

# Gender and Harm

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## 1 Women and Harm

### 1.1 A Feminist Critique

During the last decades the women's movement has debated the "woman issue" in criminal law. Focus has been on the fact that women are vulnerable to certain crimes. One could say that in some ways *women are exposed to certain kinds of violence because they are women*. The kind of abuse women experience is often a result of living conditions or personal relationships, typical for women as a group. Therefore sexual crimes, and problems with domestic violence, have been on the primary agenda. Feminist critique has pointed out that criminal law, in many ways fails to protect the interests of women.

In Sweden, the public debate has been intense after media reports of questionable court decisions. The critique has often focused on different cultural aspects of legal arguing. It seems women tend to be judged from gender stereotypes in a way which makes both individual women, and women as a group, feel alienated from the legal system. It has been claimed that the justice system sees women in the same way as men see women, and that the female victim therefore often becomes objectified.

The feminist critique of criminal law in Sweden can in many ways be described as coming from a feminist standpoint position.<sup>1</sup> Its main aim has been to improve the legal protection of women as victims of crime. But, in the way these problems have been analyzed, it is obvious that the debate to a great deal has been influenced by radical feminism. Violence is not seen as merely an experience of the individual woman, but as the result of a power structure. *Violence against women* has therefore been the leading ideological position of the feminist debate on criminal law in Sweden. To some extent this ideological stand stead has also become part of the basis for legal reform.<sup>2</sup>

The debate concerning women's vulnerability to certain crimes has led to several legislative reforms. Though, the ideological and theoretical positions of the feminist critique have not always been identified by the legislator. Important questions of how the critique relates to criminal law theory have not been analyzed or debated. The response from the legislator has to great extent instead been both political and pragmatic. One could argue that the lack of a theoretical framework makes it unclear whether these measures are adequate responses to the issue of gender in criminal law.

Women face many difficulties in our society and there is a strong consensus that something must be done to try to solve these problems. The premises for a political solution are therefore present. We can emphasize that it is important to protect women; one way of dealing with the issue has been to raise the level of punishment in order to show concern.

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1 See section 1.2 of this presentation.

2 In Sweden, the issue of violence against women has been debated in relation to a theory on violence developed by Nordic scholar Eva Lundgren. But, when this analytical model has been applied in criminal law, it has to great extent turned from analytical to ideological. Lundgren, Eva: *Det får da være grenser for kjønn* (1993); Berglund, Kerstin: *Straffrätt och kön* (2007) chapter 5.6.2.

Another approach has been to try to modernize the traditional conceptual framework. Therefore some reforms have led to a new terminology that is more in line with the feminist view on e.g. certain sexual acts.<sup>3</sup> The emphasis on the living conditions of vulnerable women has also led to a few new legal concepts, primarily the criminalization of domestic violence as an abuse of a “woman’s peace”.<sup>4</sup>

These reforms are interesting because they signify that gender has become an important issue in Swedish criminal law. An interesting question that emerges is to what extent this focus on gender and power really changes criminal law? What does *gender* mean e.g. when it comes to understanding harm in criminal law? In the following, I will reflect on some of the issues concerning how to define harm when it comes to a gendered crime like rape.

## 1.2 Analytical Positions

As a starting point for the discussion I will use my dissertation from 2007: *Straffrätt och kön (Criminal Law and Gender)*. My project started, not in criminal law, but in feminist theory and the debate on sex/gender and knowledge. There were two lines of inquiry, one in criminal law and one in women studies that interconnected throughout the book. Their common grounds were defined as *the depiction of the individual*. Both areas of research, criminal law and feminist theory, deal with problems concerning how “man” should be described.

In criminal law “man” is found first of all on the theoretical level as part of legal theory. Criminal law is based on the traditional liberal ideal of the autonomous individual. When criminal law is applied legal reasoning also demands an idea of what a human being is. Legal reasoning is therefore always dependent on descriptions of both “man” and of “reality”.

Feminist theory, in turn, deals primarily with sex/gender issues. In an attempt to structure this field of research, and in order to highlight important differences in feminism, I construed three positions. These three positions were defined in terms of what can be seen as ideological aspects of the sex/gender debate and the epistemological theories that can be related to these different ideological positions. The different positions were roughly based on the epistemological distinctions made by Harding: feminist empiricism, feminist standpoint and feminist postmodernism.<sup>5</sup>

The first position distinguishes itself from the other two positions as it is based on the ideal of *sameness*. People must be treated as equals, but also in an equal manner. This position relates to an understanding of sex/gender usually known as a sex role theory.<sup>6</sup> It rests on the idea that there is a fundamental

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3 See section 3 of this presentation.

4 Nordic scholar Monica Burman analyzed this new criminalization in her thesis on domestic violence, *Straffrätt och mäns våld mot kvinnor* (2006); Nordborg, Gudrun/Niemi-Kiesiläinen, Johanna: *Women’s peace: a criminal law Reform in Sweden*, Responsible Selves, (ed.) Kevät Nousiainen et al. (2001).

