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Zero-Tolerance Comes to International Law

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Citation Information

Aya Gruber, Zero-Tolerance Comes to International Law, 109 AJIL Unbound 337 (2016), [https://www.asil.org/sites/default/files/Gruber%2C Zero-Tolerance comes to International Law.pdf](https://www.asil.org/sites/default/files/Gruber%2C%20Zero-Tolerance%20comes%20to%20International%20Law.pdf), available at <https://scholar.law.colorado.edu/articles/407/>.

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SYMPOSIUM ON
THE INTERNATIONAL LEGAL OBLIGATION TO CRIMINALIZE MARITAL RAPE
ZERO-TOLERANCE COMES TO INTERNATIONAL LAW

*Aya Gruber**

It is difficult to engage from a theoretical perspective an advocacy piece that largely reads like a brief in favor of particular claim of law, namely, that a state's failure to (vigorously) criminalize marital rape violates international human rights law. In a brief, the litigant pulls together various sources to prove the legal claim is correct. Opponents typically respond by cobbling together their own sources to undermine that claim. In their essay, *Criminalizing Sexual Violence Against Women in Intimate Relationships*, Randall and Venkatesh set out to prove that international human rights law, *in fact*, requires states to criminalize marital rape.¹ I suspect there are international lawyers who can persuasively argue that international human rights law does not, *in fact*, require such criminalization.

The challenge is to separate the authors' theory from their strategy. Clearly, they have concluded that women all over the world would benefit from their governments prosecuting intimates for marital rape (defined as sex without "affirmative consent")² and that international human rights law is a good tool for compelling such government action. But one wonders whether the authors have elsewhere developed a convincing theory that a one-size-fits-all criminal approach to combating gender violence is better than local strategies tailored to the conditions of a particular place. One wonders whether the authors have calculated that the rightful concern for private men's power over women trumps other power differentials that may be exacerbated by their proposal—global North over global South, militarized over weak nation, government over citizen, police over individual, neoliberalism over distributive justice. One wonders whether the authors have grappled with the sociological and legal literature on how anti-gender-violence carceral schemes operate on the ground (and can disserve the women they are meant to aid).³ Have the authors simply made a strategic choice to advance a straightforward criminalization-everywhere argument because acknowledging complexity would ensure legal defeat?

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Originally published online 17 May 2016.

¹ Melanie Randall & Vasanthi Venkatesh, *Criminalizing Sexual Violence against Women in Intimate Relationships: State Obligations Under Human Rights Law*, 109 AJIL UNBOUND 189, 190 (2015).

² *Id.* at 194.

³ Cf. Prabha Kotiswaran, *Born Unto Brothels-Toward A Legal Ethnography of Sex Work in an Indian Red-Light Area*, 33 LAW & SOC. INQUIRY 579 (2008); LEIGH GOODMARK, *A TROUBLED MARRIAGE* (2012).

The Brief

In legal briefs, progressives sometimes make originalist arguments, feminists sometimes rely on stereotypical views of gender, and liberals sometimes embrace expansive state authority. Such strategic legal arguments can be costly, and therefore merit scrutiny. Feminist advocacy on transnational gender violence follows a surprisingly consistent pattern: (1) identify a broad, complex, and divergent set of behaviors as a type of brutal “violence against women,” often shorthand as VAW, (2) publicize statistics demonstrating the now-labeled phenomenon is widespread, perhaps an “epidemic” (aggregating broad, complex, and divergent behavior permits this), and (3) prescribe state-sponsored criminal enforcement—backed by the threat of international censure, economic sanction, or even military intervention—as the necessary and appropriate solution to the crisis.⁴ The authors to some extent adopt this strategy. They note that intimate partner violence is “the most common” form of VAW, that one in four women experience intimate partner “sexual violence,” and that many “assaulted women” are “forced into sex” by intimates.⁵ From this, they quickly transition to a condemnation of states (50 percent of them) that “do not explicitly criminalize sexual assault in marriage” and others that “retain exemptions” for spouses.⁶ Lack of adequate criminalization, in turn, “condones” and even “facilitates” the private violence.⁷

