

Indirect discrimination: turning a regressive space into a site for coalitional action

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As anyone who knows my work on sexuality, gender, and rights will attest, I tend toward centrifugal and inter-movement thinking—i.e., how does work “spin out into the world.” Even more particularly, in regard to the focus of this workshop on indirect discrimination in regard to sexual orientation and gender identity (SOGI), I would ask: how does argument and analysis in this discussion affect others not in the room, but who have stakes in how we argue for sexual and gender rights?

Thus, while much of this workshop may focus on the important doctrinal questions of how best to articulate the scope of norms of indirect discrimination vis a vis treaty or national law, or the evidentiary/documentation questions posed by how to demonstrate the operation of indirect discrimination, I want to ask a different question: *Do the ways that we identify, define and document harms to sexual rights* (here, the doctrinal frames and narrative structures used to bring claims under an indirect discrimination claim in the SOGI framework) *tend to open or close the possibilities for coalitions and joint advocacy work among related but not identically situated sexual and gender rights groups?*

My primary focus in this workshop is in regard to discrimination claims arising from the operation of the criminal law. I am motivated by the desperate need for stronger coalitional and solidarity politics around efforts to limit the role for policing, prosecution and incarceration vis a vis sexuality and gender expression, a solidarity which I believe is necessary to solve some of the many problems created by criminal law, which manifest in most societies as problems of equality, exclusion and racialized hierarchies.⁶⁴

Specifically, in regard to the question of indirect discrimination, I think we need to think about the implications of how we argue for “indirect discrimination” by producing fact patterns to show arbitrary, disparate, or aggravated impact against stigmatized sub-groups in those contexts in which the offending law is at least textually gender/sex identity neutral. As I will sketch out below, others *not* in the SOGI family also face discriminatory harms from laws which condemn adultery or debauchery, or criminalize prostitution or the risk of HIV transmission. I also push one step farther, asking us to think about the coalitional impacts of emerging norms crafted by sub-groups resisting what they see as the discriminatory application of gender neutral norms, such as what we can detect in the emergence of norms of “meaningful consent” in the face of gender neutral rape laws. In the claim of meaningful consent crafted by the sub-group of cis-gendered women, the concept of “informed consent” has begun to slip into the legal claim, such

⁶⁴ Miller, Alice and Roseman, Mindy (eds) BEYOND VIRTUE AND VICE: RETHINKING HUMAN RIGHTS AND CRIMINAL LAW (Univ of Penn Press, 2019)

that a differently situated sub-group (trans persons) may be facing new discriminations in the application of this new norm.

In what follows, I sketch out a few “eruptions” of disparate impact claims made for SOGI-related rights under gender neutral appearing statutes or law and then one emerging, apparently progressive (but I think, dangerous), norm against rape—informed consent—to consider the ways that the way sub-group specific claims are made visible can matter for how and whether we have potential for joint action across and among the many differently gendered sub-groups affected by criminal laws. I will close with some thoughts on some inclusive steps that show promise (in the context of adultery) and some possible principles, including using the frame of “gender stereotype” to highlight both difference in treatment and its connection to the treatment of other-gendered others, which we might want to also articulate to further delineate the scope of indirect discrimination.

I. Eruptions and partial evolutions of indirect discrimination resulting from gender neutral laws

It is important to note at the outset that as of yet, rights-based challenges to prostitution law and HIV criminalization have not met with total success at a global level, although there has been some movement in certain national and transnational spaces.⁶⁵ This means we are at an interesting (i.e. fraught) moment in crafting rights-based challenges to prostitution law and HIV criminalization: I would argue that, given that precarity, there is great importance to understanding how differently crafted challenges to indirect discrimination work not just for the named sub-group, but the unnamed.

a. Partial challenges to gender-neutral debauchery and prostitution laws (Egypt and the U.S.)

Although Law 10/1961 was enacted in Egypt to “combat debauchery and prostitution”⁶⁶ by persons of any gender, almost all the human rights-oriented documentation on this law calls attention to the unjust way that this law is used against male same-sex conduct in Egypt. There are numerous reports, generated locally as well as by INGOs, that focus on the arbitrary crackdowns, and abusive arrests and detention of gay-identified men, on the street or on the

⁶⁵ <https://www.nswp.org/nswp-plus/human-rights> , see also: https://law.yale.edu/sites/default/files/area/center/ghjp/documents/the_law_and_sex_work.pdf and <https://www.nswp.org/sites/nswp.org/files/framework-on-rights-of-sex-workers-cedaw-1.pdf> among the many documents which are beginning to address overarching rights claims.

