BOOK REVIEW

Why Prosecution Is Not the Go-To Tool to Secure Human Rights

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Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law, edited by Alice M. Miller and Mindy Jane Roseman, University of Pennsylvania Press, 2019.

This multi-authored book, edited by Alice M. Miller and Mindy Jane Roseman, raises questions about when and why human rights defenders promoting sexuality, reproductive, and gender-based rights as human rights are increasingly calling for the use of criminal law as an enforcement mechanism. Its aim is to explore the silence surrounding what they see as a fraught relationship between human rights and criminal law, arising out of a profound distrust of state power and its misuse, while at the same time hoping that greater use of the criminal law can and will reduce human rights abuses. The title of the second chapter succinctly expresses the main conundrum explored in the book: "How prosecution became the go-to tool to vindicate rights."

It is above all a book that challenges and questions some of the ways human rights are being pursued today—and deserves to be known widely. The introduction and 14 chapters address prostitution, sex laws, violence against women, relations of gender and sexuality, illegal abortion, sex selection, and, unexpectedly, clothes. There are reflections on the definition and role of harm reduction, offenses against morality, and unequal treatment under the law, and on how to achieve justice. The toughest issue the book raises is how to achieve human rights in practice. It concludes that given how many abuses arise from the application of criminal law, criminal law will not deliver human rights, but nor can we do without criminal law.

The book is dense politically and linguistically. The authors (from all world regions) hail from the academic disciplines of history, law, public health and anthropology, and from activist roles in women's rights, gay rights, sex workers' rights, HIV, and constitutional law—with connections to the human rights movement. The chapters include legal analysis, essays, interviews, first-person accounts and self-reflective critiques.

The introduction goes into depth on the primary conflict between two pursuits: (1) constraining the abuse of human rights and critiquing the administration of criminal justice, and (2) calling on state power in the fields of health, housing, and education to fulfill their social, economic, and political duties in order to remedy and reduce harm arising from human rights abuses and denial.

Part I covers specific aspects of transnational theory and practice. While the use of criminal law to regulate sex, gender expression, and reproduction is nothing new, the involvement of human rights in responding to these *is* new, arriving in the past 20 or so years, via social movements. Calls to liberalize and decriminalize (for example, sex outside marriage, the consensual sale of sex for money and goods, and abortion) occur alongside calls for greater criminalization and more prosecution (for example, of gender-based violence, sexual violence, rape and rape in marriage, sexual abuse of children, and sex trafficking).

The purpose of criminal law is to punish for doing harm, which itself is intended to inflict pain through the loss of freedom and even the death penalty. Thus, criminals are also harmed through punish-

ment. This calls for caution and an awareness of the contradictions involved in hurting those who have hurt others.

The book aims to identify (1) the "guiding conditions and rules of engagement for human rights advocacy and practice in expanding or limiting recourse to criminal law"; (2) the perils of both over- and under-regulation in efforts to promote decriminalization; and (3) the effects of criminal law and regulations on diverse groups of people, especially "marginalized populations who are often unrecognized as victims of crimes."

The range of issues covered is impressive, and the whole is worth reading. I will focus here on the chapters and examples that made the biggest impression on me.

In the chapter featuring an interview by Janet Halley with Aziza Ahmed, Ahmed argues that feminists have turned to the international criminal justice system in large numbers because it promises to use force to eliminate serious wrongs. Yet prosecution, conviction, incarceration, and the death penalty hand the state and the international criminal justice system "a monopoly over legitimate force." Yet, in fact, "the criminal law doesn't end much of anything"—certainly not violence or sexual violence against women, for example. It has at times also created new problems, such as courts wrongly equating non-consensual sex trafficking with the consensual sale of sex, which is highly controversial. This is the first of several chapters that stresses the lofty goals of criminal law versus its flawed and often discriminatory application.

