

# Articles

## Criminality and Sexual Morality in New York, 1920-1980

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This article will examine some remarkable cyclical movements in the law dealing with rape, prostitution, pornography, homosexuality, and gender-related violence in New York State from 1920 to 1980.<sup>1</sup> By focusing on this single state, which for most of the period under study was the most populous state and the economic and cultural leader of the nation, the historian can examine both familiar leading cases and lesser-known cases in the state's highest court, as well as the often revealing work product of intermediate and trial court judges, who at times

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1. This article is part of a more general study of the legal history of New York between 1920 and 1980. The scope of the larger study dictates, in part, the coverage of this article. Gender violence, which some scholars see as related to the sex crimes discussed herein (see, for example, Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* [Cambridge: Harvard University Press, 1987], 85-92), is included because the criminal law dealing with it developed in ways parallel to the law dealing with sex crimes. Sexual harassment, which is also seen as related, see *ibid.*, is not included because it did not become a subject of legal control until the very last years of the period under study, see *ibid.*, 103, 251, and even today it remains a subject for civil rather than criminal jurisdiction.

responded more openly than higher-court judges to social and cultural attitudes and pressures. Moreover, New York was in one important respect more typical of the nation than any other single state: with its metropolitan center on the Atlantic coast, its upstate industrial cities little different from those of the Midwest, its expanding suburbs, and its rural farmlands and environmentally protected woodlands, New York contained locales similar to those in all the rest of the nation except the Deep South and the Far West. One would accordingly expect to find a wider variety of the socio-political forces that shape law in New York than in other jurisdictions. Of course, those forces would converge differently in New York than elsewhere, and the end legal product molded by them would differ: for example, social forces emerging out of the metropolitan center would have much greater weight in New York, where the City typically contained nearly half of the state's population, than in the nation at large, where New York City has never equalled even five percent of total population. When adjustments are made for these differences in configuration, however, the findings that emerge from this study about how socio-political forces influenced the law's treatment of sexual immorality and gender-related violence in New York can serve as preliminary hypotheses about more general national developments, at least until scholars examine in similar detail the law governing sexual behavior in other states such as California, Texas, and a Southeastern state like Georgia.

The story begins simply enough, with a summary in Part I of legal doctrine in the 1920s and 1930s. Although liberal breezes blew on occasion during these two decades, New York judges, whose attitudes reflected, however imperfectly, those of the broader culture from which they were drawn, tended to keep a tight lid on speech, publications, and movies that referred even obliquely to sex. During the same years most judges also adopted a tough stance toward prostitution, even to the extent of occasionally upholding convictions of the male customers of prostitutes. The New York judiciary likewise showed no interest in giving homosexuals freedom to pursue their sexual practices. Until the 1940s, judges routinely defended conventional Victorian morality for the twin purposes of preventing "disorder and anarchy" and protecting "our women and children."

During and after World War II, changes began occurring in the law dealing with sex offenses and gender-related violence. Part II will show how doctrinal changes, especially in the rules of evidence, led by the 1960s to substantial decriminalization of prostitution and private, consensual homosexual behavior. Legislation produced essentially the same result in cases of wife battering and other family violence. In the case of pornography, much decriminalization resulted from federal constitutional adjudication. Finally, in the law of rape, procedural and eviden-

tiary decisions led to practical decriminalization except in the case of rape by strangers.

Part III will begin to explore the deeper concerns of this essay. The article is organized around a central insight that during the 1940s, 1950s, and 1960s, seemingly disparate developments in the law of homosexuality and gender-related violence were linked to each other, and to developments in the law of rape, prostitution, and pornography, by a judicial commitment to conferring sexual freedom on individuals, even when that freedom was carried to excess. Again reflecting the culture of which they were a part, New York judges evidenced their commitment to sexual freedom not only by recognizing the legitimacy of "recreational sex," but even more by refusing to punish men who carried their freedom to violent excess by committing either rapes or serious bodily assaults on women. In cases such as these, judges tended to trivialize the harm that was done, to understand the violence as a product of "circumstances over which" men had "no control," and to express concern with saving the potential of men to lead useful lives. By taking this approach, judges effectively legitimated men's power to dominate women physically and sexually.

In these middle decades of the century, few objections were raised to this pattern of domination of women. By the 1970s, however, a new feminist movement had been born, and women had begun to demand equality, freedom, and an end to domination by men. What, however, did these demands mean?

Throughout the 1950s and into the 1960s, equality had been a coherent idea, at least in American legal and constitutional thought. In cases such as *Brown v. Board of Education*,<sup>2</sup> courts had defined equality to require that a persecuted group be granted the same rights that the dominant group already possessed. If a white student with certain specified qualifications had a right to attend a particular school, a black student with the same qualifications had to be granted the same right to attend that school. The assumption underlying *Brown* was that granting the same rights to blacks that whites already enjoyed would put an end to structures of racial domination.

Liberal feminists in the late 1960s, like the leaders of the civil rights movement, hoped to confer practical freedom and equality on women by granting women the same rights that men already enjoyed. In the eyes of more radical feminists, however, such a strategy would achieve neither practical freedom nor true equality. In order to free women from the threat of physical domination in the form of rape and gender-related assaults, more radical feminists wanted to restrain aggressiveness on the part of men. Radical feminists also saw pornography and prostitution as

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2. 347 U.S. 483 (1954).

mechanisms that taught men to view women as objects over which to exert sexual domination, thereby encouraging male aggression.

Radical feminists holding such views wanted to extend the law prohibiting rape, prostitution, pornography, and gender assaults. To the extent that self-interest on the part of men dictated that they be free to engage in some of these activities, or at least not be severely punished if they overstepped legitimate bounds, radical feminists articulated a competing self-interest on the part of women in reducing or eliminating male freedom. Furthermore, they demanded that women's interests in controlling male sexuality be given preference when they conflicted with men's interests in sexual freedom.

With some feminists campaigning to ensure that women received the same treatment as men, with others seeking to put an end to male physical and sexual domination, and with most men standing for the status quo, the coherence that had characterized the law of sexual and gender relations in the 1950s and early 1960s evaporated. Part IV, which returns to the analysis of statutory and doctrinal development in these areas of New York law, will display the emerging confusion. In particular, this section will show that when feminists of all political stripes, together with conservative protectors of conventional morality, agreed on the need for legal change, as they did with regard to the law of rape and family violence, the law moved dramatically in the direction of recriminalization. On the subjects of prostitution and pornography, however, where liberal feminists continued to support decriminalization while radical feminists joined conservatives in seeking recriminalization, little doctrinal change occurred. And where, as in the case of homosexuality, radical feminists joined libertarians in favoring decriminalization, conservatives in New York lost, and a constitutional right to engage in private, consensual sodomy was proclaimed.

### I. THE PERPETUATION OF VICTORIAN STANDARDS, 1920-1940

The reported New York cases from the 1920s and 1930s establish beyond doubt that the era was one of continuing, and perhaps even expanded, judicial enforcement of Victorian sexual norms.<sup>3</sup> The law dealing with pornography, prostitution, homosexuality, rape, and gender-related violence performed two functions during the decades in question. First, it gave effect to a widely shared societal moral code that directed respectable, upper-class people like judges to restrain themselves from engaging in, reading about, or even discussing the sexual activities

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3. A possible exception was *People on Complaint of Savory v. Gotham Book Mart*, 285 N.Y.S. 563, 567 (Magis. Ct. N.Y. County 1936), in which a magistrate found "unwelcome" the idea of "a judge-made list of what people should or should not read." One other case made a passing reference to the belief of some individuals, other than the judge, that prostitution should be decriminalized. See *People v. Anonymous*, 292 N.Y.S. 282, 286 (Magis. Ct. Kings County 1936).

considered in this essay. Second, it turned to criminal sanctions in an effort, the success of which cannot be perfectly measured, to prevent "the great lower class" from breaching sexual norms and thereby "poison[ing] society all around them."<sup>4</sup>

Although a loosening of sexual standards may have occurred in society at large during the 1920s,<sup>5</sup> strong pressures for legal enforcement of Victorian sexual norms remained. The 1920s were the decade of Prohibition, which reformers hoped would result, among other things, in a reduction of male violence against wives and children.<sup>6</sup> Indeed, the advocates of Prohibition were even hopeful that it would "stimulate a vast process of national purification" that would include "the sublimation of the sex instinct upon which the next stage of progress for the human race so largely depends."<sup>7</sup> The early years of the decade were also a time when the Committee of Fourteen, a New York anti-vice group, sent private investigators out to monitor places of prostitution and sought legislation to facilitate the arrest of the male customers of prostitutes.<sup>8</sup> They were also part of the era during which medico-legal experts were creating and imposing a new allegedly inferior status of homosexuality upon those who engaged in sex acts with individuals of their own gender—acts that at an earlier time had been understood, like adultery, as merely sinful rather than indicative of a person's fundamental identity.<sup>9</sup> Societal hostility to homosexuality thus continued unabated.<sup>10</sup>

Societal pressure for the suppression of pornography also endured. The New York Society for the Suppression of Vice, founded by Anthony Comstock and led by him until his death in 1915, remained active into the 1930s in seeking legislation against pornography, in instituting court cases, and even in burning confiscated literature.<sup>11</sup> Over sixty books were banned in Boston in 1927, while as late as 1938, new anti-vice orga-

4. Quoted in Paul S. Boyer, *Purity in Print: The Vice-Society Movement and Book Censorship in America* (New York: Scribner, 1968), 4. On the class aspects of the law's repressive policies during the 1920s and 1930s, see *ibid.*, 3-10, and Barbara Meil Hobson, *Uneasy Virtue: The Politics of Prostitution and the American Reform Tradition* (New York: Basic Books, 1987), 163.

5. See John D'Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* (New York: Harper & Row, 1988), 222-48, 256-60; and Kevin F. White, "The Flapper's Boyfriend: The Revolution in Morals and the Emergence of Modern American Male Sexuality, 1910-1930" (Ph.D. diss., Ohio State University, 1990), 318-91.

6. See Linda Gordon, *Heroes of their Own Lives: The Politics and History of Family Violence, Boston, 1880-1960* (New York: Viking, 1988), 141-46.

7. Robert A. Woods, "Prohibition and Social Hygiene," *Social Hygiene* 5 (1919): 137, 144.

8. See Thomas C. Mackey, *Hammer at Vice: The Use of Law for Moral Reform and the Changing Business of Prostitution in New York City, 1900-1932* (forthcoming).

9. See John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (Chicago: University of Chicago Press, 1983), 10-20; George Chauncey, Jr., "Christian Brotherhood or Sexual Perversion? Homosexual Identities and the Construction of Sexual Boundaries in the World War I Era," in *Hidden from History: Reclaiming the Gay and Lesbian Past*, ed. Martin B. Duberman, Martha Vicinus, and George Chauncey, Jr. (New York: NAL Books, 1989), 294.

10. See D'Emilio, *Sexual Politics*, 22.

11. See Boyer, *Purity in Print*, Illustration no. 7.

nizations, like the National Organization for Decent Literature, were still being formed.<sup>12</sup> Thus, it is not surprising that even in the late 1930s, when one New York judge took note of a 40 percent increase in sex offenses in 1936 and a 110 percent increase in 1937, he saw a need for a "drive today against sex perverts, all forms of vice engendered by loose morals, and even positive degeneracy."<sup>13</sup>

The view just expressed was not unusual. As future Senator Robert F. Wagner argued, the struggle against vice demonstrated the need for laws for the protection of women and children similar to those that had saved them "from exploitation by the unscrupulous employer."<sup>14</sup> Judges felt duty-bound to prevent any "lecherous swing causing a corruption of the moral tone of the[se] susceptible members' of the community."<sup>15</sup> They felt they had a right to expect that the general tone of morality in America would be at least equal to that of earlier cultures such as nineteenth-century Paris.<sup>16</sup> Their goal was to elevate moral standards to an even higher plane, with less vice and crime,<sup>17</sup> and thus they were always concerned that "those who are subject to perverted influences"—the "immature, the moron, the mentally weak, or the intellectually impoverished"—"might be aroused to lustful and lecherous practices."<sup>18</sup> Indeed, some judges seem to have viewed sex outside the context of a monogamous marriage as so "despicable"<sup>19</sup> that they hesitated even to speak about the topic.

*People v. Clark*, from which the language just quoted was drawn, will illustrate. The *Clark* case was a prosecution for attempted rape in which the district attorney asked the following questions on recross-examination:

Q. Are you the fellow when she was up at the Hotel Niagara with another boy to a dance, that tucked under the windshield wiper of his car, a little envelope saying, "For Mary," with a couple of c \_\_\_\_\_ (contraceptive appliances) in it? A. No, sir.

12. See Felice Flanery Lewis, *Literature, Obscenity, and Law* (Carbondale, Ill.: Southern Illinois University Press, 1976), 102, 135-36.

13. *Ultem Publications v. Arrow Publications*, 2 N.Y.S.2d 933, 937 (Sup. Ct. N.Y. County 1938).

14. *People v. Seltzer*, 203 N.Y.S. 809, 813 (Sup. Ct. N.Y. County 1924).

15. *People v. Friede*, 233 N.Y.S. 565, 569 (Magis. Ct. N.Y. County 1929), quoting *Liveright v. Waldorf Theaters Corp.*, 221 N.Y.S. 194, 196 (App. Div. 1st Dep't 1927). As in this note, references for quotations within the cited source will be provided whenever available. In some notes below, however, such references cannot be verified and are, accordingly, not given. Typically, though not invariably, unverifiable references are to trial testimony or other material contained in trial records.

16. See *Halsey v. New York Soc'y for the Suppression of Vice*, 234 N.Y. 1, 13 (1922) (dissenting opinion). For another, later case in which sexual attitudes in New York were compared with those in another city, see *People v. London*, 63 N.Y.S.2d 227, 231 (Magis. Ct. N.Y. County 1946), in which the magistrate rejected "a bedroom view of the sex life and the sex abnormalities of the peculiar type of human animal that flourishes in the lush regions of Hollywood and Southern California."

17. See *Halsey*, 234 N.Y. 1, 6.

18. *Friede*, 233 N.Y.S. 565, 568.

19. *People v. Clark*, 2 N.Y.S.2d 433, 434 (App. Div. 4th Dep't 1937).

Q. Are you the fellow who did that? A. No, sir.

Q. Are you the fellow who, the night before last, appeared on her father's lawn and left a couple of c\_\_\_\_\_ (contraceptive appliances) on his lawn? \* \* \* A. No, sir.

In the court's view, the mere recital of these questions, which implied that "the defendant was guilty of the despicable conduct which they suggest," was so prejudicial that it required reversal of the defendant's conviction.<sup>20</sup>

The notion that the mere mention of sex was something in which respectable people like district attorneys and judges ought not even engage was repeated again and again in judicial opinions of the 1920s and 1930s. In *People v. Hall*,<sup>21</sup> a case of attempted sodomy in which the court gave vent to its passion against the "abnormal perversion" and against a defendant who "had a passion toward his own sex that was unnatural," the "nature of the case preclude[d] a discussion of the facts" which alone could answer the question of "[w]ho would [possibly] commit such a crime."<sup>22</sup> In *Hall*, of course, the court was merely following the ancient common law view about the unspeakable quality of homosexual behavior, but in other cases judicial reticence extended to a broader variety of sexual matters. The most plausible reading of the text of *People v. Clark* suggests that condoms were a subject unfit for judicial mention, while in *Halsey v. New York Society for the Suppression of Vice*,<sup>23</sup> the dissenting judge, at least, found it inappropriate "to spread upon our pages all the indecent and lascivious part[s]" of the book the Society was seeking to suppress.<sup>24</sup> Similarly, in *People v. Berg*,<sup>25</sup> the Appellate Division declined to name the book it was suppressing or to describe its contents, so as not "to excite the curiosity of the prurient."<sup>26</sup>

The sense of shock at the mere mention of sex, together with the belief that those who flouted conventional standards of sexual morality or used sex for commercial gain were degenerates and perverts, were essential to the law's efforts to repress sexual freedom during the 1920s and 1930s. The language quoted in the preceding paragraphs makes it clear that judges during the two decades in question had no empathy for anyone who violated conventional sexual taboos; the judges believed the behavior of such people to be so different from their own that they had no difficulty condemning violators as members of an evil, lower class worthy of imprisonment. Few doubted the ultimate good and verity of the conven-

20. *Ibid.*, 434.

21. 16 N.Y.S.2d 328 (Jefferson County Ct. 1939).

22. *Ibid.*, 329-30.

23. 234 N.Y. 1.

24. *Ibid.*, 12.

25. 272 N.Y.S. 586 (App. Div. 2d Dep't 1934), *aff'd*, 269 N.Y. 514 (1935).

26. *Ibid.*, 587.

tional standards, and thus the desirability of protecting the public from anyone in the lower class who might undermine them.

One important mechanism for so protecting the public was movie censorship. No movie could be shown in New York until it received a license from the Motion Picture Division of the Board of Regents, and whenever licenses were denied to movies which emphasized the carnal side of the sex relationship, the denials typically would be judicially affirmed.<sup>27</sup> Thus, a license was denied to a picture that portrayed "the nervous, emotional and mental state of the wife arising because of the impotence of the husband, and the consequent unbalanced moral character and indiscretions of the wife," on the ground that such a movie was "immoral" and would "tend to corrupt morals."<sup>28</sup>

Even motion pictures with an arguably educational or polemical content were sometimes subjected to the repression of the censor. One such picture was "The Naked Truth," which traced the lives of three individuals from boyhood to manhood, portrayed the dangers and results of "association with lewd women," and showed a male and female in the nude, along with the progress of different venereal diseases and the effects thereof.<sup>29</sup> An even clearer case occurred with the censorship of "Tomorrow's Children," described in a dissenting opinion as a forceful and dramatic argument against the enactment of statutes which, under certain circumstances, permitted forced operations to prevent procreation.<sup>30</sup> The movie portrayed, among other things, a "poverty stricken feeble-minded family" submitting to sterilization in exchange for help, a young woman sentenced to the operation being released only on the sudden discovery that "there was no law permitting the mutilation of her body against her will," and a judge "discharging a frenzied, moronic, sexual pervert, upon the intervention of a 'Senator' exerting political influence on the court." On these facts, the censors and the majority of the reviewing court found that the "reproductive organs are the theme and their perversion is the topic of the picture"; the majority concluded that "Tomorrow's Children" was "devoted to an illegal practice, which is . . . immoral and reprehensible according to the standards of a very large part of the citizenry of the state."<sup>31</sup>

Efforts to censor theatrical performances also occurred and generally met with success. Although the license of a theater could not be revoked for performing a play which the Commissioner of Licenses found

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27. *Eureka Productions v. Byrne*, 300 N.Y.S. 218 (App. Div. 3d Dep't 1937), *leave to appeal denied*, 276 N.Y. 688 (1938).

28. *Mayer v. Byrne*, 10 N.Y.S.2d 794, 795 (App. Div. 3d Dep't 1939). For a later case sustaining censorship of a book that told the same story, see *People on Complaint of Sumner v. Dial Press*, 48 N.Y.S.2d 480 (Magis. Ct. Richmond County 1944).

29. *Public Welfare Pictures Corp. v. Lord*, 230 N.Y.S. 137 (App. Div. 3d Dep't 1928).

30. *Foy Productions v. Graves*, 3 N.Y.S.2d 573, 578 (App. Div. 3d Dep't), *aff'd*, 278 N.Y. 498 (1938).

