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. 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. 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 2010.²

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 relationships 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 (McCarr, 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 (McCarr, 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’ (McCarr, 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
somewhat defensive response to feeling feminised. Moreover, according to this story, originary responsibility for these feelings is said to lie with a woman (Tyson, 2013:176).

My legal theoretical point of departure is feminist legal theory, in which law is regarded as a societal discourse in constant interaction with other discourses, and the criminal legal subject is regarded as gendered, classed, and so forth (Lacey, 1998; Naffine & Owens, 1997; Niemi-Kiesiläinen, 2004; Smart, 1998). This stands in stark contrast to mainstream Swedish criminal legal theory, which emphasizes that criminal law must be regarded and constructed as an autonomous system as free as possible from values, identity, and subjectivity in order to achieve the equal treatment of individual offenders and to counteract misuse of state powers over its citizens. Context, structure, and differences are therefore conceptualized as very problematic to take into consideration in criminal legal theory and practice (Lernestedt, 2010). Consequently, the criminal legal subject is normally theorized as detached from aspects such as gender and sexuality. In contrast, feminist legal theory emphasizes that it is impossible to conceive of a criminal law and a criminal legal subject without interrelations to, for example, social categories, value systems, power, and socially constructed categorizations such as gender. These aspects are already present in law at the same time as law interacts with them in various ways. In this article, I also will regard criminal legal culpability as inevitably interrelated with such aspects.

Viewing criminal law as a societal discourse includes a notion of criminal law as influencing the production of normative beliefs and gender norms in the social world (Hamilton, 2010). Criminal law emphasizes that violence and harm to other people is morally wrong and that domestic violence is not a shameful private matter but a societal as well as individual injustice. It is argued that criminal law has a potential to undercut cultural tolerance for violence against women and promote human rights norms that protect women from violence (Coker, 2004; Larsen & Petersen, 2001; Raphael, 2004). Law can be seen as even a particularly powerful tool in the social construction of reality because it is the only discourse that is backed by the legalized use of force (Hamilton, 2010; Niemi-Kiesiläinen, 2004).

However, feminist research has been concerned seriously and for a long time about the ways law constructs gender and the consequences emanating from such constructions. When legal discourse produces or reinforces gender norms and constructs gendered realities, it is often done in a damaging or constraining manner, which increases vulnerability effects, reproduces social injustices, ignores differences between abused women, and impedes effective intervention (Albertin, 2009; Coates & Wade, 2004; Hunter, McGlynn, & Rackley, 2010). Law also very often fails to comprehend the ways in which women are socially harmed by the violence (Hunter, 2008). These problems often are said to be particularly true as regards criminal law (Coker, 2004; Douglas, 2012; Hunter, 2008). Nevertheless, inspired by Smart and others, my position is that because violence against women is already in the legal domain, it must also be addressed there (Howe, 2008; Smart, 1989). Further, I intend to follow Smart by regarding law as a site for discursive struggle (Smart, 1998) and by conceptualizing law ‘as a site of conflict and dispute and not a place of refuge or of resolution’ (Smart, 2012: 164).

Provocation in Swedish criminal law

In Swedish criminal law, provocation is a partial excuse applicable to all criminal offences—that is, it is not restricted to mortal violence, which often is the case in Anglo-American jurisdictions. Further, provocation is both a defence and a possible mitigating circumstance in deciding the sentence. As a defence, it may lead a court to judge a criminal act as a less serious crime than an assessment of the other circumstances (for example, bodily harm) would lead to. It might, for example, mean that an assault that in respect of the physical harm caused should be judged as aggravated is judged instead as a non-aggravated assault and therefore subject to a lower scale of punishment. As a mitigating circumstance, provocation may (sometimes in conjunction with a defence) lead a court to mitigate the punishment within the applicable scale of punishment.

In comparison with Anglo-American jurisdictions, Swedish criminal law is lacking a detailed legal doctrine on provocation. The Swedish Penal Code defines provocation as being at hand if ‘the crime was occasioned by an evident offensive behaviour of some other person’. According to criminal legal scholarship, provocation is constituted by two aspects: first, a factual aspect, which means it has to be established whether the perpetrator was provoked, that is, if he or she actually was in an emotional state of anger evoked by the behaviour of the victim; second, a normative aspect prescribing that a judgement has to be made as to whether the perpetrator’s reason for being provoked should be accepted (Jareborg & Zila, 2007; Lernestedt, 2010). However, there is very little guidance in the preparatory works of the Penal Code (for example, in relevant governmental bills) or in case law as regards what is included in the two aspects, how they are to be judged, and how they relate to each other (Burman, 2011; Lernestedt, 2010).

