

## SYMPOSIUM ON THE INTERNATIONAL LEGAL OBLIGATION TO CRIMINALIZE MARITAL RAPE

### WHY SEXUAL ASSAULT IN INTIMATE RELATIONSHIPS MUST BE CRIMINALIZED AS REQUIRED BY INTERNATIONAL HUMAN RIGHTS LAW: A RESPONSE TO THE SYMPOSIUM COMMENTS

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Ending the marital rape exemption in criminal law is a demand for legal equality and autonomy for women, rights that are enshrined in international human rights law. Drawing on international human rights law as a source of authority for challenging the marital rape exception in criminal law allows feminist and other social justice organizations, within their specific national and local contexts, to seek greater state action and accountability toward ending this form of violence against women and this violation of women's human rights. In this reply, we challenge the arguments in the symposium that oppose or caution against criminalizing sexual violence in intimate relationships as a necessary legal strategy, and that refute our view that ending the marital rape exemption is required by international human rights law.

#### *The Marital Rape Exemption has Profound Implications for the Legal Personhood and Equality of Women*

The marital rape exemption in criminal law has been condemned by women's movements in Europe and America from the late eighteenth century onward, forming a critical part of the strategy to challenge legal doctrines such as coverture that denied women a separate legal existence from their husbands, binding and absorbing them as their husband's property.<sup>1</sup> Similar legal concepts continue in the law and custom in some countries as witnessed in the persistence of marital rape exemptions even where extensive reforms have been made to address domestic and other forms of violence against women. As Fareda Banda points out in this symposium, practices such as brideprice (called *lobolo* in certain parts of Africa) entrench the notion of the wife as property of her husband and justify the husband's right to use his wife for sex, even without her consent.<sup>2</sup> The struggle to end legal impunity for marital rape, therefore, is inexorably bound to the larger struggle for women's equal human rights within intimate relationships and within society as a whole.

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<sup>1</sup> Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1506 (2000)

<sup>2</sup> Fareda Banda, "If You Buy a Cup, Why Would You Not Use It?" *Marital Rape: The Acceptable Face of Gender Based Violence: Comment on "Criminalizing Sexual Violence against Women in Intimate Relationships"*, 109 AJIL UNBOUND 321 (2016).

*Criminalizing Marital Rape is an Essential Element of Multifaceted Strategies Necessary for Ending Sexual Violence in Intimate Relationships*

We emphasized in our lead essay that criminalization should be only one aspect of the kinds of state responses to gendered violence that feminist human rights scholars and activists pursue.<sup>3</sup> Calls for criminalization are necessarily situated within a broader agenda for structural change and an improvement of the social, economic, and political conditions that allow for gendered violence in the first place. As Julie Goldscheid quite correctly observes in her response:<sup>4</sup>

[I]nternational human rights laws' due diligence framework requires a range of responses that include the obligation to prevent, protect, and provide redress, along with the obligation to prosecute and punish. Explicitly framing states' obligations in terms of that more comprehensive approach would reach broadly to address the cultural and social barriers that allow marital rape to continue without sanction.

In countries that have removed the marital rape exemption, including the United States, courts continue to differentiate between intimate partner and stranger rape by imposing heightened procedural and evidentiary requirements and lower sentences. Arrest rates for marital rape (absent any visible signs of physical violence) are low, prosecution rates infrequent, and convictions are extremely rare.<sup>5</sup> Efforts to end intimate partner sexual violence through criminalization still have a very long way to go before any serious critique of criminal excess can have traction. Robin West has eloquently noted elsewhere that

[the] limited success in abolishing the [marital rape] exemption reveals how short a distance women have come, and how far we have yet to travel, toward full equality and the necessary result of equality: an assurance that the state will provide a modicum of safety in our private lives against sexual assault.<sup>6</sup>

The fact that so much intimate partner sexual violence remains unremedied and its victims unassisted, makes the law in this area even more essential. Due diligence to criminalize marital rape does not stop merely at having a law on the books.

*The U.S. Domestic Violence Movement is Exceptional and its Consequences have to be Contextualized*

The criminal law experience in the United States, with the world's largest (and racialized) prison population,<sup>7</sup> provides an important cautionary tale for international and domestic human rights movements, compelling scrupulous awareness of the context in which particular demands are made, and their possible negative repercussions, especially on marginalized groups.