31. *Ibid.*, 574-75, 577.

improper,<sup>32</sup> the Commissioner could refuse to renew the theater's license.<sup>33</sup> The theater could also be subjected to criminal prosecution.<sup>34</sup> The courts did "not propose to sanction indecency on the stage," to let down "the bars against immoral shows,"<sup>35</sup> or to sanction nudity or other performances "calculated to exploit the excitation of lustful and lecherous desires."<sup>36</sup>

Books were likewise subject to censorship throughout the 1920s and 1930s, although occasional breaks occurred in the otherwise solid wall of repression. The most important break took place in the 1934 case of *United States v. One Book Entitled Ulysses by James Joyce*.<sup>37</sup> Augustus Hand, joined by his cousin Learned Hand, held that, with literature as with science, a book could not be judged obscene "where the presentation, when viewed objectively, is sincere, and the erotic matter . . . does not furnish the dominant note of the publication."<sup>38</sup> Any other test, Hand argued, "would exclude much of the great works of literature" and prove "stifling to [artistic] progress."<sup>39</sup> Nonetheless censorship remained the dominant approach to pornographic publications. As Judge Manton, who dissented in the *Ulysses* case, wrote:

[S]tatute[s] against obscenity [exist] for the protection of the great mass of our people. . . . [L]iterature exists for the sake of the people, to refresh the weary, to console the sad, to hearten the dull and downcast, to increase man's interest in the world, his joy of living, and his sympathy in all sorts and conditions of men. Art for art's sake is heartless. . . . The people need and deserve a moral standard; it should be a point of honor with men of letters to maintain it. Masterpieces have never been produced by men given to obscenity or lustful thoughts. . . . A refusal to imitate obscenity or to load a book with it is an author's professional chastity.<sup>40</sup>

Other judges agreed, observing that the "Code of Morality or Decency . . . is as old as the World itself and does not change" and that it "would sanction the destruction of all law to give to individuals . . . the privilege of having their violations of the law adjudged by standards made by themselves and labelled 'our time.'"<sup>41</sup> Accordingly, the Appellate Divi-

32. See *A.H. Woods Theatre Co. v. Gilchrist*, 192 N.Y.S. 417, *reargument denied*, 192 N.Y.S. 421 (App. Div. 1st Dep't), *aff'd*, 233 N.Y. 616 (1922).

33. See *Bonserk Theatre Corp. v. Moss*, 34 N.Y.S.2d 541 (Sup. Ct. N.Y. County 1942).

34. See *People v. Wendling*, 258 N.Y. 451 (1932).

35. *Ibid.*, 455 (dictum).

36. *Bonserk Theatre*, 34 N.Y.S.2d 541, 548.

37. 72 F.2d 705 (2d Cir. 1934).

38. *Ibid.*, 707.

39. *Ibid.*, 708. In *People v. Miller*, 279 N.Y.S. 583 (Magis. Ct. N.Y. County 1935), another judge allowed circulation of an allegedly obscene book on the ground that "the public concept of decency has changed" and "the task of the judge is to record the tides of public opinion, not to emulate King Canute in an effort to turn back the tide." *Ibid.*, 584-85.

40. *U.S. v. Ulysses*, 72 F.2d 705, 711.

41. *People ex rel. Kahan v. Jaffe*, 35 N.Y.S.2d 104, 106-07 (Magis. Ct. N.Y. County 1942).

sion refused to permit the sale of *Hands Around*, a book of short stories that, as described by the court, commenced with a prostitute and ended with a prostitute and consisted, according to the book's advertising, of "psychological studies of the interplay of sex and keen analysis of the sophisticated modern soul." On this description, the court found the book "a lewd, lascivious, indecent, obscene and disgusting book."<sup>42</sup>

Nothing, however, appears to have rankled judges of the 1920s and 1930s as much as nudity, which they viewed as a species of obscenity. One Supreme Court Justice indicated his support for legislation designed "to prevent the publication, distribution, and sale of lascivious or obscene prints and publications, the tendency of which is to excite lustful desire," refusing to protect the copyright of a magazine containing "pictures of girls clad with nothing but underwear and stockings" and stories with "the general theme of sex and sex relations."<sup>43</sup> In another case, a court found that a photograph of a woman reclining in the nude with the lighting effect so arranged that "the woman's busts and private parts were brought into prominence" was "unquestionably . . . a 'provocative picture.'"<sup>44</sup> Nudity, as one judge summed up the matter, could not "but offend against all sense of public decency" since "the parading of persons . . . naked, in public places, would raise thoughts of lasciviousness and lust."<sup>45</sup>

The extent to which discussion of sexual matters was repressed emerges in especially sharp light in the case of *People v. Swasey*,<sup>46</sup> which involved the conviction of one George Swasey for advocating repeal of the section of the Penal Law prohibiting the giving of information concerning birth control. The reviewing court had no doubt that "[u]nder certain circumstances and at certain times language may undoubtedly amount to disorderly conduct," especially "where children are present" and where "the nature of the subject-matter discussed and the impropriety of discussing it in the presence of children" may cause mere speech "to produce a breach of the peace."<sup>47</sup> In the case at bar, the court reversed the conviction of Swasey only because "the police officers placed

42. *People v. Pesky*, 243 N.Y.S. 193, 194-95 (App. Div. 1st Dep't), *aff'd*, 254 N.Y. 373 (1930). *Accord*, *People v. Spiegel*, 222 N.Y.S. 614 (App. Div. 1st Dep't), *rev'd* on other grounds, 246 N.Y. 638 (1927). For cases in which printed matter was found not obscene, see *People v. Brainard*, 183 N.Y.S. 452 (App. Div. 1st Dep't 1920) (prosecution of president of Harper & Bros. for unknown book); *People v. Larsen*, 5 N.Y.S.2d 55 (Ct. Spec. Sess. Bronx County 1938) (magazine story on childbirth); *People v. Viking Press*, 264 N.Y.S. 534 (Magis. Ct. N.Y. County 1933) (prosecution of publisher of Erskine Caldwell's book *God's Little Acre*).

43. *Ultem Publications*, 2 N.Y.S.2d 933, 934-36.

44. *People v. Smith*, 300 N.Y.S. 651, 652 (App. Div. 1st Dep't 1937), quoting *People v. Fellerman*, 276 N.Y.S. 198, 199 (App. Div. 1st Dep't 1934). *Accord* *Freedman v. New York Soc'y for Suppression of Vice*, 290 N.Y.S. 753 (App. Div. 1st Dep't 1936), *aff'd*, 274 N.Y. 559 (1937); *People v. Fellerman*, 276 N.Y.S. 198 (App. Div. 1st Dep't 1934), *aff'd*, 269 N.Y. 629 (1936).

45. *People v. Burke*, 276 N.Y.S. 402, 411-12 (App. Div. 1st Dep't 1934) (dissenting opinion), *aff'd*, 267 N.Y. 571 (1935).

46. 180 N.Y.S. 629 (Ct. Gen. Sess. N.Y. County 1920).

47. *Ibid.*, 630-31.

a mistaken interpretation upon the language used by the defendant, . . . did not accurately report it, . . . [and] clearly did not understand" it.<sup>48</sup> In other cases where the police did their work properly, however, the courts sustained convictions of defendants who, for example, distributed advertisements about cures for venereal disease<sup>49</sup> or engaged in lewd dancing.<sup>50</sup>

Efforts to protect public decency even trod occasionally upon core political speech. In *People v. Baylinson*,<sup>51</sup> for example, the defendant, who was secretary of the Society of Independent Artists, was convicted of outraging public decency for displaying at an exhibition at the Waldorf-Astoria Hotel a painting of the scene at the wedding feast at Cana, where Christ is said to have turned water into wine. The painting also showed "the likeness of ex-Congressman Volstead," standing "with his right hand upon the Saviour's shoulder, his left directing attention to the vessels of wine, one of which lies broken upon the floor," while "the contents of another [were] being spilled out by William Jennings Bryan." Although the Appellate Division found the painting in "bad taste" and "sacrilegious," it nevertheless reversed Baylinson's conviction because there was no "proof that public decency was [actually] outraged" or that Baylinson had any power to prevent the picture from being displayed.<sup>52</sup>

Another instance of repression of ideas occurred when a trial judge annulled the appointment of the eminent British philosopher, Bertrand Russell, as a professor of philosophy at the City College of New York, because of Russell's "notorious immoral and salacious teachings" and his consequent lack of "good moral character."<sup>53</sup> The immorality charged was that Russell, in his books, saw no harm in masturbation, homosexuality, adultery, or, indeed, in any private sexual activity that did not result in the birth of children, even when college students engaged in the activity.<sup>54</sup> The trial judge's opinion, which had been entered in a taxpayer's suit against the College's governing board, became final when the City Corporation's Counsel, at the behest of Mayor Fiorello LaGuardia, refused to appeal it,<sup>55</sup> and the appellate courts refused to allow independent counsel to intervene on behalf of either Russell<sup>56</sup> or the College.<sup>57</sup>

The other subject of intense criminal regulation during the 1920s and

48. *Ibid.*, 630.

49. See *People v. Morris*, 18 N.Y.S.2d 448 (App. Div. 2d Dep't 1940).

50. See *People v. Vickers*, 19 N.Y.S.2d 165 (App. Div. 2d Dep't 1940).

51. 206 N.Y.S. 804 (App. Div. 1st Dep't 1924).

52. *Ibid.*, 806-08.

53. *Kay v. Board of Higher Educ. of N.Y.*, 18 N.Y.S.2d 821, 826 (Sup. Ct. N.Y. County 1940).

54. *Ibid.*, 827-31.

55. See Horace M. Kallen, "Behind the Bertrand Russell Case," in *The Bertrand Russell Case*, ed. John Dewey and Horace M. Kallen (New York: Viking Press, 1941), 13, 22-23.

56. See *Kay v. Board of Higher Educ. of N.Y.*, 20 N.Y.S.2d 1016 (App. Div. 1st Dep't), *leave to appeal denied*, 21 N.Y.S.2d 396 (App. Div. 1st Dep't), *leave to appeal denied*, 284 N.Y. 578 (1940).

57. See *Kay v. Board of Higher Educ. of N.Y.*, 20 N.Y.S.2d 898 (App. Div. 1st Dep't), *leave to appeal denied*, 23 N.Y.S.2d 479, 24 N.Y.S.2d 986, and 25 N.Y.S.2d 792 (App. Div. 1st Dep't 1940).

1930s, along with film and book censorship, was prostitution. Many of the prostitution cases dealt with technical questions,<sup>58</sup> but others raised more trenchant issues. *People v. Anonymous*,<sup>59</sup> for example, held directly that a male customer of a prostitute could not be found guilty of the crime of prostitution. But this view did not prevail easily. The judge who reached it did "not argue that this attitude was just or fair" toward women, and he also recognized that "in the interest of the public health, it would have been wiser to bring the male participant . . . under some sort of governmental supervision."<sup>60</sup> And another judge held that arresting prostitutes while freeing their customers amounted to "an unjust discrimination" that could no "longer be permitted to continue." In this judge's view, "[m]en caught with women in an act of prostitution are equally guilty, and should be arrested and held for trial with the women."<sup>61</sup> The question whether to arrest male customers was resolved only when the legislature refused to pass a bill mandating such arrests.<sup>62</sup>

The need to prosecute customers in order to eliminate prostitutes nevertheless seemed obvious, given the fact that prostitution was "a system" through which men "by the use of money and other valuable considerations" become "enabled to largely coerce and control the will of unfortunate women" and thereby to "dominate" those women.<sup>63</sup> Indeed, judges of the 1920s and 1930s could become quite emotional in cases such as *People v. Kramer*,<sup>64</sup> in which a man fraudulently told women that he was a representative of a major motion picture house and offered to secure for them "lucrative employment in moving pictures." Although the defendant planned "to gratuitously gratify his lust with them" as "an incident in his general scheme" for exploiting the women, his "basic purpose was to deliver the unfortunate[s] . . . to prostitution." In the court's incensed view, a "meaner or viler form of debauching persons seeking employment [was] hard to imagine."<sup>65</sup>

In view of concerns such as these for protecting women and preserving

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58. Such as the sufficiency of the evidence that the defendant had prostituted herself: compare *People v. Lorraine*, 196 N.Y.S. 323 (App. Term 1st Dep't 1922), with *People v. Wachtel*, 244 N.Y.S. 462 (App. Part 1st Dep't 1930); that the defendant had procured a woman for prostitution: see *People v. Silverman*, 245 N.Y.S. 568 (App. Part 1st Dep't 1930), *aff'd*, 258 N.Y.S. 1049 (App. Div. 1st Dep't 1932); or that the defendant's premises had knowingly been used for the purpose of prostitution: compare *People v. Royall*, 281 N.Y.S. 875 (App. Part 2d Dep't 1935), and *People v. Smith*, 207 N.Y.S. 555 (App. Part 1st Dep't 1924), with *People v. Webb*, 26 N.Y.S.2d 386 (App. Part 1st Dep't 1941), and *People v. Botto*, 237 N.Y.S. 513 (App. Part 1st Dep't 1929).

59. 292 N.Y.S. 282 (Magis. Ct. Kings County 1936).

60. *Ibid.*, 286.

61. *People v. Edwards*, 180 N.Y.S. 631, 635 (Ct. Gen. Sess. N.Y. County 1920).

62. See Mackey, *Hammer at Vice*.

63. *People v. Odierno*, 2 N.Y.S.2d 99, 102-03 (Queens County Ct. 1938). Accord, *People v. Guardino*, 30 N.Y.S.2d 729, 732 (Kings County Ct. 1941), *aff'd*, 37 N.Y.S.2d 981 (App. Div. 2d Dep't 1942), *aff'd*, 290 N.Y. 749 (1943). On the conditions of inequality that induced many women to choose lives of prostitution, see Ruth Rosen, *The Lost Sisterhood: Prostitution in America, 1900-1918* (Baltimore: Johns Hopkins University Press, 1982), 137-68.

64. 203 N.Y.S. 156 (App. Div. 1st Dep't 1924).

65. *Ibid.*, 159.

high moral standards, it is necessary to ask why most judges and legislators were unwilling to allow men who consumed the services of prostitutes to be prosecuted criminally. The reason, I suspect, was that criminal prosecution of a customer entailed "class[ifying] an otherwise respectable man with those 'who are vagrants.'"<sup>66</sup> Elite male judges found it better to permit upper-class men to dominate, control, and ultimately coerce lower-class women for purposes of sexual gratification than to subject their "erring brothers" to criminal liability and "black-mail" and thereby place them "at the mercy" of "*those conscienceless vampires who make merchandise of the passions of men.*"<sup>67</sup> The same elite judges would recoil a few years later, however, when the class tables were turned and "CCC camp boys"—"an element of young men who are transients in the community"—tried to exploit a local "girl."<sup>68</sup>

Analogous class biases also emerged in obscenity cases. Occasional judges saw a need to bar the upper class from viewing obscenity on the grounds that it would be wrong to allow "style, imagination, [and] learning" to "create a privileged class" and that "disgusting details . . . served up in a polished style" were "all the more dangerous and insidious."<sup>69</sup> Most judges, however, believed that on special occasions members of the upper class would need privileged access to sexually explicit information. It seemed obvious, for instance, that "facts" which were "not proper subject matter" for a general audience needed to be discussed openly in "the classroom of the law school, the medical school and clinic, the research laboratory, the doctor's office, and even the theological school."<sup>70</sup> And, as the many cases discussed above<sup>71</sup> clearly showed, the lower classes and the young were most in need of protection. Only "positive measures" of censoring obscene movies and publications could "protect the minds of our growing boys and girls from this pestilence and noisome filth,"<sup>72</sup> and save the lower classes from lives of vice and crime.

## II. THE JUDICIARY AND DECRIMINALIZATION

With the end of the 1930s and the coming of the 1940s, new attitudes toward sexual immorality began to appear in judicial opinions, even while old values remained deeply ensconced. As a result, the years of World War II and those following it witnessed a sort of schizophrenia on the part of the New York courts, as some judges became, in effect, lead-

66. *People v. Anonymous*, 292 N.Y.S. 282, 286.

67. *Odierno*, 2 N.Y.S.2d 99, 101, 103 (emphasis in original). The quoted language, which had its origin in substance in *People v. Draper*, 154 N.Y.S. 1034, 1038 (App. Div. 3d Dep't 1915), was also used as late as *People v. Jelke*, 152 N.Y.S.2d 479, 483 (Ct. App. 1956).

68. *People v. VanWhy*, 32 N.Y.S.2d 379 (Chenango County Ct. 1941), *rev'd on other grounds*, 288 N.Y. 659 (1942).

69. *Halsey*, 234 N.Y. 1, 13-14 (dissenting opinion). See also *Wendling*, 258 N.Y. 451, 454.

70. *Foy Productions*, 3 N.Y.S.2d 573, 577.

71. See *supra* text at notes 14-15, 18-27, 40, and 47.

72. *Ultem Publications*, 2 N.Y.S.2d 933, 937.

ers in an effort for the decriminalization of sex offenses, while others remained their conservative opponents.

In all the areas under consideration in this article—homosexuality, prostitution, gender-related violence, pornography, and even rape—the liberal judges who supported decriminalization ceased to perceive a need to keep up the “perennial struggle against all influences tending to corrupt and incite to vice” so as to preserve “the reservoir of social life” from becoming “poisoned” by “disorder and anarchy.”<sup>73</sup> At least on some occasions, these liberals went even further and became supportive of unrestrained male sexual freedom, probably without ever considering its consequences for women and children. At other times, however, other judges gave credence to more traditional values, observing that it was their “obligation . . . to protect weaker members of society from . . . corrupt influences.”<sup>74</sup> In particular, these conservative judges felt a special need to protect “adolescents,” who were “feeling the stress and strain of life in a world tortured by doubts.”<sup>75</sup>

The conflict between liberals seeking decriminalization and traditionalists who still supported criminal enforcement of conventional morality began when new sorts of fact situations first appeared in reported cases during the 1940s. Seven cases decided between 1940 and 1960, resulting in two convictions and five acquittals, will illustrate. In one of the two cases involving only adults, Walden P. Stevens lured Anna Mae Faulkner away from her home and two minor children and spent the night with her in his car “contrary to law.”<sup>76</sup> In the other case of an adult, Hazel Prudhomme pleaded guilty to “being in a parked car having improper relations with a man not her husband, she being a married woman.”<sup>77</sup>

Two cases involved minors in their late teens. In one, the defendant used “a vulgar expression” in talking to a 17-year-old boy in the presence of a girl of the same age, with whom the boy had been keeping steady company for seven months and to whom he was unofficially engaged; the defendant “told the boy ‘lay her as there are precautions you can take,’ and ‘go to bed together because there are precautions.’”<sup>78</sup> In the other, an adult male sent a letter to a 16-year-old boy saying, “‘I’ll give you \$5.00 or more if you let me’ (engage with you in an act best defined as pederasty—ed.)” The boy’s mother intercepted the letter and brought it to the attention of the authorities.<sup>79</sup>

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73. *Bonserk Theatre*, 34 N.Y.S.2d 541, 545-46.

74. *People on Complaint of Arcuri v. Finkelstein*, 114 N.Y.S.2d 810, 813 (Magis. Ct. Kings County 1952).

75. *People v. Eagle*, 117 N.Y.S.2d 380, 383 (Magis. Ct. Queens County 1952).

76. *People v. Stevens*, 74 N.Y.S.2d 346, 347 (Columbia County Ct. 1947) (conviction set aside).

