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## Perils of Prosecution: "Standing Up" or Seeking Justice? (Review of VACHSS: *Sex Crimes*)

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## Book Review

### Perils of Prosecution: “Standing Up” or Seeking Justice?

SEX CRIMES. By Alice Vachss. New York: Random House. 1993.  
Pp. xi, 284. \$21.00.

Reviewed by *James P. Carey\**

To be a woman—in most societies, in most eras—is to experience physical and/or sexual terrorism at the hands of men. Our everyday behaviour reflects our precautions, the measures we take to protect ourselves. We are wary of going out at night, even in our own neighbourhoods. We are warned by men and other women not to trust strangers. But somehow they forget to warn us about men we know: our fathers, our acquaintances, our co-workers, our lovers, our teachers. Many men familiar to us also terrorise [sic] our everyday lives in our homes, our schools, our workplaces.

Women’s experiences of incest, battering, rape and sexual harassment become the sources for documenting all women’s actual and potential experiences. . . . In each case, a woman endures an invasion of self, the intrusion of inner space, a violation of her sexual and physical autonomy.<sup>1</sup>

Prosecutors cannot know what is “true.” Nor are they immune from the desire simply to win cases.<sup>2</sup>

For those who work in the criminal courts of large cities there comes a moment of initiation. It is an occurrence which is usually insignificant in itself, like reading a police report or listening to a

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1. Elizabeth A. Stanko, *Intimate Intrusions: Women’s Experience of Male Violence* 9 (1985).

2. Eleanor Swift, *Smoke and Mirrors: The Failure of the Supreme Court’s Accuracy Rationale in White v. Illinois Requires a New Look at Confrontation*, 22 CAP. U. L. REV. 145, 167 (1993) (footnote omitted).

witness, but it has the power of revelation. At this moment, a person realizes, "this is different; this is not like anything I have experienced; this is going to be harder than I thought."

For me this rite of initiation occurred in an elevator in the criminal courts building in Chicago. I had finished my second year of law school and was working for the summer in the states attorney's office. I rode the elevator up to a courtroom where I was assisting two states attorneys in a trial. The elevator was crowded, and as it rattled up I was almost overcome by a vile odor. I couldn't tell what caused the stench. As the elevator gradually emptied, however, I saw what I assumed was a policeman or lawyer holding a large cardboard box. The words "Murder" and "People versus John Doe" (I've forgotten the name) were written in large letters on the side of the box. Spilling just over the box brim was the source of the smell. The box contained evidence in the case, a bunch of clothes. The clothes were all heavily blood-stained. The smell of dried blood, I learned that day, is nauseating. It was that sensation, that sickening smell, that marked my passage into the world of the criminal courts.

Alice Vachss's book *Sex Crimes* produces the same sort of charge for us. It jolts us into awareness of a strange and horrifying world. She shocks us with the reality of sexual violence. We read of the four-year old girl who needs reconstructive surgery after the defendant rapes her. This defendant then brags to his girlfriend, "I just had a piece of ass and it was really tight" (p. 144). We meet Antoinette and her mother Daisy. Antoinette, fourteen, is raped in her own house by a man wielding a machete. She describes the aftermath: "The bed was messed up, filled with blood. It was . . . my goodness. It looked like a ransack" (p. 97). When Daisy comes home from work and encounters the assailant, he exhibits the bleeding Antoinette to her, and in a terrible instant Daisy knows that she has a choice: to resist and fight, or to submit to the madman and his fantasies. So, like the heroine in *Sophie's Choice* she pretends to enjoy the acts to save herself and her daughter from death. We learn about Laurie, who, from the age of nine, is forced by her father regularly to have sex with him; she is raped and sodomized (part 1, ch. 5). Laurie's mother is continually aware, complicit in the horror. Laurie has two abortions after her father impregnates her. Although a strict Catholic, she begins using birth control pills after the abortions, and is overcome with numbing guilt. Soon after beginning to take the pill, she suffers a stroke.

