

Gendered Archetypes and Veils of Objectivity: Identifying Possibilities and Manifestations of Normative Influences in Swedish Rape Proceedings

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After drawing a discursive theorisation of norms in legal practice, this article outlines the shared linguistic manifestations of extra-legal gendered norms in Swedish criminal proceedings on rape. Spaces for interpretation and reframing created behind images of flawless positivist objective procedural conduct are targeted for analysis, identifying regularities in the decisive factors of the verdicts, including what is attributed and dispossessed of meaning. Two discursive orders of rape are found to constitute judges' perceptions of what the act of rape entails, separated by the existence of preceding relationships between the parties. The orders constitute adjudication processes in response to archetypes of how the events of the crime as well as the criminal proceedings usually take place, based in traditional conceptions of women's bodies and sexuality. Injured parties are thus understood as responsible for being exposed to what took place during the event, while suspects' responsibilities are non-existent as long as they can claim ignorance.

Introduction

Sexual violence, and particularly rape, has been subject to intense legislative changes in recent Swedish history. 2014 was marked by wide-reaching and reoccurring expressions of outrage through protests and the media in response to a number of notable acquit-

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tals.¹ Despite such measures in the legal and public spheres, gendered social norms regarding rape still often place responsibility on the victim. Furthermore, there has been no decrease in the prevalence of the crime, and no increase in the number of reports filed by victims or guilty verdicts.² The situation raises two questions. First, how does the objectivity pursued in criminal procedures create a possibility for influence from behavioural instructions in decision-making, beside those of criminal law and procedure? Secondly, what influences can be found in the regularities of decisive factors of criminal procedures on rape? The central claim of this article is that this problem at least partly originates in the way constructions of objectivity create a possibility for legal discourse to constitute a gendered norm among judges. It is a norm based on a perception where rape is wrong, but where only some perceived categorisations of forced sexual acts are considered to constitute rape.

Pursued through the positivist understanding of Swedish legal professionals, where descriptive, interpretive or decision-making processes are expected to generate the same result regardless of actor, the term objectivity is misleading. It is an obfuscating construction rather than an epistemological condition.³ By removing the decision-makers from the text, that is, the visible embodiment of the decision-making in the proceeding, and disregarding the impact of the individual's empirical framing of the event, the resulting image appears to be free of influence. Objectivity is constructed as a veil under which subjective influence gains a space for influence.⁴ Since every social problem does not have a corresponding legal rule, the conversion from an allegedly criminal event, through the process of

¹ See for example: Carl Jönsson, 'Starka protester mot våldtäktsdomen' (*Sydsvenskan* 16 June 2014) <<http://www.sydsvenskan.se/malmo/starka-protester-mot-valdtaktsdomen>> accessed 30 January 2014; Viktor Adolfson and Mathilda Andersson, 'Efter våldtäktsdomen—tusentals demonstrerar för samtyckeslag' (*Nyheter24* 1 January 2014) <<http://nyheter24.se/nyheter/inrikes/760455-efter-valdtaktsdomen-tusentals-demonstrerar-for-samtyckeslag>> accessed 30 January 2014.

² Frida Olsson, *Strukturerad bevisvärdering eller ren gissningslek? En studie av tingsrätternas bevisvärdering vid våldtäkt år 2012* (Lunds Universitet, 2013).

³ Christian Diesen et al, *Likhet inför lagen* (1st edn, Natur och Kultur 2007).

⁴ Stig Strömholm, *Rätt, Rättskällor, Rättstillämpning* (Nordstedts 1991).

adjudication into a sentence, makes several internally correct verdicts possible.⁵

This potential for extra-legal influence raises questions concerning the boundaries of the discursive order of rape and the ethical-political positioning and socio-structural experiences of the judge.⁶ Quantitative studies that show structural discrimination in legally flawless decisions indicate that there is a problem behind the objective surface of law. It reveals the conscious or unconscious pursuits of non-legal normative aims and the high number of reports of questionable proceedings.⁷ Even among proponents of absolute legal determinacy, that is, the existence of a single correct result for any legal question, problems arise here because of the acceptance of what could be termed a ‘wrong result’ in criminal proceedings.⁸

In legal realist or standpoint theoretical views of law, where the law adjudication process is perceived as an open process of legitimisation rather than the pursuit of a ‘right result’, it is not uncommon to conceive that there may be individual normative problems.⁹ But what happens in an imagined situation in which problems of extra-legal norms affect the legal practice by moving seemingly flawless praxis away from the coverage of law and principles of equal treatment? While the law places emphasis on the violence of the perpetrator, the ruling norm within the practice is still based on an archetype of rape in which the victim is assaulted and in some way objects.¹⁰ In other words, there appears to be both influence from

⁵ Håkan Andersson, ‘Postmoderna och diskursteoretiska verktyg inom rätten’, in Fredric Korling and Mauro Zamboni (eds), *Juridisk metodlära* (Studentlitteratur 2013) 358.

⁶ Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press 2008) 192.

⁷ Diesen et al (n 3).

⁸ Håkan Hydén, ‘Using Law as a Model—Different Approaches to the Understanding of Normative Decision Making’, in Håkan Hydén and Per Wickenberg (eds), *Contributions in Sociology of law—Remarks from a Swedish Horizon* (Media-tryck 2006) 29.

⁹ Moa Bladini, *I objektivitetens sken: en kritisk granskning av objektivitetsideal, objektivitetsanspråk och legitimeringsstrategier i diskurser om dömande i brottmål* (Makadam 2013).

