Provoked Intimate Femicides: A Privatized Version of "Honour"?

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Pascale Fournier, Pascal McDougall & Anna R. Dekker, *Dishonour, Provocation and Culture: Through the Beholder's Eye?*, 16(2) **Can. Crim. L. Rev.** 161 (2012), available at the University of Ottawa.

In their thought-provoking work *Dishonour, Provocation and Culture: Through the Beholder's Eye?*, Pascale Fournier, Pascal McDougall and Anna R. Dekker use a unique blend of historical, cross-cultural and empirical analysis to reveal the connections between so-called "honour killings" and intimate femicides where the defence of provocation is invoked. While "honour killings" typically involve "non-Western" defendants, and concerns about gender equality are more explicit, intimate femicides raise similar equality concerns which are often unrecognized and concealed. The authors acknowledge that there are differences between our typical conception of honour killings and the spousal homicides in which provocation is raised by Western defendants. For example, traditional honour killings invoke the idea of public honour, whereas in the provoked intimate femicides, "the locus of honour has shifted from the traditional extended family to the individual man" (178). However, there are underlying features that link spousal homicides to honour killings: both are "cultural claims tied to male domination of the family" (180) and both turn on the desire to control women's sexuality. In essence, the defence of provocation is portrayed as a privatization of honour, with aspects of honour manifested through Western understandings of "passion".

The defence of provocation in Canada has not been explicitly linked to male honour in the case law. Instead, the defence is viewed as making concessions to human frailty, and is limited by the concept of the "ordinary person". The insult which triggers the killing must be grave enough to cause the ordinary person to lose self-control, and the accused must have reacted suddenly, before there was time for his "passions to cool". But this concession to human frailty masks the historical basis of the defence and the meaning embedded in spousal homicide cases. The idea of women and children as property of their male partners looms large even in recent cases.[1] The public framing of honour killings as something "other" than Western obscures the foundations of spousal femicides in Canada, which are rooted in individual conceptions of male honour.

In the empirical section of the paper, the authors analyze recent cases involving honour crimes and spousal femicides in Canada. Their results demonstrate a significantly higher success rate for the defence of provocation for those defendants identifiable as Western than for those from non-Western cultures. The authors caution readers about drawing too much from their limited sample. However, it is important to consider whether these cases reflect a failure to recognize the underlying misogynist basis for Western cases involving provocation, while in cases involving accuseds from other countries with "foreign" conceptions of honour, we are able to see the misogyny for what it is. Rosemary Cairns Way has previously made this argument[2]) that the honour cases fail to acknowledge the assumptions about male entitlement to women that pervade Canadian culture. While cases involving immigrant accused often rely on expert evidence to explain the cultural basis for the accused's actions, non-immigrant accused succeed on the provocation defence without any such evidence because the values about gender inequality reflected in the cases are deeply embedded in Canadian culture.

In *R v Tran*[3], the Supreme Court of Canada held that the ordinary person standard in the provocation

test must be informed by values of equality, such that the ordinary person cannot be held to be imbued with qualities contrary to the values reflected in section 15 of the Charter. This has generated optimism in those concerned about the scope of the provocation defence in Canada: many feel that *Tran* will limit the applicability of the defence both in cases dealing with intimate femicides and in cases dealing with "homosexual panic". In the latter cases, which arguably construe homophobia as ordinary, accused men have had their liability reduced after killing a man who may have made a sexual advance.[4] However, Fournier et al. caution against too much optimism following *Tran*. We should not assume that importing Canadian values into the provocation defence will necessarily solve the issue of honour-based killings. In other words, we must unpack what Canadian values reflect about male dominance and the use of violence to assert control over women. As the authors conclude, "however right the harsh punishment of honour crimes may be, this has the potential to conceal Western femicidal behaviour, an unintended consequence we should be wary of" (188). While the horror of honour killings is explicitly acknowledged, "the equally horrifying practices which our "ordinary person" seems to accommodate" must also be scrutinized (189).

I would argue that if a commitment to equality is to be taken seriously, we must move beyond simply accepting that "ordinary" people kill in response to rage and jealousy. Rather, we must ask why these emotions are privileged over some other "human frailties" that might be more deserving of our compassion. Abolishing the defence of provocation outright is more difficult as long as we have mandatory minimum sentences for murder. Courts understandably look to defences like provocation to mitigate the harshness of those mandatory minimums in cases where they appear excessive. However, it is important to scrutinize closely why we feel mitigation is appropriate in some contexts and to ensure that gender inequality (and inequality based on sexual orientation) are not underlying the claims for mitigation. This carefully crafted article makes a significant contribution to this endeavour in the context of gender and reminds those of us hopeful about the impact of *Tran* not to be complacent about the Canadian values that will be incorporated into the objective test.

1. *See*, *e.g.*, *R v Thibert* ([1996] 1 SCR 37), where the defence of provocation was allowed when a man killed his estranged spouse's new partner; the "insult" was the refusal of his spouse to talk to him in private and the victim standing his ground when faced with a loaded gun
2. *Culture, Religion and the Ordinary Person: An Essay on R. v. Humaid*, 41 Ottawa L. Rev. 1 (2010
3. 2010 SCC 58
4. *See, e.g.,* the recent case of *R v Ouimet*, unreported, summarized in Mary Ganes Welsh, *Ex-Soldier Jailed in Gay Killing*, Winnipeg Free Press, June 8, 2012, http://www.winnipegfreepress.com/local/ex-soldier-jailed-in-gay-killing-158045545.html.

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