5 Harding, Sandra: *The Science Question in Feminism* (1986).

6 Connell, RW: *Gender and Power* (1987).

neutral core in every human being which makes it possible to describe “man” in a gender neutral way. It is therefore possible to talk about a person independently of his or her gender.

The other two positions are based on the ideal of *difference*. Gender is seen as a basic precondition for the life of every human being. According to these positions, it is not possible to talk about a person’s identity or integrity without reference to gender.

In feminist theory based on difference, gender is seen as a defining factor. Gender is fundamental to the way in which reality is defined. One important conclusion is that there is no neutral version of reality as there is no neutral “individual”.

Different descriptions of “man” and of “reality” can lead to profoundly different conditions for legal reasoning. In the book, the contradiction between the idea of *gender as a role played by the individual* and the idea of *gender as a fundamental aspect of human life* was used as the starting point for the analyses of legal arguments.<sup>7</sup>

The implications of the contradiction are particularly interesting when it comes to defining individual harm in criminal law. In the following, I want to argue that there are important issues concerning individual gender in criminal law that need to be discussed in order to improve the legal protection of women.

### **1.3 Individual Harm**

*The autonomous individual* is an important conception in criminal law. It defines an ideal, or a set of values, that creates the basis for criminal law. Its primary goal is to protect the interests of the individual.

The concept of harm in criminal law is related to the right to individual freedom.<sup>8</sup> Statutes protecting individual interests primarily relate to the civil liberties, one could say that the human rights catalogue sets the standard for the kind of values that criminal law protects. *The autonomous individual can therefore be described as the abstract bearer of the abstract values that are protected by law.*

But, what can be defined as harm is also limited by the right to individual freedom. Criminal law is about protecting the right for the individual to make free choices, without being controlled by the state or by other individuals. The right to individual freedom can only be limited when ones actions are harmful to other people. Therefore criminal law should not be applied when someone exposes herself to harm on a voluntary basis.<sup>9</sup>

Criminal law is an instrument for controlling individuals and must be applied in accordance with the ultima-ratio principle. In this sense criminal law represents the common moral codex of society, but at the same time not the tool for bringing about political change.

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7 I then analyzed different law reports on the issue of how to reform the rape statute: SOU 1976:9, SOU 1982:61, SOU 1995:60 and SOU 2001:14.

8 Mill, J.S: *On liberty and other Writings* (1989); Hart, H.L.A: *Law, Liberty and Morality* (1963); Feinberg, Joel: *Social Philosophy* (1973).

9 Feinberg, Joel: *Harm to Others* (1984) p. 35-36.

The autonomous individual and the protection of individual freedom as the basis of criminal law, has been very important for the development of Swedish criminal law.<sup>10</sup> When it comes to legislation this ideological position has led to the decriminalization of homosexuality as well as to the criminalization of rape in marriage.<sup>11</sup> Homosexual acts cannot be harmful, as long as they are not in conflict with general statutes like e.g. rape. Rape is criminalized in order to protect individual freedom, and therefore the statute of rape must include everyone; married and not married, men and women alike.

In this way it has been possible to make political use of the ideological basis of criminal law. When people are treated unequally in relation to the principal level (the protection of the autonomous individual), it is possible to claim that this is in conflict with the values of criminal law.

This argument has also been efficient when it comes to improving the legal protection of women exposed to domestic violence. Everyone has the right to be protected from physical harm, and therefore violence in the home cannot be treated differently from violence in the streets.

The theory of the autonomous individual represents a certain ethical ideal; it tells us how individuals are supposed to be treated. It tells us that in principal people should be understood as capable of making individual choices. The ideal of the autonomous individual is therefore also the basis for what is perceived as individual legal capacity.

But, the construction of the autonomous individual also relates to reality; it brings about a vision of what an ideal person is like.<sup>12</sup> In this way the idea of the autonomous individual also sets the basic conditions for how we are supposed to understand “man”, whether we are judging the perpetrator or the victim.

Because of how criminal law is systematized, priority will be given to a description of “man” that is ideologically compatible with the construction of the autonomous individual. A theory on sex/gender that is founded on the neutral individual will therefore be in line with the theoretical premises of criminal law.

In this sense criminal law tends to treat the issue of gender as a political and pragmatic issue. I would like to argue instead, that the gender issue in criminal law is really about what kind of ethical theory we want to see as the very basis of our common moral codex. A theory based on the idea of a gendered individual would change the premises for legal reasoning.

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10 Jareborg, Nils: *Straffrättsideologiska fragment* (1988) and *Allmän kriminalrätt* (2001).