¹⁰ Ulrika Andersson, *Hans (ord) eller hennes? En könsteoretisk analys av straffrättsligt skydd mot sexuella övergrepp* (Prinfo 2004) 279.

extra-legal norms and a space in which such norms could gain leeway in current Swedish legal processes in cases of rape.¹¹

This article will argue that gendered norms tied to archetypes of rape influence decision-making in criminal proceedings of rape and that such influence may be hidden from verdicts because of the interpretive space and obfuscation established by the way objectivity is constructed within the texts. As the concept of objectivity is juxtaposed with the method of critical discourse analysis, the influence of what appears as commonsensical is highlighted, and light is shed on the way pursuit of facts and truth may lead elsewhere.¹²

The theorisation and findings of the article are presented in three parts. First, a new potential intermesh between theories of discourse and norms is introduced. This makes it possible to understand the behavioural instructions and archetypes influencing decisive factors in verdicts. The article will then build upon the theory of how objectivity within the discursive order of law adjudication processes can enable extra-legal norms to influence legal proceedings through Baudrillard's concept of simulacrum. The third and final part of the article shows the image of gendered norms of rape underneath the constructed objectivity by describing the patterns of decisive factors which can be perceived in verdicts and the way in which the legitimisations of interpretations within the order reproduce gendered archetypes of the event, the injured party and the suspect.

The analysis of the second and third parts is supported by a sampling of 12 randomly collected verdicts from finalised criminal proceedings of rape, attempted rape and aggravated rape in Swedish courts of appeal from December 2013 to March 2014. Two verdicts have been randomly selected from each of the six courts of appeal, while ensuring that no verdicts were finalised within the same court and month. This ensures a national representation over the longest possible time span. The verdicts from each court were assigned a number in chronological order, and a random number generator was

¹¹ Teun A Van Dijk 'The Study of Discourse', in Teun A Van Dijk (ed), *Discourse Studies A Multidisciplinary Introduction* (Sage 1997) 2; Åsa Bergenheim, 'Gränsen för det otillåtna: om synen på våldtäkt i Sverige 1950-2010' (2010) *Antologi sju perspektiv på våldtäkt* 10, 15, 28.

¹² Håkan Andersson, 'Rättens narratologiska dimensioner - interaktion och konstruktion', in Minna Gräns and Steffan Westerlund (eds), *Interaktiv rättsvetenskap* (Åbo 2006) 22.

used to sample the first verdict.¹³ The verdicts that had been finalised in the same month as the first sample were then removed, before assigning the remaining verdicts new numbers for the randomised sampling of the second verdict of that court. While the sampling utilised a statistical method, the selected verdicts are to be considered an excerpt from the studied discursive order, rather than a generalisable selection in a quantitative sense. In this article, the verdicts have been translated from the original Swedish into English. Some of the quotes used contain grammatical errors in the original Swedish texts. Such errors have not been corrected. This is to ensure that the quotes are kept as close to their original wording and signification as possible. Potential errors are important for a representative rendering of the texts. Rephrasing would, in some cases, mean that the initial legal meaning would be lost. Where relevant, such errors are highlighted in the footnote following the quote.

An Intermesh of Critical Discourse Analysis and Norms

In this section, existing theorisations of norms and critical discourse analysis are used to suggest a new way to understand how acts and subjects are given meaning in verdicts, as well as the behavioural instructions which attach to the law adjudication process in cases of rape.

Norman Fairclough's critical discourse analysis makes it possible to study how social power relations are constituted, changed or perpetuated through the prevailing truth-claims among competing ways to describe and understand the world by outlining discursive orders. The analysis focuses on relations of power between subjects of a discursive event and potential inequalities in their ability to control how texts are produced, distributed, interpreted and consumed in a given context.¹⁴ In this case, it entails the understanding of regularities of decisive factors beyond the control of the parties of the

¹³ The generator is available at Geoffrey C. Urbaniak, *Research Randomizer* (Version 4.0 2013) <<http://www.randomizer.org>> accessed 13 March 2015. A document has been filed with records of the results of the randomisation and the court numbers.

¹⁴ Gilbert Weiss and Ruth Wodak (eds), *Critical Discourse Analysis Theory and Interdisciplinarity* (Palgrave Macmillan 2007) 1.

criminal proceedings and the way their stories are attributed and dispossessed of meaning.¹⁵

In Fairclough's model of a discursive event, a dialectic and three dimensional model is drawn, representing the text, discursive practices, and social practices. A discursive practice is the description or representation of a phenomenon in light of the purposes and norms which affect a practice, such as the adjudication process. The purposes and norms which lead the practices make up a shared frame of reference and experiences which govern what can be said and done. The discursive practices of the adjudication process are thus governed by the norms and rules within it. The social practices are non-discursive and in this case refer to the institutional and organisational context in which the legal processes are situated.¹⁶ The relationship is characterised as dialectic by way of describing how the discursive practices constituting the production of the text both constitute and are constituted by social practices. In other words, the situations, social structures and institutions in which texts are generated shape the discursive practice, but the discourse also influences the context in which they take place.¹⁷

The analysis of the discursive events of the adjudication process is also influenced by Moa Bladini's use of critical discourse analysis and Håkan Hydén's theory of the interplay between law and society through norms. Bladini draws a model of law in which verdicts make up part of the text, as dictated by discourses of objectivity and legal rules. However, the model is lacking, as she finds that legally impeccable decisions still indicate structural discrimination when they are juxtaposed. Any potential norms that could influence such decision-making could also be covered by constructions of objectivity. Even if it is impossible to know for certain the extent to which the aspects affecting the process of decision-making are influential, they are not completely invisible, as these factors are presented through the verdict, and in turn, the production of the text.¹⁸

¹⁵ Bladini (n 9) 356.

¹⁶ Weiss and Wodak (n 14) 10.

¹⁷ Norman Fairclough, *Discourse and Social Change* (Polity 1992) 73.

¹⁸ Bladini (n 9) 356. See also: Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (MacMillan 1987).