There are benefits and costs to this advocacy strategy. Calls to punish bad actors and spectacular narratives are persuasive and get things done, which can be good. Strong anti-marital-rape laws might improve women’s lives in, say, rural Uganda. (Then again, they might not.) But this rhetorical strategy also defines away the possibility of addressing women’s inequality in local, diverse, and nonpunitive ways: Being against VAW means being for criminal intervention. Those who do not support criminalization are not just nonfeminist, they are rape enablers. The empirical question of whether criminal law does actually reduce sexual violence (or the lack thereof promotes it) is entirely beside the point. To care about women’s safety and equality is, by definition, to support state violence directed against bad male actors. This ups the ante for a community that wants to devote its scarce resources toward economic programs for women rather than policing men, or for a feminist sociologist who wants to expose how criminal law made women in a certain community worse off. The rhetoric of feminist advocacy casts such communities and theorists in an ignoble lot with groups that forthrightly condone rape. The result is to discourage the open-minded from engaging in the conversation at all. Accordingly, like much of globalization, globalized feminism leaves out alternative perspectives and can create theoretically, analytically, and empirically impoverished policies.

All that said, the authors’ strategy is less crisis-speak than legal formalism. The essay largely identifies international instruments directing governments to secure a certain right through criminal law, argues that marital rape implicates that right, and concludes that international law requires marital rape criminalization. Some of these arguments, however, have disturbing implications. For example, the essay asserts that because marital rape threatens the nonderogable “right to life,” states must adequately criminally prohibit it.⁸

Why exactly does marital sex without affirmative consent amount to deprivation of the right to life? One answer is purely formal: Because courts have recognized rape and domestic violence as violations of the right to life, “rape in spousal relationships, by extension, necessarily also violates that right.”⁹ But there is no hint as

⁴ See Aziza Ahmed, *Trafficked? AIDS, Criminal Law and the Politics of Measurement*, 70 U. MIAMI L. REV. 96, 109 (2015). Cf. Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance*, 52 CURRENT ANTHROPOLOGY (SUPP. 3) S83, S85 (2011).

⁵ Randall & Venkatesh, *supra* note 1, at 189.

⁶ *Id.* at 189-90.

⁷ *Id.* at 190.

⁸ *Id.* at 191.

⁹ *Id.*

to which forms of domestic violence and rape violate the right to life and why. Does noninjurious coercive control or sex without consent count? Does any harm that one individual might cause to another “implicate” the right to life?¹⁰ Is the threshold for depriving life different for men and women, for intimates and nonintimates? Elsewhere, the authors assert that international law defines (any) violence against women as “torture.”¹¹ The authors cite an international study concluding that nations should “treat *all* forms of violence against *women and girls* as criminal offenses.”¹² Under the mantle of formal equality, the authors advocate a framework of state obligation to inflict punishment on any private person for any violence, no matter how slight, with only the caveat that the victim is female. The inherent violence of criminal punishment, the violence of masculinist and corrupt police who execute criminal programs, and the violence of states that respond to spectacular private VAW by devolving to retaliatory punishment regimes merit less concern.¹³

The second answer to why failure to criminalize marital rape violates the right to life is substantive. The authors argue that marital rape can cause “miscarriages, fistulas, and the contraction of potentially fatal sexually transmitted diseases, including HIV.”¹⁴ Are the authors arguing that the “right to life” necessitates criminal laws directed at preventing fetal termination and stemming sexual transmission of AIDS?¹⁵ Sex, unconsensual and consensual, in and out of a relationship, can cause miscarriages, fistulas, and disease. Indeed, the risk of unwanted pregnancy or STD might be greater for those who have consensual-yet-causal sex than those who have unconsensual sex within marriage. Similarly, the protection of fetal and maternal life could be used to justify antiabortion laws or state regulation of women’s reproductive health-related behavior.¹⁶ I do not deny that unconsensual marital sex, in addition to all its other problems, carries the risks of sex in general (STDs/AIDS) and to women in particular (pregnancy, complications). However, it seems unwise to equate individual acts that expose others to risks such as miscarriage and STDs with deprivations of the right to life.

The Normative Case

Notwithstanding the authors’ legal case that international law in fact mandates states to criminalize marital rape, there remains the question of whether such a mandate is desirable. To be sure, marital rape is destructive and reflects and reinforces patriarchy. Nevertheless, strategies for responding to marital rape should depend on the nature of the problem in the state where it arises. Consider Sweden, for example, where despite women’s achievement of near equality, rape rates appear disproportionately high.¹⁷ When the feminist critique of Sweden’s lax rape enforcement emerged several years ago, civil libertarians worried that it might move this highly egalitarian nation with a progressive penal system to follow the lead of other European

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (quoting Secretary General, In-depth study on all forms of violence against women, paras. 112-113 UN Doc. A/61/122/Add.1 (July 6, 2006) (emphasis added).