77. *People ex rel. Prudhomme v. Superintendent of New York State Reformatory for Women*, 21 N.Y.S.2d 563, 565 (Sup. Ct. Westchester County 1940) (conviction set aside).

78. *People v. Reese*, 212 N.Y.S.2d 696 (Dist. Ct. Nassau County 1960) (information dismissed).

79. *People v. Radaha*, 69 N.Y.S.2d 722, 724 (Rockland County Ct.), *rev'd sub nom.* *People ex*

The other three cases involved younger children or children of unknown age. In the first, a set of pictures constituting "a strip tease series" was on sale in a small neighborhood store serving the families of the area, where high school students could "come in, observe these pictures, purchase them and seek dark corners and privacy to snicker over its [sic] contents and pass the pictures around among their friends."<sup>80</sup> In the second, the defendant, a man of "good reputation," was charged with asking two girls under twelve "to commit an unnatural act with him." He admitted asking directions of the girls and produced a witness who testified that he overheard the conversation with the girls and heard no improper request. The prosecutor, in turn, produced two other girls who testified that, although they observed the first two girls talking to the defendant, they never saw the alleged witness.<sup>81</sup> In the final case, where a "sharp question of fact [was] presented," the defendant was accused of exposing his private parts before a child of unknown age.<sup>82</sup>

Why did cases such as these first begin to be published in the New York reports during the 1940s? Surely conduct of the sort involved had occurred earlier, and some individuals had undoubtedly been arrested and prosecuted for engaging in it. But, if they had interposed defenses instead of merely pleading guilty, their arguments had not risen to a level that called for a published opinion in response. Beginning in the 1940s, however, at least some judges felt a need to write and publish opinions because, I believe, they ceased to understand the conduct of the defendants as seriously criminal or exploitative of women or children. Instead, I sense that these judges viewed most of the cases as involving, at worst, what Michel Foucault has labelled "inconsequential bucolic pleasures"—terminology he chose to describe an incident in which a French farmhand exposed himself before "a little girl" and "obtained a few caresses" from her, ending in "the familiar game called 'curdled milk.'" <sup>83</sup>

Much the same pattern, in which some judges overlooked sexual misconduct as trivial even while others still wanted to punish it as seriously criminal, emerges from examination of the reported New York cases during the quarter century after World War II dealing with specific areas of the law, such as sodomy, prostitution, family violence, pornography, and even rape. Most of the cases involved commercialized vice, consensual sexual activity, or violence within families—matters in which judges and legislators increasingly came to believe that the criminal law ought not interfere. Of course, some cases, especially those that charged rape, did

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*rel. Radaha v. Mock*, 69 N.Y.S.2d 725 (Sup. Ct. Rockland County 1947) (conviction reversed) (parenthetical in original).

80. *Arcuri v. Finkelstein*, 114 N.Y.S.2d 810, 812-13 (information sustained).

81. *People v. Casey*, 67 N.Y.S.2d 9, 11-12 (Utica City Ct. 1946) (conviction upheld).

82. *People v. Reilly*, 124 N.Y.S.2d 746 (App. Div. 2d Dep't 1953) (conviction reversed).

83. Michel Foucault, *The History of Sexuality*, Volume 1: *An Introduction*, trans. Robert Hurley (New York: Pantheon Books, 1978), 31.

involve violence between strangers. But even in these, as well as in cases of nonviolence, judges increasingly hesitated to apply the criminal process with rigor, out of concern not to ruin the lives of men who, perhaps through circumstances beyond their control, had made what judges characterized as a single, stupid mistake. Comparable concern for the well-being of female and child victims, on the other hand, or even an awareness that much sexual conduct could involve victimization, was not a hallmark of sex crime jurisprudence as it moved into the 1960s. For by that decade, the trend toward decriminalization had become dominant.

#### A. *Sodomy*

Much of the argument for and against decriminalization of sex offenses, both in learned journals and in the popular press, was addressed specifically to the crime of consensual sodomy. Here the argument for decriminalization was perhaps at its strongest. As one scholar, Edwin M. Schur, explained:

Laws against homosexual acts do not significantly control the proscribed behavior. The extremely low visibility under which the acts may occur, the lack of a complainant, and the ambiguous nature of public support combine to make these laws highly unenforceable. . . . The most evident results of antihomosexuality laws are . . . the encouragement of police corruption and repressive enforcement procedures. . . . [L]aw enforcement officials fall back on an amalgam of unsavory vice-squad . . . [and] spy techniques . . . abhorrent to the democratic way of life. . . . These laws, in short, make a good many individuals more unhappy than they would otherwise be, without showing any short-run signs of effectively dealing with the problem of homosexuality.<sup>84</sup>

Arguments such as this had a profound effect on the New York Court of Appeals. At a time when most institutions, especially those of the federal government, were aggressively engaged in oppression of homosexuals,<sup>85</sup> the New York Court of Appeals took initial steps in the direction of decriminalization. Beginning with *People v. Doyle*,<sup>86</sup> a 1952 decision that placed procedural obstacles in the path of sodomy prosecutions, the majority of the judges on the Court of Appeals took a series of steps tending to decriminalize consensual homosexual acts carried on in private.

*Doyle* reaffirmed the existence of an enormous practical obstacle in the

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84. Edwin M. Schur, *Crimes Without Victims: Deviant Behavior and Public Policy: Abortion, Homosexuality, Drug Addiction* (Englewood Cliffs, N.J.: Prentice-Hall, 1965), 79-80, 114. On enforcement of the laws against homosexuality, see Jon J. Gallo, et al., Note, "The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County," *U.C.L.A. Law Review* 13 (1966): 647, 686-792.

85. See D'Emilio, *Sexual Politics*, 40-53.

86. 304 N.Y. 120 (1952).

path of prosecuting homosexuals for private, consensual conduct. In *Doyle*, a majority of the Court of Appeals reversed the conviction of a defendant who had taught in schools for boys for 25 years for an act of sodomy with one of his 12-year-old students. Finding insufficient evidence that the boy had been forced to participate against his will, the court in what Judge Desmond in dissent labelled a "shocking conclusion"<sup>87</sup> deemed him an accomplice, held that a man could not be convicted of a consensual homosexual act without evidence to corroborate an accomplice's testimony, and held that the corroborating evidence in this case, consisting of the defendant's admission to the police "that he was fooling with the boy,"<sup>88</sup> was insufficient. Although the court implied that a victim of forcible sodomy could by himself provide the evidence needed for conviction, the effect of its evidentiary ruling was to render nearly impossible the prosecution of consensual homosexual acts committed in private.

It is not obvious at what the Court of Appeals was aiming in the *Doyle* case. The case did not make new law; the rule requiring corroboration of accomplice testimony in sodomy cases went back to *People v. Deschessere*,<sup>89</sup> in which "a youth of 17 years of age, who . . . was an imbecile" had testified to what "his father had told him . . . to say" and then on cross-examination had declared "that the story he told was not true."<sup>90</sup> The rule originating in *Deschessere* and reiterated in *Doyle* had been applied uniformly in a series of Appellate Division cases in the decade prior to *Doyle*,<sup>91</sup> and the jury in *Doyle* had been instructed in accordance with the rule. Perhaps the court was usurping the Appellate Division's function of passing upon the sufficiency of the evidence,<sup>92</sup> or perhaps it was convinced that some injustice had been done. But it is difficult to see why the court would have chosen a case in which a 49-year-old teacher was charged with sodomy on a 12-year-old boy to make a point about evidentiary sufficiency or injustice.

It seems most likely that the objective of the court was to signal its unwillingness to allow use of the state's criminal process in an otherwise emerging, national pattern of oppression of homosexuals.<sup>93</sup> The court

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87. *Ibid.*, 123.

88. *Ibid.*, 123-24 (dissenting opinion).

89. 74 N.Y.S. 761 (App. Div. 1st Dep't 1902).

90. *Ibid.*, 762.

91. See *People v. LaCasse*, 42 N.Y.S.2d 730 (App. Div. 3d Dep't 1943); *People v. Petrucci*, 67 N.Y.S.2d 611 (App. Div. 2d Dep't 1947); *People v. Crocker*, 74 N.Y.S.2d 593 (App. Div. 3d Dep't 1947).

92. Passing upon the sufficiency of evidence of compulsion or consent was a function regularly performed by both the Appellate Division and triers of fact. For examples involving the Appellate Division, see *People v. Dalrymple*, 112 N.Y.S.2d 390 (App. Div. 4th Dep't 1952); *People v. Link*, 157 N.Y.S.2d 988 (App. Div. 2d Dep't 1956), *aff'd*, 168 N.Y.S.2d 316 (Ct. App. 1957). For an example involving a trier of fact, see *People v. Portolano*, 223 N.Y.S.2d 753 (Queens County Ct. 1962).

93. See D'Emilio, *Sexual Politics*, 40-52.

could not use the favored concept of the 1980s—the constitutional right to privacy—to achieve that result, since the United States Supreme Court had not yet set down the building blocks, in *Griswold v. Connecticut*<sup>94</sup> and subsequent cases, from which to construct such a right. Instead, it had to rely on the tools that were available to it—namely, rules of jurisdiction, procedure, and evidence that could be manipulated to make prosecution difficult or, in cases of private, consensual homosexuality, virtually impossible. As we shall see, the New York courts during the 1950s and 1960s relied on such rules in a wide variety of contexts, at least as often as later courts would turn to the right of privacy.

The Court of Appeals's next attempt at reform occurred in *People v. Randall*,<sup>95</sup> in which a 59-year-old defendant had been convicted of sodomy for requesting and then voluntarily permitting a 16-year-old to perform an act of anal intercourse on him. One ground of the defendant's appeal was that the police had beaten him and caused his ear canal to bleed in order to extract a confession from him, and perhaps this claim elucidated sympathy from the court. The court did not, however, reverse the conviction on this ground, but chose instead to avoid the constitutional issue and deal with the case by giving a cramped reading to the sodomy statute. Noting that, prior to 1950, New York law had declared that anyone who “‘carnally knows any male or female person by the anus or by or with the mouth; or voluntarily submits to such carnal knowledge’ . . . is guilty of sodomy” and that “[a]bruptly” in 1950 the “statute was revised” to omit any reference to the person who “‘voluntarily submits to such carnal knowledge,’”<sup>96</sup> the court held unanimously that only a man who inserted his penis into the anus of another could be guilty of sodomy; the other person could at most be guilty as an accomplice.

Although one cannot be certain, it may be that old-fashioned issues of class motivated the court in *Randall*, as well as other courts, to “emasculate . . . the statute”<sup>97</sup> prohibiting consensual sodomy. The court merely noted in *Randall* that the defendant, who lived on a small family farm, had no prior record at the time of his arrest, while the 16-year-old had been picked up by the State Police for questioning in connection with the whereabouts of a boy who was wanted by probation authorities.<sup>98</sup> An earlier court, in contrast, had been far more explicit when it described one sodomy defendant as “a man of education and culture, with a distinguished war record,” while the “boy” with whom he had committed the offense “was unquestionably of low grade mentality” which, when “cou-

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94. 381 U.S. 479 (1965).

95. 214 N.Y.S.2d 417 (Ct. App. 1961).

96. *Ibid.*, 421-22, quoting statutory language (emphasis in original).

97. *People v. Maggio*, 228 N.Y.S.2d 791, 794 (App. Div. 2d Dep't 1962) (dissenting opinion), *rev'd*, 235 N.Y.S.2d 377 (Ct. App. 1962).

98. See *Randall*, 214 N.Y.S.2d 417, 419.

pled with his vagrant habits, would not indicate a normal degree of responsibility."<sup>99</sup> When a defendant was "charged with a serious and repulsive crime" such as sodomy, he "should not be found guilty without clear and reliable testimony";<sup>100</sup> "it shock[ed] one's sense of justice that a person should be convicted, and should serve a long term in prison, upon testimony" of "this half-witted youth."<sup>101</sup> For these judges, it seems that, even if the weak and the poor were not exactly legitimate prey for the lusts of men of culture and education, such men at least ought not have their lives ruined by a blunder, the occurrence of which was evidenced by uncertain testimony.

The effect of these decisions was to make homosexual acts carried on in private difficult to prosecute. As long as both men consented to an act, the rule against convictions based on accomplice testimony prohibited either from testifying against the other. Conviction could be had only on the testimony of some third party observer; that is, conviction could be had only if a consensual act had not been truly private. Not even the most common type of nonconsensual sodomy—acts by older men on youths unable by virtue of age or mental infirmity to give their consent—could be readily prosecuted in view of the hesitancy of courts in the 1950s to rely on the testimony of boys to convict men of stature and standing. Thus, while homosexuality did not gain formal legal legitimacy in the decades after World War II, men wishing to engage in private homosexual activity could, in practice, do so with reduced fear of the criminal law.

### *B. Prostitution*

The law regulating prostitution was a second area in which a decriminalization trend occurred.<sup>102</sup> The argument for decriminalization was essentially the same as the argument for consensual homosexuality. It was expressed eloquently by Herbert L. Packer:

There seems little reason to believe that the incidence of prostitution has been seriously reduced by criminal law enforcement. . . . The side effects on law enforcement are unfortunate. Police corruption is closely associated with this kind of vice control. . . . An equally disgusting kind of enforcement practice is the use of the police or police-employed decoy to detect solicitation. . . . What does society gain from this kind of law enforcement activity? If the effort is to stamp out prostitution, it is plainly doomed to failure. If

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99. Crocker, 74 N.Y.S.2d 593.

100. Dalrymple, 112 N.Y.S.2d 390, 392 (involving sodomy on a young woman of 14).

101. Deschessere, 74 N.Y.S. 761, 762, 764.

102. Of course, much old doctrine endured, such as doctrine defining an accomplice whose testimony would not provide sufficient corroboration for a conviction, see *Guardino*, 30 N.Y.S.2d 729; or doctrine dealing with the sufficiency of evidence, see *People v. Lynn*, 307 N.Y. 683 (1954), and *People v. Santiago*, 79 N.Y.S.2d 139 (Magis. Ct. N.Y. County 1948).

it is to eradicate or curb the spread of venereal disease, that too is illusory. . . . To put it crudely but accurately, the law is perverted. . . . It seems that prostitution, like obscenity and like other sexual offenses, should be viewed as a nuisance offense whose gravamen is not the act itself, or even the accompanying commercial transaction, but rather its status as a public indecency.<sup>103</sup>

The earliest case set in the new midcentury culture of decriminalization was *People ex rel. Colletti v. Morehead*.<sup>104</sup> *Colletti* was remarkably similar to the earlier *Kramer* case, in which a man had tried to entice a woman into prostitution by offers of employment in the movie industry. What made *Colletti* different was that the court found it prudent to take note of how the defendant had become involved with two 16-year-old women who had hitchhiked from their homes in Lancaster, Pennsylvania, first to Harrisburg and then to Long Island City, in March of 1944. They had been delivered by their driver to a restaurant in which the defendant worked. After giving them free food and offering to help them get work, possibly "in a defense" industry, the defendant introduced them to one Rubenstein, who made offers of an apartment, furs, clothing and support to one of the women "if she would be nice to him" and have "no visitors." Rubenstein kept the defendant informed of "his negotiations," and when he asked the defendant for his approval, the defendant gave it with a nod and with the word "yes." Rubenstein thereupon obtained a hotel room for the woman where, it was charged, "he committed an immoral act" with her.<sup>105</sup>

The court held that, as a matter of law, these facts did not constitute sufficient evidence to warrant holding the defendant for trial on charges of enticing a woman into prostitution. In its view, this exploitation of a 16-year-old woman amounted to nothing more than an "incidental concession . . . to lasciviousness." Prostitution, in contrast, involved "a permanent condition" that required "'common, indiscriminate, meretricious commerce with men.'"<sup>106</sup> It is difficult, though, to appreciate the court's reading of the facts. At the very least, *Colletti* was a case in which one man, Colletti, assisted another, Rubenstein, in buying sexual favors. If the case had been allowed to go to trial, facts might have emerged at trial showing that Colletti anticipated Rubenstein to be merely the first customer. The *Colletti* case manifests too many aspects of sexual exploitation and is best understood as one in which the court, consistent with cultural norms beginning to emerge during World War

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103. Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), 328-31.

104. 50 N.Y.S.2d 78 (Sup. Ct. Queens County 1944).

105. *Ibid.*, 79.

106. *Ibid.*, 81, quoting *People ex rel. Howey v. Warden of City Prison*, 207 N.Y. 354, 363 (1913).

II,<sup>107</sup> found what a later court would call “‘recreational sex’”<sup>108</sup> an appropriate reward for hardworking men who, because of rationing, had few other ways to spend the money that their contribution to the war effort had brought. This was especially so when the women providing the recreation had seemed to display their willingness to do so by uprooting themselves from protective homes in a moral community of middle America and hitchhiking to one of the main domestic centers of the war. The court’s mindset blinded it to certain small facts of the case, which in the aggregate suggest that the defendant, “behind the mask of a legal-looking business, lure[d] innocent young girls into a respectable-appearing” restaurant “and there . . . procure[d] them for unlawful sexual intercourse.”<sup>109</sup>

Three decisions by the Court of Appeals during the 1950s displayed a similar judicial mindset. The decisions, one taken with the support of an amicus brief from the ACLU, can all be interpreted as upholding the civil liberties of higher-class call girls and the men involved with them. Viewed from another perspective, however, the three decisions deprived the police of their main weapons for putting call girls out of business, and “undoubtedly hamper[ed] . . . law enforcement officers in their continued attempts to control th[e] social evil.”<sup>110</sup> By declining to pass on significant constitutional issues and, in the alternative, construing statutes narrowly and holding evidence insufficient to sustain convictions, the Court of Appeals made it difficult to prosecute and thus to a significant degree decriminalized prostitution that was conducted in a discrete fashion.

*People v. Gould*<sup>111</sup> reversed the conviction of a man admitted to the bar but engaged in the jewelry business. He had telephoned a policewoman working undercover who had placed an advertisement in a large New York daily seeking employment as a bookkeeper. After offering her a job as a salesperson, he had told her that she could earn a much higher income if she would have affairs with his customers. During a personal interview, he offered to set her up in an apartment, pay her \$50 per week, and arrange to send her at least four men daily whom she could charge \$10 each for acts of sexual intercourse. He also inquired whether she engaged in “two forms of abnormal sexual activity.”<sup>112</sup>

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107. See *infra* text at notes 312-31 for a discussion of the emergence of new attitudes during the war.

108. *People v. Costello*, 395 N.Y.S.2d 139, 142 (Sup. Ct. N.Y. County 1977).

109. *People v. Catalano*, 205 N.Y.S.2d 618, 621 (Magis. Ct. N.Y. County 1960). In *Catalano*, the defendant ran an employment agency where “the only employment which the defendant offered these girls (two of whom were seventeen) were jobs for which they would have to submit to unlawful sexual intercourse, or other lewd acts, etc., with their employers.” *Ibid.*, 620. On those facts, defendant was found guilty of violating the same statute which the *Colletti* defendant was acquitted of violating.

110. *People v. Choremi*, 301 N.Y. 417, 421 (1950) (dissenting opinion).

111. 306 N.Y. 352 (1954).

112. *Ibid.*, 355 (dissenting opinion).

