SYMPOSIUM ON THE INTERNATIONAL LEGAL OBLIGATION TO CRIMINALIZE MARITAL RAPE

MARITAL RAPE, CONSENT, AND HUMAN RIGHTS: COMMENT ON "CRIMINALIZING SEXUAL VIOLENCE AGAINST WOMEN IN INTIMATE RELATIONSHIPS"

*Robin West**

Randall and Venkatesh's important essay *Criminalizing Sexual Violence against Women in Intimate Relationships* is a breakthrough in our understanding of human rights, rape, and the institution of marriage, and the intersection of the three.[1] Rape within marriage, the authors argue, strips its victims of multiple human rights, and therefore any state's refusal to criminalize it is a violation of international law. However, more than half the countries in the world, according to the authors, fail to explicitly criminalize rape or sexual assault within marriage (which I will sometimes call "marital rape" in this comment). In this comment I will first briefly elaborate on the authors' thesis, emphasizing what it tells us about the meaning, respectively, of "marriage," "rape," and "law." I will then register three objections, or qualifications, to their argument.

So, what does the continued existence of "marital rape exemptions" in so many of the world's criminal codes signify regarding marriage, rape, and law respectively? On marriage, it means just this: in those countries that fail to criminalize marital rape or meaningfully enforce the prohibition, to be "married" essentially *means* that a wife is by virtue of her status available to her husband for forced sex whenever and however imposed, regardless of the presence or absence of either her consent to, or desire for, either the sex itself. Moreover, although the authors don't dwell on the point, the wife is by virtue of this status available to her husband for the pregnancy that is its highly possible outcome where birth control is unavailable or not used, and, of course, the birthing, the maternity and the mothering that is the result of that pregnancy, where the same is true of abortion services. Being married, then, in countries with the marital rape exemption, means that one's body is essentially boundary-less, or porous, and one's own will is irrelevant with respect to sexual penetration by one's husband and impregnation with his offspring. Likewise, in countries that fail to criminalize marital rape, the criminality of something called "rape" in their criminal codes *doesn't* mean that unwanted forcible or nonconsensual sex is understood to be a serious crime warranting significant punishment; rather, it means that forcible or nonconsensual sex with a woman *not one's wife* is understood to be a crime—the status of being married strips one of the protection from the state against violent and forced sex, with respect to one's husband. This much is widely understood, at least by feminist reformers and scholars of marital rape laws.

What Randall and Venkatesh show in their article is that *law itself*, by virtue of a broad array of international and regional rights documents, is overwhelmingly clear that this status quo constitutes a violation of the individual human rights of wives. Therefore, they conclude, the states' failures to criminalize marital rape, and to

* *Frederick J. Haas Professor of Law and Philosophy, Georgetown University Law Center.*

Originally published online 07 January 2016.

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

thereby protect wives against violent sexual assault by their husbands, constitute an illegal failure to provide equal protection of their domestic criminal law against private violent assault, and to provide due diligence against human rights violations by private actors. Those states are accordingly in violation of international law. If the authors are right, we are left with a profound historical paradox: the institution of marriage, beloved through much of history and most recently thoroughly sentimentalized and romanticized in equal rights campaigns seeking to secure marriage as a fundamental human right for gay and lesbian couples—is *itself*, by definition, and quite profoundly, a human rights violation. That paradox, in turn, is not just a puzzle. Rather, it has profoundly harmful consequences, most of which Randall and Venkatesh catalog. Their article is an important first step toward resolving the paradox, and addressing some of its harms.

Although the piece promises and accomplishes much, it leaves some questions unanswered. Let me mention three. The first concerns the causal connection between marital rape and women's subordination. Marital rape exists within nested circles of coercion—circles that are difficult to understand, much less unravel. In short, it is simply not at all clear what causes what. Are women as economically and politically disenfranchised as they are, in part *because* they are so physically disempowered at home, and then unprotected by the state against that violation? Does women's subjection within marriage to the unchecked physical and sexual violence of their husbands constrict not only their physical and moral integrity within the marriage, but also their vision, their potency, and their sphere of plausible impact as citizens in the public world? How does legal marital rape contribute causally to the subordination of women? One can easily construct such a causal story: a person whose role and identity is to be physically available to another, might well lack the physical self-sovereignty required of a liberal subject in a liberal world, and will hence come to play a minimal role in that public sphere. Or, what seems at least on first blush more plausible, does the causal chain go the other way: are women physically and sexually subordinated in the home because of their lack of economic and political power outside of it? Does marital rape occur precisely because women lack economic alternatives to domestic life, and the political power to force the state to protect them from it? One can readily construct this causal story as well: because of their economic dependence on men, and their lack of participation in the public sphere, married women as a group can neither abandon the homes that sustain them and on which their biological existence depends, even if those homes also shroud the violence that harms them. Nor can they mount the legal campaign that would prompt legal change.

