications of a criminological, hermeneutic, or functional nature. Nevertheless, these excerpts from judicial decisions allow for the illustration of legal conditions, interpretative models, and axiological conceptions, both in the path towards piecing together social mores and their legal meaning within the framework of homicide and in the sociologically indicative character of the tension between voluntary manslaughter and murder. I will now proceed to examine this latter question.

## 2.2. Particular Reprehensibility or Perversity

The Penal Code of 1982 categorizes the offense of murder (article 132) as carrying a heavier sentence than the range allowed for culpable homicide<sup>12</sup> in cases where the death was caused in circumstances that revealed particular reprehensibility or perversity on the part of the agent (a ‘wicked intention to kill’)—initially the stipulated sentence ranged from 12 to 20 years; after the 1995 revision, the upper limit was increased to 25 years. This general criterion (stipulated in number 1 of the law) is accompanied (in number 2) by a set of circumstances that might reveal the particular reprehensibility or perversity of the agent. These circumstances have been altered several times since and include premeditation (point j: ‘acting in cold blood, after reflection on the means employed or having persisted with the intention to kill for more than twenty-four hours’); use of poison or another insidious method (point f); ‘committing the fact against a spouse, ex-spouse, or person of the other or same sex with whom the agent maintains or has maintained a romantic relationship or a relationship analogous to a spousal relationship, even without cohabitation, or against the progenitor of a child in common’ (point b),<sup>13</sup> or ‘being driven by voracity, by the pleasure of killing or causing suffering, for excitement or for the satisfaction of the sexual instinct or for any vile or petty motive [*motivo fútil*]’ (point e). I will return to this last circumstance.

As is abundantly clear in case law and legal scholarship (e.g., Serra 2003), by relying on the legislative practice of standard examples, this merely illustrative set of circumstances is based on the definition of constitutive types of guilt, in which one of the qualifying circumstances is subject to the scrutiny that is stated in the introductory wording of the same legal framework: the death is caused in circumstances that demonstrate particular reprehensibility or perversity. In other words, the confirmation of any of the prescribed circumstances does not presuppose, *per se*, the crime of murder: a ‘wicked intention to kill’ on the part of the agent must be demonstrated. In this sense, it remains subject to the interpretation of the arbiter of justice, who must decide whether, in the specific circumstances, the agent has acted with particular reprehensibility or perversity, and thus with an aggravating form of guilt, which would justify the accusation of murder.

This interpretative license generates or has the potential to generate difficulties for the interpreter-arbiter, divergences in legal reasoning and case law, and social polemics, often revealing the friction of the different fictions and functions bound to the idea of truth and justice, and mostly to the role they play in law or as law. The law’s claim to truth (as a revelation, as a confession) and *society’s* claim for justice (especially as punishment) expose the historical and political contingencies of both claims. However, they also expose the way in which the legal production (as truth and as justice) is necessarily precarious.

Although each of these qualifying circumstances deserves a detailed and illustrated analysis, in the next section, I will focus on the legal relevance of the motives attributed to the killing from the starting point of a juridical expedient of murder: to be considered a ‘petty motive’. My point is not to correct or improve this legal category, nor is it to rescue love from these nothing-to-do-with-love stories (as certainly would be said about Colonel Jesuino); it is to show how, in itself, it is a troublesome tool for legal reasoning.

## 3. It Must Have Been Love

Myth or metaphor, the Parisian ‘courts of love’, conceived by Peter Goodrich (1996) as one instance of an alternative jurisdiction, are useful as a place in which to think through the

<sup>12</sup> Article 131 describes the base crime of homicide merely as s/he ‘who kills another person’. It is punishable with a custodial sentence of 8 to 16 years. The imputation of the crime as murder is dependent on aggravating factors that ‘qualify’ the crime as more serious in nature.