Women's rights movements take different organizational, ideological, and strategic forms at different times, in diverse contexts. In the United States, the movement to end domestic violence (as distinct from marital rape) took on particular forms resulting in legislation that had an inordinate emphasis on penal solutions with lesser attention to rehabilitation, structural inequalities, economic and class issues, and the position of racial-

<sup>3</sup> Melanie Randall & Vasanthi Venkatesh, *Criminalizing Sexual Violence against Women in Intimate Relationships: State Obligations Under Human Rights Law*, 109 AJIL UNBOUND 189, 190 (2015).

<sup>4</sup> Julie Goldscheid, *Considering the Role of the State: Comment on "Criminalizing Sexual Violence against Women in Intimate Relationships"*, 109 AJIL UNBOUND 202 (2015).

<sup>5</sup> Emily J. Sack, *Is Domestic Violence a Crime: Intimate Partner Rape as Allegory*, 24 ST. JOHN'S J. LEGAL COMMENT 535 (2010); Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law's Failure to Keep up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819 (2011).

<sup>6</sup> Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 11 (1990).

<sup>7</sup> See International Centre for Prison Studies, see, *Half of the world's prison population of about nine million is held in the US, China or Russia*, BBC NEWS; *The Prison Crisis*, ACLU.

ized, immigrant, and other marginalized groups.<sup>8</sup> But as Marie Gottschalk has observed, in other Western countries feminist advocacy against rape and domestic violence during the same period did not result in such “far-reaching penal consequences.”<sup>9</sup> Even in the United States, the antirape movement and domestic violence movements have had different trajectories.<sup>10</sup> Similarly, Sweden was one of the first countries in the world to remove the marital rape exemption in the 1960s yet comprehensive domestic violence and rape reform with more severe penal consequences happened only decades later.

Furthermore, criminalizing marital rape has not come even close to replicating the success (or failure) of criminal domestic violence laws. The U.S. experience may indicate risks of adverse consequences in particular contexts; this is however an insufficient basis on which to reject ending immunity for spousal sexual assault. Engaging law in general, and criminal law in particular, is always a process fraught with complications, setbacks and challenges. But this has never meant that the struggle for civil rights, equality, and human rights protection in law should be abandoned.

*The Potential Costs of Criminalization do not Outweigh the Discrimination and Human Rights Violations that Inhere in the Marital Rape Exemption*

West observes that “criminalization of anything—from recreational drugs to sedition to hate speech to sexual assault—carries costs, and . . . those costs are severe, both in terms of social resources expended and of lives damaged by virtue of the state’s punitive response.”<sup>11</sup> Questions assessing the costs of criminalization are crucial, but they are questions about how the criminal justice system is working and needs improvement, not about whether it should exist as an option for women sexually assaulted within intimate relationships.

Any new criminal law requires new regulatory measures in enforcement that might be seen to go “too far,” or “not far enough;” removing the marital rape exemption is not even new law, it only makes existing legal protections equally available to all women. The calculus of how far a law goes—or doesn’t—in practice holds for all regulatory regimes and cannot possibly render useless an essential measure like criminalizing marital rape to protect women’s basic rights.

West powerfully answers her own questions about the costs of *not criminalizing* marital rape in an earlier article:<sup>12</sup>

The marital [rape] exemption . . . is simply the most brutal of all possible expressions of the social inclination to trivialize women’s interest in physical and sexual security. Until women have physical and sexual security, both their public contributions and their private lives will be stunted, not only by personal fears, but by social and legal inferiority . . . . Women will not have that security until they have established their constitutional right to be equally protected against laws that encourage their psychic and sexual subordination and render them subject to private states of separate sovereignty. Conversely,

<sup>8</sup> Kimberle W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally about Women, Race, and Social Control*, 59 UCLA L. REV. 1418 (2012); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); Deborah Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 DUKE J. GENDER L. & POL’Y 221 (2013 2012).

<sup>9</sup> Marie Gottschalk, *Hiding in Plain Sight: American Politics and the Carceral State*, 11 ANN. REV. POL. SCIENCE 235 (2008); GOTTSCHALK, *supra* note 8, at 153–164.

