



Blaming violent men—A challenge to the Swedish criminal law on provocation

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SYNOPSIS

Feminists have long criticized how provocations narrative of a woman 'asking for it' functions as a legal 'abuse excuse' for violent men and confirms their rationalizations and justifications for violence. This article aims to challenge a particular aspect of provocation in Swedish criminal law—namely, a tendency to individualize and subjectivize culpability in a way that suggests that the individual male perpetrator's specific understanding of his violence should be the perspective from which to understand and judge his violence. Criminal legal culpability is approached as an important aspect in the relationships between gender, power, and violence, and the author argues that the notion of culpability should be changed in two respects. The tendency to regard emotions as 'factual' should be replaced by an evaluative view on emotions and men's responsibility for their emotional responses to women should be judged by acknowledging how values and reasons intersect with power relations.

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Introduction

In this article, I want to challenge how provocation and violent men's culpability for their violence against female partners or former partners are dealt with in the Swedish criminal law. Criminal legal doctrines of provocation long have been criticized in Anglo-American feminist legal studies (Edwards, 2004; Howe, 2002, 2004; Ramsey, 2010; Tyson, 2013). This criticism is directed at the provocations narrative of a woman 'asking for it', which functions as a cultural and legal 'abuse excuse' for violent men and confirms violent men's rationalizations and justifications of their violence against women.¹ Moreover, defence laws, both provocation and self-defence, have been criticized for failing to reflect and respond to the circumstances in which female domestic violence victims kill their male abusive partners. Because of this criticism and public debate, often fuelled by particular cases, legal reforms regarding provocation have been carried through in Anglo-American jurisdictions. Provocation as a partial defence that reduces the crime of murder to manslaughter has been abolished in three Australian states.² The provocation defence has also been abolished in New Zealand (Crimes Amendment Bill 2009). In these jurisdictions, provocation is to be considered

instead by the court as a possible mitigating circumstance when deciding the sentence.

Debates and reform processes in England and Wales and in the United States have not resulted in repealing the defence of provocation. In England and Wales, the provocation defence has instead been replaced by a new partial defence of loss of self-control (Coroners and Justice Act 2009, Section 55). This defence is applicable if the defendant's loss of self-control is attributable to certain 'qualifying triggers'. One example of a 'qualifying trigger' is 'things done or said (or both) which caused the defendant to have a justifiable sense of being seriously wronged'. However, the fact that a thing said or done constituted sexual infidelity is to be disregarded in determining whether a loss of self-control had a qualifying trigger. A few US jurisdictions have also introduced categorical exclusions of some victim behaviours. For example, in Maryland, 'the discovery of one's spouse engaged in sexual intercourse with another' does not constitute a legally adequate provocation (Ramsey, 2010). In several of the above-mentioned jurisdictions, gender bias in self-defence laws for women who kill abusive male partners has been acknowledged simultaneously and resulted in reforms—for

example, in Queensland, Australia, where a separate partial defence to murder in abusive domestic relationships was introduced in 2010.³

A slightly different picture appears in the Swedish context. Feminist research, feminist advocacy, and public debate so far have paid very little attention to the problems of gender bias and gender constructions in defence laws in general and as regards provocation in particular. Although several legislative and policy measures in the area of criminal law and men's violence against women in heterosexual relations have been introduced in Sweden in the pursuit of more effective and gender-sensitive law and policy, the law and adjudication on provocation has not been up for serious scrutiny and discussion.⁴ The Swedish criminal legal doctrine on provocation and the ways in which the courts deal with provocation differ to some extent from the Anglo-American ones, as elaborated below. However, similar cultural and gendered problems can be observed in Swedish criminal law. Apologizing gendered discourses fit well into Swedish criminal law by means of the provocation excuse, which blames women for the violence they are exposed to and mitigates culpability for the perpetrator (Burman, 2010). Similar observations have been made regarding discourses among violent Swedish men themselves (Gottzén, 2012; Edin & Nilsson, 2014—in this issue). As mentioned in the beginning, this gendered-mitigating effect is a familiar problem in feminist research. With this article, I want to add a specific dimension to the analysis of this problem, namely, how the Swedish criminal legal notion of culpability contributes to uphold the opportunity of mitigating blame in this way and counteracts possible change. More precisely, the aim of this article is to challenge a tendency in Swedish criminal law to individualize and subjectivize culpability in a way that suggests that the individual male perpetrator's specific understanding of his violence should be the perspective from which to understand and judge his violence.