Hydén's theory of norms is used to amend the model further by highlighting the constituting interactions with reference to the way law, norms and society are interrelated.¹⁹ The focus on discourse and norms makes it possible to draw an alternative to the dichotomisation of an external and internal perspective on law, revealing the dialectic nature of the relationship between the internal law, external society and the norms in-between. The distinction does not imply norms or law as separate from society, but rather aims to show that not all law has corresponding norms (and vice-versa), and that society is governed by its residents' understandings of socially reproduced expectations of their behaviour, rather than comprehensive knowledge of law. This means that legal decision-makers' perceived behavioural instructions might be derived from perceptions gained in society rather than the code of law. They may thus be incongruent with the legal code.²⁰

Where Hydén's conception of norms places emphasis on individual perceptions, the use of the theorisation in this study takes a discursive approach to the expectations. The discursive order of how events usually are given meaning, and the discursive boundaries of what can be said and done, are behavioural instructions, socially reproduced and, like the idea of perceived expectations, they indicate an external origin of the norms.²¹ As a shared frame of reference and knowledge, the discursive practices not only limit what norms and purposes can be present, but also how they can be interpreted, as perceived expectations can only be understood through language.²² A critical discourse analysis is thereby particularly effective for understanding the structural idea of norms. In this intermesh of norms and discourse theory, it becomes possible to reveal how the presence of a dominating way of speaking and writing also constitutes a dominating intersubjective understanding of the definitions and divisions involved in the term, and a norm regarding what

¹⁹ Hydén (n 8) 29.

²⁰ Hydén (n 8) 23.

²¹ Håkan Hydén and Måns Svensson, 'The Concept of Norms in Sociology of Law', in Hydén and Wickenberg (n 8) 131; Emile Durkheim, *The Rules of Sociological Method and Selected Texts on Sociology and Method* (first published 1895; The Free Press 1982); Andrei Marmor, 'The Pure Theory in Law', in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter edition 2002).

²² Weiss and Wodak (n 14) 10.

expectations the actors of the law adjudication processes are subject to, both in their actions and in how they view rape.²³

Below follows the first of two parts that illustrate how the techniques of constructing objectivity within verdicts makes possible and hides individual influence based on extra-legal perceptions of rape using this theorisation. Following the initial analysis of the form, the second part builds upon such findings to outline the techniques within their content. The analysis then continues to delineate the discursive orders found within the verdict and relates them to concepts of archetypes.

Constructing Objectivity through Form

Bladini argues that the objectivity of a verdict is established through both the format and the content of the text. The format includes the voices used in the verdict and the way their authors or instigators are presented.²⁴ As the expression of the law adjudication process, the format is important because of its role in establishing authority to the arguments. It also has the possibility to decontextualise the author into an objective, position-less, all-seeing voice, or what Donna Haraway calls the 'god trick'.²⁵ Deconstructing verdicts through Bladini's theorisation of form and voices is thus an important initial stage to reveal how the existence and influence of the legal professional is rendered invisible.

In the verdicts selected for this study, the events of the crime are typically presented twice: first in the main hearing; and then a second time in the testing of evidence. Even though the first delivery includes several and often conflicting stories of parties and witnesses, constructed through the evidence and questions asked, their statements are later merged into one.²⁶ The phrasing also makes it appear as if the parties are speaking freely, when they are in fact led by the legal

²³ Weiss and Wodak (n 14) 23.

²⁴ Bladini (n 9) 360.

²⁵ Donna Haraway, *Simians, Cyborgs, and Women—The Reinvention of Nature* (Routledge 1991) 188.

²⁶ See for example B 10020-12 Svea Court of Appeal or B 1676-13 Göta Court of Appeal.

actors in the process.²⁷ This includes the content of what is told as well as the way in which it is presented and makes up a central part of the way the main hearing unfolds. The responsibility of the legal actors as well as the decision-maker for the outcome of the discursive event is thereby hidden. Without the questions that shape the framing of the witness stories and govern what details are included, the verdicts do not reveal what was excluded. The legal story thus gains a stronger image of being all-encompassing.

The second part of the verdict contains the legal story and its framing of the event, where the objectified voice of the court, without reference to its actors, forwards the legal truths it has found after testing the evidence. Anything referred to in the hearing which has not been given legal meaning by the judges' interpretation is excluded. The selection of the version of events which is brought forward, as well as the way in which they are presented, are not used to find a single result for the verdict, but to legitimise it and strengthen the idea that it is the only possible conclusion. The following expression of the judges of the Göta court of appeal demonstrates the way the objectified voice is used to value what has been stated:

The explanation that [the suspect] hence has presented does not in a satisfactory way explain the fact that his sperm was detected in the crotch part of the women's underwear. Above all, the explanation means that [the injured party] would have saved a pair of stained women's underwear to later be able to untruthfully impute [the suspect] a criminal act. His explanation comes to this background across as so unlikely that it can be left without regard.²⁸

The sharp difference between the form and phrasing in the courts' objectified and decisive findings, and the dissenting judges' more clearly subjective expressions in first or third person, also contribute to the image of objectivity. The dissenting judges use a human voice to present their beliefs and opinions, resulting in a contrast that further legitimises the verdict over any alternatives and renders invisible all traces of human impact on the majority's reasoning. The following example from the court of appeal for Northern Norrland highlights this distinction.

²⁷ Bladini (n 9) 245.

²⁸ B 1676-13 Göta Court of Appeal. This quote contains errors in the original text.