It's fair to note that this question—whether marital rape and domestic violence are causes or consequences of subordination—has divided feminists for two centuries, not just two decades.[2] And because the nature of the relation is in fact unclear, it is also not clear what the impact of the marital rape exemption itself (as opposed to the impact of marital rape) is on women's subordination, and in women's day-to-day life, and what the impact would be of repealing it. To what degree would criminalizing marital rape lower the incidence of marital rape? And, were the incidence lowered, to what degree would that in turn prompt greater participation by women in public life and in economic markets? The authors don't suggest that these questions require answers. But they do. Criminalization of anything—from recreational drugs to sedition to hate speech to sexual assault—carries costs, and as critics of rape law propounding decriminalization much note, those costs are severe, both in terms of social resources expended and of lives damaged by virtue of the state's punitive response. It's imperative to ask what the felt benefits in women's lives might be of this attempt to further the reach of the criminal law into the conditions of marital life (in addition (perhaps) to the symbolic or psychic gains noted above).

The second and related problem is definitional, and concerns how rape, and hence marital rape, is to be defined. The problem is alluded to toward the end of the essay. Rape, the authors argue, concurring in the views of the majority of rape law reformers the world over, should be defined starkly as nonconsensual sex

[2] See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L.J. 1373 (2000).

rather than as forced or violent sex, and it should be understood to be a crime against the physical integrity, autonomy, equality, and liberty of the woman who is raped, not as a crime against morality, culture, family, or society. Furthermore, the "consent" required for sex to be clearly legal, both in marriage and outside of it, should be "affirmative consent" rather than implied or implicit or passive consent; unless a woman affirmative consents to sex, all parties should understand her to have withheld consent, rendering the sex nonconsensual and therefore rape. There are good reasons to worry, however, that the affirmative consent standard might overshoot the mark, as a number of critics of that reform position now argue.[3] But entirely aside from the *merits* of the affirmative consent requirement itself as a definition of rape, the particular reason Randall and Venkatesh give for requiring affirmative consent is telling.[4] The presence of overwhelming coercion, the authors contend, from a community and state that condones marital rape, to the gender inequalities in the marriage relationship, to "threats of violence, dishonor or stigma, removal of economic support and shelter, polygamy and other societal pressures," implies that affirmative consent, rather than passive or implied consent, is "arguably the only way that women's universal rights to security and liberty are meaningfully protected." Whether or not the authors are right to endorse the reform position favoring affirmative consent as definitive of rape, *this* argument for that position, I submit, is peculiar.

The presence of all of these societal pressures—threats of violence, of stigma, the removal of economic support, gender inequality in the marriage and a community that condones or supports marital rape—one would think, would render meaningless *any* act of consent that follows, whether affirmative or implied. "Consensual" sex, even if the consent is "affirmative," in the context of coercive threats of violence, dishonor, stigma, removal of economic support, or shelter, would surely be as problematic, as disempowering, as damaging, as painful, and as unpleasurable as marital rape—and might also be indistinguishable from it. In other words, if sex is coerced in marriage because of these conditions, adding the requirement that the sex be "consensual," in order for it to be legal, and even affirmatively consensual, won't address either the harms done by either the sex itself, or the underlying coercive conditions.

In fact, an affirmative consent standard might go a considerable distance toward *legitimating* all of that coercion, and if so, it might worsen those conditions by rendering them all the more beyond purview. Or it might trivialize the problem: were we to define "rape" as "sex without affirmative consent," we might indeed wind up with a world with much less rape, but only because we've defined "legal sex" as including a meaningless coerced ritual in which a would-be victim mouths a meaningless utterance, rendering the sex legal. But there's just no reason to think that, if the underlying coercive conditions don't change, wives won't "consent" to forced and coercive sex, just as affirmatively and frequently as they today "submit" to that sex, where they have no other palatable choice. This may not be true all the time—an affirmative consent requirement might prevent some of this coercive sex from happening—but it's surely true much of the time. If so, the political capital expended in the campaign to criminalize marital rape will have been arguably for naught: the same sex, under the same conditions, with the same harmful consequences, would be rendered fully legal in reform jurisdictions by a trivial insistence on verbal consent, which can't possibly be any harder for a rapist to accomplish than a rape itself.

One solution to this "definitional difficulty," recently argued with great persuasiveness by Scott Anderson, and which I have endorsed (with some qualifications) elsewhere, would be to define rape as "coerced sex" rather than either nonconsensual sex (as reformers argue) or forced sex (as it is traditionally defined).[5] If rape

[3] See Jed Rubenfeld, *The Riddle of Rape By Fraud*, 122 YALE L.J. 1372 (2013); Scott Anderson, *Conceptualizing Rape as Coercion Sex*, ETHICS (forthcoming).

[4] Randall and Venkatesh, *supra* note 1, at 194.