Vachss also shocks us with the systemic barriers to effective prosecution. Her unit, the Special Victims Bureau, was located in a rat- and roach-infested office that periodically flooded from the ceiling due to

clogged toilets one floor above. The staff had to carry umbrellas and maneuver among pails filled with standing water (pp. 167-68). Added to these extreme working conditions were the apathy of many of the lawyers and police officers, the laziness and vindictiveness of the judges, and the inertia and short-sightedness of the supervisors. Vachss claims that the greatest barrier to effective prosecution, however, was an attitude about rape, an attitude which she asserts is pervasive among those whom she alleges are "collaborators:"

There is a large, more or less hidden population of what I later came to call collaborators within the criminal justice system. Whether it comes from a police officer or a defense attorney, a judge or a court clerk or a prosecutor, there seems to be a residuum of empathy for rapists that crosses all gender, class, and professional barriers (p. 30).

*Sex Crimes* shocks finally with the vibrancy of indignation:

We have allowed sex crimes to be the one area of criminality where we judge the offense not by the perpetrator but by the victim. There *is* an essential difference between sex crimes and other crimes, but it has nothing to do with victims. Most other crime is in response to a need that the offense itself seeks to meet. (Some) people kill because they are angry. (Some) people steal because they want money. But as each rape is committed, it creates a greater need. Rape is dose-related—it is chronic, repetitive . . . and always escalating (pp. 278-79).

Alice Vachss served ten years in the Queens County, New York, District Attorneys Office, prosecuting sex offenses almost exclusively. She followed an unexpected path to success as a prosecutor, eventually earning a distinction in *Parade* magazine as one of "America's toughest prosecutors" (p. 69). After her graduation from Boston University she counseled Rikers Island inmates as a VISTA volunteer. Frustration with counseling led her to law school, an experience she found "unremittingly boring" (p. 10). Her first legal job after admission to the bar was as a public defender with the Manhattan Legal Aid Society where she specialized in assault cases. She gradually became disenchanted with processing cases in a large system. During a brief leave of absence to assist her husband in research for his book on juvenile violence, her incentive to be an agent of social change—to make a difference—reawakened. Her role as a case processor became intolerable. The last straw came when the Legal Aid Union Chief pressed her to pay union dues. For her refusal to pay, she was fired (pp. 17-18).

Thereafter she appears to have foundered, unsure of her direction. Taking a few criminal and family court cases proved only moderately

satisfying. It was during this period that she learned about a developing idea in the law: providing rape victims their own counsel (pp. 18-19). Her research into this idea led her to the realization that she wanted to fight against the violence she had observed as a counselor and public defender. She thought the prosecutor's office was the best place to wage this fight, and John Santucci, the new Queens County District Attorney, soon hired her.

Santucci hired her to prosecute sex crimes (pp. 26-29). Although he had created a Special Victims Bureau to deal with special categories of offenses, such as domestic violence and sex offenses, the Bureau only investigated and presented these cases to the grand jury; it did not try them. With the media in mind, Santucci felt he needed a woman to try sex cases. Vachss's trial experience and obvious motivation made her an ideal candidate. She was assigned immediately to the Supreme Court Trials unit, the unit trying felony cases. Over the ensuing three years she tried over one hundred cases, earning a promotion along the way to the Major Offenses Unit. Despite her success and growing expertise, she was increasingly frustrated with office politics. Her ambition had been to run the Special Victims Bureau, to transform it from a toothless investigative agency into an effective trial division. But Santucci ignored her repeated inquiries. Finally, as she neared the end of her three-year commitment, she decided to force his hand. She requested application papers for a judgeship. In the politically overheated atmosphere of the Queens District Attorneys Office, her seeking the judgeship without prior consultation or approval was extraordinary. Within days of her request for the application form, Santucci called her into his office and appointed her Chief of the Special Victims Bureau (pp. 159-60).

Ms. Vachss's tenure as an Assistant District Attorney was marked continually by clashes with Santucci and other superiors. The common thread to her relationship with them was, in her view, their narrow vision and instinct for political self-preservation at the cost of effective prosecution (pp. 140-41). Santucci retired under a cloud following his reelection in 1989. For a time his appointed successor, Richard A. Brown, seemed to hold out for Vachss and the Special Victims Bureau the promise of a new age of support for the work of the Bureau. A portent of the character of his regime, however, occurred when he reversed his decision, during his own election campaign, not to involve Assistant District Attorneys in the campaign. Although the attorneys were thus expected to participate, Vachss did not. As she tersely describes the events following Brown's election: "Three days after the election, the chief assistant called me into his

office. I was fired" (p. 273).