Further, neither the preparatory works of the Penal Code nor the case law clarifies the justification for the mitigating effect of provocation. Swedish criminal legal scholars argue that the mitigating effect of provocation should be justified by the argument that provocation places the perpetrator into the situation of a moral conflict involving contradictory ethical reasons: a basic demand on self-control conflicts with a morally acceptable reason for reacting and giving vent to anger. The actor’s sense of anger is seen as an appropriate emotional response to the provocative behaviour, and a person who, because of such an emotional response, is placed in a moral conflict and does the wrong thing is regarded as deserving less blame than a person who has all the moral aspects speaking against him (Jareborg & Zila, 2007; Ulväng, 2009; Von Hirsch & Jareborg, 1987).

Because of the lack of a detailed criminal legal doctrine on provocation, the Swedish courts seem to have considerable freedom in how to judge statements and defences of provocation. Apart from an article in 1996 concerning a Supreme Court case of ‘homosexual advance defence’, part of a book (Lernestedt, 2010, which is discussed below) and a book chapter on emotions and provocation (Burman, 2011), very little interest has been shown so far in mainstream Swedish criminal legal scholarship in studying how provocation is dealt with in the courts or in theorizing and problematizing provocation. However, a feminist legal study of case law concerning men’s violence against women in intimate
relationships has shown that it is common for the Swedish Supreme Court and the Appeal Courts to accept without any further comments or discussions a man’s statement that he was provoked by ‘his’ woman (Burman, 2007, 2010). For example, in the following Appeal Court case, where the man killed his wife, the court stated,

[The man’s] story further shows that [the woman], who was heavily under the influence of drink, after she woke him up said things that [the man] took to be very provocative. After that [the man] fetched his shotgun, loaded it and shot [the woman] at a close range with one shot from behind. Thus [the man] has acted without premeditation and in a temper after feeling he had been seriously offended.7

In another case, where the man was convicted of repeated assaults and unlawful threats during a period of five years, the man argued that the quarrels and ‘disturbances’ that, according to him, characterized their intimate relationship were because of the woman’s provocative behaviour towards him. The Supreme Court concluded,

It should also be noted that it must be assumed that the behaviour of [the woman] under the influence of drink on certain occasions might have had an impact on the development of the rows and disturbances between the spouses.8

The normative aspect of provocation was tested in a few cases, but in a clear majority of cases where provocation was an issue, the courts, without clarifying how the issue of provocation was judged, either implicitly accepted the man’s statement that he was provoked or, only on the basis of the man’s statement of being provoked, explicitly established that the woman had provoked the man (Burman, 2010). Thus, the way Swedish case law deals with provocation in such cases gives the impression that the individual male perpetrator’s personal and specific understanding of his violence as caused by ‘his’ woman’s behaviour is the perspective from which to judge his violence.

Lernestedt (2010), a Swedish criminal legal scholar, has suggested that the normative part of provocation, if not abolished, should be changed. His arguments are in line with the negative retributive theory on criminal law that dominates Swedish criminal law and legal scholarship.

However, Lernstedt does not elaborate what ‘retrospective measures very close to the individual’ could be. I suspect that aspects such as the unique emotions, beliefs, or values of the individual perpetrator and his reasons at the time of the criminalized act could count as such measures. This is, as shown above, much in line with how this issue already is dealt with often in case law on men’s violence against women in intimate relationships. Further, a notion of individualized blame in line with Lernstedt constructs the precedence of the male perpetrator’s point of view on his own violence as an inevitable consequence due to how punishment is considered having to be justified.

Gender, power, and culpability

In this section, I will outline three problems emanating from how provocation and culpability are dealt with, as demonstrated in the previous section. In my view, these problems counteract a feminist understanding of the violence in criminal law and point to the importance of including gender and power into the analysis of criminal legal culpability. First, I will argue that the current construction limits the ways in which the violence can be contextualized. The second problem regards how power operates in criminal law through culpability. Finally, I will highlight how provocation and culpability facilitate a construction of masculinity as an ‘abuse excuse’ in a Swedish context of strong gender equality discourse.