¹³ See Neha Thirani, *Debating the Death Penalty for Rape in India*, N.Y. TIMES BLOG (Dec. 28, 2012); Alissa J. Rubin, *Flawed Justice After a Mob Killed an Afghan Woman*, N.Y. TIMES (Dec. 26, 2015).

¹⁴ Randall & Venkatesh, *supra* note 1, at 191.

¹⁵ See Aziza Ahmed, *Feminism, Power, and Sex Work in the Context of HIV/aids: Consequences for Women's Health*, 34 HARV. J. L. & GENDER 225, 228 (2011).

¹⁶ Cf. Álvaro Paúl, *Controversial Conceptions: The Unborn and the American Convention on Human Rights*, 9 LOY. U. CHI. INT’L L. REV. 209, 210 (2012). See Andrea D. Friedman, *Bad Medicine: Abortion and the Battle over Who Speaks for Women's Health*, 20 WM. & MARY J. WOMEN & L. 45, 46 (2013).

¹⁷ Ruth Alexander, *Sweden's rape rate under the spotlight*, BBC NEWS MAGAZINE (Sept. 15, 2012).

states that had become increasingly punitive.¹⁸ Today, we can add concerns about how feminist critique of rape permissiveness might dovetail with the anti-immigrant sentiments of the far right.¹⁹

In the United States, marital rape is a subset of the larger domestic violence (DV) problem, for which most Americans already profess zero tolerance.²⁰ Today, every state in the United States has exceptional prosecution rules for DV, ranging from mandatory arrest to no-drop policies. DV arrests typically result in multiple misdemeanor charges against defendants, often followed by guilty pleas in exchange for probation or short jail sentences, setting in motion a revolving door scenario involving unemployment, break-up and reconciliation, issues with children, loss of subsidized housing, and possible deportation.²¹ Sometimes this cycle is good, for example, if jail induces the abuser to reform or empowers the woman to become independent. Often it is not, and today many feminist commentators regard zero-tolerance DV policies with a healthy degree of skepticism.

Within this system, criminalization of marital rape may increase the power of prosecutors to compel guilty pleas because they can threaten a serious felony charge. But prosecutors hardly need more leverage securing DV plea bargains. Indeed, charging marital rape will not incentivize (and may further disincentivize) reluctant victims to report and testify about abuse. Further, broad criminalization of marital rape has the potential to affect people who are not in abusive relationships. A regime requiring affirmative consent for each instance of marital sex will render a lot of sex between married people criminal.²² Some of this prohibited sex will occur in abusive relationships, but some will not. Some of the sex will be forcible or otherwise repugnant, but some will not. We might hope that the affirmative consent regime will deter forcible sex, without affecting married people who engage in acceptable sex-without-a-yes. However, married women who experience coerced/forcible/repugnant sex generally have remedies under existing laws. Thus, in the United States, outside of DV cases, lack-of-affirmative consent legal claims may arise most frequently in the context of nasty divorces.

Finally, marital rape might be an issue of the developing world (or segments of the developed world), where oppressed women are forced to enter into horrible marriages, marked by violence, dependence, and lack of alternatives. Sex occurs in these marriages, not to mention pregnancy, child bearing, and back-breaking domestic labor. This is what the authors appear to envision in their passionate calls for criminalization. Nevertheless, generally criminalizing sex-without-affirmative-consent within marriage seems like a questionable method of addressing forced marriage, when compared with other proposals.²³ First, express consent is meaningless when compulsion is omnipresent.²⁴ Moreover, many of these women are subject to “structural gender inequalities,” as the authors recognize.²⁵ It is hard to imagine that a woman who faces “ongoing threats of violence, dishonor, or stigma; removal of economic support and shelter; polygamy; and other social pressures” will somehow be moved by rape law to finally seek state assistance against her hus-

¹⁸ Apparently, Sweden did pass new rape laws, but did not generally become more punitive. See *Sweden tests rape law amid surge of attacks*, THE LOCAL (Dec. 4, 2013); Erwin James, *Why is Sweden closing its prisons?*, THE GUARDIAN (Dec. 1, 2013).