11 Homosexual acts between adults were decriminalized in 1944. The rules on adolescents and homosexual acts have been treated under the same statute as heterosexual acts since 1978. Rape within marriage was criminalized under the rape statute in 1964.

12 Feinberg, Joel: *Autonomy, the Inner Citadel*, (ed.) John Christman (1989). Feinberg presents several examples of how to understand the autonomous individual. All of the examples relate to a certain social setting.

## 2 Individual Gender

### 2.1 Ideals and Morals

Traditionally women studies in law have been about adapting legal rights to “the female predicament”. Legal rights have often been handled as ideologically neutral tools, which can be used to improve the living conditions of women.

Nordic scholar Tove Stang Dahl stressed that legislation can be gendered. When rules are applied to a woman instead of a man, the same rules tend to lead to different results. Therefore legal rules must correspond with the life of a person with living conditions typical for most women; otherwise women could in fact be denied basic rights.<sup>13</sup>

In more recent studies scholars have argued that law in itself is always dependent on an ideological standpoint and therefore it cannot be a mere question of adapting certain rules to the lives of women.<sup>14</sup> As we have seen above, this is certainly true when it comes to criminal law which is based on a certain liberal conception of both man and of freedom.

The ideals portrayed by the concept of the autonomous individual can also be seen as gendered. One way of explaining this problem is to say, like Stang Dahl, that the individual depicted in this theory is not a typical woman.

But, this line of arguing can lead to a misunderstanding. The critique is not primarily about the fact that not all people are autonomous at the individual level: People are different and different people live different lives.<sup>15</sup> As Stang Dahl argued this must be dealt with when making the rules and rules can always be adjusted to specific needs, at least within certain limits.

When the ideology of criminal law is criticized for portraying “the self made man” instead of the vulnerable woman, this is not just a matter of adapting certain rules to a gendered reality. It is instead an issue that concerns the basic ethics of criminal law. As Lacey argues, the feminist critique runs deeper than the issue of bias: “it suggests that there is something not merely about particular laws or sets of laws, but rather, and more generally, about the very structure or method of modern law, which is hierarchically gendered.”<sup>16</sup>

The autonomous individual represents an ideological framework that creates a setting in which the legal concepts are defined. Individual freedom, in terms of a liberal ideology in criminal law, is in itself a set of values that tells us what is important and what is not. In this sense this ideological stand stead also defines what is considered to be adequate knowledge about reality.

The legal system interacts with the description of reality in many ways. This is especially important when it comes to sex crime; it is not possible to interpret or to judge such an act without an understanding of man and of reality. In these cases the depiction of reality will always involve an understanding of sexuality,

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13 Stang Dahl, Tove: Innledning til kvinneretten, *Kvinnerett I*, (ed) Tove Stang Dahl (1985).

14 Svensson, Eva-Maria: *Genus och rätt* (1997); Andersson, Ulrika: *Hans (ord) eller hennes?* (2004).

15 This line of arguing can also be questioned on theoretical grounds: Hallberg, Margareta: *Kunskap och kön* (1992) p. 237; Solheim, Jorunn: *Den öppna kroppen* (2001) p. 92-95.

16 Lacey, Nicola: *Unspeakable Subjects* (1998) p.2.

which will include all sorts of arguments; sexual morals, sexual politics, sex and gender, sex and power, and so on. A criminalization of a sexual act will sooner or later bring about all of these different premises.

The debate on sex crimes and criminal law has often been dominated by the question of law and morals. Some scholars have e.g. discussed the problem of “moral as such”, often as a kind of argument that has no bearing on the theory of individual harm. Often, the solution has been to say that criminal law should only rest on its own primary value; the protection of individual freedom.

I would argue that it is very difficult to make such distinctions between law and morals, especially when it comes to sexual crimes. It is not possible to make a statement about sexuality, without an interpretation of what sexuality is. After all, sexuality is a social construct, not merely a biological fact. Any statement about sexuality can therefore be considered normative. There is no real difference between the question of when and the question of how; to say that this is an acceptable moral standard or to say that this is an example of a typical intercourse.

In criminal law, the great opposition has traditionally been between the conservative and the liberal agenda. The different positions can be described as the idea of protecting society and the idea of protecting the individual: To what extent can society control the sexuality of the individual? But, this is a discussion that does not include the depiction of reality. The understanding of sexuality might just be the same in both cases.

There are several telling examples of this problem in criminal law. If a woman is socializing with a man on a voluntary basis and then is sexually abused by this man, her participation in this gendered activity tends to result in a lesser degree of harm.

This, of course, is an example of a very traditional moral argument, often analyzed by feminism as typically conservative. But, it is possible that the kind of blame that women experience in these situations is not a matter of choosing between a conservative or a liberal ideology.

The conservative could argue that certain women, who are behaving inappropriately, are not harmed in a way that makes them worthy of legal protection. The liberal could argue that women have legal capacity to make choices, and therefore they can (within certain limits) dispose of their own legal protection, e.g. by exposing themselves to harm.