[Lay judge A] is dissenting and argues: ... It has in my opinion not clearly enough come forward what happened. There are also differing statements from the preliminary investigations and at the main hearing about what happened. Taking into account what is now stated, I believe that it is not with a satisfactory degree of security established that [the defendant] acted against the injured party as has been specified in the indictment. I therefore dismiss the prosecution for attempted rape. In other matters I agree with the majority.²⁹

Objectivity through Content

It is possible to understand the creation of objectivity further by analysing the effects of what the voices present through Baudrillard's concept of simulacrum. This highlights how reality is represented and whether it is, in fact, needed. The theorisation of the process of simulacrum draws up four stages. The first is founded in reality or so called pure representation, followed by the second stage, where the image masks and distorts reality. In the third stage, the image masks any absent references to reality. Finally, the fourth stage entails an image which has no relationship to reality whatsoever. This is termed 'hyper-reality', as it allows discussions relative to it without any requirements of a connection to reality. When this stage is reached, images of the outside world—in this case the event and the parties—as well as concepts related to them such as guilt, insight, will, or sexuality can lead their own lives without connection to the original reality. The terminology can distort the facts and values they once portrayed, and which have grown central to the outcome.³⁰

While not specifically intended for legal analysis, legal reasoning is a prime example of Baudrillard's theory of simulacrum, and its reading of linguistic constructions may contribute greatly to understanding how an advanced and complex portrayal of a reality is replaced by a constructed reality.³¹ Håkan Andersson states that: 'The legal story

²⁹ B 332-13 The Court of Appeal for Northern Norrland.

³⁰ Andersson (n 5) 358.

³¹ Jean Baudrillard, *Simulacra and Simulation* (University of Michigan Press 1994).

must include, convey and legitimize a picture of a reality—something that happened, something that exists—and a picture of a rule or measurement plan with decisive normative necessary requisites that justifies that certain legal effects will occur'.³² The way the selective parts of witnesses' memories are brought forward by legal professionals and reconstructed into the legal story can be studied to find the techniques used to present the illusion of a singular 'right' portrayal, reminiscent of the idea of the 'right' result. To solve the legal problem, the decision-makers of the court need to simplify and adapt both the law and the reality using techniques of delimitation and relevance-making, made possible by the reconstruction of the story. Through this reconstruction, they are moulded into rhetorical tropes, with different limits and possibilities from the reality discussed within the verdict, which they are meant to represent. In addition to the fact that potential true representations are uncertain, Baudrillard argues that the question of whether they actually coincide with the reality are irrelevant in the face of the way they are related to, regardless of such connections.

The form the verdicts take allows for frequent retelling and rephrasing, including and excluding parts of the statements and events in the courtroom. Thus, there is much room for influence of actors in the main hearing by deciding what is given importance and what questions are ignored, how it is interpreted and shaped. The content of the experiences of parties that are deemed trustworthy can be understood as the first stage of Baudrillard's representation, as it is these, rather than an actual representation of everything that happened, that is tried in the court. This is, in Baudrillard's words, a 'pure' representation of those events, a representation which never surfaces within the court or its following verdict. The way questions are asked, framing the story's depth and the duration of the event, then distorts and masks parts of the story. This is rendered invisible by the absence of the actors within the verdicts, in favour of the image of a positivist objectivity where all actors are interchangeable to reach the same 'right result'. This makes up the second step of the process. The third step, where the references to a reality are hidden,

³² Håkan Andersson, 'Juridisk verklighetsbild—realitet eller simulacrum?' (2001) *Juridisk tidsskrift* 13, 902; Baudrillard (n 31).

is actualised when the actors start to translate the statements into a legal story.³³

Simulacrum is created as both the empirical images of the event and the legal terminological images are turned into tropes. The court creates facts by how it tells the story, what circumstances are presumed, what is inserted into the legal story, and what is left out in response to the discursive order of rape. Here, factors which were a great part of the event and influenced the actions of the parties, but which make the search for a result more complex, are left without meaning to the reasoning of the court, in favour of simple deciding factors selected in response to an archetypical case. Because of legal discourse's positivist foundation, looking for the universal and identical rather than differences, the image presented is certainly easier to comprehend, but also less connected to the events it represents.³⁴ The relation to these archetypes will be discussed further in the next part of the analysis.

The creation of simulacrum is not only actualised in the transfer from an event, through the statement process and into the understanding of the event from the way it fits into the mould of the discursive order, adding or removing facts. It may also take place in the epistemological arguments of the court. One such example is the way reality is constructed through the arguments of a reassessment of the credibility of the injured party and the assessment of the suspect's intent in a case heard in the court of appeal of Western Sweden. In this case, the prosecutor's failure to put forward a text conversation between the two parties is held against the injured party (considered highly trustworthy by the court), in response to a statement from the untrustworthy suspect arguing that the injured party showed more interest in him:

In this case it is added that [the suspect] additionally has stated that the injured party in the unreported conversation has been significantly more sexually interested than [the injured party] was in the reported conversation and also to a significantly greater extent than what the injured party admitted. The fact that the conversation is not complete therefore brings that the injured party's statement must be

³³ Andersson (n 5) 358.

³⁴ Andersson (n 31) 909. This is also studied extensively in Bladini (n 9) 356.

assessed with greater caution than what otherwise could have been the case.³⁵

Here, the use of ‘admitted’ implies that the claim of the suspect, whose statements are not used as a basis for the assessment in the legal story, is assumed to be true. The specific lack of supporting evidence becomes important when a question of earlier expressions of will, which are not a legal requisite, are actualised for the assessment of the event, despite the court arguing that it is supposed to be inconsequential:

The court of appeal agrees that the sexual right to self-determination entails that the person who declines a sexual invitation should be respected, regardless of what contacts that previously have occurred between the parties. At the same time, what has preceded a sexual intercourse may have significance for the assessment of the act and the intent of the suspect.³⁶

Thus, the created fact of the event-preceding conversation, which even if it were to be representative of events would be inconsequential, has a direct impact on the factors that are taken into account in the invisibly reductive ‘overall assessment’ of the simulacritic legal story. The created fact is furthermore based on a presumption of evidence over which the injured party has no control, and which he therefore is unable to disprove. This could be understood as the result of a reversed simulacritic event, where the image of the terminology is adapted, rather than the represented reality.³⁷ In this image, the trope of trustworthiness is made to include all actors, where one’s actions in the process have bearing on the assessment of the other. Through these associative moments, creating linguistic understanding—the way the legal story is framed and reality is constructed—affects the assessment and thus outcome in different directions.