The court concluded that the defendant had done nothing more than “suggest to a woman of good character, that she become a prostitute under his management, and she, of course, rejected the proposal at once.” Noting that “very seldom in our criminal law . . . [does] a rejected suggestion of wrongdoing amount . . . to a substantive crime or offense,” the majority concluded that the defendant had not violated the statute, which prohibited mere suggestions or, in its own language, “offers to secure the services of another for the purpose of prostitution.”<sup>113</sup> By its headstrong misreading of the statute, a misreading which required undercover officers actually to engage in wrongdoing in order to obtain prostitution convictions, the majority effectively prevented their use.

The liberal majority had similarly pursued a policy of substantially decriminalizing call-girl type prostitution in *People v. Choremi*.<sup>114</sup> There, telephone conversations intercepted by the police under a court order, together with the defendant’s own voluntary statements, showed that she had made dates on one night with men who were “‘very nice’” and “‘for twice what . . . [she] expect[ed].’” On another occasion, her codefendant, also a woman, arranged a date for her with a man who “‘had not been laid in a month, and so you can get paid and can enjoy yourself at the same time.’” On still another occasion, when the defendant had refused to meet another man because the money was insufficient, her codefendant replied that “‘you can’t meet fellows like we had yesterday every day. They were exceptional and you can’t always get that money.’”<sup>115</sup>

On these facts, which it characterized as only “[s]uspicion and surmise,” the majority of the Court of Appeals found no “evidence of a purpose to induce, entice, or procure another to commit an act of sexual intercourse” and “not the slightest bit of evidence” that the defendant had engaged in prostitution. With the support of an amicus brief from the ACLU, the court found the evidence too “thin and meager” to support a conviction, apparently demanding what could never be obtained by wiretapping—personal observations by police of the prostitutes and their customers “in compromising positions” in “bedrooms where the lights went off shortly after their entry.”<sup>116</sup>

Relying on the court’s recent unanimous decision in *People v. Feiner*<sup>117</sup> as authority for a broad reading of the vagrancy statute, including its provision making prostitution a crime, the dissenters accused the majority of an unduly narrow construction of the act. The majority’s decision,

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113. *Ibid.*, 354.

114. 301 N.Y. 417.

115. *Ibid.*, 423 (dissenting opinion).

116. *Ibid.*, 419-20.

117. 300 N.Y. 391 (1950), *aff’d*, 340 U.S. 315 (1951).

according to the dissent, thwarted the will of the legislature, put individuals who had committed a recognized crime “beyond the reach of the law,” and made it impossible “to forbid persons from making themselves available for unlawful sexual intercourse.” The majority’s holding, it was said, produced an “incongruous” result, whereby a woman who solicited on a street corner could be convicted of prostitution, but a female who held herself forth in her home over the telephone was rendered immune from punishment.<sup>118</sup>

The third case, *People v. Moss*,<sup>119</sup> must be understood against the backdrop of a key fact about the law of prostitution: its ambiguity. It is relatively easy to know that an act of prostitution has occurred when a conspicuous streetwalker offers to engage in sex with a man in return for money and subsequently engages in sex and receives the money. New York legislation in effect at the time of *Moss* defined prostitution broadly to include not only acts of women providing sex for money but also activities of men inducing women to lead lives of prostitution or to commit acts of prostitution or other lewd or indecent acts. This legislation, as Judge VanVoorhis noted for the Court of Appeals in *People v. Jelke*,<sup>120</sup> was “obviously a patchwork affair” that contained “botchy and immaterial provisions”; the “problem[s] in analyzing” the cases above “stem[med] in considerable part from the draftsmanship” of the New York statutes.<sup>121</sup> As applied to *People v. Moss*, which involved a “housekeeper” who “was a willing participant” in acts of “sexual intercourse and other lewd and indecent acts” with the defendant, her employer, until she “became ‘afraid of him,’”<sup>122</sup> the statutory law seemed utterly lacking in precision and rigor.

Many judges found such conduct “reprehensible,”<sup>123</sup> but they also knew that prostitution convictions “may often be attended with the gravest consequences.” It followed that, “if there is to be proper security of personal liberty,”<sup>124</sup> criminal statutes had to be strictly construed and that, “[i]f the Legislature chooses to make . . . privately committed [sex] acts . . . a public offense or a crime, under whatever name, it should do so expressly.”<sup>125</sup>

From *Moss* it was easy for lawyers to take the next step and argue that “a ‘sexual revolution’” had occurred “in the past few decades” that had

118. Choremis, 301 N.Y. 417, 421-22.

119. 309 N.Y. 429 (1956).

120. 152 N.Y.S.2d 479 (Ct. App. 1956).

121. *Ibid.*, 483, quoting *People v. Draper*, 154 N.Y.S. 1034, 1041 (App. Div. 3d Dep’t 1915).

122. 309 N.Y. 429, 431.

123. *Ibid.*, 432.

124. *People on Complaint of Harrington v. Marcial*, 110 N.Y.S.2d 361, 364 (Magis. Ct. N.Y. County 1952).

125. *Moss*, 309 N.Y. 429, 433. See also *People v. Loocerello*, 233 N.Y.S.2d 206, 224 (Onondaga County Ct. 1962), *rev’d*, 239 N.Y.S.2d 283 (App. Div. 4th Dep’t 1963), which insisted that “no lesser standards should be required” in “a criminal prosecution.”

legitimated "sex for pleasure, [or] 'recreational sex'" and had recognized that "[n]on-married individuals have a right to pursue sex drives even if they have to pay for it." On this basis, it could be urged that society could "not legislate morality" and that, as " 'older legislators and judges . . . raised in repressive sexual adaptations [were] replaced by younger *men* whose sexual adaptation' " emerged out of " 'the more recent social mores of American society,' " the law would " 'be brought into line.' " <sup>126</sup> One judge, at least, accepted such arguments and declared that, "[h]owever offensive it may be, recreational commercial sex threatens no harm to the public health, safety or welfare" and thus should "not be proscribed." <sup>127</sup>

The approach of most judges to prostitution in the 1950s and 1960s, and even into the 1970s, was thus parallel to their approach to consensual homosexuality. By construing legislation narrowly and holding evidence of guilt insufficient to sustain convictions, a majority of judges, in effect, pursued a policy of decriminalization. In doing so, moreover, they expressed a concern in cases like *Moss* for protecting the personal liberty of men, <sup>128</sup> while failing to appreciate how wealthy men could engage in sexual exploitation of less privileged women. The court in *Moss*, for example, could see only that "a young woman intelligent enough to have been graduated from high school at the age of seventeen . . . participated in sexual relations with the defendant voluntarily"—that two intelligent individuals had "voluntarily" <sup>129</sup> entered a relationship which had turned sour and had come to the attention of the criminal courts only when, as the Court of Appeals observed five months later in another case, the woman "found herself rejected" and "became vindictive." <sup>130</sup> The court thereupon construed the law so as " 'not . . . to place the erring male at the mercy of the erring female.' " <sup>131</sup> Of course, the effect of this construction was to place women who were not in the least in error in perceiving their economic necessity <sup>132</sup> at the mercy of men who likewise did not err in appreciating the sexual liberties they desired. But until the 1970s, the courts did not perceive this victimization.

### C. Family Violence

The effort to decriminalize sex and gender-related offenses reached its farthest extent when, in 1962, the legislature adopted Article 8 of the Family Court Act, entitled Family Offenses Proceedings. Prior to 1962,

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126. Costello, 395 N.Y.S.2d 139, 142 (emphasis added).

127. In re P., 400 N.Y.S.2d 455, 468 (Fam. Ct. N.Y. County 1977), *rev'd*, 418 N.Y.S.2d 597 (App. Div. 1st Dep't 1979).

128. See *Moss*, 309 N.Y. 429, 432-33.

129. *Ibid.*, 432.

130. Jelke, 152 N.Y.S.2d 479, 492.

131. *Ibid.*, 484, quoting Odierno, 2 N.Y.S.2d 99, 103.

132. See Rosen, *Lost Sisterhood*, xvii.

a family member who had been assaulted or otherwise victimized by another member and desired judicial assistance was compelled to commence a criminal action.<sup>133</sup> Article 8, in contrast, created a civil proceeding under the jurisdiction of the family court, which would attempt to provide conciliation and treatment to alleviate the violence. As Linda Gordon has shown, serious physical violence by men against women and children has had a long history,<sup>134</sup> and by 1870 had been made a fit subject for criminal prosecution and severe criminal sentences in most American jurisdictions.<sup>135</sup> In the attempt to decriminalize it, no one advanced the argument that some had made in the effort to decriminalize homosexuality and prostitution: that the men who engaged in it had a right to do so or that government had no business impairing their right. Rather, the sole concern that was articulated for decriminalizing family violence was that criminal prosecution had not worked and had not offered protection to the victims of violent husbands and fathers. Although the drafters of Article 8 were not "expecting miracles," their hope was that "not punishment, but practical help," was the best device "for dealing with the underlying family difficulties" that often manifested themselves in domestic violence.<sup>136</sup>

Thus, there began a curious attempt to decriminalize acts of domestic violence<sup>137</sup> and thereby "save the potential" of men who, "trapped by circumstances over which they have no control," could not otherwise "channel" personal "qualities" in a fashion beneficial to themselves and "society" and thereby achieve their "right to self realization."<sup>138</sup> Article 8 aimed for this result by giving exclusive original jurisdiction over family offense proceedings to the family court and requiring the criminal courts to transfer to that court jurisdiction over proceedings previously begun before them.<sup>139</sup> In assuming jurisdiction over family offense proceedings, however, the family courts of the state, and the appellate courts above them, would need to focus on two main issues raised by the jurisdictional provisions: (1) what constituted a family offense, and (2) what constituted a family?

The early cases tended to construe the jurisdiction of the family court generously and thus to extend the decriminalization effort broadly. Thus, the Court of Appeals ruled in 1967 that the family court should assume original jurisdiction over all "family assaults . . . and not simply

133. See Peter Wessel, Note, "Jurisdiction over Family Offenses in New York: A Reconsideration of the Provisions for Choice of Forum," *Syracuse Law Review* 31 (1980): 601.

134. See Gordon, *Heroes of Their Own Lives*, 250-88.

135. See *ibid.*, 254-55.

136. "Report of Joint Legislative Committee on Court Reorganization, The Family Court Act," 1962 N.Y. LAWS 3428, 3444.

137. See Douglas J. Besharov, "Introductory Practice Commentary" to Article 8, N.Y. FAM. CT. ACT (McKinney 1983).

138. *M. v. M.*, 336 N.Y.S.2d 304, 305, 309 (Fam. Ct. Bronx County 1972).

139. See An Act to Establish a Family Court, §§ 813-823, 1962 N.Y. LAWS 686.

those which were trivial."<sup>140</sup> Lower courts agreed,<sup>141</sup> even when the assault had been "a shocking offense—that the defendant placed his two-year-old son on a hot stove."<sup>142</sup> Two years later the Court of Appeals further extended this holding, in a case in which a defendant had been indicted for burglary, in entering his estranged wife's apartment, and for weapons possession, as a result of using a knife in assaulting her. The court declared unanimously that the burglary and weapons charges were "inextricably related" to the assault and that those charges therefore had to be transferred to family court lest "[t]he purposes" of the legislature "be subject to . . . likely circumvention."<sup>143</sup> The same was true of charges of aggravated harassment.<sup>144</sup> A charge of possession of the gun used to assault a family member did not have to be transferred from criminal to family court, however, since a gun, unlike a knife, was *per se* a dangerous and unlawful instrument, whether or not it was used in an assault.<sup>145</sup> Likewise, homicide charges could be prosecuted initially in criminal court, since with the family member's death "no domestic quarrel remained to remove for solution or help."<sup>146</sup> Courts also did not require that cases of attempted homicide<sup>147</sup> or of attempted use of motor vehicles to kill or injure family members<sup>148</sup> be heard initially in family court.

Sex offenses also were placed within the coverage of the Family Court Act. Although sodomy between members of the same household appears never to have been within the jurisdiction of the family court,<sup>149</sup> the Court of Appeals in 1969 reversed a conviction of assault with intent to commit incest on the ground that jurisdiction of the case belonged in family court rather than in criminal court.<sup>150</sup> Following this case, a family court judge in New York City accepted jurisdiction over a case of incest between a 16-year-old male and his 12-year-old sister that led to

140. *People v. Johnson*, 282 N.Y.S.2d 481, 484 (Ct. App. 1967).

141. See *People v. DeJesus*, 250 N.Y.S.2d 317 (App. Div. 4th Dep't 1964).

142. *People v. Davis*, 278 N.Y.S.2d 750, 756 (App. Div. 1st Dep't 1967).

143. *People v. Williams*, 300 N.Y.S.2d 89, 98-99 (Ct. App. 1969).

144. See *People v. McCarthy*, 398 N.Y.S.2d 585 (App. Div. 2d Dep't 1977); *People v. Hasse*, 291 N.Y.S.2d 53 (Dist. Ct. Suffolk County 1968). Since mere verbal harassment was not a crime, the family court would not take cognizance of any petition alleging it. See *DiDonna v. DiDonna*, 339 N.Y.S.2d 592 (Fam. Ct. Ulster County 1972).

145. See *People v. Wade*, 296 N.Y.S.2d 515 (App. Div. 2d Dep't 1968); *People v. Mancuso*, 300 N.Y.S.2d 1003 (Dist. Ct. Suffolk County 1969). But see *People v. Oliver*, 426 N.Y.S.2d 569 (App. Div. 2d Dep't 1980); *People v. Diggs*, 339 N.Y.S.2d 712 (Dist. Ct. Nassau County 1973).

146. *People v. Brennan* 306 N.Y.S.2d 384, 386 (App. Div. 3d Dep't 1970). *Accord Whiting v. Shepard*, 312 N.Y.S.2d 414 (App. Div. 3d Dep't 1970).

147. See *People v. Vaughn*, 417 N.Y.S.2d 621 (Dist. Ct. Suffolk County 1979); *People v. Coady*, 361 N.Y.S.2d 587 (Sup. Ct. Queens County 1974).

148. See *People v. Bronson*, 337 N.Y.S.2d 215 (App. Div. 4th Dep't 1972). The family court also would not take jurisdiction over a reckless use of an automobile by one spouse against another if no criminal assault was involved. See *Seymour v. Seymour*, 289 N.Y.S.2d 515 (Fam. Ct. Tioga County 1968).

149. See *People ex rel. Doty v. Krueger*, 302 N.Y.S.2d 605 (App. Div. 2d Dep't 1969), *appeal dismissed*, 309 N.Y.S.2d 932 (Ct. App. 1970).

150. See *People v. Nuernbereger*, 303 N.Y.S.2d 74 (Ct. App. 1969).

the birth of a child; the judge argued that only the family court could “restor[e] the various members of this family to useful and less encumbered lives.”<sup>151</sup>

The courts also extended the jurisdiction of the family court and thereby narrowed the scope of the criminal law by construing the word “family” in the Act to mean the extended rather than the nuclear family. In referring to family court an indictment against a man who in the course of an assault on his wife also assaulted his brother-in-law, one judge noted that “marriage is a relationship which, as a matter of essence, brings spouses and in-laws into contact, and into conflict.”<sup>152</sup> Other cases likewise held that a man who assaulted his mother-in-law<sup>153</sup> and a man who assaulted his brother-in-law<sup>154</sup> should have their cases heard in family court, even though neither victim lived in the same house as the man committing the assault. The courts in early cases also ruled that the commencement of divorce proceedings did not terminate the jurisdiction of the family court,<sup>155</sup> and the first judge to confront the question even held that a final decree of divorce did “not cause a complete severance between the spouses and a complete return to the status quo as if their marriage had never existed,” since the “problems of support and visitation of children . . . result in a continuation of contact.”<sup>156</sup>

Most early judges also construed the concept of family broadly when they held that violence between a man and a woman who were living together was subject to family rather than criminal court jurisdiction, even if the two were not formally married. As one of these judges observed, the “countless households where men and women reside with their offspring . . . without being legally married” produced precisely the kinds of “behavior problems, support problems, [and] mental and emotional problems” for which, “from a social point of view, . . . the unique and flexible procedures and services available in the Family Court” could provide “a remedy.”<sup>157</sup>

By giving Article 8 a broad construction and thereby extending the decriminalization effort instituted by the legislature, New York judges illustrated how, as reformers hoped, legislation, judicial interpretation, public opinion, and social science could be conjoined to address a societal

151. *S. v. S.*, 311 N.Y.S.2d 169, 179 (Fam. Ct. N.Y. County 1970).

152. *People v. Harkins*, 268 N.Y.S.2d 482, 484 (Erie County Ct. 1966). But see *Klemes v. Sohnen*, 303 N.Y.S.2d 533 (App. Div. 2d Dep’t 1969) (assault by man on his son’s mother-in-law not a family offense).

153. See *People v. Keller*, 234 N.Y.S.2d 469 (Dist. Ct. Nassau County 1962).

154. See *People ex rel. Clifford v. Kreuger*, 297 N.Y.S.2d 990 (Sup. Ct. Nassau County 1969).

155. See *Hrab v. Hrab*, 332 N.Y.S.2d 91 (App. Div. 2d Dep’t 1972). Cf. *Ardis S. v. Sanford S.*, 389 N.Y.S.2d 529 (Fam. Ct. Kings County 1976).

156. *Koeppel v. Judges of Family Court*, 254 N.Y.S.2d 600, 602 (Sup. Ct. Nassau County 1964). But see *People v. King*, 300 N.Y.S.2d 600 (Fam. Ct. Dutchess County 1969).

157. *People v. Dugar*, 235 N.Y.S.2d 152, 153 (Dist. Ct. Nassau County 1962). Accord *People v. James*, 287 N.Y.S.2d 188 (Sup. Ct. Queens County 1968); *People v. Johnson*, 265 N.Y.S.2d 260 (Dist. Ct. Nassau County 1965).

problem. For students of the legal process, the story of Article 8 and its judicial interpretation during the 1960s is an extraordinary one that emphasizes how effortlessly legal change can occur when legislators and judges do not behave confrontationally but instead cooperate with each other in pursuit of an end supported both by public opinion and by social science elites. Nevertheless, despite all the hopes and cooperation it engendered, Article 8 did not eliminate family violence.

#### D. Pornography

A somewhat different pattern emerged in the law concerning pornography, the fourth area in which decriminalization ultimately took place during the 1950s and 1960s. Initially, the majority on the New York Court of Appeals took a firm stand against decriminalization. In the years following the close of World War II, many judges continued to subordinate concerns for freedom of expression to a perceived need to protect "the young as well as all other segments of the population from the corrupt influences exerted through the lascivious literature."<sup>158</sup> Thus, in *Hughes Tool Co. v. Fielding*,<sup>159</sup> in which the license commissioner of the City of New York had threatened to revoke the license of any theater exhibiting the film called "The Outlaw," which he had found to be obscene, a unanimous Court of Appeals upheld the commissioner's "duty to protect public morals against exhibition of lewd, obscene or indecent motion picture films."<sup>160</sup>

The lower courts initially behaved in a similar fashion. One court, for example, sustained a denial of a license for a movie that told "of clandestine affection and even illicit intercourse," followed by an "abortion . . . to prevent disclosure through the birth of a child."<sup>161</sup> Similarly, in *Sheehan v. Valentine*,<sup>162</sup> a lower court found that the city police commissioner had exercised his discretion "wisely"<sup>163</sup> in denying a cabaret entertainer's identification card to a man previously convicted of an indecent assault. Indeed, the Court of Appeals went so far as to sustain censorship of a magazine about "fiendish and gruesome crimes" that was "besprinkled with lurid photographs of victims and perpetrators," on the ground that it "appeal[ed] to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake."<sup>164</sup>

158. *People v. Richmond County News*, 179 N.Y.S.2d 76, 81 (Ct. Spec. Sess. Richmond County 1958), *rev'd*, 205 N.Y.S.2d 94 (App. Div. 2d Dep't 1960), *aff'd*, 216 N.Y.S.2d 369 (Ct. App. 1961).