Alice Miller with Tara Zivkovic look at this from another angle. It was hoped that if implemented from a rights basis, criminal law would stop being used for the repression of rights and the morality-based regulation of behavior, instead turning toward harm reduction and rights protections. In the spheres of gender, sexuality, and reproduction, this has led to some definite successes—that is, progressive law reforms and judicial decisions and greater public understanding of the issues. It has also motivated recent generations of activists to support and demand bodily autonomy in its many forms.

On the other hand, Miller and Zivkovic provide examples of how the reliance on criminal law to right wrongs has had negative consequences. For example, in the late 1980s, sexual violence became a subject of primary focus for many women's rights advocates, culminating in wide-ranging demands for justice at the 1993 World Conference on Human Rights in Vienna. Prosecution became the primary tool recommended—both for prevention and to end the impunity of violations. Increased prosecutions were seen as key evidence of a commitment by states to equality. Expanding the state's obligations in this way, however, also leads to expanding the power of the penal state—a two-edged sword.

Alli Jernow's chapter opens by describing the important role played by John Stuart Mills' *On Liberty* (1859) in the United States and the Wolfenden Report (1957) in the United Kingdom as seminal statements on the sovereignty of the individual over their own mind and body when it does no harm to others. *On Liberty*, Jernow says, carried the "harm principle" from philosophy into legislative guidance and later into the courts, most famously in cases decriminalizing sodomy and other criminalized forms of sexual relations. The Wolfenden Report argued that society should not use the law to equate the sphere of crime with the sphere of sin. Instead, there must remain a realm of private morality and immorality that is not the law's business, if there is an absence of harm.

Jernow analyzes what happened in courts in the USA, UK, South Africa and India, and in the European Court of Human Rights, when "the harm principle met morality offenses" in relation to privacy, personal autonomy, and the regulation of sex and gender. These courts all reacted differently. No human rights body has as yet declared that safe, legal abortion is a human right. Why? Because instead of focusing entirely on the harms of unsafe abortion to women, for example in *A, B and C v. Ireland* in 2010, the European Court of Human Rights focused on the harm to the "life" of the embryo or fetus *as balanced against* the pregnant woman's health, bodily integrity, and privacy.[1] However, the Convention on the Rights of the Child makes it clear that the "right to life" begins at birth, and

points up the way in which morality, conservative religion, and the failure to fully recognize women's rights still support ongoing restrictions on abortion when this issue should have been resolved as a rights issue decades ago.[2]

Jernow is at her strongest discussing how consent to sexual relations is treated. For example, the United Nations Human Rights Committee found it "undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy.'" The European Court of Human Rights (ECHR), on the other hand, "disavowed any broad notion of sexual autonomy in cases involving sadomasochistic sex and adult consensual incest." In a case of incest the ECHR examined between a brother and sister, it expressed concern that the girl's sexual self-determination over a long period of time was in question, and imposed a criminal sentence on the brother. Central to such decisions, the court argued, is preventing harm by protecting the right to withdraw consent, even if it was given at an earlier moment.

Jernow also examines several South African courts' decisions to reject the legal enforcement of private moral views when they are based on prejudice and hostility, such as toward gay men. She quotes Justice Albie Sachs, who similarly insisted on using the "harm principle" to proscribe what is unacceptable in relation to sexual expression, even in the sanctum of the home. He argued that it remains important to "penalize what is harmful and regulate what is offensive," thus overriding in some cases the privacy principle.[3] In contrast, in a more recent South African case, a sex worker sought compensation for unfair dismissal from a brothel on the grounds that she still had constitutional rights, even though prostitution was illegal.[4]

Lastly, Jernow covers the 2009 ruling in *Naz Foundation v. Union Government of India* in which—in spite of the absence of protection of privacy in the Indian Constitution—the Delhi High Court read down Section 377 of the Indian Penal Code, ending the ban on gay sex. The judgment was overturned in 2013, however, by the Supreme Court of India in an opinion that Jernow describes as "notable both for the thinness of its reasoning and its deference to majority [moral] opinion." She thus concludes that while the "harm principle" is accepted everywhere as a reason to proscribe harmful behavior, its interpretation is so "plastic as to be without any real power to challenge state regulation of private behavior" if a state wishes to do so.