This also highlights an essential factor in the discursive order: the image of objectivity and freedom from discursive norms in general within the law adjudication process of rape, and the many other

³⁵ B 4384-13 The Court of Appeal for Western Sweden.

³⁶ B 4384-13 The Court of Appeal for Western Sweden.

³⁷ Andersson (n 5) 348.

discursive intersections between knowledge and power. The power which governs the events through prohibitions, differentiations and divisions is not raised as power and interest, but as a pursuit towards truth and fact. The problem of power becomes particularly alarming in the meeting with archetypical narratives of how a rape usually takes place and how law usually responds, as it sets a frame separate from what may be the actual circumstances of the event.³⁸ This leads back to and magnifies the problem highlighted by Bladini. The reality which the result is legitimised in response to cannot be controlled or criticised because it is reductively presented as objective. Thus to see the order and its power, one needs to look at the regularities which govern the discourse.³⁹

Gendered Decisive Factors in the Discursive Orders

Analytically, this part defines regularities in the content of the verdicts, including the circumstances which are assumed, the decisive factors of the outcomes, and the reasons given for the selection of relevant evidence. Through this, decisive differentiations (arguments, values or norms) which circulate a case and which can be used to motivate solutions can be made visible. From there it is possible to find intertextual patterns of argumentation among the principles and requisites of what Håkan Andersson calls the surface for how narratives can be created, valued, changed and developed. In other words, it is done in search of the decisive factors, in particular what they are and how they are portrayed.⁴⁰

The regularities of decisive factors within the discursive practices of rape can be divided into two separate orders. What is often perceived as the primary order in light of social norms, yet is the more minor category in terms of the number of crimes committed, is largely reminiscent of the idea of ‘real rape’ within international discourses of rape, where ‘real rape’ signifies an assault by an unknown or brief and distant acquaintance.⁴¹ This is contrasted with the more numer-

³⁸ Andersson (n 5) 353.

³⁹ Bladini (n 9).

⁴⁰ Andersson (n 12) 22.

⁴¹ Débora de Carvalho Figueiredo, ‘Representations of Rape in the Discourse of Legal Decisions’, in Lynne Young and Claire Harrison (eds), *Systemic Functional*

able second order in which the parties are either acquaintances or in a close and potentially sexual relationship.

The type of violence, supported by the reliability of the stories and the way in which they relate to the technical evidence and potential witnesses, is the primary decisive factor within the first order. For example, in a proceeding in the court of appeal of Southern Norrland, the violence is the obvious decisive factor to the conviction of the suspect. The court refers to and joins the reasoning of the district court, which states:

It is thus found that [the suspect] through violence forced the injured party to intercourse. It is also found that he through violence forced her to endure a sexual act—penetration of her vagina with the fingers—which with regards to the nature of the violation and the other circumstances are comparable to sexual intercourse.⁴²

The judge's reasoning in the court of appeal signifies the event in question by using the term 'assault rape', without any terminological basis in penal law to do so, thus placing the case in an informal extra-legal category.⁴³

Other sanctions than prison cannot come to question. The violence which has been practiced has admittedly not been a very serious offense but can still be described as an assault rape.⁴⁴

Another example of violence as the primary decisive factor in assault rape is a verdict from a proceeding in the court of appeal of Southern Norrland. The court changed the verdict of the district court, acquitting the suspect on the first indictment count and changing the classification of the crime of the second. None of the indictment counts brought out the expressions or internal feelings of will of the injured

Linguistics and Critical Discourse Analysis (Continuum 2004); Maria Wendt, 'Mellan normalitet och avvikelse Forskning om sexualförövare och framväxten av praktisk behandling' (2010) 2 *Antologi sju perspektiv på våldtäkt Nordiskt centrum för kvinnofrid rapport* 140.

⁴² B 1024-13 The Court of Appeal of Southern Norrland. This quote contains errors in the original text.

⁴³ *ibid.*

⁴⁴ *ibid.*

parties. In addition, the first count did not bring up the intent of the suspect in any of the instances, but rather emphasised the violence of the assault:

Regarding this indictment count, nothing has been forwarded which gives reason to question [the injured party]’s statement. She has thus been exposed to a sexual assault in the way she has described. The question is whether it is shown that [the suspect] is the perpetrator.⁴⁵

The suspect was acquitted due to a lack of technical and support evidence binding the specific man and moped to the scene as new alibi evidence had been forwarded in the court of appeal. It also emphasised uncertainty in light of the fact that the injured party never saw the suspect’s face and spoke of a moped of a different colour in her statement than that belonging to the suspect, factors which were downplayed in the district court:

The injured party may very well remember incorrectly regarding what colour the moped had or have been mistaken regarding other details without it ruling out [the suspect] as the perpetrator. The defendants statements alone does not, however, bind [the suspect] to the crime scene. Nor is the moped bound to the crime scene through the tire imprint even if it gives some support for that [the suspect]’s moped may have been on the scene.

The ... court of appeal forwarded alibi evidence further means that it cannot be ruled out that [the suspect] was not in [the city] at the specific time. Overall, the court of appeal finds that is has not been placed beyond reasonable doubt that [the suspect] committed the act.⁴⁶

The second indictment count, in which the suspect was found guilty of attempted rape in the district court, was changed as it relied on the guilt in the first indictment count to prove the suspect’s intention to rape the injured party. What took place was deemed sexual molestation and assault—less serious crimes—and the court argued that there was no evidence that the suspect intended to rape the

⁴⁵ B 141-14 The Court of Appeal of Southern Norrland.

⁴⁶ *ibid.* This quote contains errors in the original text.

injured party after he had hit her. The district court forwarded its findings, which the court of appeal adhered to, as follows:

It is thus found that [the suspect], on the time and place that the prosecutor has stated has attacked [the injured party] by attempting to grab her in the neck without getting a real grip but came to hit her here, at the same time that he brought his hand in between her legs and tried to break, throw her onto the ground.