159. 297 N.Y. 1024 (1948).

160. *Hughes Tool Co. v. Fielding*, 80 N.E.2d 540 (N.Y. Ct. App. 1948) (quoted language does not appear in official New York Reports).

161. *Distinguished Films v. Stoddard*, 68 N.Y.S.2d 737, 739 (App. Div. 3d Dep't), *leave to appeal denied*, 71 N.Y.S.2d 728 (App. Div. 3d Dep't 1947).

162. 54 N.Y.S.2d 328 (Sup. Ct. N.Y. County 1945).

163. *Ibid.*, 330.

164. *People v. Winters*, 294 N.Y. 545, 551 (1945), *rev'd*, 333 U.S. 507 (1946). But see *People ex*

Postwar judges even remained offended by nudity. The "use of clothing to cover one's sexual organs," in one judge's view, had "been, throughout history, the practice of all humans except for the lowest grade of savages." Allowing nudity, he feared, would have "a libidinous effect upon the most ordinary, normal, healthy individuals," and its "effect upon the abnormal individual may be more disastrous."<sup>165</sup> Another judge asked that "Heaven help our future generations" if nudity should ever come into "accord with the ethical and moral standards of our community."<sup>166</sup> Yet another thought that "much greater police activity in connection with pictures of female nudes and so-called art books would appear to be indicated."<sup>167</sup>

The repressive mindset of New York judges was so strong in the years immediately following World War II that they felt comfortable, in *People v. Doubleday & Co.*,<sup>168</sup> in suppressing a book of substantial literary merit without even bothering to publish an opinion. The book's author, Edmund Wilson, had already established a strong reputation as a critic and essayist when Doubleday published *Memoirs of Hecate County*, which won critical acclaim from the likes of Lionel Trilling, the *New York Times Book Review*, and even *Time* magazine. Nonetheless, a unanimous Appellate Division and a similarly unanimous Court of Appeals issued per curiam affirmances of the unreported trial court judgment. The case then went on to the United States Supreme Court, where it was affirmed, again without opinion, by an equally divided Court, after Justice Frankfurter had recused himself because of a personal friendship with Wilson.<sup>169</sup>

Four years later the majority of the Court of Appeals again displayed the same repressive mindset, in what may be the most important case of all in setting today's moral tastes and standards, *Joseph Burstyn, Inc. v. Wilson*.<sup>170</sup> *Burstyn* arose when the state revoked the license it had granted for the showing of an Italian movie, "Il Miracolo," which was distributed as part of a trilogy, "Ways of Love." According to the licensing authority, the picture, whose first character, Saint Joseph, caused a peasant girl named Mary to become intoxicated and pregnant with a "blessed son," was sacrilegious, as well as filled with "drunkenness, seduction . . . and lewdness" or, in the language of the script, "ardent

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rel. *Kahan v. Creative Age Press*, 79 N.Y.S.2d 198 (Magis. Ct. N.Y. County 1948) (Charles O. Gorham's *The Gilded Hearse* held not obscene).

165. *Sunshine Book County v. McCaffrey*, 112 N.Y.S.2d 476, 483 (Sup. Ct. N.Y. County 1952), modified, 168 N.Y.S.2d 268 (App. Div. 1st Dep't 1957).

166. *People v. Eagle*, 117 N.Y.S.2d 380 (Magis. Ct. Queens County 1952).

167. *People v. Gonzales*, 107 N.Y.S.2d 968, 971 (Magis. Ct. N.Y. County 1951).

168. 71 N.Y.S.2d 736 (App. Div. 1st Dep't) (per curiam), *aff'd mem.*, 297 N.Y. 687 (1947), *aff'd by equally divided court*, 335 U.S. 848 (1948).

169. See Lewis, *Literature, Obscenity, and Law*, 162-63.

170. 303 N.Y. 242 (1951).

affection, . . . sexual passion, gratification, [and] devotion.'"<sup>171</sup> A 5-2 majority of the Court of Appeals sustained the revocation of the movie's license. In an opinion that supported conventional morality not out of a belief in its righteousness but out of a policy against insulting those who still believed in it, the majority noted that the film's "ways of love" amounted to nothing more than "insults" "hurl[ed] . . . at the deepest and sincerest religious beliefs of others." "Insult, mockery, contempt and ridicule," the majority added, could "be a deadly form of persecution." America, it observed, was "essentially a religious nation" and "a land of religious freedom," and then the majority concluded:

[I]t would be strange indeed if our Constitution, intended to protect that freedom, were construed as an instrument to uphold those who publicly and sacrilegiously ridicule and lampoon the most sacred beliefs of any religious denomination to provide *amusement*.<sup>172</sup>

Having won the New York Film Critics award as the best foreign language film of 1950, "Il Miracolo" also won some support on the Court of Appeals in the form of a dissent from Judge Fuld. "[C]onfronted in this case with censorship in its baldest form . . .—a prior restraint of broad and undefined limits," Fuld found that the licensing scheme "constitute[d] an attempt to legislate orthodoxy in matters of religious belief."<sup>173</sup> The "unquestioned good faith" of the people who found "Il Miracolo" "offensive to their religious sensibilities" could not make it legitimate to "censor the free expression of ideas or beliefs in the field of religion." "[N]o official," Fuld concluded, could "'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"<sup>174</sup>

When the majority of the United States Supreme Court agreed with Fuld, it reversed the judgment of the New York Court of Appeals<sup>175</sup> and thereby began the process of abolishing most movie censorship. The federal Supreme Court, out of the necessities of its institutional position, also began another new process that differentiated the decriminalization of pornography from the early stages, at least, of the decriminalization of homosexuality and prostitution. Unlike the state court, the federal court did not construe legislation narrowly or reverse convictions on procedural or evidentiary grounds; on the contrary, it declared state legislation constitutionally invalid. Because the nature of federal jurisdiction deprived the Supreme Court of the gentle power, which state judges enjoyed, of engaging in a dialogue with state legislatures whereby the courts limited the scope of the criminal law over victimless offenses but

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171. *Ibid.*, 257.

172. *Ibid.*, 259-60 (emphasis added).

173. *Ibid.*, 268.

174. *Ibid.*, 276, quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

175. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

left the ultimate judgment on total decriminalization to the political process, the federal Court had to arrogate that ultimate judgment to itself. In arrogating such power, the Supreme Court effectively transformed the meaning of decriminalization, from a process involving judicial suggestion, political discussion, and ultimate legislative determination, to one of judicial command.

The novelty of the step taken by the Supreme Court in *Burstyn* emerged most dramatically, perhaps, in the difficulty that conservative New York judges had in absorbing the Court's message. Thus, two years after *Burstyn*, in *Commercial Pictures Corp. v. Board of Regents*,<sup>176</sup> the Court of Appeals was back in the censorship business. The case involved the French motion picture, "La Ronde," which portrayed a series of sexual encounters primarily between men and women not married to each other, including one episode between a soldier and a prostitute who "informs him," in a manner reminiscent of much World War II practice, "that 'civilians' pay, but for 'boys like you it's nothing.'" <sup>177</sup> Noting that "La Ronde" "depict[ed] promiscuity as the natural and normal relation between the sexes, whether married or unmarried,"<sup>178</sup> the majority concluded that it "pander[ed] to base human emotions" and thereby constituted "a breeding ground for sensuality, depravity, licentiousness and sexual immorality," which was "portrayed in such manner as to invite concupiscence and condone its promiscuous satisfaction, with its evil social consequences."<sup>179</sup>

The two dissenters observed that "La Ronde" had been banned nowhere in the United States except New York, from which they concluded that the movie was "not inimical to the public peace, welfare and safety" and was "not offensive" to "a large segment of society."<sup>180</sup> They accordingly refused to join in banning it, as did the United States Supreme Court, which reversed the Court of Appeals's judgment.<sup>181</sup>

*Kingsley International Pictures Corp. v. Regents*<sup>182</sup> was yet another attempt by the Court of Appeals at movie censorship, despite Judge Fuld's warning in dissent that any system of prior administrative censorship was unconstitutional.<sup>183</sup> The majority, however, was out "to protect" the people from the "abuses"<sup>184</sup> that the movie, "Lady Chatterley's Lover," would impose on them. It was astounded that the movie exalted "illicit sexual love in derogation of the restraints of marriage," presented the "complete surrender" of the leading characters "to the baser instincts

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176. 305 N.Y. 336 (1953).

177. *Ibid.*, 339.

178. *Ibid.*, 347.

179. *Ibid.*, 342.

180. *Ibid.*, 358-59.

181. See *Superior Films v. Department of Education*, 346 U.S. 587 (1954).

182. 175 N.Y.S.2d 39 (Ct. App. 1958).

183. See *ibid.*, 59.

184. *Ibid.*, 41.

... as a triumph over the social mores," and heralded their "decision to live in adultery . . . as a conquest of love over the 'form' of marriage."<sup>185</sup> Banning "Lady Chatterley's Lover," the court said in language reminiscent of Thomas E. Dewey's 1944 presidential campaign, was "necessary for our survival as a nation in an age of open conflict with atheistic materialism."<sup>186</sup> Again, however, the federal Supreme Court disagreed.<sup>187</sup>

Despite emerging federal standards, a 4-3 majority of the Court of Appeals as late as 1963 had a similar reaction to Henry Miller's *Tropic of Cancer*. The majority was responding in part, perhaps, to its "increased awareness of the serious problem" created by the "ever-increasing amount of printed material featuring sex and sensationalism . . . sold not only in bookstores but from open racks in candy stores and similar outlets." The result was "an alarming decline in the moral climate of our times."<sup>188</sup> It found *Tropic of Cancer* to be "nothing more than a compilation of a series of sordid narrations dealing with sex"—"dirt for dirt's sake."<sup>189</sup> In his concurring opinion, Chief Judge Desmond found the "whole book [to be] 'sick sensuality,' " with "[n]o glory, no beauty, no stars—just mud." Despite the recent Supreme Court cases that he cited, he believed it "unthinkable that the practical political thinkers who wrote the Bill of Rights ever intended to protect downright foulness" and hence concluded that "something must remain of the ancient police power of the States . . . to ban stuff as filthy as 'Tropic of Cancer.'"<sup>190</sup> However, because they remanded the case for a new trial on other grounds, Desmond and his colleagues in the majority never had the opportunity to learn how badly they had misread both Henry Miller's *Tropic of Cancer* and the Supreme Court's emerging caselaw.

Gradually, however, the New York courts began to conform to the more libertarian federal standards. One year prior to the suppression of "Lady Chatterley's Lover," the Court of Appeals in a 4-3 decision in the *Excelsior Pictures* case authorized the exhibition of "a fictionalized depiction of the activities of the members of a nudist group in a secluded private camp in Florida," in which the "pictured episodes" were "'honestly relevant to the adequate expression of innocent ideas.'"<sup>191</sup> Nonetheless, three judges still dissented because, although "[v]iews of the adults' private parts [were] not shown to the audience," the "genitalia of children and girls [sic] and the buttocks and breasts of men and women [were] revealed," and, moreover, "the picture contain[ed] specific protracted

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185. *Ibid.*, 42.

186. *Ibid.*, 52.

187. See *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959).

188. *People v. Fritch*, 243 N.Y.S.2d 1, 3-4 (Ct. App. 1963).

189. *Ibid.*, 6.

190. *Ibid.*, 8, 10.

191. *Excelsior Pictures Corp. v. Regents*, 165 N.Y.S.2d 42, 43 (Ct. App. 1957), quoting *United States v. Kennerley*, 209 F. 119, 120-21 (S.D.N.Y. 1913).

scenes of women in unwholesome, sexually alluring postures.”<sup>192</sup>

Even though *Excelsior Pictures* did not extend so far, the lower courts read it as placing all displays of mere nudity, which New York judges had traditionally treated as obscene, within the constitutionally protected scope of free expression.<sup>193</sup> Similarly, *Connection Co. v. Regents*<sup>194</sup> held that “use of the word ‘shit’ . . . not in its usual connotation but as a definitive expression of the language of the narcotic” was not obscene.<sup>195</sup> Meanwhile, an early case had declined to censor a movie about a teenage drug addict, despite the argument of the censors that “use of heroin and marijuana is directed to . . . people who seek sensual pleasures” and that “[w]here drugs are used in mixed company, sexual immorality is generally the motivation and end result.”<sup>196</sup> Another case had licensed a movie that “portray[ed] under restrained and controlled conditions, a human birth,” in the form of “a biological demonstration, scientific in level and tone.”<sup>197</sup>

Soon a 4-3 majority of the Court of Appeals, in an opinion by Judge Fuld, went even farther, declaring that only the “sexually morbid, grossly perverse and bizarre” was obscene and thereby outside the scope of constitutional protection.<sup>198</sup> Although “[a]dolescents may be hurt by” such a standard and “[v]irtuous adults will reject it (as all of us Judges would were we not restrained by the Roth-Alberts legal test),” even Chief Judge Desmond in concurrence knew that his “prepossessions” were “not the law,” which “in a pluralist society” could “not regulate literary standards or give expression to the loftiest virtues.”<sup>199</sup> The court also accepted federal doctrine that a seller of obscene material could not be held criminally liable without proof of *scienter*,<sup>200</sup> thereby increasing the protection for obscenity.<sup>201</sup> By the early 1970s the Court of Appeals had fully jumped aboard the libertarian bandwagon, when it reversed for vagueness in the specification of obscenity a conviction resulting from a police raid on a Rochester bookstore, which had netted 126 separately

192. *Ibid.*, 51.

193. See *People v. Urban*, 222 N.Y.S.2d 461 (App. Div. 1st Dep’t 1961); *Calderon v. City of Buffalo*, 397 N.Y.S.2d 655, 661 (Sup. Ct. Erie County 1977), *aff’d*, 402 N.Y.S.2d 685 (App. Div. 4th Dep’t 1978); *People v. Stabile*, 296 N.Y.S.2d 815 (Crim. Ct. N.Y. County 1969); *People v. Kaplan*, 252 N.Y.S.2d 927 (Crim. Ct. N.Y. County 1964).

194. 230 N.Y.S.2d 103 (App. Div. 3d Dep’t), *aff’d*, 234 N.Y.S.2d 722 (Ct. App. 1962). Accord *People v. Vanguard Press*, 84 N.Y.S.2d 427, 429 (Magis. Ct. N.Y. County 1947) (use of four-letter words did not make a book obscene).

195. *Connection Co. v. Regents*, 230 N.Y.S.2d 103, 103.

196. *Broadway Angels, Inc. v. Wilson*, 125 N.Y.S.2d 546, 549 (App. Div. 3d Dep’t 1953).

197. *Capitol Enterprises v. Regents*, 149 N.Y.S.2d 920, 921 (App. Div. 3d Dep’t 1956).

198. *People v. Richmond County News*, 216 N.Y.S.2d 369, 376 (Ct. App. 1961).

199. *Ibid.*, 378.

200. See *People v. Finkelstein*, 214 N.Y.S.2d 363 (Ct. App. 1961). For an earlier lower court opinion reaching the same result, see *People on Complaint of Callaghan v. Bunis*, 198 N.Y.S.2d 568 (Buffalo City Ct. 1960).

201. See also *People v. J.W. Productions*, 413 N.Y.S.2d 552 (Crim. Ct. N.Y. County 1979) (city may not deny licenses to movie theaters previously convicted of showing obscene movies).

titled books and calendars depicting " 'scenes of nude persons' " and of " 'the female and male genital organs, . . . including the male penis and the female breasts.' " <sup>202</sup>

But sexual pleasure and liberty did not triumph entirely. " 'Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated, [and/or] . . . of masturbation, excretory functions, and lewd exhibition of the genitals' " <sup>203</sup> remained obscene and thus outside the scope of constitutional protection. Although the Court of Appeals upheld legislative attempts to apply stricter standards in regard to sales to minors, <sup>204</sup> the New York courts gave adults in the 1970s access to all but what it declared to be the most hard-core materials, such as dildos; <sup>205</sup> advertisements "soliciting . . . acts of sodomy, and wife-swapping orgies"; <sup>206</sup> photographs of "young men," one of them "hardly more than a boy," all "in various stages of undress," engaged in "embracing, wrestling, spanking, beating, or . . . manually soap-lathering the genitalia of the other"; <sup>207</sup> magazines rating motion pictures "by a 'Peter Meter,' a drawing of a penis superimposed upon a scale" which rates the picture "according to the percentage of erection" which the picture induces; <sup>208</sup> and live sex shows, which "include[d] simulated heterosexual copulation by nude performers, masturbation, and three kinds of sodomy." <sup>209</sup>

Although judges found that material such as this, ranging from the ribald to the disgusting, "furnish[ed] escape literature to those who . . . 'because of lack of education, the meanness of their social existence, or mental insufficiency, cannot cope with anything better,' " <sup>210</sup> they also found it too lewd and lascivious to merit First Amendment protection. Their conclusion is puzzling, given the fact that they did not find nude sunbathing lascivious, <sup>211</sup> even when engaged in by "a woman in her late

202. *People v. Abronovitz*, 335 N.Y.S.2d 279 (Ct. App. 1972).

203. *People v. Heller*, 352 N.Y.S.2d 601, 612 (Ct. App. 1973), *cert. denied sub nom. Buckley v. New York*, 418 U.S. 944 (1974), quoting *Miller v. California*, 413 U.S. 15, 25 (1973). Accord *Trans-Lux Distrib. Corp. v. Bd. of Regents*, 248 N.Y.S.2d 857 (Ct. App. 1964), *rev'd*, 380 U.S. 259 (1965).

204. See *People v. Hartman*, 297 N.Y.S.2d 143 (Ct. App. 1968); *People v. Tannenbaum*, 274 N.Y.S.2d 131 (Ct. App. 1966), *appeal dismissed*, 388 U.S. 439 (1967), *conviction vacated*, 296 N.Y.S.2d 798 (Ct. App. 1968); *Bookcase, Inc. v. Broderick*, 271 N.Y.S.2d 947 (Ct. App.), *appeal dismissed*, 385 U.S. 12 (1966).

205. See *People v. Buckley*, 320 N.Y.S.2d 91, 96 (Crim. Ct. N.Y. County 1971) (dictum), *aff'd*, 340 N.Y.S.2d 191 (App. Term 1st Dep't 1972), *aff'd sub nom. People v. Heller*, 352 N.Y.S.2d 601 (Ct. App. 1973), *cert. denied sub nom. Buckley v. New York*, 418 U.S. 944 (1974); *People v. Clark*, 304 N.Y.S.2d 326 (Crim. Ct. N.Y. County 1969).

206. *Buckley*, 320 N.Y.S.2d 91, 97.

207. *People v. G.I. Distributors*, 281 N.Y.S.2d 795, 796-97 (Ct. App.), *cert. denied*, 389 U.S. 905 (1967).

208. *Buckley*, 320 N.Y.S.2d 91, 94.

209. *People v. Bercowitz*, 308 N.Y.S.2d 1, 6 (Crim. Ct. N.Y. County 1970).

210. *People v. Birch*, 269 N.Y.S.2d 752, 754 (App. Div. 2d Dep't) *appeal dismissed*, 274 N.Y.S.2d 159 (Ct. App. 1966), quoting *People v. Birch*, 243 N.Y.S.2d 525, 530 (Sup. Ct. Queens County 1963).