If one starts from either one of these two very different positions in criminal law, the legal result in terms of diminished harm will be the same. It is possible this is due to a mutual understanding of reality. But, in the debate on criminal law and control, the question on how sexuality should be described is not considered relevant.

In liberal theory sexuality becomes part of the private sphere. In order to protect the privacy of the individual, the idea of defining what is meant by sexuality, is considered off limits for the legislator. Such legislative measures could lead to a kind of moralizing that would be in conflict with the ideal of protecting individual freedom. And, after all, the aim to protect individual interests does not include the question of what gender and sexuality means to the individual.

In relation to the classical divide between liberalism and conservatism, feminism has often been labeled conservative. Feminism has a collective approach in the way that it is a theory about women as a group. But conservatism is about controlling sexuality, an idea that tends to lead to an extensive control of women. In relation to the ideological divide between conservatism and liberalism, feminism is also about protecting individual freedom.

It seems therefore that the conflicts surrounding sexual crimes today are between parties that can be found on the same side of the opposition that has dominated the debate on sex crime. It is therefore important to acknowledge that the feminist critique cannot be understood in this traditional context. There is a fundamental difference between the classical liberal approach to individual autonomy and the feminist critique. Feminism is based on the idea of a bodily integrity that is gendered.<sup>17</sup>

## 2.2 *The Gendered Individual*

Sex/gender as a human characteristic has always been a troublesome issue within feminism. For political feminism it has been important to argue against sex as a determining factor.

As we have seen, the development of women studies has turned gender into the important factor; gender is seen as fundamental to human life. But, to yet again place sex/gender as a determining factor, in a normative system like criminal law, becomes both politically and theoretically complicated.

The gender issue raises different questions in criminal law. First of all it becomes relevant to the question of how reality is described in law. In this sense it can of course be of interest to identify in what way cultural arguments play a role in legal arguing. Secondly, it is important to discuss, both the theoretical and cultural premises, for how the individual is portrayed in criminal law.

The most important issue is though: how should we deal with gender in criminal law? This is a problem that is both theoretical and practical, it concerns both the definition of the autonomous individual as well as the way we talk about people in concrete cases.

In my thesis I started from the three different epistemological positions mentioned above. I then established that there are at least two fundamentally different ideological positions when it comes to understanding sex/gender in the human being. In relation to the issue of harm to the individual, the two positions lead to very different premises.

The first position was described as representing a sex-role theory; there is a neutral individual that precedes gender. According to this way of thinking, there is a free human being that can be discussed independently of social norms. Harm is defined in relation to the free will of the autonomous individual; fundamental to the definition of harm is the abuse of human rights.

Gender is then seen as a role the individual will play out of convention. I have argued that this way of theorizing gender is based on the idea of a fundamental human "sameness". It means that it becomes politically (and

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<sup>17</sup> Lacey (1998), p.112-113.

legally) important to treat people as if they were the same. In this line of arguing there is really no structural level. Compared to e.g. the issue of social class, gender becomes more of an individual problem.

In the second (and third) position the human being becomes part of a social structure where gender is important. “Man” is understood as depending on both gender and culture; therefore it is not possible to talk about a human being without reference to gender.

A definition of such a gendered person will include both body and soul.<sup>18</sup> The gendered body is fundamental to a persons sense of identity, and therefore also to the notion of integrity. In this line of arguing gender becomes part of our understanding of reality. Things and acts carry meaning; gender brings structure to our lives. Harm is done to a person who is gendered and living in a society where the meaning of gender is important.<sup>19</sup>

The two different ideological positions are also fundamental to the way in which we understand sexuality in the individual. In sex-role theory, sexuality can be treated in the same way as gender. Like gender, sexuality is a matter of a free choice made by the neutral and independent individual. In this sense sexuality is not a part of the individual. Harm is about the possibility to choose, the individual right to consent or to reject.

When the theory of the gendered body is applied to the understanding of sexuality, this changes the understanding of what sexuality means radically. Sexuality becomes an aspect of a gendered identity and therefore fundamental to human integrity. The gendered body is part of a cultural setting where gender carries social and cultural meaning. In this line of arguing both the individual and the structural level is present. Sexual violence can e.g. be a defining factor to what gender means in our culture.

Criminal law, as ideologically dependent, will give priority to a description of “man” that is ideologically compatible with the ideal of the autonomous individual. In this sense the idea of gender as a sex-role will be in line with criminal law theory. It is therefore important to recognize to what extent this ideological position determines how “man” and “reality” are understood in criminal law.