<sup>13</sup> This circumstance to establish the offense of murder was introduced in 2007 and revised in 2018, when it came to include explicit reference to nonmarital relationships. This revision grants uniformity to the provision for the crime of domestic violence (article 152 of the Penal Code) which, since 2013, has expressly included romantic relationships in its standard description. Criminal policies relating to domestic violence and ‘marital murder’ have been resorting to a ‘type of ‘solution of continuity’ and a rationale for the construction of a coherent program of criminal protection between the two crimes, which approaches them from the outset in the light of the literal element used’ (Agra et al. 2015, p. 30).

fragilities of the law and what influences it (whether poetry, the body, intimacy, or ethics); as a satire on the sovereignty operated by law, and on the entrapment of subjects within the conditions of existence established by and as law; and as an aporia of the blindness that frequently characterizes iconographic representations of Justice and Cupid alike. The scope of this article does not allow for a more extensive discussion of the links between love and the regulation of it by the state through marriage, or the equation of love with marriage;<sup>14</sup> or of the aims of such an equation and regulation; or indeed of the terms (of the laws of love) and implications of that hallowed jurisdiction. It would be equally impossible to trace here a genealogy: of love as an object of social, civil, political, or criminal protection; or of the transmission of wealth through/in marriage; or of the *dispositif* of love as a *bug* in the *subjectivation* and arrangement of subjects as sexual beings.<sup>15</sup> Certainly, even if love does not exist as a legal form, the (more or less diluted) juridical memory of it is recuperated in various other forms,<sup>16</sup> and its *specter* casts a shadow over the *poiesis* (of the laws) of law.

One of the central questions in these legal cases, and in criminology in general, is that of the reason, or reasons, that lead someone to kill another person. What leads a person to kill, sometimes with his or her own hands, someone with whom he or she has lived or had a relationship daily, over months, years, or even decades? Mental illness, which is the usual starting point (based on forensic psychiatric or psychological expertise)? Lack of emotional control? If, for a long time, the measures taken against subjects who are shown to be dangerous because of their mental illness have been the object of detailed legal regulation and careful scholarship, then what social defense is possible against the manifestation of such unforeseeable (?<sup>17</sup>) anger?

An exhaustive doctoral thesis by João Curado Neves (2008) deals precisely with the topic of understanding states of intense emotional disturbance and their legal consequences, particularly from the legal determination of anomalous psychic states (which allow for the exclusion of guilt and therefore of criminal responsibility) and the legal-criminal landscape of heightened emotional-passionate states. I will not extend the discussion of that topic here, except to note what has come to be at the heart of the development of ‘crimes of passion’: if the constellation of feelings that we recognize as orbiting around love and loss is no longer a moral and legal expedient that enables the homicide to be classed as voluntary manslaughter, do they qualify it as murder? Can feelings such as an asthenic state of desperation, loss of control, the anguish of betrayal, humiliation, or the desire for revenge simultaneously constitute a sinister motive and a petty one (the legal procedure, methodology, and line of reasoning based on which legal reasoning has come to judge a homicide to be murder)? In a moral and legal sense, is the individual repercussion of the meaning and social desire of the romantic couple, and their breakup, a petty motive? A petty motive is that which has been described in several rulings as irrelevant or frivolous: a motive ‘that has no value, that cannot reasonably explain the behavior, the motive that

<sup>14</sup> On the historicity of the semantics of love (as a symbolic code and communicative form), the codification of (sexually based) intimacy, and the integration of love and marriage, see Niklas Luhmann’s *Love as Passion* (Luhmann 1986).

<sup>15</sup> On this issue, see Elena Loizidou’s essay on the *love bug* and the formation of the subject as sexual (Loizidou 2004).

<sup>16</sup> On the metaphoric potential of the homeopathic principle of the memory of water in the conceptualization of legal memory about juridical concepts and forms, see Ana Oliveira (2022).

<sup>17</sup> In the forensic, social, and psychological reconstitution of cases, sociographic indicators or personality markers are frequently identified, which, in light of their observation, confer almost a predetermination on the brutal event: that is, the consummation of such violence emerges almost as though it ‘were written in the stars’. This apparent evidence—usually invoked through the demonstration of institutional incompetence (police, courts, etc.) and social indifference (family, friends, work colleagues)—performs a Foucauldian type of interrogation of the ambition of power that brings with it a desire to find and confirm a predetermining factor. This is not new, by any means. The transition from the principle of responsibility, which places the stress on the criminality of the fact, to the principle of the danger presented moves the attention to the subject who committed it and to the affirmation of the theory of social defense—a privileged topic in Michel Foucault’s writing (e.g., Foucault 1997). However, the two notions are linked by a pretension to monitor the dangerous subject, about whom scientific knowledge must be produced. This is a project to monitor the mysterious interior workings of the subject, with attention to what the subject did and may potentially do, and the implications of the subject’s liberty for the population at large (Ribeiro 2019b, p. 85).