I will carry through my challenge by utilizing an analytical approach based on feminist legal theory and theories concerning men's violence against women as related to gender and power developed within feminist research and critical masculinity studies. Criminal legal culpability thus will be approached and analyzed as an important aspect in understanding the dynamic relationships between gender, power, and violence. I particularly aim to challenge how provocation and culpability discourse tend to construct male rage towards women as an 'inevitable' excuse for violent men that is beyond possible change.

I will start by outlining my theoretical and analytical framework regarding gender, power, violence, and criminal law. The next section presents how provocation and culpability are conceptualized and dealt with in Swedish criminal law, with a focus on case law on men's violence against women in intimate relations and criminal legal scholarship on culpability and provocation. Here I will also develop my claim that the Swedish notion of culpability suggests that the individual male perpetrator's specific understanding of his violence should be the perspective from which to understand and judge his violence. In the third section, I will outline three problems that follow from the way provocation and culpability are conceptualized and dealt with and argue for the importance of including gender and power into the analysis of criminal legal culpability. These problems concern how

violence can be contextualized, how power operates through culpability in criminal law, and how masculinity is constructed as an 'abuse excuse' in a Swedish context of strong gender equality discourse. Finally, in the last section, I will problematize the possibility to promote change by legal reform and argue for how the criminal legal notion of culpability should be challenged and changed in the Swedish context.

Analytical framework

Feminist theorizing regarding men's violence against women frequently concerns the specific relations between gender, power, and violence. The violence is seen often as having two interrelated functions: violence is used on an individual level by men to exert power and control over individual women, and, on a structural level, it has the effect of perpetuating systems of domination related, for example, to gender, race, and class (McCarry, 2007; Thiara & Gill, 2010). Domestic violence is thus seen as the result of men wishing to dominate women through violence and coercive control as well as of a culture that encourages or condones it (Raphael, 2004). In this way, links are created between power systems, individual acts of violence, agency, and social/legal responses to the acts. 'Power systems' are in this context conceptualized as dynamic and contested forces that produce a context of opportunity within which people choose to resort or not resort to violence. Power systems are seen as 'structuring forces' defining possible acts and the consequences emanating from them and thus affecting how people act, the opportunities that are available to them, and the ways in which their behaviour and how they are situated are understood and socially defined (Burgess-Proctor, 2006; Connell, 2009; Thiara & Gill, 2010).

Men and masculinities have become increasingly more central in feminist theorizing about men's violence. The relationships between men, masculinity, and violence are well documented (McCarry, 2007). It is also argued that there is a great deal of evidence that men react violently to challenges to their authority, honour, and self-esteem as men (Dobash, Dobash, Wilson, & Daly, 2011). Notions of masculinity can contribute both to making men's violence possible and to its being excusable and excused (Enander, 2009; Tyson, 2013).

In several contexts, however, neither the problem of violence nor the perpetrator is explicitly gendered (Hearn & McKie, 2010). And if the perpetrator actually is gendered explicitly as male, it might well be just a new way of locating the blame for the violence away from the men who perpetrate it. For example, if violence is understood as being 'naturally' associated with men, this 'naturalness' can be invoked to justify such violence (Hearn, 2012). Men might also be disembodied from masculinity with the result that the focus is directed away from the material reality of men's violent behaviour and interaction and onto 'masculinity' (McCarry, 2007). Or causal power may be attributed to 'masculinity' or 'hegemonic masculinity', which thereby becomes the explanation and excuse for the behaviour (Connell & Messerschmidt, 2005; Hearn, 2012). Another possibility that follows with some approaches to masculinity—for example, some psycho-social narrative approaches—is according to Tyson that more stories are told that 'permit the long held cultural habit of reading male violence as an effect of anxiety and/or latent and

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