⁶⁶ Articles of Law 10/1961 on the Combating of Prostitution. “Article 1:

(a) Whoever incites a person, be they male or female, to engage in debauchery or in prostitution, or assists in this or facilitates it, and similarly whoever employs a person or tempts him or induces him with the intention of engaging in debauchery or prostitution, is to be sentenced to imprisonment....”

internet, under cover of this law.⁶⁷ Most of the gay rights world, I would hazard, thinks of this law as an “anti-gay law.” Human rights reports that document the facts call out the homophobia and abuse attached to the application of the law to gay-identified men—positing this as a clear case of (indirect) discrimination of a gender neutral law, and analyzing its application for violations of privacy, health, freedom from arbitrary arrest, freedom from torture, and other rights. I would note that although most human-rights oriented coverage of this law typically talks about it as affecting the “LGBTQ” population in Egypt, until recently, all the documentation focused on the G and the T (gay and trans) part of the acronym, with little evidence regarding how women identified as lesbians might be repressed under this law.⁶⁸ The “false solidarity” of inclusion of lesbians in rhetorical efforts to document laws as “anti-LGBTQ” is one kind of impact of unreflective, sub-group (here gay men and some trans) focus of documentation and analysis.

However, there is at least one more problem arising from the gay dominated/partial analysis through indirect discrimination claims, of the Egyptian debauchery and prostitution law. The partial, indirect discrimination analysis tends to support, not a full-throated abolition of this law, but perhaps having it “re-defined/read down” so as *not* to include same-sex sexual conduct. For a full move to decriminalize sex work, advocates *might* want to know about how this law is used to arrest and presumably abuse the rights of all persons—especially women of any kind—arrested for sex work or the exchange of sex for money. There is very little rights reporting in English on the application of this law to conventionally gendered women—and what little I found on its application in the context of prostitution to “women” is not linked, in analysis or in regard to impact, to the work on abuse of gay men under the law.⁶⁹

If the unjust application of the law to a sub-group is the focus of rights advocacy—here, in the Egyptian prostitution and debauchery law case, it would be built as an aspect of indirect discrimination—then the goals of law reform, and our definition of success will likely be much different—and in my opinion, partial, if measured in the achieving of sexual rights for all.

I also note that general prostitution laws (where they are gender neutral, as they are in most U.S. states) have a pattern of disparate application in place and time: here, think of the recent litigation in New York City challenging loitering for purposes of prostitution (also known as “walking while trans*”) which highlighted the intersection of racism and transphobia in the

⁶⁷ The Tahrir Institute for Middle East Policy, <https://timep.org/reports-briefings/timep-briefs/timep-brief-lgbtq-human-rights-in-egypt/>

⁶⁸ HRW <https://www.hrw.org/news/2020/03/20/egypts-denial-sexual-orientation-and-gender-identity>

⁶⁹<https://www.undp.org/content/dam/rbas/doc/Gender%20Justice/English/Full%20reports/Egypt%20Country%20Assessment%20-%20English-min.pdf>. Notably, the UNDP report notes that 40% of the women in jail for prostitution charges may meet the standard of having been ‘trafficked’—leaving even more unsaid about the practice and experience of women arrested under this law.

patterns of arrest.⁷⁰ One might make the claim that all prostitution law is applied disparately across the populations who sell sex: street-based vs hotel- and Internet-based; “foreign women” vs local populations, gay sex, trans sellers of sex, conventionally gendered women, etc. But some efforts to deploy indirect discrimination have had more success in making inroads into the application of the law than others. The game, if one is not interested in merely moving one’s sub-group up the sexual hierarchies of legitimacy and respectability is to attend to those who may be left out of the story and ensure that they are not “kicked to the curb.”⁷¹

b. Partial analyses of HIV criminalization laws (U.S.)