Which takes us to Widney Brown, who offers a swingeing critique of how the criminal justice system in many countries fails most victims of crime, from women who have been raped in New York City to women migrants working as housemaids in Saudi Arabia. She describes how women migrants working as housemaids in Saudi Arabia are imprisoned for "becoming pregnant illegally" due to sexual exploitation by men in the households where they were employed, and then deported penniless upon their release. She also describes the well-known phenomenon whereby victims of rape may or may not be re-victimized by the criminal justice system, depending on their race and class, while perpetrators may be assumed to be guilty or innocent, depending on *their* race and class. Thus, in the United States, if a rape victim is a white, educated woman and the defendant is an African American man, he is presumed to be guilty, but the opposite is true if the woman is African American and the accused man is white. Hence, no one is surprised that most men in prison for rape in the United States are African American.

In Saudi Arabia, apparently, according to one minister of the interior that Brown spoke to, people confess if they are guilty. However, if they refuse to confess, this is also evidence of their guilt, so they are tortured until they confess their guilt. The "torture simply helps those who are guilty to come to terms with their guilt." Moreover, in "refusing to confess initially, they were responsible for the torture." I may be naïve to be shocked by this, but I am shocked. Yet this is only an extreme example of the deeper point Widney Brown, and indeed all the authors in this book, are making—that the justice system is not our salvation. She asks, "How can human rights activists demand that the state bring those who perpetrate crimes to justice" when the justice system itself is so often systemically unjust?

In assessing a given country's "scorecard" on these issues, she recommends asking the following:

> *What is defined as a crime? What are the patterns and practices of the police? How is prosecutorial discretion exercised? Are all defendants ensured legal representation? Are there disparities in sentencing for comparable crimes?*

And perhaps most importantly: Who is in the country's prisons, because the answer to this last question is indicative of who is denied their rights in that country.

She asks equally critical questions about procedural issues: whether rules of evidence or procedure undermine due process or fair trials protections, or discount the testimony of victims or witnesses; whether the presumption of innocence is reflected in all parts of the system; and whether there is judicial independence (and, I would add, judicial expertise) on the law itself.

She concludes that it is not possible to ignore the failures of the criminal justice system—which themselves cause great harm—nor is it possible to give up on the system. She therefore urges the human rights movement to campaign to strictly limit the scope of criminal law and to demand that states provide for an independent, civilian oversight mechanism that represents the diversity of the community and ensures that the communities most scrutinized by the police have the strongest representation. The goals of equity and equality of treatment, fairness, and transparency, she says, require tackling the criminal justice system and not allowing the privileged and the marginalized to be treated differently by it.

Part II of the book has chapters on national historical perspectives, including prostitution and sex trafficking in South Korea since the 1990s and the law; the trajectory of criminal law in relation to sex in Brazil from 1830 onwards; and abortion treated as treason by the Germans in France in 1942, when the Vichy government made obtaining and providing an abortion punishable by death.

These studies explore how the content and role of the law changes over long periods of time, going back as much as 100 years. The value of such research in contextualizing current law and policy and when trying to make change happen is important—knowledge of the past may make the difference between success and failure in seeking to reform national law and policy.

Part III of the book has six chapters on the following contemporary national concerns:

- the impact of criminal laws on sexual and gender non-conforming people in East Africa;
- criminal law, activism, and sexual and reproductive justice in regard to sex selection in India;
- whether old moralities are only wearing new clothes—and whether modern laws on sex crimes protect neutral moral values or not, which concludes that this is, at best, a work in progress;
- "sex panics," a vividly descriptive term, in relation to pornographic films, gay bars, unnatural sex, marital rape, and sexual relations among migrants and refugees;
- a reflection on sexual rights advocacy and the legal recognition of same-sex marriages, what counts as a family, how families are formed, who is included, what legal protections are extended, and how this all relates to family law versus criminal law; and
- a closing argument on the decriminalization of what produces harm, asking whether the harm caused by, for example, restrictive abortion laws, laws against prostitution, and laws criminalizing the non-disclosure of HIV infection provide a compelling enough rationale for decriminalization on its own.