is not a motive' (District Court of Coimbra, ruling of 16 January 2009). In the face of this axiological and epistemological knot, case law has been unanimous in considering that the 'emotional motive' removes the premise of the petty motive, as we read in the following verdict:

[...] the motivation for the crime was the breakup of the couple at the initiative of the victim; a breakup that the defendant did not accept. We are faced with heartbreak, with the suffering that this caused in the defendant. That is not to be considered trifling or insignificant. It is not an action with a petty motive, therefore the qualifier stated in article 132, number 2, point e) of the Penal Code is not confirmed. (Supreme Court of Justice, ruling of 18 March 2010)

In its multiple and distinct configurations, heartbreak has the capacity to inspire and immortalize tragedies, such as those of Romeo and Juliet, Young Werther, Madame Bovary, as well as songs such as 'Ne me quitte pas' by Jacques Brel and musical landmarks such as the legendary 1972 performance of 'Atrás da Porta, by Elis Regina. Different metrics of Eros and Thanatos make up the artistic and literary canon. Where love is king, how can it not be (in) law?

Although it is possible to break them down into hundreds of micromeanings and explanations, the sorrows of love and jealousy as demonstrations of the emotional depth of subjects cannot be delinked from relationships of power and expectation that are forged through social relations and from the weight of social frameworks for intimacy and the mind frame of subjects—that is, from the 'love code's representational world', as formulated by Luhmann (1986, p. 32). As Tiago Ribeiro writes in his essay on jurisprudence:

It is argued that the 'exacerbated jealousy' of the defendant may be censurable, but that it does not constitute a 'vile or petty motive, which recalls the natural, spontaneous, and timeless character of this feeling, expressed in art, cinema, literature, and the theatre—of which, [the panel of judges] concludes 'Othello who kills Desdemona' is a classic manifestation. (Ribeiro 2014, p. 108)<sup>18</sup>

The timelessness of the matter of the crime of passion is attested to by the place that historically has been reserved for it in the literature—its literary vocation, as Nuno Igreja Matos (2020) writes in his article on guilt in crimes of passion, which focuses on Shakespeare's *Othello*. Modes of fictional representation of crimes of passion are often recovered in the world of legal reasoning, whether because of the nature of the stories that are portrayed (which are repeated through the centuries) or for the ethical-normative judgements and mediations in which those literary representations are based. As such, the timelessness of the crime of passion has been the object of extensive research in terms of its reflection in jurisprudence and case law, especially in the Anglophone context. In these legal cases, love/passion is commonly accepted as an existential *tragedy* that causes the eruption of an impulsive and explosive nature—emotional blindness that is tormented by jealousy and heartbreak. As Caetano Veloso sang, 'Over every street/over every room/the monstrous shadow of jealousy looms'.<sup>19</sup> The paths indicated by the social, cultural, and legal history of jealousy—in relation to its temporal continuity, what it expresses in the ('contractual') relationship between experience and expectation, the emotional potential that it carries—make the framing of it within the precept of the 'petty motive' problematic, if not paradoxical. If, as José de Faria Costa (2017) argues, the cloak of jealousy enables the establishment of an 'interpretative methodological line' that, in its demand for respect, allows for a trajectory that goes from 'text-as-rule' to 'rule-as-text', then jealousy cannot be directly and automatically viewed as a 'petty motive'.

However, as stated by the District Court of Leiria (25 May 2016), 'it is in the subjectivity of the agent that the nature of the motivation for the crime must be found for the purposes of considering the pettiness of the motive'. It is, therefore, from this extralegal pretext

<sup>18</sup> Here, the author is analyzing the 7 December 2011 ruling of the Supreme Court of Justice.

<sup>19</sup> Caetano Veloso, 'Ciúme', from the 1987 album *Caetano*.

(subjectivity of the agent; i.e., *who the agent is*) that the articulation and labelling of jealousy as a form of spite (as opposed to a natural, spontaneous, and timeless manifestation of emotional suffering) potentially makes the feeling/emotion, related to the ‘resentful end of a romantic relationship’, correspond to a petty motive. As the Coimbra Court of Appeal surmised:

The situation of the man in question was one of a person who greatly resented the ending of a romantic relationship. His attitude lies, therefore, in the petty motivation to keep a specific person captive to affections that were no longer felt, [for he was] unable to bear the development of human relationships. The pettiness of his motives is clear and manifest, the brutal disproportion of his act is an undeniable translation of his particularly reprehensible and perverse attitude. (Coimbra Court of Appeal, ruling of 22 March 2006)