Like all good trial lawyers, Ms. Vachss organizes *Sex Crimes* around a thesis and uses several themes. Although the book has the virtue of portraying the true violence of sex offenses and the operation of a large urban prosecutor's office, it also raises some disturbing questions which are not likely to have been intended by the author. These questions arise out of her style and her choice of themes. The questions that these literary choices raise are not merely literary questions. They go to the core of the administration of justice. These questions are: What do we expect a prosecutor to be? What price is paid emotionally and psychologically by those who do this kind of work?

There are two metaphors in the book that particularly prompt these questions. Throughout the work, Ms. Vachss relies upon a boxing metaphor, apparently because she and her husband enjoy watching boxing matches and because she feels it captures the adversarial nature of her prosecutorial role. From virtually the first page she uses this device. As she describes one prosecution: "We had all the information we could ever want to convince us that Gary Glenn needed to go down for the count. But all the criminal justice system could do was keep him breathing hard on his stool between rounds" (p. 3).

She describes her boss, Santucci, as "short, with the build of a lightweight who had grown moderately fleshy over the years" (p. 26). The culmination of this sort of thing comes near the book's end, when she takes to heart her husband's advice: "The morning I had to sum up, my husband shook me awake. 'Alice, Alice.' He had one final piece of advice: 'Get out there and fuck him up.' I tried. It felt like it was my last day in the ring" (p. 264). Then, after she recounts her firing, we have her valedictory: "That's O.K.—they don't own the only ring. I'll find someplace else to go out there and fuck 'em up" (p. 273).

Another disturbing device is Ms. Vachss's references to dogs, to her own pets and to the dog that became the mascot of the Special Victims Bureau. While these vignettes might provide a human interest interlude to the rather chilling parade of sexual depredation, Vachss lends them a portentous, personal tone. She sees herself as a sort of "hound of justice." This strange metaphor can't be paraphrased; it needs quotation:

All of my dogs hate squirrels. For the most part, they have shown remarkable incompetence translating that reaction into action. My dogs range in deadliness from the feral intensity of Simba the junkyard dog to the huge, indomitable bulk of

Gussie, the Neapolitan mastiff. When it comes to protection work, their abilities are legendary, awesome. But one squirrel can reduce them to comical ineptitude: the junkyard dog spinning in frustrated circles of fury beneath a telephone wire supporting a safe and taunting squirrel; Bruiser the Rottweiler so engaged in the chase he literally overruns his astounded quarry, Honey the pit bull's joy when a miscalculated jump literally landed the squirrel at her feet—only to be liberated by the captor's dance of celebration. They all let something get in the way.

The one exception was Sheba, the Special Victims dog. Sheba hated squirrels as much of [sic] the rest of them. But as old and slow as she was, her wolf instincts would still surface when she saw one. Motionless, she would study the squirrel, absorbing its rhythm, understanding its essence. Then she would start to sway slowly from side to side, homing in on some fundamental kinetic truth about her prey, until the exact right moment when it was time to fake right, flash left, and arrive at where the squirrel was going before it got there.

Sheba had generations of encoded knowledge, to help her attune her mind to her enemy's movements. I had to learn about rodents by watching and studying (p. 77).

These two thematic choices accompany a consistently one-sided view of the criminal justice system. Since the early 1970s, the substantive and procedural law of rape has undergone dramatic changes, many of which Ms. Vachss mentions. Rape has itself been redefined so that the state no longer must bear the burden of proving beyond a reasonable doubt that the victim did not consent. Moreover, the definition of consent has been narrowed, typically with language requiring "freely given consent." Corroboration of the victim's testimony that she did not consent is no longer generally required, nor is proof that the victim resisted or that the defendant used such force that resistance would have been futile.

Several procedural developments have also facilitated rape prosecution. Hearsay exceptions have been expanded statutorily to make out-of-court statements by child victims admissible. Statements of any sex offense victim, regardless of age, made for purposes of diagnosis or treatment are admissible. "Rape shield" laws have limited the scope of cross-examination of victims of sex offenses. There have been changes in the method of presenting the testimony of child victims, both to the grand jury and to the trial jury. Videotaped testimony has been made possible in both settings. The prosecution has further benefited from recent scientific developments. DNA technology and

psychiatric syndrome evidence have come to play a significant role in sex offense prosecutions.

In spite of these developments, many of which Vachss relies upon herself, she is persistently disdainful of “technicalities.” She sneers at various rules of evidence, such as those restricting proof of other crimes and takes a passing, gratuitous shot at psychiatry. She describes the Diagnostic and Statistical Manual of the American Psychiatric Association (“DSM III-R”) as “a political document, revised to reflect societal attitudes about such issues as homosexuality, so there is no assurance that ‘rapism’ will not be included in future editions” (p. 157).