I've left one chapter, from part II, for last, because it was so unexpected. After 40 years of publishing on reproductive and sexual health and rights, it isn't often that something new comes along for me. This chapter, by Oliver Phillips, is called "The Reach of a Skirt"—a provocative enough title—which opens with an even more provocative question: "What's in a skirt?" You may well ask!

The chapter opens with a story from 1992:

> *A woman walking alone on campus at the University of Zimbabwe was pursued and stripped naked by a mob of approximately 100 male students. She was rescued … by being bundled into the car of two female deans who happened to be passing, thus saving her from further violence.*

The male students claimed that their actions were justified because she was wearing a miniskirt and it was too short. A few days later, a second such attack took place at a nearby shopping center. A few days after that, women students began mobilizing on campus, and about 40 women dressed in miniskirts held a protest march to which supporters came, of whom six were men, including the author of this chapter. The march was surrounded by more than 500 male students who threatened the women with gang rape and threw stones and sticks at them. Four of the six supportive men were big and well known. They intimidated the mob just enough to restrain them. When the author talked to some of the men afterwards, they said they were "defending traditional values" and that women should wear decent skirts and "discipline themselves" (or it would be done for them).

There have apparently been other such attacks over the years too. In 2014, a young woman wearing a short skirt was attacked in central Harare near a taxi rank. This incident was filmed on a smartphone and posted on YouTube, where it went viral. The attackers were shouting "Whore!" at her as they tore at her skirt and underwear. She and the young man who was with her tried to get into a taxi, but the drivers closed their doors against them. Finally, another taxi came to their rescue and drove them away. Women with a significant public profile, including a member of Parliament who was previously a deputy minister of justice and legal affairs, spoke out against the attack, as did many others. The video led to police involvement, and two men were eventually arrested and convicted of assault and imprisoned for eight months. But it had taken from 1992 to 2014 for an intervention supporting the rights of the women to take place.

The rest of this chapter discusses the complex role of clothing and gender, and the conflicting interpretations of culture and tradition in relation to women believing they have the right to wear clothes of their choice. The author found occurrences of disputes about miniskirts not only in Zimbabwe but also in Nigeria, Botswana, Namibia, and Zambia, and proposals to ban miniskirts in Uganda, Nigeria, Swaziland, Chile, Indonesia, South Korea, and Italy.

Thus, the "dressed body" has social import, signifying conformity in some cases and transgression in others, but always serving as a visible "representation of the relationships between power, gender, class, race, and sexuality." It was sexual repression that led to the young men's reactions in 1992 and has continued to do so. For the young women, the miniskirt was their challenge to what the author called "gender hierarchies." Because the young men were "disturbed, excited and confused" (and felt taunted with sexual arousal), they blamed the young women for provoking them.

When women insist on their right to dress as they wish and choose dress that is considered transgressive, conservative men demand they be regulated by "decency," prohibition, or even criminalization, and all sides want the law on their side. Thus, appeals to "law" (whether social, moral, or legal) may be associated with social control and claims to liberty and equality at the same time. This challenging thought is, I think, a good place to end this review.

I hope this book will inspire many other papers, as there is so much more to delve into along these lines. *Beyond Virtue and Vice* should be high on the reading list of anyone who wants an international perspective alongside national examples of the contradictions and inter-connectedness of struggles for human rights and the role of criminal law. It's a major contribution.

References

1. *A, B and C v. Ireland* (European Court of Human Rights), December 16, 2010.

2. R. Copelon, C. Zampas, E. Brusie, and J. deVore, "Human rights begin at birth: International law and the claim of fetal rights," *Reproductive Health Matters* 13/26 (2005), pp.

120–129.

3. *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1999 (1) SA 6 (South African Constitutional Court), para. 32.

4. *Kylie v. Commission for Conciliation, Mediation and Arbitration*, 2010 (4) SA 383 (South African Labour Appeal Court), paras. 19–26.