<sup>10</sup> Gottschalk, *supra* note 9, at 139 (describing the differences between the antirape and battered women movements in the United States).

<sup>11</sup> Robin West, *Marital Rape, Consent, and Human Rights: Comment on “Criminalizing Sexual Violence Against Women in Intimate Relationships”*, 109 AJIL UNBOUND 189, 197 (2015).

<sup>12</sup> West, *supra* note 6.

when the law guarantees women that security, the gains will be immense. All women, married and single, and all men might learn what it means to live in a truly democratic home.

Answers to questions about the operation of the criminal justice system in relation to spousal sexual assault are not, therefore, dispositive of the normative and legal questions of whether immunity for spousal sexual assault should be ended.

*Criminalization Creates a Vital Option for Women and has Significant Progressive Effects*

It is a serious mischaracterization to claim, as Aya Gruber does, that the call for criminalization of marital rape represents a “one size fits all” model and involves “inflicting punishment on any private person for any violence, no matter how slight, with only the caveat that the victim is female.”<sup>13</sup> To the contrary, engaging criminal law to end sexual violence in intimate relationships calls for social and legal recognition of the harms of this expression of gender inequality and privatized gender domination, and is an *expansion* of legal remedies available to end it.

Critics of criminalization ignore what happens to women at the individual level and dismiss the fact that for some women, the ability to report intimate partner sexual violence to the police is a crucial potential source of relief.<sup>14</sup> Opponents of criminalization also appear to casually disregard the critically important question of how to deal with perpetrators of marital rape.<sup>15</sup> Yet this crucial question must be answered at both the social and individual levels.

Numerous surveys show how many women across the world routinely submit to unwanted sex by their husbands to avoid being subject to physical and emotional violence and to avoid bringing shame and disgrace within their family and societies.<sup>16</sup> The pressures to submit are clearly exacerbated when the law does not even recognize marital rape as rape.<sup>17</sup> One major multinational study shows that the mere presence of criminal laws has advanced efforts to strengthen women’s rights and combat violence against women.<sup>18</sup> This strengthening of women’s rights takes place both at the structural and social levels, and at micro-levels, in the context of individual women’s lives. Law’s significance cannot be discounted.

Do the critics of criminalization of intimate partner sexual violence seriously contend that marital rape should be or remain decriminalized and that the marital rape exception remain intact? What are the logical conclusions of arguing against criminalization of this form of gendered violence? Should aggravated assaults of women in intimate relationships or domestic homicide also be decriminalized because of the problems within the criminal justice system? As Lise Gotell aptly explains, “while criminal law reform has had contradictory effects, the absolute rejection of criminalisation strategies would only intensify the silence around

<sup>13</sup> Aya Gruber, *Zero-Tolerance Comes to International Law: Comment on “Criminalizing Sexual Violence against Women in Intimate Relationships”*, 109 AJIL UNBOUND 337 (2016).

<sup>14</sup> To take one example, shortly after sexual assault laws were revised in California, Frank Martinez, who kidnapped and brutally raped his wife, was sentenced to 16 years in prison. He would have received only 4 years had the marital rape exception not been removed just prior to his prosecution. See DIANA RUSSELL, *RAPE IN MARRIAGE* 362-366(1990).

<sup>15</sup> Lise Gotell also makes this point, see Lise Gotell, *Reassessing the Place of Criminal Law Reform in the Struggle Against Sexual Violence*, in *RAPE JUSTICE* 53 (Nicola Henry et al. eds., 2015).

<sup>16</sup> See Amnesty International, *Hungary: Cries Unheard: The Failure to Protect Women from Rape and Sexual Violence in the Home* (2007). R. v. MacFie, [2001] A.J. No. 152, 2001 ABCA 34 [Can.]; Kate Painter, *Wife Rape in the United Kingdom* 23 (1991).

<sup>17</sup> See Vasundhara Sirnate, *When Marriage Is Less than Sacred*, THE HINDU (June 24, 2015).

<sup>18</sup> Andrew Morrison et al., *Addressing Gender-Based Violence: A Critical Review of Interventions*, 22 WORLD BANK OBSERVER 25-51 (2007).

sexual violence as a systemic problem, re-privatizing sexual assault and risking the return of impunity for acts of sexual violence.”<sup>19</sup>

Opposing the criminalization of spousal sexual assault radically denies to women the very possibility of an important legal avenue. How can that be reconciled with respecting women’s choice and autonomy?