It is, therefore, a matter of describing descriptions; of semantics—in the interaction of the meaning (its content and context) with the signifier (the form, the word); of plausibility, which accrues from its compatibility with the social structure (and social mores); and of imprinting a more progressive or more protective vision of the law (in its sense, function, and range). In the tension between legal progress and social expectation, or social progress and legal expectation, or indeed between the aspiration to progress and the function of law, such imprinting may signify and imply a certain mythology of history as ‘progress’—as in the introductory cultural case study (the novel and TV series *Gabriela*)—or a surrender to (and thus a redemption from) the constitutive and inevitable interpretive condition of law.

In spite of the attention given to it, the most decisive criterion for criminal censure is not constituted by the reading made by the law and those who apply it of the border between the emotional blindness of the *Othellos*, the scornful disdain of the *Iagos* (who kills his wife, Emilia, in the same act as that in which Othello kills Desdemona), and the spiteful, proprietorial, or possessive vision of the *Colonel Jesuínos*. In most cases, the fact (whether it was conceived as driven for an ‘emotional motive’ or for a ‘petty motive’) is understood as revealing a particular reprehensibility or perversity, and the agent is convicted of murder (commonly, in Portugal, prison sentences range from 18 to 20 years). Nevertheless, the malleability of the form, content, and scope of emotions and motivations and its relevance and effect on criminal responsibility compose a fertile observatory and a repository of the infralegal dimensions that take part in this matter—that is, as in this exercise in the legal-formal structuring of emotions and motivations, which is directed towards whatever result may be ultimately intended: from the *diagnosis* of the emotion or motivation, to proving an emotion or judging it to have been proven (whose classification inevitably rests on a convincing demonstration that corresponds to preconceived terms and one’s own cosmovision), to the relevance, suitability, equivalence, and configuration of that emotion as motivation (to which various degrees of reprobation or comprehension, and of guilt, correspond).

From the ‘rules of experience’ to the cultural-symbolic mediations and resonances, which permeate the reflexive and intuitive process of signification and evaluation of plausibility, normality, and suitability, this ‘interpretative methodological line’ combines both legal and extralegal elements and repertoires—elements and repertoires that shape beliefs structuring and interrogating the relationship between subject, fact, and norm.

#### 4. Final Considerations

As Ribeiro (2014, p. 108) wrote, ‘it would not be excessive to assert that, over the course of history, the same facts and the same behaviors (although, of course, these are never exactly the same) have generated distinct feelings and consequences’—facts and behaviors whose classification, as argued by Hespanha (2018, p. 224), on the one hand, refers to an idea of models for the organization of perceptions and ‘reality’ and, on the other, reveals the active, structuring, creative (*poietic*) capacity of such classification to mold knowledge. Categories such as that of ‘passion killing’ have the capacity to organize and create image-laden and moral repertoires for an action and a motivation, repertoires that have been

accommodated over time by different guidelines on comprehensibility and monstrosity on which different degrees of lawfulness or unlawfulness have been conferred, and for which legal and literary imaginations have established different levels of atonement.

This is the driving force for this article, which has drawn on the legacy of the law and literature movement as an inspiration for an investigation of law and social phenomena within, and in the relationship between, legal and literary cultures, and for an exploration of the cultural and symbolic nature of the categories through which legal reasoning operates—thus reconsidering the terms of the dilemma that James Boyd [White \(1973\)](#) works through, between ‘literatures of reality’ and legal imagination (starting from which it may be possible to find or create meaning in experience). My intention has not been to study or diagnose the process of decision making, or the factors that may foretell the type and length of the sentence imposed; nor have I sought to wave a flag for the *confirmation* of (patriarchal) failings and biases in a way that treats both those failings and the agents who enact them as detectable exceptions within a system that is (liable to be) rightful and just.

If history and human actions gain meaning and can be understood only in the light of their narrative context and dramatic framing, as Allan [Hutchinson \(1988\)](#) argues, then many of the stories that are imagined and performed will be heard and understood in the light of the vernacular context of other stories that determine their moral force and epistemological validity. The law and humanities scholarship gains particular importance in this understanding of the radical impossibility of switching off from cultural life, or, to borrow from Ian [Ward \(2011\)](#), of switching off the jurisprudential lives of those who apply the law to subjects and circumstances. As sources that recognize and create value and meaning, both law and literature comprise cultural archives on the interpretation and regulation of subjects and human experiences. Beyond this, law and literature alike are constituted in the inseparability of creation from application by means of interpretation and—in accordance with the work of Joana Aguiar e [Silva \(2001\)](#)—by means of the full participation of the interpreter in the construction and revelation of that interpretation. This is an interpretation that creates the text, the effectiveness of which presupposes that interpretation, and on the basis of which it is attributed meaning.