### 2.3 *Sexual Harm*

One of the early reports on sex crime, that I studied, led to a criticism that in many ways can be seen as the starting point of the public debate on rape in Sweden.<sup>20</sup>

In this report, dating from 1976, it was suggested that the statute of rape could be abolished. It was argued that there was no specific sexual integrity that

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18 Berglund (2007) chapter 6.4; Grbich, Judith E.: *The body in legal theory, At the Boundaries of Law*, (ed.) Martha Albertson Fineman/ Nancy Sweet Thomadsen (1991) p. 71-73.

19 Grosz, Elisabeth: *Bodies and Knowledges – Feminism and the Crisis of Reason*, *Feminist Epistemologies*, (ed.) Linda Alcoff/ Elisabeth Potter (1993) p. 187-215.

20 SOU 1976:9.

could be harmed. It was considered enough to criminalize the use of unlawful force.<sup>21</sup>

This report is interesting because it touches upon the very core of the current debate. If we want to understand what the feminist critique of criminal law is about, the question of sexual harm presents a good starting point.

According to the liberal view, sexuality is an activity very much like any other kind of socializing. One could e.g. ask why sexual acts and ballroom dancing should not be treated in the same way. To force someone to dance will fall under the statute of unlawful force, why should then to force someone to a sexual activity, be any different? If the theory of the gendered body is applied, it is possible to answer this question.<sup>22</sup>

Dancing is a gendered activity that is usually performed by a man and a woman. But, to understand why these situations are different when it comes to defining individual harm, one must recognize one important condition. The understanding of sexuality is part of a society where power structures and violence exist. One aspect of sexuality is that violence occurs; violence is an important aspect of what sexuality means in our culture. Ballroom dancing is culturally not an area where the possibility of violence between the parties is immediately implicated.

When dancing, the dancers can switch between the roles they play; the dance can be separated from the individual. The two parties could perform each others dance steps, without being affected.

To be forced to dance does not involve the kind of social degradation that is a vital aspect of sexual violation. There is no social system that will evaluate the performance of the individual dancers.

It is important to recognize that the ideology of difference changes the premises for defining harm: When someone is exposed to sexual violence he or she is harmed as a gendered person. Sexual violence, as a gendered act, will bring a certain meaning to the deed. The cultural meaning of sexual violence is therefore an important aspect of what harm means at the individual level.

It is therefore not only important to recognize that women are harmed because they are women. It is also important to stress that they are harmed as women; they are so to speak, harmed *in their capacity of being women*.

#### **2.4 Individual Gender in Criminal Law**

Gender is not new to criminal law, on many occasions legal arguments relate to a persons sex. But, the way these arguments are presented, reveals that there is no consistent gender theory in criminal law. I would argue that gender arguments are present in criminal law, but in an asymmetrical manner.

When an offender is judged, it is his deed and his personal mens rea that is being investigated. Criminal responsibility is always a result of some kind of personal shortcoming. Gender issues can therefore be of interest when evaluating the offender. In criminal law theory there are several possibilities for recognizing human failure, e.g. excuse.

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21 SOU 1976:9, p. 54-55.

22 Berglund (2007) chapter 5.4.4 and 5.4.9.

The position of the victim in criminal law relates primarily to the theoretical level. The interests of the victim are so to speak covered by the statutes. A deed is criminalized because it means harm to the values carried by the autonomous individual.

But, this means that the individual freedom protected by the criminalization is defined at the theoretical level of criminal law where gender is not considered to be of relevance. In this sense there is no theoretical basis for recognizing gender when claiming harm.

In the law report presented in 1976, one line of argument was presented that gives a clue to how these different gender premises can operate in criminal law. As I have mentioned earlier, the report talked about the behavior of the female victim as relevant to the issue of harm.<sup>23</sup>

The individual person, as representing the bearer of the protected interest, has (some) legal capacity to dispose of her own interests. And, because of the kind of risks the victim exposes herself to; her actions can lead to diminished harm.

It is also possible to argue that the degree of the blamefulness of the offender can be reduced because of the fact that he was e.g. tempted. To react to temptation can in itself be rational, or at least human.

In the report there are several references made to socializing between the sexes as a “game”. This way of describing the actual situation is important because the idea of a game lead to several important premises. It tells us that the events in many ways can be foreseen by the victim. It puts blame on the individual victim because she does not know the rules, or because she does not play by the rules. In this way the victim can also be blamed for not being in control of the situation. The idea of a game defines the partners as equal participants, not only in the actual socializing, but also when the crime is committed.

The report is interesting because it clearly takes on the ideology of gender as a sex-role. This theory represents the basis for the argument of gendered socializing as a game. Though, the way in which gender is used as a legal argument, indicates that gender is seen as something biological instead of social.

In the report, arguments concerning the responsibility of the offender, relates to the cultural ideal of masculinity. One could say that the arguments presented were cultural instead of individual. Temptation as an excuse could in fact be claimed by any male offender. The argument followed as a result of the way in which the situation was described. It was favorable to the offender, because it could only lead to less blame.