*Multiple National Supreme Courts have Recognized that Criminalizing Marital Rape is Obligatory Under International Law*

Barbara Stark is severely critical of us for using even the most basic of interpretative sources of international human rights law to make our argument that marital rape must be criminalized; Stark ignores the considerable consensus that these are authoritative sources of interpretation.<sup>20</sup> She further argues that we should have been more specific on the content of the obligation to criminalize marital rape, i.e. what is the exact kind of criminal legislation we are arguing for.<sup>21</sup> But the international human rights regime has always allowed for multiple ways to implement human rights obligations, allowing for contextualized applications while ensuring that implementations fit within a state’s obligation to protect, respect, and fulfill human rights and do not go against the object and purpose of the treaty.

While normative arguments about how to best ensure women’s equality and other rights may differ it is hardly controversial to point out that the marital rape exemption always violates women’s rights to equality and autonomy. However, in a baffling statement, in response to our claim that impunity for marital rape breaches the fundamental human rights to life, liberty, and security of the person, and to nondiscrimination and freedom from torture, Stark categorically replies: “No, it doesn’t.” She then selectively argues that marital rape may or may not violate certain specific rights (to health, life, and torture) under all circumstances, omitting other fundamental rights such as equal protection under the law, equality, and liberty which the impunity for marital rape violates, at least under any conceivable circumstances.

Furthermore, and contrary to Stark’s view that marital rape exceptions do not impinge international human rights instruments and binding principles, courts and states across the world have accepted that these exemptions are violations. The Supreme Courts of Nepal and Philippines are paradigmatic examples of recent judicial rulings that criminalizing marital rape is, in fact, obligatory under international law. The Nepal Supreme Court asserted that legal impunity for marital rape is a “discriminatory practice . . . against the provisions of the Convention on the Elimination of All Forms of Discrimination against Women and [the letter] and spirit of Articles 11(1), (2) and (3) of the Constitution of the Kingdom of Nepal.”<sup>22</sup> Similarly, the Supreme Court of the Philippines emphasized that marital rape impunity is a violation of Philippines’ international law obligations. It elaborated at length on the state’s commitments to the Convention on the Elimination of All Forms of Discrimination against Women and even the UN Declaration on the Elimination of Violence Against Women, concluding that “marriage is not a license to rape.”<sup>23</sup>

*Conclusion*

Criminal law remains a crucial avenue for seeking state accountability and ending impunity for a range of rights violations. Law and human rights movements exist in dynamic interplay. The demand for criminaliza-

<sup>19</sup> Gotell, *supra* note 15.

<sup>20</sup> Barbara Stark, *Does International Law Really Require the Criminalization of Marital Rape?*, 109 AJIL UNBOUND 332 (2016).

<sup>21</sup> A detailed exposition of our other disagreements with Stark’s article are beyond what space constraints allow.

<sup>22</sup> *Meera Dhungana v. His Majesty’s Government*, Writ No. 55 of the year 2058 BS (2006) (Nepal).

<sup>23</sup> *People v. Jumawan*, G.R. No. 187495, 722 SCRA 108 (Apr. 21, 2014) (Phil.).

tion of marital rape coexists with robust critiques of the effects and deficiencies of the criminal justice system.<sup>24</sup>

Engaging criminal law to further human rights does not reinforce “individualization and decontextualization,”<sup>25</sup> but articulates in the public sphere, that sexual violence in the private sphere is not to be tolerated. Criminalizing spousal sexual assault repudiates viewing women as men’s property within marriage, and rejects traditional, patriarchal social norms conferring upon men unmitigated rights of sexual access to women who are their spouses. Criminalizing marital rape is predicated on principles of equality and significantly moves towards establishing social norms of gender equality, consent, autonomy and sexual personhood for women.

<sup>24</sup> For an example of the debate among Indian feminists, see Saptarshi Mandal, *The Impossibility of Marital Rape: Contestations around marriage, sex, violence and the law in contemporary India*, 29 AUSTL. FEM. STUD. 255–272 (2014).

<sup>25</sup> See Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1069 (2015) (describing the “turn to international criminal law” by human rights advocates.)