In this sense, states of emotional disturbance, which often fall into the category of the so-called *crimes of passion* (but also appear in other cases, such as infanticide), frequently stir up discussions in legal reasoning and case law around imputability and criminal responsibility, the exclusion or substantial diminution of guilt, or even the presence or lack of consciousness of wrongdoing. In the legal diagnosis of emotional disturbance, the debate around the emotional fact and its forensic meaning has lost its centrality in Portuguese jurisprudence because, in contemporary times, it tends to be accepted that emotional states do not constitute factors that exclude or mitigate guilt, nor do they correspond, in and of themselves and automatically, to a heat of passion that allows for the criminal fact to be understood as voluntary manslaughter. That is not to say that the debate has lost relevance; it has been renewed, and that state of passion has taken up a new place within the dilemma of whether it constitutes a petty motive. The pettiness or otherwise of a motive is understood largely as a legal rather than an empirical problem. The presence of a petty motive reveals and translates into the particularly reprehensible and perverse nature of the act and its agent, which qualifies the crime as murder (and, as such, requires a longer sentence). As stated in the ruling of the Supreme Court of Justice on 10 December 2008, a ‘petty motive is the driver for the unreasonable action of an agent who is not guided by common sense; it is totally irrelevant to the suitability of the fact and has no plausible, rational explanation; it lies in the insignificant and petty selfishness of the agent’. The arguments revolve around the plausibility of love and heartbreak, of expectations, of the constitution and collapse of the (romantic) couple, and of the (idea of) family. Within this frame of reference—which is political and politicizable, civil, and aesthetic-artistic and increasingly is made scientific—lies the heuristic permeability that allows those who apply the law to be/cite poets and to say to the court: ‘And the love, whatever it was, an infection’ (Anne Sexton, ‘Wanting to Die’).

**Funding:** This research was funded by FEDER—European Fund for Regional Development funds through the COMPETE 2020—Operational Program for Competitiveness and Internationalization (POCI), and by Portuguese funds through FCT—Foundation for Science and Technology in the framework of the Project IPHinLAW—Intimate Partner Homicide: challenges to the law. Reference: POCI-01-0145-FEDER-030862-PTDC/DIR-DCP/30862/2017. The author also discloses receipt of funding by FCT—Foundation for Science and Technology, within the Individual Contract 2021.03341.CEECIND/CP1698/CT0005.

**Institutional Review Board Statement:** Not applicable.

**Informed Consent Statement:** Not applicable.

**Data Availability Statement:** Publicly available datasets were analyzed in this study. These data can be found here: <http://www.dgsi.pt> (accessed on 1 March 2022).

**Acknowledgments:** This publication was translated from Portuguese by Rhian Atkin. Final revisions are the author's responsibility.

**Conflicts of Interest:** The author declares no conflict of interest. The funders had no role in the design of the study; in the collection, analyses, or interpretation of data; in the writing of the manuscript; or in the decision to publish the results.