Some other reasonable explanation—seen in light of how [the suspect] acted in the event of indictment count 1 and what has been put forward regarding his strange behaviour—of that [the suspect] tried to throw her to the ground but that he did this with purpose to force [the injured party] to intercourse or a different sexual act which with reference to the nature of the violation is comparable to intercourse. It is further found that [the injured party] resisted and that this is what resulted in that [the suspect] discontinued his attack.⁴⁷

Despite accepting the other factors, the court of appeal places the guilt of the preceding act as the deciding factor in the question of the intent of the evidence. While agreeing that the suspect's actions must have been intended, intent to do more cannot be safely established, despite using the injured party's statements as the basis for the act, finding that the suspect's initial violence and molestation were intended, and agreeing with the district court's finding that the suspect stopped his attempts because of the injured party's resistance.

The court of appeals adheres to the assessment of the district court that [the injured party]'s statement can serve as the basis of the assessment of the case and that it thereby is found that [the suspect] has acted in the way that is claimed in the prosecutor's statement of the criminal act as charged.

That the injured party can have experienced the event as an attempted rape is easily understood. Because [the suspect] was acquitted from the indictment regarding rape, the event under indictment point one cannot be taken into account at the assessment of what intent [the suspect] could have had

⁴⁷ *ibid.* This quote contains errors in the original text.

with his actions. In these circumstances the court of appeal finds that it is not from [the suspect]’s actions with sufficient safety can be established that he had intent to force [the injured party] to intercourse or another thereby comparable sexual act. The action can therefore not be established to compose an attempted rape. What is clear is that [the suspect] used some violence towards [the injured party] and put his hand between her legs and that this must have happened intentionally.⁴⁸

After presenting the finding of violence, the court leaves questions of intent and any expressions of will of the injured party without comment. The verdicts also indicate a change from the explicit or implicit requirement for the injured party to prove both that the act happened against her will and that she had adequately expressed that the perpetrator acted against her will. The expectation on victims to attempt to resist in a ‘regular situation’ is not present in this order. Nor is it the point of departure where the injured party is in a position in which they are either unable or too scared to react.⁴⁹ As soon as violence or a threatening situation is considered proven in the situation of an assault, it is also assumed the act was committed with intent. The stronger emphasis on the uncertainty of the intent of the suspect as a decisive factor, rather than the violence, appears to be an atypical discourse in the order.⁵⁰

The verdicts of the second discursive order, in which the parties had an earlier relation of some sort, have more in common with the theory of Ulrika Andersson, placing more responsibility on the injured party in line with traditional gendered conceptions of sexuality. The acts of the injured parties before and at the time of the event are attributed importance and the injured party is thus through the process established as partially responsible for the act.⁵¹ Not only is the relationship between the suspect and the injured party presented in this order, but also discussed in relation to the event, indicating the conception that a potential relationship between the parties, and

⁴⁸ *ibid.*

⁴⁹ Andersson (n 5) 232.

⁵⁰ B 1024-13 The Court of Appeal of Southern Norrland; B 141-14 The Court of Appeal of Southern Norrland.

⁵¹ Andersson (n 10).

the shape thereof, is relevant to the assessment of criminal liability, and that suspects in the second order are less likely to have intent.⁵² This is also supported by the shift in decisive factors. In these cases, the factor is rather the extent to which the suspect had any intent to rape the injured party, including if they were aware of the fact that the victim did not want to have sexual contact. The reasoning of the court creates an understanding of the latter factor as a question of what expressions of will have been forwarded by the injured party.

Thus it is a relation in which the woman is understood as open until saying no, rather than one where all attempts at such contact are to be understood as rape until the victim gives some expression of will. This order, and thus discursive norm, is applicable in all cases where the story is framed as if the perpetrator, from some undefined circumstance, might interpret the situation as open for sexual contact. Despite a shift from the act of ‘resisting’ as a way to prove that the act was against the injured party’s will, the implications remain the same where the discourse of the second order has turned toward questioning the extent to which the intent of the suspect can be proven.⁵³ The injured party is thus responsible for being exposed to what took place during the event, with the result that a suspect’s responsibility is non-existent as long as the latter claims ignorance.

The following case highlights how the emphasis is placed on the suspect’s intent, understood as a question of whether he knew that he was forcing a sexual act against the will of the injured party, thus having already established that the injured party was indeed forced in a violent and dominating manner. The injured party’s statement of physical violence preceding the crime is central in the verdict.

Thus the court of appeal finds that [the injured party]’s statement on the violence she has been exposed to wins support from the other investigation. Regarding the question of whether the intercourse happened voluntarily or not it should be considered that [the injured party], who directly after the event when home to [witness 1] has told [witness 1] that she had been both assaulted and raped.

⁵² B 141-14 The Court of Appeal of Southern Norrland; B 3407-13 Scania and Blekinge Court of Appeal; B 4856-13 Svea Court of Appeal; B 2570-13 Göta Court of Appeal.

⁵³ Andersson (n 5) 202.

Besides this the Court of Appeal holds that [the injured party]’s statements win support from [the suspect]’s behaviour. If it would have been a case of a voluntary sexual intercourse, so called reconciliation sex, [the suspect]’s behaviour afterwards appears very strange. He has *partly* exited the house when [the injured party] and [witness 1] came back to retrieve [the injured party] things, *partly* fetched a rifle which [witness 2] later found him with *and partly also* in response to [witness 2]’s question about what he did with the rifle said it was just as well that he shot himself. The Court of Appeal considers that [the suspect]’s behaviour speaks for that he was well aware that limits had been exceeded.⁵⁴

Thus, the violence is initially established. Thereafter, the will of the injured party, which is central to the concept of the Swedish term ‘voluntary’, is presented to determine whether the violent intercourse constitutes rape. It is important to note that the Swedish term for voluntarily is *frivilligt*, which is made up of the terms ‘free’ and ‘willingly’, denoting an active will of the subject to a greater extent than its English translation. In what follows, the injured party’s expressions of will are left without regard. The injured party’s will is instead determined based on the suspect’s intent, which is assessed from his behaviour after the event. Interestingly, the suspect’s ‘awareness’ of ‘lines being crossed’ after the event is here used interchangeably with the legal term ‘intent’ at the time of the event. The district court’s verdict, on which the court of appeal’s verdict is based, argues in a similar way, but defines the ‘awareness’ specifically as ‘intent’.

