this interrogation featured legal practitioners, advocates, and academics working from distinct positions, but with a shared commitment to fusing theory with practice, the group was able simultaneously to critique current advocacy work and to incorporate those critiques into shaping new principles and practices of human rights advocacy.

MAPPING THE SHIFT: HUMAN RIGHTS AND CRIMINAL LAW

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In 2015, the Institute for Policy Studies (IPS)—a progressive think tank on U.S. domestic and foreign policy—awarded its annual human rights awards to two criminal lawyers. The domestic award went to Daryl Atkinson, who advocates for the rights of convicted felons. Its international award went to Almudena Bernabeu, for what the IPS called her “successful prosecution of several of the worst Latin American perpetrators of crimes against humanity.” I do not think that the IPS was trying to be balanced by picking a lawyer working on behalf of the rights of the formerly incarcerated, on one hand, and a prosecutor, on the other. Rather, the organization sought to honor those it sees as promoting human rights. In the context of U.S. law, that means fighting for the rights of defendants and the convicted. For international law, it means the opposite.

The Washington Post published a story praising both lawyers for the awards, and identifying Bernabeu as a hunter, rather than a healer. It quoted her as saying: “I don’t want to take care of the poor or those who have been tortured. … I want this world to stop abusing people.” Bernabeu is not alone. In fact, in the twenty-first century, fighting impunity has become both a rallying cry and metric of progress for international human rights advocacy and law. Criminal prosecution is at the heart of the fight against impunity, and is often coupled with the assumption of deterrence embedded in Bernabeu’s message. This emphasis represents a shift from the early days of the contemporary human rights movement, when Amnesty International formed to argue for amnesty for prisoners of conscience, and then began to fight unlawful detentions, harsh interrogation methods, and prison conditions more generally. Today, Amnesty International often argues against laws that permit amnesty, and calls for stronger criminal laws to counter impunity, although we will hear from Carrie Eisert and Widney Brown about some of the ways and sites in which the organization has tempered its enthusiasm for criminalization.

There are two parts to the contemporary turn to criminal law in human rights. One is the development of international criminal institutions, beginning with the International Criminal Tribunal for the former Yugoslavia in 1993. Feminists were present from the beginning, seizing upon the Tribunal as an opportunity to respond to the widely reported rapes of women during the armed conflict in the region. They received a great deal of mainstream support for their efforts and have, over time, campaigned successfully to expand international criminal law to cover a wide range of acts that are seen to constitute sexual violence in conflict. The Rome Statute establishing the International Criminal Court is one noteworthy site of that success.

The other part of the turn pre-dates international criminal institutions. It can be found in the development of human rights law to require states to investigate, prosecute, and punish non-state actors who commit serious human rights violations. This trend began in the late 1980s, somewhat fortuitously, in the Inter-American Court of Human Rights case on enforced disappearances,

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Velasquez Rodriguez v. Honduras. Although the Honduran state denied direct involvement in the disappearance at hand, the Court nevertheless ruled against Honduras, holding it accountable for failing to mount a serious criminal investigation into the disappearance.1 The decision was lauded by many at the time, including women’s human rights advocates, who had long sought to establish state responsibility for certain acts of non-state actors in the so-called private sphere.

Velasquez Rodriguez was not thought of as a case about criminal punishment at the time but, in the mid-1990s, the Inter-American Court began affirmatively to require that states investigate, prosecute, and punish individual perpetrators, with decisions that set the stage for jurisprudence striking down amnesty laws. The Court’s rulings both reflected and influenced international law and activism on human rights more broadly, in large part because it coincided with the emerging focus on international criminal law and also with attention by human rights activists to what they called a “culture of impunity.” It also fit with feminist activism concerning violence against women, which was increasingly turning to the punitive state to protect women’s rights—through, for example, mandatory arrests for domestic violence and harsher penalties for rape.

In many ways, the story sounds like a success story. But the turn to criminal law was effected almost reflexively, with little attention to its consequences, or the ways in which it would change the human rights movement. Let me sketch a few of those consequences:

Individualization and Decontextualization: The criminal law lens addresses the world as populated by a few bad individual perpetrators, even monsters (as Hannah Arendt brought to our attention long ago). The turn to criminal law in human rights not only offers a distorted view of the world; it affects our ability to attend to the contexts in which human rights violations occur and to their structural causes. Human rights have often been criticized for their individualism, of course, but that concern has foregrounded a focus on individual victims, not perpetrators. And, while feminists, quite rightly, have long called attention to the role of non-state actors in perpetrating human rights violations, the turn to criminal law threatens to miss the ongoing need for structural analysis of biases within state bureaucracies as well.

Victims as Alibi: The human rights movement is participating in the legitimization of international and domestic criminal institutions as largely benign institutions that operate on behalf of victims. While others have made this observation, my concern is that by prioritizing retribution and pinning it on the desires of victims, the turn to criminal law effectively narrows the repertoire of responses to human rights violations. That narrowing makes it more likely that retribution is in fact the remedy victims will want—making it a fait accompli that those who might resist the desire are invisible to human rights.

Alliance with the State: Human rights advocates are often dependent upon the very police, prosecutorial and even adjudicatory apparatuses that they have long had reason to suspect. More importantly, their advocacy often encourages states to overreach in investigations, prosecutions, and punishments. Specifically, wrongful arrest and detention—and even confessions induced by torture—can offer an expedient means for state officials to stave off accusations of impunity for human rights violations.

This alignment of human rights with the carceral state cannot help but affect the extent to which the human rights movement is able to mount serious criticism of mass and brutal incarceration, as well as of the biases that are operative in nearly every penal system in the world. Indeed, to go back to my opening illustration, lawyers like Atkinson might be needed to respond to the very consequences of those like Bernabeu.