She recognizes the necessity of plea bargaining and certainly understands the role of defense counsel both during plea negotiations and at trial—after all she was a public defender. Yet her disdain for defense lawyers is scarcely concealed:

I have to admit that the defense attorneys I admire most are those who refuse to represent rapists and child abusers. Unless they’re public defenders, who [sic] they represent is their choice (p. 92).

Lawyers who find common cause with rapists are simply worms. Their clients are snakes. Both crawl on their bellies (p. 109).

Basically there are only three defenses to rape: 1. It never happened; 2. She consented; or 3. It wasn’t me. Defense attorneys *cold-bloodedly* select which of these three is most likely to fly in their particular case (p. 110 (emphasis added)).

One might think the selection of a theory of defense to be an essential part of the defense function, yet when defense lawyers make tactical decisions and resort to the evidence rules and pre-trial and trial stratagems, they are, in Vachss’s view, acting reprehensibly—they are “collaborators.” On the other hand, when she resorts to the same techniques, we are apparently to conclude that she is resourceful. She uses the law to see to it that an offender is denied bail (p. 56). She uses it so that a case is assigned to a judge whom she feels will provide her with a better chance for securing a conviction (pp. 88-89). During trial she stands near a defendant and touches his shoulder to show her fearlessness (pp. 135-36). She leaves an unloaded gun on the counsel table near the defendant so that the resulting panic in the courtroom impresses upon the jury the violent potential of the gun (p. 159). She prepares her witnesses carefully so that the emotional impact of their testimony is maximized (p. 138).

Certainly, we can argue about the appropriateness of these tactics,

the wisdom of certain evidence rules, or the value of DSM III-R. Ms. Vachss's opinion on these matters ought to be entitled to weight in light of her experience. But rather than treat these issues fairly, or at least concede their complexity, she subordinates all meaningful discussion by treating the issues with a tone of mockery.

What *do* we expect our prosecutors to be? Their job is very difficult, and, as Ms. Vachss demonstrates, many of their problems exist in their own camp. But we do expect prosecutors to maintain a certain disinterest even in the face of these evils. The prosecutor is to seek justice, and the constraints upon her behavior are explicit in most codes of Professional Responsibility. The American Bar Association Standards for Criminal Justice provide, in part:

(b) The prosecutor is both an administrator of justice and an advocate; the prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.<sup>3</sup>

The United States Supreme Court described the high standard that guides federal prosecutors in *Berger v. United States*:<sup>4</sup>

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.<sup>5</sup>

This sense of constraint was eloquently summarized by Justice Robert H. Jackson:

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.<sup>6</sup>

There is no basis in *Sex Crimes* to infer that Ms. Vachss abused her discretion, but one wonders about such a persistent, pervasive anger as reflected in her choice of the boxing and canine themes. Is it heroic

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3. STANDARDS FOR CRIMINAL JUSTICE Standards 3-1.1(b),(c) (1980).

4. 295 U.S. 78 (1935).

5. *Id.* at 88.

6. Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1940-41).

or has she assimilated to a degree the violence of those whom she is prosecuting?

What price do those who work within these systems pay emotionally? Can one become inured to the horror one sees, reads about, and hears each day? And what does it mean to become inured to this horror? Does one become apathetic like many of the lawyers and police officers whom Vachss describes? Or does one burn out in a kind of incandescent fury? Even Vachss found herself reduced to tears in court on two occasions (*see, e.g.* p. 138). *Sex Crimes* is important, then, not only for revealing to us the truth about these terrible offenses and their disposition within our justice system, but also for raising these questions about those whom we have empowered to protect us.

Ms. Vachss talks about "standing up." One of the young lawyers in the Special Victims Bureau had lost a case and was upset. Vachss sought to console her. She asked the young lawyer: Did you stand up? The lawyer was confused: Do you mean I was supposed to stand up when the verdict was read? No. What did you do afterward? The lawyer replied, "I walked over to the defendant and I pointed a finger at him and I told him, 'I'll see you again.'" Vachss then tells us: "So I told the ADA not to worry about it, she had stood up" (p. 164). When we think of prosecutor's standing up for us, do we envision this idle taunt of a defendant, or do we hope to see something closer to Justice Jackson's vision?