A further example of the emphasis on intent is a verdict from a proceeding in the Svea court of appeal, where positive expressions of will have led the court to accept that the suspect must have assumed that the injured party consented. In two cases of convictions for attempted rape, the court used the injured party’s statements as a basis for the assessment of the suspect’s intent or ‘awareness’, stating that violence took place during the events in question.

The for the question of guilt decisive circumstance of if [the suspect] should be sentenced for the actions in indictment

⁵⁴ B 2570-13 Göta Court of Appeal.

count 1 as well as indictment count 3 is if [the suspect] has realised that the intercourse on 12 January 2013 happened against the injured party's will (indictment count 1) as well as that the injured party was not interested in having intercourse with him the 8 March 2013 (indictment count 3).

In this part the court of appeal also agrees to the district court's assessment of indictment count 1 that it cannot be ruled out that [the suspect], on basis of the parties sexual relations both physically and in text-conversations among others had been and which the district court has accounted for in its verdict, can have assumed that the intercourse happened with the injured party's consent this time too.⁵⁵

Note that in the quote above, the concept of rape, besides the question of intent, is not defined by violence. This is especially important in contrast to the previous order, as the injured party—whose statements were established as the basis of the assessment—told the court of violent treatment preceding and during the event. It appears as if the injured party's earlier affirmations or expressions led the court to disregard the later violence and expressions of will, including running away, shouting 'no' and 'please [suspect], stop'.⁵⁶ The uncertainty of the intent would also be questionable in light of the injured party's statements of the suspect saying that she should do what he wanted or it would get worse, that it did not matter what she wanted, that no one would believe her if she reported him because they had previously been role playing violently and, after the act, that this was a call for help.⁵⁷ In the reasoning of the district court, to which the court of appeal adhered, it is found that the injured party had been crying and said no, placing emphasis on the expressions of will. The court also notes the suspect's relation of domination to the injured party, as well as the former's arguments that sexual relations are necessary for the parties' relationship to work and for the well-being of their son to be ensured. Despite this, the earlier sexual text messages and, more notably, the later sexual contact, are the decisive factors for the court's dismissal of the indictment:

⁵⁵ B 4856-13 Svea Court of Appeal. This quote contains errors in the original text.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

That there for [the suspect] exist a series of disturbing circumstances, e.g. that he did not even want to accept that the injured party said no and cried as well as that he afterwards apologised in a text message are not enough to lead to another assessment.⁵⁸

Legitimisations of Archetypes and Ignorance

These orders show the outline of a reoccurring archetypical narrative, serving as a framework to delimit the reasoning of the court. These findings support the narratological theorisation of Håkan Andersson, who argues that the actors in law adjudication processes require some level of archetypical narratives in order legally to make sense of an event.⁵⁹ Because reasoning in line with these archetypical narratives requires less argumentation, or may even be used instead of it in order to legitimise a verdict, it is possible to speak of a norm, that is, a discursive imperative to reason in a certain way based on a certain model, subject to the idea of how the events of the case and its procedure usually happens. In other words, the norm regarding the actions of the legal decision makers also contains, or acts in response to, a social norm regarding rape in itself and what it constitutes.⁶⁰ The shift from expressions of will, with its implications for the injured party's perceived bodily openness and sexual passivity, to the discourse of violence and intent does not preclude the creation of the same image, as the injured party is not only partly responsible for

⁵⁸ *ibid.* The Swedish/English Glossary for the Courts of Sweden translates the term *besvärande* into 'appeal', which in its context would not make sense. The terms 'disturbing' or 'troublesome' are more in line with the use here. It can also be noted that the use implies a meaning similar to *försvärande* ('aggravating'), but without its legal connotations. See Domstolsverket, *Glossary for the Courts of Sweden: Swedish/English English/Swedish* (Domstolsverket, 2014) 17. The use is reminiscent of the use of *allvarlig* ('severe'), instead of the legal term 'aggravated' in cases of domestic violence to mark awareness of the serious nature of an event, but without actualising higher penalty levels, as discussed by Hermansson, Sofia, *'Parternas förhållande har varit stormigt' – en studie av formuleringar i svenska hovrättsdomar om grov kvinnofridskränkning och våldtäkt i nära relationer utifrån ett genus- och rättighetsperspektiv* (Lund University, 2012).

⁵⁹ Andersson (n 12) 22.

⁶⁰ Hydén (n 8) 29.

being exposed to what took place during the event, but the suspect's responsibility is non-existent as long as they can claim ignorance.

These archetypes delimit the legal picture from factors that are essential to the event. They motivate the highlighting or downplaying of certain aspects, as well as the creation of new factors and circumstances, and the removal of others. This can include everything from the events themselves, to the links between chains of events, and how they are understood in relation to other factors.⁶¹ One of the more notable factors in this is the attentiveness to threatening situations or the relations of power between the parties. Reoccurring factors of oppressive relationships, implicit or explicit threats of violence, or expressions of intent to rape from a trustworthy injured party are rarely brought into the legal story. For example, one verdict from a proceeding in the Svea Court of Appeal briefly describes a preceding oppressive relationship between the parties as an introduction to the events in the legal story. However, there is no explicit mention as to whether the decision makers brought it into the 'cumulative assessment' of the verdict's legitimisation.⁶²

It is also beneficial to replace the legal discursive order within, and in relation to, a larger frame of discourse and power relations in the society in which the legal process takes place. The way the expressions of will are given meaning in the present discursive order continue to reproduce the focus on expressions of will, portraying women as sexually passive and their bodies as open.⁶³ When criminal law promotes the decontextualisation of the criminal event from preceding events and the relationship between the victim and perpetrator through a wish to avoid difficult socioethical positioning, the genders and structural situation of the parties are ignored as violence against a gender-less person.⁶⁴ Despite this decontextualisation, the event and the legal response to it are still affected by gendered ideas of the victim, the perpetrator, and factors surrounding the event.