In the U.S., there are some 28 states (35+, depending on how you count enhanced punishment and/or aggravated felony statutes) which have HIV-specific criminalization laws.⁷² Social science research has demonstrated wildly uneven patterns of arrest: a few specific counties, for example in Michigan, Florida and California, produce almost all of the arrests.⁷³ In other states the laws are almost never used, or only used in “notorious” cases (which are often highly racialized, as in the case of the young black man accused of having sex with/potentially infecting some number of young white women.)⁷⁴ Notably, data on actual arrest practices (arrests, disposition, demographics of the arrested, etc.) are very hard to find across jurisdictions. What data there is, is highly local and almost always collected in ways that suggest that county arrest practices follow certain sub-group discrimination patterns, such as working through homophobia and primarily affecting men who have sex with men (MSM) and gay-identified men in Michigan,⁷⁵ or working through both racism and what Gail Pheterson referred to as the “whore stigma,” affecting almost exclusively women in California.⁷⁶ If we were to argue for highlighting the negative impact of these laws on MSM—which we certainly might want to do, to highlight the arbitrary, homophobic, and discriminatory nature of enforcement (and to a large extent, historical roots of the substance of these laws) and their undoubted effect on exacerbating stigma for MSM, we would miss—both as a matter of documentation and analysis of rights affected—their use on, and abuses experienced by women arrested and charged under the same laws elsewhere in the U.S.

⁷⁰ <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/peel-the-walking-while-trans-ban>; see also Kate Mogalescu, “Your Cervix is Showing: Loitering for Prostitution Policing as Gendered Stop & Frisk.” Univ of Miami L Rev (forthcoming)

⁷¹ Miller, Alice M., and Carole S. Vance. "Sexuality, human rights, and health." (2003): 5.

⁷² <https://www.hivlawandpolicy.org/resources/map-hiv-criminalization-united-states-center-hiv-law-and-policy-updated-july-2020>

⁷³ Hoppe, Trevor. "From sickness to badness: The criminalization of HIV in Michigan." *Social Science & Medicine* 101 (2014): 139-147.

⁷⁴ T. Shevory. Notorious HIV: The media spectacle of Nushawn Williams (University of Minnesota Press, 2004)

⁷⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5218970/>

⁷⁶ <https://williamsinstitute.law.ucla.edu/publications/hiv-criminalization-ca-penal/>

c. Sub-group status, disparate impact and the trouble with (partial) new norms

Because I am most interested in the ways we harness discrimination claims to the broader goal of law reform for all in sex regulation, my last sketched-out example draws from a “progressive” norm shift: the taking of consent to sexual conduct seriously. As articulated by women’s groups, the importance of consent to distinguish sex from rape has a long and storied history in women’s rights campaigning.⁷⁷ Notably, there has also been an effort to include both conventionally gendered men and trans* persons as rape victims: a push to gender neutral (regarding both perpetrator and victim in most but not all case), which is producing new documentation on the specific targeting of gay men/transwomen for rape.⁷⁸ In light of my concerns for attending to the differences governing sub-groups and their experiences of indirect discrimination, it is worth noting that the journey to inclusion of persons identified as men as rape victims has a very different trajectory to that of conventionally gendered women: recognizing men as rape victims at the hands of other men has meant recognizing a right to say yes to sex with men (i.e. distinguishing protected sex from criminal sodomy), whereas recognizing cis-gendered women as rape victims has meant recognizing a right to say no to sex (with men.)⁷⁹

In this effort, attention to what is “meaningful consent”—i.e., moving away from an assumption that women always say “yes” to sex, toward a substantive and contextually sensitive right to say no—has produced some new formulations of consent. In these new formulations, meaningful consent, sensitivity to context has begun to include a requirement that there be the transmission of key information, such as marital or HIV status of a sexual partner

This focus on meaningful consent has seen the migration of “informed consent” as a phrase in medical ethics of research participation move into inter-personal rights around sex, and into the business of the criminal law.⁸⁰ The notion of informed consent has proven dangerous already to one sub-group: what some advocates refer to as “having sex while trans*”—as a handful of cases suggest, including a number in the U.K. that “gender variance” can become a stand-in for gender fraud, with non-disclosure of one’s trans status a proxy for lack of [full and informed] consent.⁸¹

⁷⁷ Alice M. Miller with Tara Zivkovic, *Seismic Shifts: How Prosecution Became the Co-To Tool to Vindicate Rights* in Miller, Alice and Roseman, Mindy (eds) *BEYOND VIRTUE AND VICE: RETHINKING HUMAN RIGHTS AND CRIMINAL LAW* (Univ of Penn Press, 2019)

⁷⁸ HRW They Treated Us in Monstrous Ways at: <https://www.hrw.org/report/2020/07/29/they-treated-us-monstrous-ways/sexual-violence-against-men-boys-and-transgender>.

⁷⁹ Alice M. Miller, *What is the gender of conflict related sexual assault? An inter-disciplinary genealogy of current disputes*, *SEXUAL AND REPRODUCTIVE HEALTH MATTERS* (publication forthcoming).