[5] Anderson, *supra* note 3; Robin West, *Rape, Consent and Coercion*, JOTWELL (forthcoming).

is defined as "coerced sex," rather than consensual sex (regardless of how consent is then defined) those background conditions of coercion to which the authors allude are very much "on the table," in full view—they are in effect part of the definition. And, consent, with all its conceptual difficulties, is no longer part of the definition of rape (although it may come in as a defense). Such a definitional shift would carry its own problems, but it might nevertheless be a substantial improvement, at least in our understanding of what rape is, and what makes it both gendered and harmful. It is not, Anderson argues, the presence or absence of consent that renders sex either innocuous (or pleasurable) or injurious, but rather, the presence or absence of *coercion*. Consensual sex might be coerced, which makes it at least morally problematic—including the consensual sex that occurs in the coercive conditions the authors note. And nonconsensual sex might for various reasons not be coerced, rendering it relatively innocuous. In my view, this "coercion-focused" definition of rape holds much promise, particularly in the context of marital rape, possibly precluding problems stemming from both the over-inclusiveness of consent-based definitions stressed by some of their critics, and the possible under-inclusiveness problem, which I've stressed here.

The definitional difficulty centering on consent suggests the third and final problem with the authors' thesis. When women, whether married or not, have been forced to have sex to which they do not consent, they have been raped. In reform jurisdictions in which the marital rape exemption has been abolished, that rape, outside of marriage and inside it as well, is a criminal act, from which would-be victims should be protected and for which perpetrators punished. Were the state to do so, both inside and outside of marriage, there would presumably, at least arguably, be less rape, and that would be a significant step toward women's equality, for all the reasons Randall and Venkatesh suggest. But just as the joke goes regarding the financial world—that the problem is not with what's criminal, but rather, with what's legal—here too, the problem with both heterosexual sex and marriage might rest with what's legal rather than what's criminal, even were the exemption to be repealed worldwide and marital rape affirmatively criminalized everywhere. Nonconsensual sex is a monstrous problem in women's lives. Nevertheless, the magnitude of that problem, with respect to the conditions of women's inequality, may be dwarfed by a larger psycho-sexual reality, and that is the almost unfathomable extent of the unwanted, painful, and oftentimes harmful sex to which women *do* give unambiguous consent, both in and outside of marriage, and both of the affirmative and implied variety. Women consent to sex (again, no matter how defined) for some of the very reasons the authors list: if they don't, they face expulsion from a household on which they depend, or they face a potentially violent partner, or at best an irritated partner who won't cooperate in household tasks. Young unmarried women in liberal societies consent to unwanted sex because of peer pressure or the press of status, and married women, throughout the world, consent to unwanted sex within marriage because of a religious obligation to do so, or because of implied threats of violence, or because of community pressure, or because they have never fathomed the possibility of the relevance of their own desires and pleasures—and hence the relevance of their lack of desire or pleasure—to their decision to do so. None of these background conditions makes the consent that is given in light of them any the less "real"—any more than background conditions of economic coercion make the consent given by an employee to low wages and bad working conditions unreal. But, the consent given does not, in turn, render the sex any the more pleasurable, or in the extreme, less harmful.

That unwanted, undesired, often painful, and often harmful sex, to which women consent, both in and out of marriage, can be harmful. Unwanted sexual intrusion into a woman's body diminishes a girl's or a woman's physical integrity: her boundaries are literally compromised, with her consent, but against her desires. It diminishes her moral integrity if she lies to herself and others about the role of sex in her married or adult life. Most important, when a woman or girl relinquishes her body to another for the pleasures of another rather than her own, she profoundly diminishes her own self-sovereignty. She gives it away, in effect, when she gives her body. And, ultimately, she diminishes her autonomy, when she turns not just her body but a good bit and perhaps all

of her adult life over to the task of mothering the children that are the result of that unwanted sex. Particularly in a liberal world that expects individuals to maximize their own interests and pleasures and desires by choosing that which pleases them, by so fundamentally putting their own choices regarding their bodies at odds with their own desires, they likewise cast themselves as at odds with the assumptions of their culture, state, and law. When women consent to the use of their body in a way that maximizes the pleasures and satisfies the desires of someone other than themselves, and they do that repeatedly over years, they cast themselves as illiberal subjects in a liberal empire.

For that harm to even come into focus, much less begin to change, marital rape exemptions must be repealed, as the authors urge. Recognizing that those exemptions are *themselves* illegal, as the authors claim, would indeed be a sea change: such a recognition puts law and its expectations on the side of women who are raped, rather than on the side of their abusers. Nevertheless, for the consequence of that change to not backfire, the coercive conditions within which those rapes occur must be addressed. A world in which marital rape is recognized as criminal, but all else remains constant, may become a world in which sex in marriage becomes, by enforced ritual, consensual. For that consent to be meaningful, however, it must not only be "affirmative," it must not be coerced. And, for marital sex to not be coerced, the conditions that thrust women into marriages not of their own choosing and not in their own interest must change as well.