⁶¹ Andersson (n 5).

⁶² B 4856-13 Svea Court of Appeal.

⁶³ Andersson (n 10).

⁶⁴ Bladini (n 9).

What is usually regarded as the legal position on rape places more emphasis on violence and force than expressions of will.⁶⁵ This establishes that the discursive order, which affects the outcomes of the studied processes by moving the decision-making away from such a position, fails to provide the intended result from law in response to rape. From the perspective of the law adjudication process as legitimisation, rather than a mechanical process of finding the ‘correct result’, objectivity does not change the content of the decision-making from the outcome, but only the way it is both framed and allowed to be framed. Even if the concept of the indeterminacy of law is rejected, objectivity is problematic in that it legitimises the reaching of a ‘wrong result’. The discursive order of the law adjudication process does not make visible individual positions and interpretations in light of their socio-cultural backgrounds, and does make it possible to reframe both the event and the way it is to be related to law, even if one finds that the ‘correct result’ of law is entirely clear. Because the order legitimises such procedural aspects as normal or necessary, it may lead to a shift of an imagined previously clear legal position in less desirable ways. The situation of gendered norms as extra-legal may, in response to the structural nature of the norm, lead to a situation in which the practice is established as the legal position through its practice.⁶⁶

Finally, this study of legal text may be of additional use given the arguments that law constitutes, produces and reproduces the general discourse of society.⁶⁷ A perception of ‘real rape’ in law has previously been argued to be exported to society, reproducing gendered conceptions of sexuality and maintaining the frequency of the crime.⁶⁸ With respect to the role of the court and the complaints against it, it would seem that the discursive and normative order of the law adjudication process is also central to the understanding of views and behaviour in Swedish society.

⁶⁵ Nils-Olof Berggren et al, *Brottsbalken–en kommentar* (Supplement 4, 2014) 3.

⁶⁶ Bladini (n 9) 354.

⁶⁷ Van Dijk (n 11) 2.

⁶⁸ Bergenheim (n 11).

Objectivity is often described as a means to generate legitimacy of legislation in the view of those regulated by it.⁶⁹ While there are critiques of inconsistent reasoning in similar cases, the external image of law adjudication processes still carries a strong image of objectivity, with the idea of the court as an objectified institution reaching the right answer. This might explain the emphasis within social debates and protests on changes in legislation rather than legal processes and norms.⁷⁰ Taking the findings of this article into account, such changes will not lead to their intended results. The separate discourses and archetypes advance assumptions and images of the cases' facts, influencing everything from wording to the thought behind the image of objectivity, without a direct tie to the legal code. In other words, even if calls for a change in legislation are right, the target of their critique is not the only problem.⁷¹

It is also likely that the reproduction of legal ideas of what actually constitutes a rape contributes to the continuation of the high volume of the crime. When previous relationships affect the reasoning as well as their outcomes in courts, and when violence, forced actions, or relations of power are disregarded, it also affects the image of law.⁷² Not only are fewer of the cases of forced sexual acts deterred by the threat of being caught by the sanctions of the law, but the conception of what rape actually constitutes is shaped by the way the law treats it.⁷³ While the legal discourse unquestionably condemns rape itself, the frame for what the term encompasses is too narrow for the regulatory needs not only of the injured parties, but also those who have been raped but have not reported it, or those whose preliminary investigation is closed.

⁶⁹ Paul H Robinson, 'Criminalization Tensions: Empirical Desert, Changing Norms & Rape Reform' (2009) Faculty Scholarship, Paper 308 <http://scholarship.law.upenn.edu/faculty_scholarship/308> accessed 3 May 2015; Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

⁷⁰ Jönsson (n1).

⁷¹ Andersson (n 5) 360.

⁷² Bergenheim (n11).

⁷³ Robert D Cooter, 'Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization' (1999) 79(1) *Oregon Law Review* 1.

Conclusion

This article has proposed a framework for a theory that makes visible the discursive convergence of normative archetypes and objectivity. It has outlined two legal discursive orders on rape, separated by the occurrence of preceding relationships between the parties. The discursive orders of rape not only establish a linguistic framework for how judges are to perceive the act of rape (with reference to traditional conceptions of women's bodies and sexuality), they also move these actors to rule in response to this framework. The norm is strengthened by a discursive imperative to reason in a certain way, based on a certain model; an archetype departing from the idea of how the event of the case and its procedure usually happens to make sense of the presented event. These archetypes generate the legitimisation of a legal result as well as reproduce the norms and perceptions entrenched in them.⁷⁴ The findings show that deciding to be objective—that is, not to be affected by subjective or extra-legal perceptions—does not in fact lead to a situation where one is not.

The first discursive order places emphasis on violence by an unknown perpetrator and makes up the formative narrative from which the other is perceived. The second order constitutes the far more common case in which the parties have a preceding relationship. While emphasising the intent of the perpetrator, it effectively places the women's expressions of will and responsibility at the centre of the decision-making. At the heart of the problem is a discursive order and structural norm regulating not only the behaviour of legal professionals in processes, but also the actions of those regulated. This creates a perception where rape is wrong, but where only some perceived categorisations of forced sexual acts are considered to constitute rape. They are perceived categorisations that ensure that the responsibility of the vast majority of the crimes committed remains on its victim.

⁷⁴ Andersson (n 12).