The female victim was treated as a representative of “the Woman”. The main issue was the interpretation of her actions by the offender. The actions considered tempting were possible to relate to any woman. To be a woman is to be a gendered person, and any gendered behavior can in fact be seen as tempting. It is therefore very difficult to control how one is interpreted by

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23 Berglund (2007) chapter 5.1-5.4.

someone else. In this way of dealing with gender, the victim becomes objectified. There is no real possibility for her to change the part she is playing.<sup>24</sup>

This presents the victim with a very strange legal position. The theory brings her the legal capacity of the genderless individual. And yet, she is objectified in a way that gives her no real options.

Gender already plays a part in criminal law. But, the stereotyped man or the stereotyped woman does not represent a functional basis for a theory on how to treat the issue of gender in criminal law.

If instead, the concept of harm was related to the gendered individual, gender in criminal law would be treated in a symmetrical way. This would also have an effect on the possibility for claiming arguments like “temptation”. A better understanding of harm to the gendered individual would narrow the space for arguments based on cultural depictions of gender.

### 3 Harm and Gender in Criminal Law Reform

#### 3.1 *Gender as a Prerequisite*

In 1995 a Commission on violence against women presented a law report on sexual crimes and domestic violence.<sup>25</sup> One of its proposals, though turned down by the legislator, was to yet again define rape as a gendered crime.<sup>26</sup> Rape has historically been defined as the abuse of a woman. The law reform in 1984, following the intense debate of the 1970ties, made the statute of rape gender neutral; the definition covered all possible rape victims and offenders. As a result, there was a feeling of disappointment in the women’s movement. After presenting the legislator with a critique based in radical feminism, criminal law was reformed in accordance with the official policy of equal rights.

In the report, the Commission suggested that the statute of rape should be redefined in order to “portray reality”. The definition of the crime was not altered in any significant way, instead section one of the proposed statute defined the crime of *a man against a woman*. While section two protected all victims of rape, as well as both hetero- and homosexual crimes of rape. The commission argued that in this way also crime statistics would become evident; it would be obvious to all that rape is a gendered crime. One interesting question is then: what is meant by “reality” in this case?

One important feminist critique is about knowledge. The idea is that the experience of women has been neglected in science as well as in law. This means that the issue of power is really about the power to define “man” and “reality”. In my mind, the most important question is then from what understanding of man and of reality the concept of harm should be defined. In

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24 In a sense, *she* is the object of the deed, the object of the interpretations of the offender, the sexual object of the offender, the object of the courts investigation, and at worst, also the sexual object of the courts arguing and decision-making.

25 SOU 1995:60.

26 SOU 1995:60, p. 279; Berglund (2007) chapter 5.6.

the proposal, harm relates to a theory on violence and power, expressed in the statute as a man abusing a woman.

It is possible that the commission did not acknowledge that there are several different issues when it comes to gender and power: The power represented by the crime when committed, rape as a symbol of a power structure, and on the other hand, power as an epistemological problem in criminal law theory.

It seems to me that there are two main lines of argument when it comes to solving the issue of harm and gender. The first would be to try and define an alternative ethical theory based on the idea of the gendered individual, from which a new concept of harm can be derived. The second would be to try to define harm to the gendered individual, within the framework of the current criminal law theory.

The commission gives no clue to whether it wants to see an alternative ethical theory in criminal law, the issue of gender and harm was never discussed on a principal level. One can therefore assume that the proposal was meant to be a revised version of the statute of rape within the existing criminal law theory.

This means that, according to the Commission, women should be protected by a separate rape statute. But then again, one important argument seems to be missing. When different victims, of the same type of crime, are to be protected by different statutes, this is usually due to the interests that are being protected or to differences in the degree of harm. The commission could e.g. have argued that the abuse of a woman is more harmful than the abuse of a man, because of the gendered power structure that was used as the theoretical basis for the proposal.

Perhaps this was after all, a matter of symbolic measures taken to deal with a symbolic crime. Even so, the proposal was not without complications. It seems the Commission differentiated between victims at a level of criminal law theory where gender is not supposed to be of importance; the right to individual freedom.

The proposal, made by the Commission, is troublesome because it clearly politicizes the issue of rape. The idea of a power structure emphasizes a conflict between the sexes that, in the proposal, led to a differentiation between different victims of sexual abuse.

A theory of harm to the gendered individual would, of course, also be relevant when a man is sexually abused. Then, a difference in the degree of harm between two different acts of abuse, would not relate to the sex of the victim but to the understanding of harm to the individual.