211. See *People v. Hardy*, 357 N.Y.S.2d 970 (App. Term 2d Dep't 1974).

twenties" who "was observed playing with a ball, swimming, waving at a passing boat, slowly applying suntan lotion (to the frontal portion of her body including her breasts and down to her pubic hair)," being photographed, and "sunbathing on a blanket (arms behind her propping her up, legs outstretched and knees approximately twelve to eighteen inches apart)."<sup>212</sup> Similarly, there was nothing wrong with a man's wilful and lewd exposure of his private parts before two or more women, as long as he committed the act in the cellar of his own home.<sup>213</sup> With the courts unwilling to enforce the indecent exposure laws in numerous other cases,<sup>214</sup> the only situation in which the statute seemed to be enforced was when a man exposed himself in a car in front of young children<sup>215</sup> or on subway platforms or the equivalent.

When the practice of nude and topless dancing arose in bars and restaurants in the early 1970s, the courts leaned toward the view that it could not be prohibited. Thus, although several trial court judges sustained state and local legislation prohibiting the practice,<sup>216</sup> all the appellate judges who considered the issue declared the legislation invalid,<sup>217</sup> as did some lower court judges,<sup>218</sup> even where "a nude dancer . . . touched the area of her private parts, laid on the floor on a rug and performed dance maneuvers while lying there."<sup>219</sup> It was similarly held that taking

212. *People v. Gilbert*, 338 N.Y.S.2d 457, 459 (Crim. Ct. Kings County 1972). The court did, however, find her guilty of indecent exposure. See *People v. Gilbert*, 339 N.Y.S.2d 743 (Crim. Ct. Kings County 1973).

213. See *People v. Dohen*, 116 N.Y.S.2d 351 (App. Div. 2d Dep't 1952).

214. See *People v. Case*, 227 N.Y.S.2d 212 (App. Div. 1st Dep't), *cert. denied*, 371 U.S. 849 (1962); *People v. Westervelt*, 218 N.Y.S.2d 77 (App. Div. 2d Dep't 1961); *People v. Abbate*, 216 N.Y.S.2d 443 (App. Div. 2d Dep't 1961); *People v. Lardarello*, 209 N.Y.S.2d 913 (App. Div. 1st Dep't 1961); *People v. Thompson*, 113 N.Y.S.2d 499 (App. Div. 2d Dep't 1952); *People v. Smookler*, 52 N.Y.S.2d 616 (App. Div. 2d Dep't 1945); *People v. Lagani*, 159 N.Y.S.2d 447 (Westchester County Ct. 1957). In all these cases, lack of evidence was the only ground stated for voiding convictions. What may have been at stake in these cases is illustrated, perhaps, by an earlier case, in which "a young man of previous unblemished character, well educated, of a good home, and . . . steadily employed" had his conviction reversed since his act of exposure "may have been 'the result of carelessness and negligence in dress.'" *People v. Ulman*, 16 N.Y.S.2d 222, 223 (App. Div. 1st Dep't 1939).

215. See *People v. Palladino*, 237 N.Y.S.2d 266 (Westchester County Ct. 1962).

216. See *People v. Morgan*, 382 N.Y.S.2d 666 (Crim. Ct. N.Y. County 1976); *People v. Karns*, 365 N.Y.S.2d 725 (Rochester City Ct. 1975); *People v. Moreira*, 333 N.Y.S.2d 215 (Dist. Ct. Suffolk County 1972); and *Brandon Shores, Inc. v. Incorporated Village of Greenwood Lake*, 325 N.Y.S.2d 957 (Sup. Ct. Orange County 1971).

217. See *TJPC Restaurant Corp. v. State Liquor Authority*, 402 N.Y.S.2d 483 (App. Div. 4th Dep't 1978), *aff'd*, 424 N.Y.S.2d 896 (Ct. App. 1979); *People v. Nixon*, 390 N.Y.S.2d 518 (App. Term 9th & 10th Dists. 1976).

218. See *Lucifer's Gate, Inc. v. Town of VanBuren*, 373 N.Y.S.2d 304 (Sup. Ct. Onondaga County 1975); *People v. Conte*, 315 N.Y.S.2d 348 (Dist. Ct. Suffolk County 1969). Cf. *Beck v. Wallander*, 71 N.Y.S.2d 237, 239 (Sup. Ct. N.Y. County 1947) (city could not deny license to cabaret dancer who had previously danced with "her breasts and lower part of her torso . . . exposed"); *Application of DuBarry Caterers, Inc.*, 105 N.Y.S.2d 795 (App. Div. 1st Dep't 1951) (city may not deny license to catering firm which had previously failed to stop indecent entertainment, of which it had no knowledge, occurring at a meeting on the premises of a fraternal lodge).

219. *TJPC Restaurant Corp.*, 402 N.Y.S.2d 483, 485 (statement of facts from dissenting opinion).

pictures of nudes in photography studios was constitutionally protected,<sup>220</sup> although similar photography at a "farm outing" where guests paid \$10 for the privilege of "photographing female models, some of whom posed in the nude," had earlier been held to violate the indecent exposure laws.<sup>221</sup>

When all the cases are examined in conjunction, the difficulty of discerning clear lines between the permissible and the impermissible in the area of obscenity becomes apparent. One sensible distinction might have been between acts and pictures, and, at times, that distinction was drawn. One judge, for example, noted that he had "no difficulty in distinguishing between the interests served in 'topless dancing' and that of the study of the female form,"<sup>222</sup> and another held that, even when the First Amendment protected "the dissemination of [sexually explicit] printed or photographic material," that protection did "not shield one against a prosecution for a [sex] crime [namely, prostitution] committed" during the course of filming.<sup>223</sup> But this distinction would have cut in favor of giving verbal and pictorial expression even more protection, perhaps, than the courts gave it, while acts of nude sunbathing and nude dancing would have received less protection.

A second distinction might have focused on the difference between acts of individual "self-expression" and "'bald attempt[s] to profit on indecent exposure.'"<sup>224</sup> On occasion, the New York courts seem to have "examine[d] the method of advertising and exploiting" sexually explicit material to determine its obscenity,<sup>225</sup> as called for by the "pandering" test of *Ginzberg v. United States*.<sup>226</sup> But the profit motive was, after all, at the heart of most motion picture production, and greater emphasis on profit would not have led to the end of movie censorship that in fact occurred.

A third possibility is that the judiciary drew the line where it did out of a concern, frequently expressed as late as the 1950s, that lifting restrictions on sexual expression would produce social disorder. The prosecution of three defendants for harassing police tends to support this explanation: in the first, the defendant called a state police investigator an "asshole";<sup>227</sup> in the second, a student protesting the Vietnam War "uttered an obscene epithet and made an obscene gesture" to a police-

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220. See *People v. Wilhelm*, 330 N.Y.S.2d 279 (Buffalo City Ct. 1972).

221. *Carr v. Hoy*, 158 N.Y.S.2d 572, 574 (Ct. App. 1957).

222. *Moreira*, 333 N.Y.S.2d 215, 221.

223. *People v. Kovner*, 409 N.Y.S.2d 349, 352 (Sup. Ct. N.Y. County 1978).

224. *Moreira*, 333 N.Y.S.2d 215, 220, quoting *J.D.H. Rest. v. New York State Liquor Auth.*, 279 N.Y.S.2d 975, 976 (App. Div. 1st Dep't 1967).

225. *People v. Weingarten*, 271 N.Y.S.2d 158, 162 (Crim. Ct. N.Y. County 1966), *aff'd*, 286 N.Y.S.2d 429 (App. Term 1st Dep't 1967), *rev'd on other grounds*, 306 N.Y.S.2d 17 (Ct. App. 1969).

226. 383 U.S. 463, 470 n.11 (1966).

227. *People v. Cecere*, 334 N.Y.S.2d 83, 89 (Batavia City Ct. 1972).

man during a parade;<sup>228</sup> in the third, a black defendant called a white policeman "a jackass" and said that "the officer shouldn't treat colored people like dogs."<sup>229</sup> The acquittal of the last two defendants and the conviction only of the first militates against this explanation, however.

As the inadequacy of all three of these explanations demonstrates, the emergence of constitutional limitations on the criminalization of pornography had "evoked passion," as conservatives spoke of "the poison of obscenity" and libertarians "deplored another breach in the constitutional bulwark against repression." But newly formulated doctrines did not bring "clarity" either "to the constitutional questions or to the social questions" raised by pornography.<sup>230</sup> The reason for the confusion, according to a 1963 article by Louis Henkin that saw pornography law as the analog of legislation against homosexuality and prostitution, was that the Supreme Court and the commentators had refused to examine the central issue raised by its obscenity cases—"the right of constitutional government to legislate morality which has no secular, utilitarian, or social purpose." In Henkin's view, it was time "to define and articulate the extent to which the religious antecedents of our values may continue to motivate our governments in the enactment and enforcement of law."<sup>231</sup> At the time Henkin wrote, his analysis of the issue at stake in pornography, as well as homosexuality and prostitution, surely seemed correct. But, as the next section of this essay, which deals with the law of rape, will soon suggest, another issue—the exploitation of women by men—lurked beneath the surface and would soon emerge.

### E. Rape

No one, of course, ever proposed to decriminalize rape. At the height of the efforts to decriminalize homosexuality, prostitution, family violence, and pornography, the law treated what has been labelled "real rape"<sup>232</sup>—that is, cases of attacks on women by strangers—as a heinous crime. Indeed, as the judges on the Court of Appeals noted in one 1950 case, the "protection of women in a county with sparsely settled sections [was] one of the responsibilities" of courts and prosecutors, and contrary to its proclivity in other areas, the court was prepared in cases of "real rape" to construe criminal statutes broadly to achieve that end.<sup>233</sup> But a totally different attitude governed when women claimed rape by men whom they knew, such as dates, ex-husbands, and ex-lovers. As one scholar explained:

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228. *People v. Benders*, 312 N.Y.S.2d 603, 605 (Buffalo City Ct. 1970).

229. *People v. Brown*, 303 N.Y.S.2d 981 (Justice's Ct. Rockland County 1969).

230. Louis Henkin, "Morals and the Constitution: The Sin of Obscenity," *Columbia Law Review* 63 (1963): 391.

231. *Ibid.*, 414.

232. Susan Estrich, "Rape," *Yale Law Journal* 95 (1986): 1087, 1088.

233. *People v. Florio*, 301 N.Y. 46, 53 (1950).

When a woman is familiar with a man she claims has raped her there is always a question as to whether the force used in obtaining sexual intercourse was brought on by her own provocation. Many women with hysterical personality features are unusually seductive in their relationships with men. Sometimes their efforts at being charming arouse erotic reactions. . . . This suspicion can be legitimately raised when a woman has known her attacker, has accepted dates with him and has indulged in some kissing and petting.<sup>234</sup>

In such cases, the New York courts prior to the 1970s were loathe indeed to subject men to the criminal process, and, in order to leave men free, they did exactly what they had done in their efforts to decriminalize homosexuality and prostitution: they altered technical legal doctrines surrounding the law of rape so as to increase the difficulty of obtaining criminal convictions.

The large number of written opinions in rape cases necessitates the division of the subject into sub-categories. Thus, this section will focus on two important rules of evidence which were manipulated in ways that limited use of the criminal process during the 1940s, 1950s, and 1960s. First, this section will analyze the rule requiring corroboration of a rape victim's testimony. Second, it will turn to the rule requiring a victim to resist an attack to her utmost and treating lack of resistance as evidence of consent. Finally, it will consider other doctrinal issues raised by the changing law of rape.

### 1. *The Corroboration Issue*

Until the 1970s, no one questioned the requirement that a conviction could not be had for rape unless the testimony of the prosecutrix was duly corroborated.<sup>235</sup> This requirement, which had been codified by statute long before 1920, was "not a mere rule of evidence, but a settled legislative declaration that such uncorroborated testimony is inherently untrustworthy."<sup>236</sup> "[F]ounded on centuries of social and legal experience," the corroboration requirement, as stated in one case, "wisely recognize[d] that some complainants are designing or vicious" and that in the absence of the rule defendants would be at these women's "mercy."<sup>237</sup>

Cases in the first half of the century suggest that the requirement was a substantial one. Corroboration, it was said, had to extend to every mate-

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234. Seymour L. Halleck, "Emotional Effects of Victimization," in *Sexual Behavior and the Law*, ed. Ralph Slovenko (Springfield, Ill.: C.C. Thomas, 1965), 673, 675.

235. See, for example, *People v. Yannucci*, 283 N.Y. 546, 549 (1940); *People v. Page*, 162 N.Y. 272 (1900); *People v. Cunningham*, 95 N.Y.S.2d 189 (App. Div. 2d Dep't 1950); *People v. Pandeline*, 251 N.Y.S. 384 (Ct. Gen. Sess. N.Y. County 1931).

236. *Eric R. v. Ploskitt*, 312 N.Y.S.2d 447, 449 (App. Div. 2d Dep't 1970).

237. *People v. Yannucci*, 15 N.Y.S.2d 865, 866 (App. Div. 2d Dep't 1939) (dictum), *rev'd on other grounds*, 283 N.Y. 546 (1940).

rial fact essential to constitute the crime charged,<sup>238</sup> and for that reason the courts held that pregnancy and birth of a child would not by itself corroborate a claim of rape.<sup>239</sup> Similarly, medical testimony that the complainant's hymen was broken was held not to constitute corroboration when the doctor could not account for how it had been broken.<sup>240</sup> But medical testimony combined with the statement of another young girl whom the defendant had raped did amount to sufficient corroboration,<sup>241</sup> as did testimony that the defendant was at the complainant's house near the time of the offense.<sup>242</sup> A confession also constituted sufficient corroboration,<sup>243</sup> although a statement by a defendant that he "fooled with her, but . . . didn't rape her" did not.<sup>244</sup> The courts also held that the prosecution need not offer corroborating evidence of the actual fact of penetration; this was "necessarily the rule, else few convictions could be secured even in flagrant cases."<sup>245</sup>

Cases decided after 1950 not only continued to adhere to traditional corroboration requirements,<sup>246</sup> but also displayed a tendency to become even more stringent than before. Thus, *People on Complaint of Lore v. Smith*<sup>247</sup> reversed the old rule and declared that corroboration "must extend to the element of penetration."<sup>248</sup> Similarly, *In the Matter of William S.*<sup>249</sup> declared, apparently for the first time, that evidence of similar sex crimes against others could not be introduced to corroborate the charges on trial,<sup>250</sup> while two cases held that the requisite corroboration could not come from a confession,<sup>251</sup> although one of them held that the

238. *People v. Lammes*, 203 N.Y.S. 736, 737 (App. Div. 4th Dep't 1924).

239. See *People v. Anthony*, 293 N.Y. 649 (1944); *People v. Whitson*, 234 N.Y. 517 (1922), *rev'g* 185 N.Y.S. 590 (App. Div. 3d Dep't 1921); *People v. Hornbeck*, 101 N.Y.S.2d 182 (App. Div. 2d Dep't 1950); *People v. Palmer*, 200 N.Y.S.2d 837 (App. Div. 3d Dep't 1923); *People v. Karlan*, 13 N.Y.S.2d 482 (Queens County Ct. 1939).

240. See *People v. Brehm*, 218 N.Y.S. 469, 473-74 (App. Div. 2d Dep't 1926). See also *People v. Croes*, 285 N.Y. 279 (1941).

241. See *People v. Hop Sing*, 215 N.Y.S. 301 (App. Div. 2d Dep't 1926). Accord *People v. Wright*, 16 N.Y.S.2d 593, 595 (Columbia County Ct. 1940).

242. See *People v. Deitsch*, 237 N.Y. 300 (1923); *People v. Wright*, 17 N.Y.S.2d 382, 383 (Columbia County Ct. 1940).

243. See *People v. Tubbs*, 267 N.Y.S. 846 (App. Div. 2d Dep't 1933), *aff'd*, 264 N.Y. 641 (1934).

244. *People v. Downs*, 236 N.Y. 306, 309 (1923).

245. *People v. Haskall*, 210 N.Y.S. 337, 338 (Sup. Ct. Steuben County), *aff'd*, 213 N.Y.S. 878 (App. Div. 4th Dep't 1925), quoting *People v. DeNigris*, 142 N.Y.S. 620, 621 (App. Div. 1st Dep't 1913). Accord *People v. Van Allen*, 89 N.Y.S.2d 594, 601 (App. Div. 3d Dep't 1949). See also *People v. McDuffee*, 63 N.Y.S.2d 98 (App. Div. 3d Dep't), *leave to appeal denied*, 64 N.Y.S.2d 671 (App. Div. 3d Dep't 1946) (evidence sufficiently corroborative). But see *People v. Romano*, 300 N.Y.S.2d 366 (App. Div. 2d Dep't 1937) (evidence not corroborative).

246. See, for example, *Matter of Steven D.G.*, 349 N.Y.S.2d 754 (App. Div. 2d Dep't 1973) (statement of defendant that "she went with me" held not sufficient corroboration); *People v. Tashman*, 233 N.Y.S.2d 744 (Sup. Ct. Kings County 1962) (pregnancy not sufficient corroboration).

247. 256 N.Y.S.2d 422 (New Rochelle City Ct. 1965).

248. *Ibid.*, 425.

249. 333 N.Y.S.2d 466 (Fam. Ct. Kings County 1972).

250. *Ibid.*, 471-72.

251. See *People v. Perez*, 269 N.Y.S.2d 768 (App. Div. 2d Dep't 1966); *People v. Dunbar*, 130 N.Y.S.2d 59, 63-64 (Magis. Ct. Queens County 1954) (dictum).

defendant's confession together with the complainant's pregnancy would be sufficient corroboration.<sup>252</sup>

Several cases of special factual difficulty came before the Court of Appeals. One was *People v. Porcaro*,<sup>253</sup> in which a ten-year-old girl testified to her father's "having regular and frequent sexual intercourse" with her "during four years, in the usual manner as well as through her mouth." Noting that "a matrimonial dispute [was] in the background,"<sup>254</sup> the plurality opinion of Judge VanVoorhis implied that the girl's testimony was unreliable without corroboration, and Judge Fuld in a separate concurrence would have reversed because, "as a matter of law, no conviction for impairing the morals of a child may validly rest on the uncorroborated testimony of the child victim."<sup>255</sup> VanVoorhis in fact reversed on the narrower ground that the defendant claimed the girl was a virgin and was not permitted to have her medically examined as "common fairness require[d]."<sup>256</sup>

The companion case of *People v. Oyola*<sup>257</sup> was even more difficult. There, the defendant's ten-year-old daughter

testified to all the particulars of a completed act of intercourse upon her by her father, soon after she had retired for the night. She said that she had on her nightgown, and that he was clothed. In spite of the early arrival of both mother and the police, no evidence was offered . . . of any examination of the child's body, nor the finding of any residual evidence of a seminal emission in or about the child's sex organs, adjacent area nor on any other portion of her body, bed-clothes or nightgown nor upon appellant's clothing or anywhere else.<sup>258</sup>

The only corroboration offered was defendant's statement to his wife "that it was true what he had done" and that "he was sorry for what he did to his daughter."<sup>259</sup> Writing for the majority, Judge VanVoorhis observed that "testimony by complainants in these cases" should be distrusted since "errant young girls and women are given to 'contriving false charges of sexual offenses by men'" and "'sinister possibilities of injustice . . . lurk[ed] in believing'" them.<sup>260</sup> He accordingly reversed Oyola's conviction for want of proof beyond a reasonable doubt. Judge

252. See *People v. Dunbar*, 130 N.Y.S.2d 59, 64 (Magis. Ct. Queens County 1954).

253. 189 N.Y.S.2d 194 (Ct. App. 1959).