¹⁹ See Sue Reid, *Torn apart by an open door for migrants: Sweden is seen as Europe's most liberal nation, but violent crime is soaring and the Far Right is on the march*, THE DAILY MAIL (Nov. 13, 2015).

²⁰ See GOODMARK, *supra* note 3; Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007).

²¹ See GOODMARK, *supra* note 3; Gruber, *supra* note 20.

²² People often signal consent nonverbally rather than affirmatively. See Terry P. Humphreys & Mélanie M. Brousseau, *The Sexual Consent Scale—Revised: Development, Reliability, and Preliminary Validity*, 47 J. SEX RES. 420, 421 (2010) (citing studies).

²³ See *New Research from the Population Council Shows Child Marriage Can Be Delayed*, POPULATION COUNCIL (Aug. 12, 2015).

²⁴ See Robin West, *Martial Rape, Consent, and Human Rights: Comment on “Criminalizing Sexual Violence against Women in Intimate Relationships”*, 109 AJIL UNBOUND 197 (2015).

²⁵ Randall & Venkatesh, *supra* note 1, at 195.

band, especially given the embarrassment of sexual disclosure.²⁶ In addition, faith in corrupt and sexist police forces to fairly enforce such laws and not penalize women seems misplaced. Perhaps the authors envision a regime that cabins police discretion through mandatory arrest and prosecution provisions, but such provisions may produce more backlash than change and harm the economically/socially dependent women forced to prosecute. Thus, victim-initiated rape prosecution seems an unpromising avenue of state intervention in forced marriage.

The three situations described above are all bad, but they are *different*. And one can question whether rigorous marital rape prosecution will helpfully address the harms involved. I have played out these scenarios as hypotheticals, and there is a possibility that the authors have an evidence-informed sense of the likely distributional effects of their proposal in a multiplicity of scenarios. But I suspect not. Criminalization occupies a privileged space in feminist reform efforts, and concerns over racialized mass incarceration and reform's "unintended effects" on marginalized people are simply a footnote—a brief caveat in the push for criminal laws that are "necessary to signal" condemnation of VAW.²⁷ But this "expressivist" argument grants virtually unfettered authority to states to enact illiberal, discriminatory, and disproportional punishment schemes on the ground that those schemes communicate "strong condemnation" of individual bad behavior.²⁸ Moreover, policing and prosecution regimes express other messages, such as "racial and political . . . message[s] about who is in control and about who gets controlled" and messages about the nature of crime as matter of individual violence rather than of larger social and economic inequality.²⁹

The authors characterize criminalization as "only a first step" in addressing the problem, with a later step being no less than "the eradication of institutional and cultural structures, practices, and norms that entrench male dominance."³⁰ But it seems that eradicating patriarchy is a much better, though more difficult, pursuit than "message-sending" criminalization. In certain communities, criminalization will undermine women's material well-being. In certain communities, police and prosecutors are a large part of the "institutional and cultural structures, practices, and norms that entrench male dominance."³¹ Given criminal law's built-in costs, why do the authors regard it as a remedy of *first resort*—as "the only way that women's universal rights to security and liberty are meaningfully protected"?³²

Criminal law theorizing often manifests a "punitive impulse" reflecting cultural inculcation that "criminal law [i]s a legitimate, if not the preferred, response to harms attributable to bad individuals." This impulse "can lead even those who, as a philosophical matter question state authority . . . [to] embrace punitivity for whatever they consider true harm."³³ However, the less feminism tolerates weak criminal enforcement against bad individual actors, the more it tolerates hypermasculine policing and punishment. The more it tolerates war—the ultimate manifestation of male dominance—waged in the name of the responsibility to protect women from bad men. I hope that conversations like this one will open up a space where feminist commitment to antisubordination and nonviolence is measured, not by the strength of one's anger, condemnation, or authoritarianism, but by one's openness to exploring the many and heterodox ways to effect positive change.

²⁶ *Id.* at 196.

²⁷ *Id.* at 195.

²⁸ *Id.* See Aya Gruber, *A Provocative Defense*, 103 CAL. L. REV. 273 (2015) (critiquing expressivism).

²⁹ Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 168 (2001).

³⁰ Randall & Venkatesh, *supra* note 1, at 196.

³¹ *Id.* at 195.

³² *Id.* at 194.

³³ Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3223 (2015).