The presented view on culpability as regards men’s violence against women in intimate relationships facilitates a discourse in which the violence is understood as caused by something internal or external to the perpetrator. The contextualizing is directed at finding particular events or ‘factual’ aspects that might answer the question of why an individual man performed the violent act against a female partner or ex-partner. In this context, power and control are seldom seen as such ‘factual’ aspects. In Swedish criminal law, the interest is instead mostly directed towards aspects such as psychological deviance or ‘normal’ psychological disturbances inside the violent man, the latter most often presumed to be ‘caused’ either by the behaviour of the woman or by problems in the intimate relationship as experienced by the man and interpreted from his perspective (Burman, 2007).

A feminist discourse on violence, on the other hand, emphasizes the need to contextualize men’s violence against women in heterosexual relations in a way that acknowledges that this violence occurs in a particular context of perceived entitlement and institutionalized power asymmetry (Dobash et al., 2011). Consequently, violence is not regarded as a result of something primarily inside or outside the perpetrator. Violence is instead viewed as a choice and as a means of achieving, aspiring for, or maintaining power and control. Violence is comprehended as functional in that it for example
may end an undesired argument, prove that the violent man deserves ‘respect’, or hold women in relationships (Dobash & Dobash, 1998; Enander, 2009). Such a feminist discourse will find it difficult to influence criminal law, however, because of the current notions of provocation and culpability.

Contextualizing violence in criminal law by taking account of differently situated male perpetrators’ experiences of anger and of being violated by women is an easy operation. Contextualizing violence in a way that acknowledges the situation and experiences of differently situated abused female partners or former partners is, on the contrary, difficult. This impacts on, among other things, what constructions of abused women’s agency can be included in criminal law. Allowing space for the view that men justifiably may be violent towards women leads the law to view women as ‘true victims’ only if they can be regarded as free from guilt (Bumiller, 1998) and being free from guilt is often equivalent to being a non-agent (Mahoney, 1994). Therefore, abused women risk having to downplay or even deny their agency in order to be regarded as ‘true victims’ by the criminal legal system. Further, if women show agency by resisting violent men, for example, by arguing with the man or leaving the relationship, they risk being considered as providing ‘morally acceptable reasons’ for men to feel violated and to react violently. In this way, abused women’s claims of agency in relation to abusive men mitigate violent men’s culpability. In order to open up for an understanding of abused women’s agency and exposure to violence outside the dominant dichotomy of agency—victimization—the agency and culpability of violent men have to be problematized (Burman, 2010).

According to feminist legal theory, an individual man’s violence against his individual female partner or ex-partner cannot be reduced to a decontextualized act of an individual. Also, the manner in which culture and power ‘enter’ a conflict and merge with it must be recognized. From such a point of view, criminal law should acknowledge that men’s violence against women in heterosexual relations is very often a dysfunction of power, not of intimacy (Coker, 2004; Stark, 2004). Instead, when Swedish criminal law enters an individual case of men’s violence against women in heterosexual relations, it tends to merge with the point of view of the male perpetrator and with discourses that condone violence. Accordingly, Swedish case law subjects abused women to moral judgements contained in a masculinist discourse, which seldom takes account of the position and rationality of abused women. The discourse is masculinist because it justifies and naturalizes male domination in a set of gender relations in which the point of view and power of men are taken for granted (Brittan, 2001). Provocation and culpability, as dealt with in the Swedish context, can be conceptualized as a legal construct which gives violent men power to repeatedly attribute blame for their own violation onto women. From a feminist perspective, such constructions in law help to perpetuate violence and are counterproductive in preventing men’s violence against women.

This gendered power structure in law allows individual violent men to defend a masculine position of power and a construction of themselves as normal male subjects by blaming the women exposed to their violence (Hearn, 1998: Sørensen, 2002). In a context where being a man who is violent towards women is a negative or stigmatized identity, using provocation and masculinity as an abuse excuse can be an escape route from being constructed as a violent man. In a Swedish context, the strong discourse on gender equality must be acknowledged because there is a problematic relationship between Swedish gender equality ideology and men’s violent practices against women. According to Swedish gender equality ideology, violence against women is connected to power relations between men and women in society and incompatible with the goal and basic values of gender equality (Burman, 2010; Gottzén, 2012). Therefore, as pointed out by Gottzén, a gender-equal man cannot be violent towards women and a violent man cannot be gender equal. And because all ‘ordinary’ Swedish men are comprehended as gender equal, a violent man must be someone else; he becomes the ‘other non-ordinary Swedish man’ (Gottzén, 2012).