## References

- Agra, Cândido, Jorge Quintas, Pedro Sousa, and André Lamas Leite. 2015. *Homicídios Conjugais: Estudo Avaliativo das Decisões Judiciais*. Lisbon: Commission for Citizenship and Gender Equality.
- Amado, Jorge. 1962. *Gabriela, Clove and Cinnamon*. Translated by James L. Taylor, and William L. Grossman. New York: Crest Books. First published 1958, by Livraria Martins. (In Portuguese)
- Costa, José de Faria. 2017. *Direito Penal*. Lisbon: Imprensa Nacional—Casa da Moeda.
- Cunha, Isabel Ferin. 2003. A revolução da Gabriela: o ano de 1977 em Portugal. *Cadernos Pagu* 21: 39–73. [CrossRef]
- Dawson, Myrna. 2016. Representing intimacy, gender and homicide. The validity and utility of common stereotypes in law. In *Homicide, Gender and Responsibility: An International Perspective*. Edited by Kate Fitz-Gibbon and Sandra Walklate. New York: Routledge, pp. 53–77.
- Foucault, Michel. 1995. *Discipline and Punish. The Birth of the Prison*. Translated by Alan Sheridan. New York: Random House. First published 1977.
- Foucault, Michel. 1997. *Il Faut Défendre la Société. Cours au Collège de France (1975–1976)*. Paris: Gallimard/Seuil.
- Govern, João. 2017. Gabriela, 1977, a novela que mudou a televisão. *Diário de Notícias*. May 13. Available online: <https://www.dn.pt/artes/gabriela-1977-a-novela-que-mudou-a-televisao-8472243.html> (accessed on 1 February 2022).
- Goodrich, Peter. 1996. *Law in the Courts of Love. Literature and Other Minor Jurisprudences*. London: Routledge.
- Hespanha, António Manuel. 1991. A emergência da História. *Penélope. Fazer e Desfazer a História* 5: 9–25.
- Hespanha, António Manuel. 1993. Lei e Justiça: história e prospectiva de um paradigma. In *Justiça e Litigiosidade: História e Prospectiva*. Edited by António Manuel Hespanha. Lisbon: Fundação Calouste Gulbenkian.
- Hespanha, António Manuel. 2018. Categorias. Uma reflexão sobre a prática de classificar. *Práticas da História* 7: 224–56.
- Hutchinson, Allan C. 1988. *Dwelling on the Threshold: Critical Essays on Modern Legal Thought*. Toronto: Carswell.
- Loizidou, Elena. 2004. The love bug and the melancholic drag queen or a reflection on the cultural/political «grounds» of subjects as sexual. *Journal for Cultural Research* 8: 447–65. [CrossRef]
- Luhmann, Niklas. 1986. *Love as Passion. The Codification of Intimacy*. Cambridge: Harvard University Press.
- Matos, Nuno Igreja. 2020. Variações sobre a culpa nos crimes passionais a partir de A Tragédia de Otelo, de William Shakespeare. In *Estudos em Homenagem ao Prof. Doutor João Curado Neves*. Edited by Maria Fernanda Palma, Augusto Silva Dias, Paulo de Sousa Mendes, Teresa Quintela de Brito, João Gouveia de Caires and Catarina Abegão Alves. Lisbon: AAFDL Editora, pp. 317–43.
- McDiarmid, Claire. 2019. Drury v HM Advocate 2001 SLT 1013. In *Scottish Feminist Judgments. (Re)Creating Law from the Outside In*. Edited by Sharon Cowan, Chloë Kennedy and Vanessa Munro. Oxford: Hart, pp. 109–30.
- Meyler, Bernadette. 2017. Law, Literature, and History. The Love Triangle. In *New Directions in Law and Literature*. Edited by Elizabeth S. Anker and Bernadette Meyler. New York: Oxford University Press, pp. 160–75.
- Neves, João Curado. 2008. *A Problemática da Culpa nos Crimes Passionais*. Coimbra: Coimbra Editora.
- Oliveira, Ana. 2022. *Assédio: Aproximações Sociojurídicas à Sexualidade*. Lisbon: Contemporary History Press.
- Oliveira, Guilherme de. 2010. A nova lei do divórcio. *Lex Familiae—Revista Portuguesa de Direito da Família* VII: 5–32.
- Ribeiro, Tiago. 2014. Ensaio Sociológico Sobre o Direito, o Sexo e a Desigualdade Numa Era que Ainda é. Master's dissertation, University of Coimbra, Coimbra, Portugal.
- Ribeiro, Tiago. 2019a. Direito, sentido e razão: sobre o sexo como problema normativo. *Práticas da História* 9: 167–89.
- Ribeiro, Tiago. 2019b. Labor and sex as objects of regulation: Contribution to the cultural study of law. *Configurações* 24: 79–95. [CrossRef]

- 
- Serra, Teresa. 2003. *Homicídio Qualificado. Tipo de Culpa e Medida da Pena*. Coimbra: Almedina.
- Silva, Joana Aguiar e. 2001. *A Prática Judiciária Entre Direito e Literatura*. Coimbra: Almedina.
- Ward, Ian. 2011. On Literary Jurisprudence. *Journal of Law and Interdisciplinary Studies* 1: 6–15.
- Ward, Ian. 2021. Law, Literature and History. *Law & Literature*, 1–21. [[CrossRef](#)]
- White, James Boyd. 1973. *The Legal Imagination*. Boston: Little Brown & Co.