⁸⁰ Carole S. Vance, “Interrogating Consent” #2 of *Global Dialogue, Criminalization, Choice and Consent* (CREA et al, Bellagio 2014) at: <http://www.creaworld.org/blog/global-dialogue-decriminalisation-choice-and-consent>

⁸¹ Sharpe, Alex. *Sexual Intimacy and Gender Identity' Fraud': Reframing the Legal and Ethical Debate*. Routledge, 2018.

This is a case of an effort toward progressive norm building in criminal law which harms through its partiality of sub-group origin.

II. Potentials for solidarity, gender 360 and fighting indirect discrimination in the name of fighting 'gender stereotype' for all

Protecting sub-groups who are harmed under apparently neutral statutes is a critical component of rights work. But it is, at least in my experience, a very tricky one, particularly as here where the issues are of sex and gender, and groups are seeking to make their gender and sexual differences both socially and legally knowable, and yet not legally problematic. This work is also tricky in that we are striving to differentiate and connect sex, sexuality, and gender systems, such that they are not conflated, but also that their connections are salient when appropriate, such as noting how men having sex with men are deemed to violate gender norms, just as women seeking to live alone without male partners are also violating gender norms. They face different systems of privilege and punishment, which vary again depending on age, race and place. Unfortunately, while it would seem these issues are connected, and that for example, concern with undoing gender stereotype and hetero-patriarchal privilege would be the business of a wide range of advocates, the actual advocacy is often very siloed: SOGI and/or LGBTQI+ rights, HIV/AIDS and rights, sex worker rights, GBV norms and rights of a wide range of affected persons (VAW/women's rights, children's rights, etc.).

a. the dangers of synecdoche for human rights campaigning

I believe that a clear-eyed review of these groups would note that they overlap in constituencies and demographics, but also that they tend to be defined by synecdoche: i.e. sub-groups which stand in for the whole, and in that standing in, crowd out other sub-groups.⁸² Of course, each sub-group needs visibility to get recognition for the specific manifestation of harm and barriers to effective rights protection—certainly this has been the story of much of SOGI+ work. But I think we also need more powerful, joined-up claims that focus on liberation from criminal regulation as the mode of social guidance. This is the argument for attending to how and what we document and its relation to others who are also affected but not caught by our fact patterns or our analytic frame.

b. Adultery decriminalization: an unexpected site of decriminalization tout court

⁸² Narayan, Uma, *Undoing the "Package Picture" of Cultures*, *Signs* 25(4): 1083- 86, 2000. Narayan uses the literary term synecdoche to analyze the way that in the 'rights vs culture' contests that arise so often in women's rights, aspects of complex and historically multi-faceted cultural regimes are reduced to a tiny set of practices, without which the culture and nation are said to be at risk.

Notably, in another area of criminal law there has been a fascinating and perhaps instructive alternative result. In 2012, the UN Working Group on Discrimination Against Women took a position favoring full de-criminalization of adultery, despite having received mostly evidence that it was women who were primarily and disparately affected by prosecution/threat of prosecution of adultery—even in countries where the adultery law was gender neutral.⁸³ The Working Group took this position because they determined that equalizing the adultery law (or calling for its equalization) across genders would always tend toward repression of basic rights of privacy and autonomy of everyone, including but not only of women as the subordinated group. It is not a fully coherent position as elaborated, but it is a practical and generous one, rooted, I think, in a feminist understanding of how gender stereotypes run deep and ultimately bind everyone in rights restrictive ways.

In closing, then, one way through the difficulties of searching for indirect discrimination that arises through the disparate and discriminatory application of criminal law is to embrace what some of us are calling a “gender 360 project,” which centers analysis and action on the fact that gender stereotypes are formed relationally: if we see gender, working through and with race, age and [dis]ability among the key vectors, as constructing hierarchies of inclusion/exclusion through role assignments based on ideas of masculinity and femininity *for all persons*, then we can see how if we change a norm of construction for femininity for persons deemed “women,” we may also be re-defining the reach of the gender norm of masculinity to them—and to others.⁸⁴ Thus, a “common voices/ all of us are affected, even if differently” analysis is the site from which I want us to think, with and ultimately through, not only frames of *disparate impact* but frames of *both/and* impacts.

⁸³ <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E>

⁸⁴ Fleming, P. J., Lee, J. G., & Dworkin, S. L. (2014). “Real Men Don’t”: constructions of masculinity and inadvertent harm in public health interventions. *American journal of public health*, 104(6), 1029-1035.]