In Gottzén’s interviews with Swedish men who had been violent towards their female partners or former partners, the men oriented themselves towards the gender equality discourse when they talked about their violence. Defining themselves as ‘good’ and ‘ordinary’ Swedish men demanded that they in one way or another confessed to the values of gender equality (see also Edin & Nilsson, 2014–in this issue). However, according to Gottzén, men’s violence against women is disguised as a consequence of this process in which violent men define themselves as gender equal. Therefore, men’s violence against women can continue at the same time as Sweden might go on naming itself as the most gender equal country in the world (Gottzén, 2012).

It is obvious, from my feminist legal perspective, that the concept of provocation should not be allowed to facilitate a construction of masculinity as an ‘abuse excuse’. However, Swedish case law and the idea of ‘true’ blameworthiness facilitate the status quo. In this way, uncomfortable and power-imbued questions about violent men’s agency, the relation between masculinities and violence, and the distribution of blame beyond violent men’s own experiences and emotions can be avoided. From a feminist legal perspective, this counteracts not only efforts to reduce men’s violence against women in heterosexual relationships, but also contravenes change in the overall unequal gendered power relations between men and women in society.

Challenging for change

Feminist scholars have long demonstrated the difficulties in implementing feminist understandings of men’s violence against women into criminal legal practice. Legal reform without parallel social and cultural reform cannot counteract men’s violence against women in heterosexual relations, neither can a criminal justice system lacking professionals with the specialized knowledge needed to adequately address abused women’s needs and provide supportive treatment (Albertin, 2009; Bailey, 2010; Bell, Perez, Goodman, & Dutton, 2011; Connelly & Cavanagh, 2007; Hunter, 2008; Meyer, 2011). Even if law is changed with an explicit feminist ambition, notions of gender often find new ways of influencing legal practice. One such example is the reform in Victoria, one of the Australian states mentioned in the introduction, that has abolished provocation as a defence that reduces the crime of murder to manslaughter. The reform seems to have resulted in some improvements in how violence against
women in heterosexual relationships is contextualized. Because provocation instead is relevant as a mitigating circumstance at the sentencing stage, however, excuses for male anger and violence against women still can influence case law. Further, there is some evidence that provocation-type arguments might still be successful in the guise of other offences such as manslaughter by an unlawful and dangerous act (Tyson, 2013).

With this feminist knowledge in mind, my main line of argument is not related to how the law on provocation should be changed or whether provocation should be abolished. Abolishing provocation as a defence and a mitigating circumstance or changing it in order to respond to the feminist critique without simultaneously changing the notion of culpability will probably lead provocation-type arguments to find new ways into the Swedish criminal legal discourse. As mentioned in the section on the analytical framework, I do not primarily view law as simple tool for change. Instead, I consider the law on provocation and the notion of culpability as a site for struggle where dominant discourses that are oppressive for abused women can be challenged. By arguing that the notion of culpability should be changed, I wish to take on a particular feminist legal method by disrupting the process of gender construction in law and introducing different accounts that might be less limiting for women (Hunter et al., 2010).

In my view, the notion of culpability (at least in relation to provocation) should be changed in two respects. First, the tendency to regard emotions as ‘factual’ should be replaced by an evaluative view on emotions. This should be in line with how current criminal legal doctrine justifies why provocation should mitigate blame (i.e., contradictory ethical reasons), but it seems as if this notion is forgotten repeatedly, especially in legal practice. Second, men’s responsibility for their emotional responses to women must be judged by acknowledging how values and reasons intersect with power relations.