254. See *ibid.*, 195. See also *People v. Moore*, 230 N.Y.S.2d 880, 885-86 (App. Div. 3d Dep't), *cert. denied*, 371 U.S. 838 (1962), in which the court noted that a pending divorce action was "germane to the motivation leading to the prosecution" of a father for raping his stepdaughter.

255. *Porcaro*, 189 N.Y.S.2d 194, 197.

256. *Ibid.*, 196.

257. 189 N.Y.S.2d 203 (Ct. App. 1959).

258. *Ibid.*, 204-5.

259. *Ibid.*, 208.

260. *Oyola*, 189 N.Y.S.2d 203, 208, quoting John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Boston: Little, Brown & Co., 1940), 3:459-60.

Desmond dissented in both *Porcaro* and *Oyola*, noting in the latter that there “never has been a rule . . . requiring corroboration of the sworn testimony of . . . infant complainants, . . . [and] such a rule would be very much against the public interest.”<sup>261</sup>

In two other cases, there was no doubt that the complainants had been raped, yet convictions were still reversed for lack of corroboration. In the one, a 17-year-old school girl ran home after the rape, appearing with a bloodied mouth, bruised lips, disheveled appearance and apparent emotional distress. She described the defendant’s car, as well as a ring worn by her attacker and found on the defendant at the time of his arrest, and a medical examination verified that intercourse had taken place and that the complainant had been physically abused.<sup>262</sup> In the other, the victim made prompt complaint, was in a distraught emotional state immediately after the alleged assault, and had bruises on her body.<sup>263</sup>

Sufficient corroboration tended to be found only where evidence of the defendant’s guilt was overwhelming, as where the complainant’s blood or a piece of her clothing were found in the defendant’s car,<sup>264</sup> or the defendant’s fingerprints were found in the complainant’s car and he was found near where it was wrecked.<sup>265</sup> Corroboration was also held to exist in a case in which a defendant did not deny getting the prosecutrix pregnant and further admitted “‘having a crush on’” her and “‘necking’ with her in the early morning hours in a parked automobile.”<sup>266</sup> In a weaker case, in which the only corroboration was that intercourse had occurred, that the defendant had been observed in the vicinity near the time thereof, and that the complainant had thrown a jewelry box, allegedly to protect herself, four judges of the Court of Appeals voted to affirm the rape conviction,<sup>267</sup> but three others—Judges Desmond, Fuld, and VanVoorhis—dissented on the ground that “no ‘other evidence’” apart from the complainant’s testimony identified the defendant as the perpetrator.<sup>268</sup> Although they did not so indicate, the dissenters may also have doubted whether a rape had actually occurred, since the evidence showed that the defendant and the complainant were engaged in a friendly dialogue before their act of intercourse occurred.

As it became increasingly difficult to satisfy the corroboration require-

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261. *Ibid.*, 211.

262. See *People v. Linzy*, 335 N.Y.S.2d 45 (Ct. App. 1972).

263. See *People v. Watson*, 410 N.Y.S.2d 577 (Ct. App. 1978).

264. See *People v. Garland*, 346 N.Y.S.2d 47 (App. Div. 2d Dep’t 1973) (blood); *People v. Marshall*, 172 N.Y.S.2d 237 (App. Div. 3d Dep’t 1958), *aff’d*, 188 N.Y.S.2d 213 (Ct. App. 1959) (clothing).

265. See *People v. Spinks*, 326 N.Y.S.2d 261 (App. Div. 3d Dep’t 1971).

266. *People v. Imperiale*, 180 N.Y.S.2d 814, 817-18 (Ct. Spec. Sess. Kings County 1957).

267. See *People v. Masse*, 182 N.Y.S.2d 821 (Ct. App. 1959).

268. *Ibid.*, 825. Compare also *People v. Roman*, 402 N.Y.S.2d 405 (App. Div. 1st Dep’t 1978) (unspecified evidence insufficient corroboration), with *People v. Duegaw*, 312 N.Y.S.2d 518 (App. Div. 3d Dep’t 1970) (unspecified evidence sufficient corroboration).

ment, prosecutors in cases involving completed rapes sought to circumvent the requirement by indicting defendants only for attempted rape or for assault with intent to rape. Until approximately 1960, nearly all these cases held that a defendant accused by a complainant of a completed rape for which inadequate evidence of corroboration existed could be convicted without corroboration for either an attempt<sup>269</sup> or an assault,<sup>270</sup> although not, of course, for both.<sup>271</sup>

The Court of Appeals began to reverse these rules, however. In *People v. LoVerde*,<sup>272</sup> a teenage girl accused a teenage boy of forcible rape, but in the absence of corroboration, the jury found him guilty only of an act of intercourse that endangered the morals of a minor. In reversing his conviction, the court observed that under the established rules which had been applied by the jury "a prosecutor might easily circumvent the requirement of corroboration necessary for a conviction of misdemeanor rape simply by charging instead the impairment of the morals of a minor, as he did here. The law," the court added, "may not be so circumvented."<sup>273</sup>

The Court of Appeals continued to increase the difficulty of prosecuting cases of forced sex. In *People v. English*,<sup>274</sup> in a 4-3 memorandum decision, it reversed convictions for attempted rape and assault with intent to commit rape on the ground of lack of corroboration. The rule in *English* was designed "as a matter of policy . . . to prevent the prosecutor from settling for the lesser conviction simply because of his inability to obtain the requisite corroboration."<sup>275</sup> It soon led, however, to outrageous results, as demonstrated by another case that came before the court, *People v. Radunovic*.<sup>276</sup>

*Radunovic* arose when a prosecutor, seeking to avoid the need for corroboration in a rape prosecution, brought only a charge of assault against a high school student who had attacked his teacher. The majority of the Court of Appeals, in an opinion by Judge VanVoorhis, reversed the con-

269. See *People v. McGhee*, 244 N.Y.S.2d 500 (App. Div. 2d Dep't 1963); *People v. Manwaring*, 162 N.Y.S.2d 548 (App. Div. 3d Dep't 1957); *People v. Phillips*, 197 N.Y.S. 567 (App. Div. 2d Dep't 1922), *aff'd*, 235 N.Y. 579 (1923). But cf. *People v. Cosad*, 1 N.Y.S.2d 132 (App. Div. 4th Dep't 1937).

270. See *People v. DeGroat*, 173 N.Y.S.2d 169 (App. Div. 3d Dep't 1958), *aff'd*, 183 N.Y.S.2d 565 (Ct. App. 1959), *cert. denied*, 364 U.S. 284 (1960); *People v. Chimino*, 58 N.Y.S.2d 844 (App. Div. 4th Dep't 1945), *aff'd*, 296 N.Y. 554 (1946); *People v. Dixon*, 234 N.Y.S.2d 415 (Sup. Ct. Kings County 1962); *People v. Girolyme*, 78 N.Y.S.2d 845 (Sup. Ct. Kings County), *aff'd*, 79 N.Y.S.2d 885 (App. Div. 2d Dep't 1948). But see *People v. Adler*, 73 N.Y.S.2d 841 (App. Div. 2d Dep't 1947). Of course, if the assault resulted in the death of the victim, the assailant could also be prosecuted for and convicted of murder. See *People v. Harris*, 121 N.Y.S.2d 868, 871 (App. Div. 1st Dep't 1953), *aff'd*, 306 N.Y. 345 (1954).

271. See *People v. Williams*, 19 N.Y.S.2d 780 (App. Div. 2d Dep't 1940).

272. 195 N.Y.S.2d 835 (Ct. App. 1959).

273. *Ibid.*, 836.

274. 262 N.Y.S.2d 104 (Ct. App. 1965).

275. *People v. Reynolds*, 307 N.Y.S.2d 201, 204 (Ct. App. 1969).

276. *People v. Radunovic*, 287 N.Y.S.2d 33 (Ct. App. 1967).

viction. Van Voorhis held that when the only evidence of assault was the complainant's testimony of a completed rape, corroboration was required, and he further held that bruises on the victim's thigh and medical testimony that her hymen was intact shortly before but not after the alleged assault was not sufficient corroboration.

This case produced some vehement dissents. One by Judge Scileppi called the majority opinion "a license to commit rape," since the crime was "hardly ever committed in the presence of others" and the necessary corroboration was therefore almost always unobtainable. He found this "an intolerable situation" when "the incidence of attacks on women . . . [was] steadily increasing."<sup>277</sup> As Judge Conway had declared only a few years earlier, the conservatives on the court were generally "disturbed" by "appeals . . . to the sexual appetite" and "by the increasing marks of moral laxity," and they were "unable to look upon [this] moral disintegration as a mere change in custom."<sup>278</sup> Taking what would soon be seen as more of a feminist approach, Judge Bergan noted in a companion dissent that, "[i]f a man had been assaulted," the evidence of bruises "would be sufficient; it ought to be sufficient, too, if a woman is assaulted."<sup>279</sup>

Nonetheless *English* and *Radunovic* were the law, and the lower courts uniformly applied the rule of the two cases to invalidate convictions both for attempted rape<sup>280</sup> and assault with intent to commit rape<sup>281</sup> when the actual crime was a completed rape. Conviction could be had for an attempt or assault only if the evidence showed that the defendant tried to have intercourse but failed.<sup>282</sup> Such holdings led, of course, to the absurd and anomalous result that "one who makes a sexual attack on a woman can be convicted without corroboration if he falls short of satisfying his lust, but not if he succeeds."<sup>283</sup> Thus, the law directed men who, even in ambiguous circumstances, had used only the slightest force in the service of passion to press forward to the end, while

277. *Ibid.*, 38-39.

278. *Kingsley Int'l Pictures Corp. v. Regents*, 175 N.Y.S.2d 39, 50 (Ct. App. 1958), *rev'd*, 360 U.S. 684 (1959).

279. *Radunovic*, 287 N.Y.S.2d 33, 39-40.

280. See *People v. J.T. Nixon*, 374 N.Y.S.2d 491 (App. Div. 4th Dep't 1975); *People v. Halpern*, 289 N.Y.S.2d 130 (App. Div. 2d Dep't 1968), *aff'd*, 313 N.Y.S.2d 119 (Ct. App. 1970); *People v. Moore*, 286 N.Y.S.2d 296 (App. Div. 2d Dep't 1967), *aff'd*, 297 N.Y.S.2d 944 (Ct. App. 1969), *cert. denied*, 394 U.S. 1006 (1969).

281. See *People v. Butt*, 313 N.Y.S.2d 461 (App. Div. 2d Dep't 1970); *People v. Jenkins*, 284 N.Y.S.2d 302 (App. Div. 1st Dep't 1967), *aff'd*, 291 N.Y.S.2d 368 (Ct. App. 1968); *People v. Coleman*, 284 N.Y.S.2d 334 (App. Div. 1st Dep't 1967), *aff'd sub nom. People v. Jenkins*, 291 N.Y.S.2d 368 (Ct. App. 1968); *People v. King*, 273 N.Y.S.2d 925 (App. Div. 2d Dep't 1966); *People v. Debe*, 264 N.Y.S.2d 396 (App. Div. 2d Dep't 1965); *People v. Curtis*, 265 N.Y.S.2d 393 (App. Div. 1st Dep't 1965).

282. *People v. L.B. Nixon*, 374 N.Y.S.2d 491 (App. Div. 4th Dep't 1975). Cf. *People v. Colon*, 265 N.Y.S.2d 653 (Ct. App. 1965) (case remanded to determine whether defendant's acts "amounted to an un consummated attempt to rape").

283. *People v. Mills*, 298 N.Y.S.2d 549, 552 (App. Div. 4th Dep't 1969), *aff'd*, 309 N.Y.S.2d 603 (Ct. App. 1970).

it directed women who complained to the police of a rape to assert at trial, presumably falsely, that their "condition at the time of the assault was such" that they "couldn't say that there had been a consummated rape."<sup>284</sup>

## 2. *The Consent Issue*

By definition, rape is forcible sexual intercourse, and thus a defendant can always negate his guilt by showing that the complainant consented to sexual relations. Black-letter law, which remained constant throughout the period under study, demanded that a woman offer her utmost resistance to the attack or at least "as much resistance as she possibly could under the circumstances and the facts" of the case.<sup>285</sup> From the 1950s until the mid-1970s, judges applied this doctrine strictly, and men accordingly enjoyed the benefit of the doubt if a woman's reaction to a demand for intercourse was in the least ambiguous.

Two of the mid-1970s cases that failed to produce convictions were paradigmatic. In *People v. Evans*,<sup>286</sup> the defendant used the pretense of being a psychologist to lure a college sophomore into his apartment, where he put her in fear by remarking that she was in "the apartment of a strange man" and that he "could kill" or "rape" her. After he next yelled and screamed, he broke down and told the sophomore about "his lost love," who had committed suicide. When she reached out for him, he grabbed her, announcing "You're mine, you are mine." They then slept together for the night, during which there were three acts of sexual intercourse and an act of oral-genital contact.<sup>287</sup>

Although the complainant contended that she yielded out of fear and thus did not consent, the court found otherwise. It commented that it was "not illegal to feed a girl a line, to continue the attempt, not to take no for a final answer, at least not the first time." The court also noted that the defendant "spurned the readily available . . . [and] acquiescent women" and "got his kicks through the exercise of these techniques." As he boasted to the police, "this was a game he played with girls' heads" as well as their bodies—a game that gave him pleasure and power at the expense of women's victimization. While the court found this conduct "reprehensible," it was "not criminal"—it was only "conquest by con job."<sup>288</sup>

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284. *Ibid.*, 551-52.

285. *People v. Liller*, 275 N.Y.S.2d 69, 71-72 (App. Div. 3d Dep't 1966), *rev'd on other grounds*, 283 N.Y.S.2d 51 (Ct. App. 1967).

286. 379 N.Y.S.2d 912 (Sup. Ct. N.Y. County 1975), *aff'd*, 390 N.Y.S.2d 768 (App. Div. 1st Dep't 1976).

287. *Ibid.*, 917.

288. *Ibid.*, 922.

*People v. Hughes*,<sup>289</sup> the second case, involved a runaway who was staying in the defendant Hughes's apartment. When he returned one evening at midnight and found her lying asleep nude in his bed, the defendant undressed and got into bed with her, kissed her, and fondled her, but, according to his testimony, did not have intercourse. According to the complainant, he attacked her with a knife, demanded sex, and, despite her protests, forced her to relent. Later he pulled her hair, choked her, and engaged in more intercourse. On these facts, plus the additional one that her two male friends sleeping in the room with her did not intervene because "they were afraid someone would get hurt,"<sup>290</sup> a jury found the defendant guilty, but the Appellate Division reversed, apparently finding the testimony of both the defendant and the two other men incredible.<sup>291</sup> The likely interpretation of the facts by the court was that the defendant and the complainant did have intercourse, but that despite her protests, her posture made it legitimate for him "not to take no for a final answer."

Another striking reversal occurred in the earlier case of *People v. Mahoney*,<sup>292</sup> in which the court invalidated a rape conviction by finding lack of sufficient resistance on the part of a complainant who had been the voluntary drinking companion of the defendant. Then there was *People v. Brundage*,<sup>293</sup> in which the court found that, if an 11-year-old girl was mature enough to be capable of resistance, her lack of resistance would reduce a charge from first-degree to statutory rape. Finally, in *People v. Light*,<sup>294</sup> the court reversed a conviction because the complainant, who had had intercourse not only with defendant but also with his co-defendants, failed to give sufficient testimony that she had not consented to the intercourse with him.

Of course, the courts were more likely to find lack of consent and accordingly affirm convictions in cases of stranger rape, such as *People v. Yannucci*,<sup>295</sup> in which eight or nine men had dragged the complainant into a shack and kept her there for three hours while they had intercourse with her, and *People v. Pelvino*,<sup>296</sup> in which the court found a woman of the mental age of seven incapable of giving consent. Courts also found lack of consent and therefore affirmed convictions in other cases in which they neglected to spell out the evidence.<sup>297</sup>

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289. 343 N.Y.S.2d 240 (App. Div. 3d Dep't 1973), *appeal dismissed*, 374 N.Y.S.2d 601 (Ct. App. 1975).

290. *Ibid.*, 241.

291. See *ibid.*, 242-44 (majority and dissenting opinions).

292. 113 N.Y.S.2d 693 (App. Div. 2d Dep't 1952).

293. 147 N.Y.S.2d 45 (Sup. Ct. Monroe County 1955).

294. 138 N.Y.S.2d 262 (App. Div. 4th Dep't 1955).

295. 283 N.Y. 546.

296. 214 N.Y.S. 577 (App. Div. 4th Dep't 1926).

297. See *People v. Bercume*, 329 N.Y.S.2d 862 (App. Div. 3d Dep't 1972); *People v. Liller*, 275 N.Y.S.2d 69 (App. Div. 3d Dep't 1966), *rev'd on other grounds*, 283 N.Y.S.2d 51 (Ct. App. 1967);

But when a woman was acquainted with a man with whom she had had intercourse, mid-twentieth-century judges would tend to accept the view of leading scholars that the woman's "hysterical personality" and "efforts at being charming" had "arouse[d] erotic reactions," that the act of intercourse was "brought on by her own provocation,"<sup>298</sup> and that it was therefore a product of her own consent. Judges believed that, even when a woman said "no" to a man's demand for sex, in reality she often meant "yes." Their understanding, moreover, reflected the era's popular culture—a culture expressed, for example, in the lyrics of a song contained in Mitch Miller's *Sing Along with Mitch* collection, declaring, "Your Lips Tell Me No! No! But There's Yes! Yes! in Your Eyes."<sup>299</sup> Thus the holding of *People v. Evans*<sup>300</sup> which is so inconsistent with today's values<sup>301</sup> — that it was "not illegal" for a man seeking sex "to continue the attempt [and] not to take no for a final answer"<sup>302</sup> — was characteristic of its time.

### 3. *The Victimization of Women*

The doctrinal developments in the law of rape that have been considered in this section occurred at high cost to women and with little regard to their right not to be compelled to engage in intercourse. The slight regard in which judges held a woman's right of refusal was perhaps best illustrated by two damage cases, one of which set aside as excessive a \$66,000 jury verdict on behalf of a 13-year-old rape victim,<sup>303</sup> while the other awarded a meager \$5000 judgment for a 14-year-old victim.<sup>304</sup> It was also reflected in the ancient rule that on account of the doctrine of marital consent a husband could not be guilty of raping his wife.<sup>305</sup>

In the context of the double standard whereby a woman, as the "con-

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People v. Warren, 261 N.Y.S.2d 217 (App. Div. 3d Dep't 1965). Cases also dealt with the admissibility of evidence: see People v. Dabney, 422 N.Y.S.2d 116 (App. Div. 2d Dep't 1979), *rev'd*, 438 N.Y.S.2d 283 (Ct. App. 1981); People v. Wheeler, 377 N.Y.S.2d 329 (App. Div. 4th Dep't 1975); People v. Bradley, 190 N.Y.S.2d 916 (App. Div. 2d Dep't 1959). Other cases dealt with the sufficiency of evidence. For a case holding evidence sufficient, see People v. Hutchings, 318 N.Y.S.2d 92 (App. Div. 3d Dep't 1971). For cases holding evidence insufficient, see People v. Strong, 242 N.Y.S.2d 62 (Ct. App. 1963), *rev'g* 236 N.Y.S.2d 533 (App. Div. 2d Dep't); People v. Spruill, 248 N.Y.S.2d 931 (App. Div. 2d Dep't 1964); People v. Conley, 87 N.Y.S.2d 745 (App. Div. 4th Dep't 1949); People v. Czyz, 30 N.Y.S.2d 299 (App. Div. 2d Dep't 1941). For a case holding evidence sufficient on one count and insufficient on another, see People v. Parker, 142 N.Y.S.2d 867 (App. Div. 3d Dep't 1955).