### **3.2 *Rape and Law Reform***

In the Swedish criminal code, rape is (in principal) defined as the use of force to obtain a sexual act (BrB 6:1). Historically, the amount of force needed to fulfill the definition of rape was in fact extreme. During the last decades the definition of rape has changed in several ways. First of all, the amount of force which is sufficient to be recognized as rape, has been reduced considerably. In accordance, several other crimes have been redefined as rape. This means that nowadays e.g. sexual abuse of a person who is unconscious (e.g. as a result of voluntary drinking) is considered to be an act of rape.<sup>27</sup> In the last couple of

27 SOU 2001:14, p. 177-178; Prop. 2004/05:45, p. 47-49.

years, it has also been debated whether it would be better after all, to introduce a definition of rape as non-consensual sex.<sup>28</sup>

Though, when it comes to the issue of gender and harm, the other part of the rape definition is perhaps of greater interest. In Swedish criminal law, rape has been defined as an act of force to obtain sexual intercourse. The concept of intercourse has though been strictly legal; in a way one could say that already an attempted intercourse has been enough to meet the requirements.

Force, as a prerequisite, relates to the individual interest that is protected by the criminalization; the individual freedom of choice. This puts the sexual aspect of the crime in a theoretically difficult position. In what way, and to what extent, is the sexual act relevant to the level of harm?

In the way the statute is defined one could argue that it is the “normal”, or non-violent, sexual intercourse that serves as the background for interpreting the statute of rape. If this is correct, the context in which harm is defined, is referring to something else than the abuse of individual integrity. It is therefore important to acknowledge that gender carries meanings, and by using the concept of intercourse, a whole set of cultural premises is introduced into legal arguing.

Why the concept of intercourse is given such a status is hard to explain. It has been claimed that the act of intercourse must be the most harmful kind of sexual abuse a woman can experience.<sup>29</sup> In relation, feminist critique have argued that e.g. the use of tools, like sticks and bottles inserted into the vagina can be far more harmful, even though these kinds of acts cannot be interpreted as intercourse in the cultural sense.

It is possible that there is yet another explanation, since criminal law deals with the deeds and responsibilities of the actual offender. Perhaps the statute is construed from the needs of the legal system; after all it is the act of the offender that is being defined.<sup>30</sup> Though, this would mean that in fact harm is defined from the body of the supposed male offender, and not from the physical and mental experience of abuse to the (female) body.

When the definition of rape was made gender-neutral in 1984 the sexual prerequisite had to be changed to include homosexual acts. The statute was then redefined as *intercourse and sexual acts similar to intercourse*. This meant that several other sexual acts were included in the rape statute, even if not all possible sexual acts were considered to be similar in the legal sense.<sup>31</sup>

From a feminist point of view it has been argued that it is not possible to separate, so to speak, between the force and the sex. It is the forced sex that is harmful to women; it is in fact a question of sexualized violence and not

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28 Leijonhufvud, Madeleine: *Samtyckesutredningen* (2008); Andersson, Ulrika: *The Unbounded Body of the Law of Rape: The Intrusion Criterion of Non-Consent*, Responsible Selves, (ed.) Kevät Nousiainen, et al. (2001) p. 331-351.

29 SOU 1953:14, p. 231.

30 Naffine, Ngaire: *The Body Bag, Sexing the Subject of Law*, (ed.) Ngaire Naffine/ Rose-Mary J. Owens, (1997).

31 Prop. 1983/84:105, p.17-18. Acts where tools, or other strange objects, are put into the anus or vagina of the victim, were at this stage not considered to be similar to intercourse.

violence to obtain sex. This means that the sexual act must be defined from an understanding of harm to the (gendered) individual, not from cultural ideas of what is regarded as typical sexual acts.

The last Committee argued in 2001 that the reference to heterosexual intercourse had to be abandoned.<sup>32</sup> Instead it was important to focus on harm to the individual. When the last reform of the sexual prerequisite in the rape statute was introduced, the idea of defining the statute according to what is most harmful to the victim obviously had played a role. Even though intercourse as a prerequisite was not abolished, what is considered “similar to intercourse” is no longer a question of whether a certain act is equivalent to the cultural understanding of heterosexual intercourse or not. Instead the court must decide if an act is as *harmful* to the victim as forced intercourse. This means that today a number of different kinds of sexual abuse can be judged as rape. After 20 years of debating, the act of inserting strange objects into another person’s vagina or anus was found to be as harmful as forced intercourse.<sup>33</sup> But, heterosexual intercourse is still the point of reference when it comes to rape and harm. And, there is a lack of theory on how to judge the harmfulness of sexual abuse.

## 4 Harm to the Gendered Individual

### 4.1 *Gender and Power*

During the last 30 years the understanding of gender has changed dramatically. From being the oppressive factor, it is nowadays seen as fundamental to our understanding of reality, and therefore used as the defining factor in both research and politics.

In this article I have tried to argue that one important clue to the conflicts surrounding e.g. rape legislation, is really about how “man” is portrayed. The way in which “man” is described is crucial to legal arguing in many ways. As I have tried to show, already different ways of understanding gender in the human being, changes the premises for defining harm to the individual.