An evaluative conception does not regard emotions as merely physical bodily sensations. Emotions, such as anger, are instead seen from a constructionist point of view as being constituted by thought and reason. This is because thoughts are needed in order to identify and define a specific emotion and separate it from others (Lupton, 1998; Nussbaum, 2004). According to Kahan and Nussbaum, A person experiences anger when she perceives that another has slighted her in a significant way. This perception presupposes conventions that specify from whom a person may legitimately demand respect (from her social subordinates; from her peers; from certain members of her family; from all members of the community) and what forms of behaviour count as disrespectful (insulting words; the failure to include the person in some important activity; an inappropriate sexual overtone). For this reason, anger can be viewed as a mechanism by which a person defends her status in the community and the social norms on which her status depends. (Kahan & Nussbaum, 1996:347–348)

Social norms and conventions are thus necessary components in dealing with anger and provocation, for individuals as well as for those who are to judge them. Even if the normative part of provocation was abolished, social norms would still be needed in order to judge whether or not an individual perpetrator’s anger was evoked by the behaviour of the victim (Burban, 2011). Social norms, and thus also aspects related to, for example, gender, cannot simply be excluded from the notion and treatment of provocation and should instead be explicitly addressed. But this will not be enough to facilitate a more feminist approach to provocation. Violent men should—in line with an evaluative conception of emotion—be regarded as responsible for their emotional responses to women. How a person deals with emotions and constructs reasons for reacting and acting, violently or not, should be regarded as a matter of agency and choice. This responsibility should be judged by acknowledging how values and reasons intersect with power relations. This argument is not to be confused with a view in favour of ‘collective’ blame or punishment of ‘groups’ or of ‘men in general’. It is simply to argue for dealing with the issue of individual responsibility for the way we reason by judging the values the reasoning is based on and by including aspects of power on individual and societal levels, instead of hiding these dimensions within a liberal notion of a value-free criminal law.

In my view, criminal legal intervention is needed in order to try to prevent violent men from depriving women of their rights to autonomy, integrity, and well-being. However, there is no guarantee that such a notion of culpability that has been sketched out here will deliver an outcome which is more favourable from a feminist point of view. It might as well lead to an even more outspoken confirmation by the criminal justice system of violent men’s rationalizations and justifications of their violence against women. However, hopefully a changed notion of culpability will provide better tools for taking the discursive struggle in Swedish criminal law one step forward in challenging provocation and gender constructions in law. Maybe it will also facilitate the implementation of gender equality as a value in criminal law in a feminist direction, instead of gender equality being a discursive tool which ‘ordinary’ Swedish violent men, with some help from the courts, can use to distance themselves from their abusive behaviour. And one thing is for sure, without such a challenge to Swedish criminal law, the criminal law will do no more than continue to facilitate the use of violence as a tool for men to achieve, to aspire to or to maintain power and control over women.

Endnotes

1 Regarding violent men’s discourses on violence and culpability, see, e.g., Hearn, 1998; Mullaney, 2007.
2 Tasmania (Criminal Code Amendment Act 2003), Victoria (Crimes Homicide Act 2005), and Western Australia (Criminal Law Amendment Act 2008).
4 The most comprehensive reform in Sweden is the Women’s Peace Reform in 1998 in which, among many other legal and policy measures, a new crime designed to better reflect and respond to domestic violence as experienced by women was enacted. The new crime is named ‘gross violation of a woman’s integrity’ and is partly described and analyzed in Burman, 2010, 2012.
5 The Penal Code Chapter 29, Section 3, 1st paragraph, with amendment 1 July 2010 (SFS 2010:370).
6 Homosexual advance defence is available to heterosexually identified men who have murdered a homosexual male victim and claim provocation.
because of a sexual advance from the victim. In the article, the author poses the question when it should and when it should not be justified for a court to dismiss a perpetrator’s own opinion regarding the reasons for killing another person (Träskman, 1995–96). Regarding ‘homosexual advance defence’ in common law jurisdictions, see, e.g., Tyson, 2013.

References


Coker, Donna (2004). Race, poverty and the crime-centered response to intimate abuse. In the article, the author poses the question when it should and when it should not be justified for a court to dismiss a perpetrator’s own opinion regarding the reasons for killing another person (Träskman, 1995–96). Regarding ‘homosexual advance defence’ in common law jurisdictions, see, e.g., Tyson, 2013.


Ender, Viveka (2009). Jekyll och Hyde or who is this guy?—Battered women’s interpretations of their abusive partners as a mirror of opposite discourses. Women Studies International Forum, 33, 81–90.


Träskman, Per-Ole (1995–96). Normalfall eller dödsfall med förmålande sårdrag—gränsen mellan morb och dråp [A normal case or a mitigated