In the feminist debate on criminal law in Sweden, the issue of gender has primarily been acknowledged as a problem of gender and power. The political analysis of the oppression of women has played an important role when arguing why criminal law must acknowledge gender.

I would argue that this approach leads to several problems. First of all, structural arguments do not relate to an individual level where individual harm can be discussed. Secondly, the idea of a power structure is political, even though we might know by heart that it exists, it does not present us with a

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32 SOU 2001:14, p. 156-158.

33 The Commission on violence against women suggested that intercourse should not be a prerequisite in the rape statute, SOU 1995:60, p. 276. When the reform was introduced in 1998, the legislator decided to keep the reference to intercourse, Prop. 1997/98:55, p. 91. Instead the sexual prerequisite was defined in relation to sexual acts that could be as harmful as intercourse. In the following law report, SOU 2001:14, the Committee supported the proposal made by the Commission. But, when the last reform was introduced in 2005, the sexual prerequisite was not altered again.

description of reality, which can be used as a starting point for a reconstruction of criminal law.

In liberalism the individual is regarded as independent, according to the political theory of feminism, women are oppressed. Regrettably, such a theoretical position lacks the kind of dynamic that is needed. If the idea that women are raped because they are oppressed is used as a starting point, it does not present us with a clue to how different rape cases should be judged. Which act is harmful and which act is not, and why is one particular sexual act more harmful than the other?

Arguments based on radical feminism are in this sense often troublesome. It can be questioned whether such a theoretical position can bring new meaning into criminal law. Radical feminism and traditional liberalism are both depending on the same conceptual framework of individual freedom.<sup>34</sup> Though, in radical feminism, the power structure can make it more or less impossible for women to be truly free. This means that the right to individual freedom must be underlined, a theoretical position that can be criticized for failing to acknowledge gender.

The gender argument, even if it can be both politically and theoretically complicated, is in this sense more functional than the reference to a power structure. The gender argument can be debated in relation to individual harm and therefore creates better grounds for alternative solutions. Though, it is important to stress that power, as a structural problem, can be of relevance to the issue of harm. Knowledge of what it means to be a woman, in a certain social setting where there is a power structure, can play a role when defining harm to the gendered individual.

#### **4.2 *Gender and Ethics***

It has been claimed that the body of the autonomous individual is understood in a way that diminishes the legal protection of the (gendered) body of women.<sup>35</sup> I would like to add that it is important to recognize that the critique of the autonomous individual is not a question of whether this individual is “male” or not. It is a critique of a theoretical position that lacks the necessary means to include a gendered reality. It is possible therefore that the introduction of the gendered individual will demand a revision of the ethical theory of criminal law.

One interesting way of analyzing this problem would be to ask: how should we define the gendered individual in criminal law? This is both an issue that concerns the theoretical level of criminal law: on what premises should the ideal of individual freedom be defined? As well as, the more practical problem of how to decide what circumstances should be acknowledged, when it comes to judging harm to the individual.

In one of the examples I presented, gender seems to be theorized as a kind of social role play. The idea of gender as something that can be treated as a social game is problematic, especially since the rules of the game are never negotiated by the parties.

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34 Berglund (2007) chapter 3.2.3.

35 Andersson, Ulrika: *Hans (ord) eller hennes?* (2004); Naffine (2007).

In this case, the roles were instead interpreted in a way that made gender deterministic: the depiction of the gendered person was based on a cultural understanding of the Man and the Woman.

Another example showed that an approach where men and women are seen as the representatives of two opposing groups is not functional when applied to criminal law: Rape is a crime that is harmful to the gendered individual, whether the victim of abuse is a man or a woman.

It is, so to speak, not possible to deal with the issue of harm to the gendered integrity of women, only by placing gender into a statute. Or even, to define the concept of “woman” within criminal law theory. As I have argued, it is of more importance to understand what it means to be harmed as a woman (or a man) in a certain society, not to make normative assumptions on the cultural meaning of femininity.

A similar problem can be found in the debate concerning ethnicity and criminal law.<sup>36</sup> Often the idea is that certain rights should be connected to the belonging of a cultural group. This poses the legislator with the same kind of dilemma; the individual cannot be defined through the idea of a group. If so, criminal law would be presented with arguments that could become deterministic to the individual human being. Therefore ethnicity, like gender, must relate to an understanding of the individual, at another and more principal level of criminal law theory.

Such an approach will need not only a deconstructive, but also a reconstructive, analysis of the autonomous individual in criminal law. In this process many important issues, like human subjectivity and embodiment, must be discussed.

A debate about the understanding of harm to the individual in criminal law would, so to speak, move the issue of gender from the political and legislative level and into criminal law theory. The question on how women are treated by the legal system is, after all, an ethical issue.

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36 Nuotio, Kimmo: *Criminal Law and Cultural Sensitivity*, *Retfærd* (2008) p. 18-44.