298. Halleck, "Emotional Effects of Victimization," 675.

299. Cliff Friend, "There's Yes! Yes! in Your Eyes," in *Sing Along with Mitch: The Mitch Miller Family Songfest, A Treasury of Funtime Favorites*, ed. Mitch Miller (New York: Random House, 1961), 67.

300. 379 N.Y.S.2d 912.

301. See Estrich, "Rape," *Yale Law Journal* 95 (1986): 1116-21.

302. Evans, 379 N.Y.S.2d 912, 922.

303. See Gallagher v. City of New York, 292 N.Y.S.2d 139 (App. Div. 2d Dep't 1968).

304. See Foster v. State of New York, 292 N.Y.S.2d 269 (Ct. Cl. 1968).

305. See People v. Meli, 193 N.Y.S. 365, 366-67 (Sup. Ct. Chautauqua County 1922).

troller of the sexual relation,"<sup>306</sup> was supposed to "say . . . 'no' [even] when she mean[t] 'yes,'" <sup>307</sup> date rape inevitably occurred in a "grey area,"<sup>308</sup> in which there was "no clear dividing line between physical assault and sexuality."<sup>309</sup> To use the criminal law in this context to protect a woman's right to say "no" would deprive men, as well as women who meant "yes" when they said "no," of sexual opportunities that they felt entitled to pursue. Even worse, the commonly held, mid-twentieth-century view of male and female sexuality understood that, once a couple had started to pursue the love and closeness that women were thought to crave, actual intercourse became "a *necessity* to [the] man."<sup>310</sup> In light of this view, the grant to women of a legal power to terminate the "ritual, . . . game, or . . . dance" of which "the consummation of sexuality [was] an integral part"<sup>311</sup> would painfully deprive men not merely of an opportunity but even more of a satisfaction to which, in mid-century understandings, they were entitled.

New York judges, as the cases decided prior to the 1970s plainly show, would not countenance the use of criminal law either to deprive men of their sexual opportunities or to disappoint their sexual expectations. But in protecting the rights of men, the judges trampled on the rights of women. For what the mid-century law of date rape made clear was that, once a woman became close to a man who demanded intercourse and had the physical power to compel it, she could not refuse even if she did not, in fact, consent. Even if the words "No! No!" passed from a woman's lips, a man was free to assume that the woman's true desire—"Yes! Yes!"—was reflected in her eyes. In accordance with such sexist thought patterns of the 1960s, the law did nothing to obstruct men from obtaining the sex they wanted, even though women did not always give that sex freely. The protective attitude of the judiciary of the 1920s had, in short, largely disappeared by the 1960s.

### III. SOCIETAL REALITIES UNDERLYING DOCTRINAL CHANGE

#### A. *Sexual Mores in World War II and the Postwar Suburbs*

Underlying the dramatic doctrinal changes that had occurred by the 1960s in the law of sodomy, prostitution, family violence, pornography, and rape were more fundamental social and economic changes that had begun with the end of the Great Depression and the coming of World

306. Ira Reiss, *Premarital Sexual Standards in America* (Glencoe, Ill.: Free Press, 1960), 245. Accord Winston Ehrmann, *Premarital Dating Behavior* (New York: Holt, 1959), 268.

307. Barbara Sichtermann, *Femininity: The Politics of the Personal*, ed. Helga Geyer-Ryan, trans. John Whitlam (Minneapolis: Polity Press, 1986), 39.

308. *Ibid.*, 33.

309. *Ibid.*, 32.

310. D'Emilio and Freedman, *Intimate Matters*, 179 (emphasis in original). See also *ibid.*, 267, 274.

311. Sichtermann, *Femininity*, 33.

War II. The decade of the 1940s "changed . . . [people's] lifestyle and . . . outlook," replacing the New Deal's aspiration for structural reforms that would protect the weak and poor from social conditions they could not control with a new faith, growing out of the revival of economic opportunity, that people "could do things" by and for themselves.<sup>312</sup> Whereas people during the Depression had been "radicalized" and "convinced of the need for social change" because "the system as it was wasn't good enough,"<sup>313</sup> wartime culture had shown them that "problems are of an individualistic nature" and that "the virtues and vices of the central" actors rather than "social forces . . . move[d] . . . events along."<sup>314</sup>

The massive suburbanization of the postwar years reinforced the individualistic assumptions that many Americans had developed during the war. As nine million people migrated to the nation's newly constructed suburbs in the decade after the war, the map of New York and the nation was dramatically altered. Old ethnic neighborhoods in New York City were depopulated and extended families torn apart as Italians, Jews, and Scandinavians, for instance, became neighbors to each other. They and their children became more important social influences on each other than their families, their old communities, or their churches could be. But the new neighbors would never have a dominant influence because, as one observer has commented, the suburbs were much more private and individualistic than the old neighborhoods had been. Suburban life was focused inside the home around new entertainment forms such as television, suburban homes opened outside into private back yards, and suburbanites usually travelled to the outside world enclosed in automobiles. In prewar city life, in contrast, homes had front porches opening on the street, entertainment occurred in public places such as movie theaters, and people got places on foot or by public transportation, where they could not avoid meeting each other.<sup>315</sup>

As suburbanites pursued their individualistic economic opportunities and private recreations, they no longer automatically accepted the values of the groups, especially the neighborhoods, churches, and extended families, of which they had been a part. As essentially private individuals, they had a choice of pursuing the lifestyles of their new neighbors or of their more familiar groups, or of taking bits and portions from each. They could yield publicly to pressures for suburban conformity on some occasions while rejecting them privately on others. The result was that

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312. Statement of James Covert, in *The Homefront: America During World War II*, ed. Mark J. Harris, Franklin D. Mitchell, and Steven J. Schechter (New York: Putnam, 1984), 240. Accord Statement of Laura Briggs, in *ibid.*, 255. See also John Morton Blum, *V Was for Victory: Politics and American Culture during World War II* (New York: Harcourt Brace Jovanovich, 1976), 12-13.

313. Statement of Henry Fiering, in *The Homefront*, ed. Harris, et al., 242.

314. Sherman H. Dryer, *Radio in Wartime* (New York: Greenberg, 1942), quoted in Blum, *V Was for Victory*, 26.

315. See Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* (New York: Oxford University Press, 1985), 234-38, 278-82.

much social practice changed. Some of the most striking, best documented, and most important changes related to issues of sexuality.

Dramatic changes had begun as early as 1940 with the enactment of the first peacetime draft. They continued to escalate thereafter, as burgeoning war industries and the military did what the suburbs would later do: they removed people from established communities and from the traditional moral and social structures linked to them, and transposed them into new, often transient groups, in which anonymity and the ever-present horrors of war encouraged young people to indulge.<sup>316</sup> The war, in short, "provided an infinite variety of situations for the fulfillment . . . of male sexual desires."<sup>317</sup> Here are three eye-witness reports:

Many things took place then because the men were being shipped overseas. There were a lot of girls I knew in college who got caught in that—let's make his last days here happy, just in case he never comes back. I don't know how many had illegitimate children . . . simply because they felt they owed it to this man because this might be the last he'd ever have.<sup>318</sup>

Another indelible scene I remember was a startling sight on a train. It was night and our train was slowly passing another. I turned and looked, and there in the dimly lit car was [sic] a GI and a woman having sex while several other GI's stood around watching or not watching. . . . I could hardly believe what I had seen. You took a deep breath and it was gone, yet it made a deep impression on me. You knew everybody was going to get off the train at the next stop, and that was the end of that. You were passing each other in the night.<sup>319</sup>

I let a sailor pick me up and go all the way with me. I had intercourse with him partly because he had a strong personal appeal for me, but mainly because I had a feeling of high adventure and because I wanted to please a member of the armed forces.<sup>320</sup>

As one man named Roger Montgomery, who found himself involved in sexual activities that were "totally new to me," reported, he was not "a great lover in this situation, because . . . I was frightened to death about it a good deal of the time." Nonetheless, "for me it was quite a liberating experience."<sup>321</sup> The same was undoubtedly true for a high school student who lost his virginity with a woman of thirty whose husband was overseas. "We weren't in love," he recalled, but the "times were condu-

316. See D'Emilio, *Sexual Politics*, 24; D'Emilio and Freedman, *Intimate Matters*, 260; Allan Berube, "Marching to a Different Drummer: Lesbian and Gay GIs in World War II," in *Hidden from History*, ed. Duberman, et al., 383, 384-85.

317. Ehrmann, *Premarital Dating*, 70.

318. Statement of Virginia Rasmussen, in *The Homefront*, ed. Harris, et al., 172, 174-75.

319. Statement of Frances Veeder, in *ibid.*, 175, 177.

320. Quoted in Ehrmann, *Premarital Dating*, 74.

321. Statement of Roger Montgomery, in *The Homefront*, ed. Harris, et al., 185, 186.

cive for this sort of thing."<sup>322</sup> For another high school student working in a war plant "full of working girls who were 'on the make,' . . . a male war worker became the center of loose morality. It was a sex paradise."<sup>323</sup>

Gay women and men enjoyed similar experiences, as the same social transformations that proved liberating for heterosexuals proved liberating for homosexuals as well. Gay GIs, who if they had been home could never have "stay[ed] out all night or promote[d] a serious affair," since their parents would have considered them "perverted" and kept them "in the house," had "no one to answer to" in the army as long as they "behave[d]" themselves "during the week and stay[ed] out of the way of the MP's on weekends."<sup>324</sup> Since no one knew where they "might be sent tomorrow," gay GIs did what young Americans in the military "did with everything else," which "was take chances and risks and try to enjoy things."<sup>325</sup> Those who wrote letters or kept diaries clearly did enjoy things, as did one young man who "spent the nite in an empty barracks . . . with the cutest thing you have ever seen . . .—and all was wonderful."<sup>326</sup> Another man reported how his relationship with his lover "was developing more beautifully than I ever dreamed possible," while "it seemed so good" to a third man that he and his lover developed a lasting relationship.<sup>327</sup> The war brought similar opportunities and experiences to lesbians<sup>328</sup> such as Lisa Ben, who, while sunbathing on the roof of a Los Angeles rooming house populated by women, "got to talking," stated that she preferred to "go out strictly with girls," and later was taken by her new friends to lesbian bars, where she "met *lots* of girls."<sup>329</sup>

During the war years, in short, the almost imperceptible changes that had been occurring in sexual mores since the beginning of the century coalesced into a qualitatively new and identifiable form.<sup>330</sup> "The net impression" on a leading contemporary sociologist was "that war with its accompanying increase in personal mobility, decrease in social controls, increase in women working, and reorientations in life philosophies did bring about an appreciable change."<sup>331</sup> People who had lived through those years—and this is the important parallel between homosexual and

322. Quoted in Ehrmann, *Premarital Dating*, 73.

323. Quoted in *ibid.*

324. Quoted in Allan Berube, *Coming Out under Fire: The History of Gay Men and Women in World War Two* (New York: Free Press, 1990), 98.

325. Quoted in *ibid.*, 98.

326. Quoted in *ibid.*, 102.

327. Quoted in *ibid.*, 119.

328. See D'Emilio, *Sexual Politics*, 27-30.

329. Quoted in *ibid.*, 30 (emphasis in original).

330. See John D'Emilio, "Gay Politics and Community in San Francisco since World War II," in *Hidden from History*, ed. Duberman, et al., 456, 458.

331. Ehrmann, *Premarital Dating*, 75.

heterosexual liberation during World War II—simply could not go back to their old lifestyles encrusted by the old traditions. Thus, one veteran was “afraid to return to Maysville,” a small Kentucky town where he could have no “gay life . . . , being as well known as I am,” while another remarked even more pointedly that he was “not going back to what I left” because “it took me a long, long time to figure out how to enjoy life.”<sup>332</sup> Although a heterosexual like Roger Montgomery, who had engaged in “liberating” promiscuity during the war, probably entered marriage with an expectation of future monogamy, his earlier liberation typically made him more tolerant of extramarital sex and promiscuity, whether on his own part or on the part of others. Indeed, parents of the 1950s and 1960s were far more tolerant of their children than their parents had been of them: they didn’t keep their children “in the house” when the teens and even pre-teens of the 1950s developed the practice of “going steady . . . —a sort of play-marriage, a mimicry of the actual marriage of their slightly older peers,” which “implied greater sexual intimacy.”<sup>333</sup> Perhaps they understood that their children were turning to intimate relationships for the same reason they had: as an escape from the competition, insecurity, and fear of the postwar era that “perpetuated that classic wartime desire for something stable in an unstable world.”<sup>334</sup>

Thus the Second World War and the years that followed it produced new realities and expectations with regard to sex. Some of the most striking evidence for the change comes from Linda Gordon’s study of gender-related violence. Gordon reports that social workers in the 1930s “did not accept the assumption that wives owed sexual availability to their husbands, but retained a rather Victorian suspicion of male sexual demands.” In particular, they saw nothing wrong with wives demanding money in return for sex and refused to condone male violence on grounds of sexual deprivation. In the 1950s, in contrast, the “very complaints that had previously been recorded as allegations of ‘sexual excess’ were now rendered as evidence of female frigidity,” and women who used refusal of intercourse as a weapon to gain control of their husbands’ paychecks, or whose refusal led to violence, were condemned.<sup>335</sup>

When this new postwar ethic of sexual indulgence, especially for males,<sup>336</sup> was conjoined to the era’s individualistic assumptions, the moral climate was transformed for everyone, including those who continued to abide by conventional standards. Strange and novel theories were expounded for legitimating the varied sexual explorations on which individuals wished to embark. It was argued, for instance, “that the sexual

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332. Quoted in Berube, *Coming Out Under Fire*, 244-45.

333. Beth L. Bailey, *From Front Porch to Back Seat: Courtship in Twentieth-Century America* (Baltimore: Johns Hopkins University Press, 1988), 49, 51.

334. *Ibid.*, 49.

335. Gordon, *Heroes of their Own Lives*, 269-70.

336. See D’Emilio and Freedman, *Intimate Matters*, 262-64.

restrictions imposed by contemporary societies . . . are excessive and harmful to the mental health of the individual" and that the "institutions of society should be so organized so as to foster the release of sexuality."<sup>337</sup> Drawing on the individualistic rhetoric of "rights" used by President Roosevelt to exhort Americans to victory in World War II,<sup>338</sup> those seeking sexual liberty typically cast their demands in the language of "rights"<sup>339</sup> and, in the case of gay men and lesbians, tried to portray themselves as "minorities" entitled to special legal solicitude.<sup>340</sup> In particular, those searching for sexual freedom repeatedly advanced the argument initially formulated by John Stuart Mill a century earlier that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others"; power could not be exercised over a person for his own moral good or "because in the opinions of others, to do so would be wise or even right."<sup>341</sup> As reported in the popular press, the American Law Institute agreed: in its Model Penal Code, the ALI adopted the view that the law should not "'attempt to use the power of the state to enforce purely moral or religious standards,'" since it was "'inappropriate for the Government to attempt to control behavior that has no substantial significance except as to the morality of the actor.'"<sup>342</sup> An individual's choice of sexual fulfillment, in short, was recognized by the ALI and others as a guaranteed private right and an essential part of the atmosphere of "human freedom" which distinguished life in the United States from the sort of "monolithic totalitarian enslavement" that existed in much of the rest of the world.<sup>343</sup>

As years went on, unconventional minorities would demand more, however, than merely their freedom and their rights: they would demand respect for the lifestyles they led. More importantly, as increasing numbers of otherwise conventional individuals continued to violate sexual norms, it became harder to deny that respect. As we have seen, sexual repression before the war depended on the maintenance of a gap between cultural leaders and those who violated sexual norms—a gap that made the violators seem evil and inferior. But when one's best friend was discovered in an affair with one's next door neighbor, when the teenage

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337. Reuben Fine, "Psychoanalytic Theory of Sexuality," in *Sexual Behavior and the Law*, ed. Slovenko, 147, 152-53.

338. See "An Economic Bill of Rights," 11 January 1944, in *Documents of American History*, ed. Henry Steele Commager, 8th ed. (New York: Appleton-Century-Crofts, 1968), 2:483, 484-85.

339. Daniel T. Rodgers, *Contested Truths: Keywords in American Politics since Independence* (New York: Basic Books, 1987), 217-22.

340. See, for example, Berube, *Coming Out under Fire*, 228-54.

341. John Stuart Mill, *On Liberty*, ed. Currin V. Shields (New York: Liberal Arts Press, 1956), 13.

342. "The Law: Sin & Criminality," *Time Magazine*, 30 May 1955, p. 13, col. 1, quoting an unspecified ALI source.

343. James Burnham, "Rhetoric and Peace," *Partisan Review* 17 (1950): 861, 870.

daughter of the town bank's president became pregnant, or when the high school valedictorian joined a gay or lesbian community in New York or San Francisco after graduation from college, the gap could no longer be maintained. The violators were now too much like oneself or one's children and, however much one might abhor their specific misconduct, it was impossible to treat them as nonpersons and deny them all respect. As "vast numbers in the community, including the otherwise most respectable," ceased to adhere to the traditional "standard of sexual conduct," a moral crisis and an "acute problem . . . for the administration of criminal justice" arose,<sup>344</sup> and demands for decriminalization of sexual "misconduct" grew.

There were also two other reasons for decriminalizing sexual "immorality." The first was the tendency of the police to enforce morals legislation arbitrarily and unequally. Those favoring decriminalization recognized that "most . . . American legislation against sexual immorality" was already a "dead . . . letter," but they did not "contemplate this situation with complacency." Their concern was that "the existence of criminal laws which are generally not enforced places formidable discriminatory powers in the hands of the police and prosecuting authorities,"<sup>345</sup> and that police and prosecutorial discretion was "unlikely to be exercised in any but an arbitrary kind of way" accompanied by "unsavory methods" of enforcement.<sup>346</sup> In a widely publicized speech in support of decriminalization of sex offenses, Judge Learned Hand summed up the argument by observing that "[c]riminal law which is not enforced practically is much worse than if it was not on the books at all."<sup>347</sup> "[R]eliance upon the criminal law . . . [i]n the case of morals offenses" had "reduce[d] the criminal law's essential claim to legitimacy by inducing offensive and degrading police conduct," had "fostered organized criminality and ha[d] produced, possibly, more crime than it ha[d] suppressed."<sup>348</sup>

The final argument for decriminalization was the law's ineffectiveness. To the extent that people continued to understand certain practices as deviations from acceptable sexual behavior, they also came to the view that criminal punishment and the threat of punishment would not alter behavior. By the 1960s psychiatry rather than law seemed the most fruitful way to address matters of sexuality. Thus, a book published in that decade, entitled *Sexual Behavior and the Law*, was authored by

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344. Sanford H. Kadish, "The Crisis of Overcriminalization," *Annals of the American Academy of Political and Social Science* 374 (1967): 157, 160.

345. H.L.A. Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963), 27.

346. Packer, *Limits of the Criminal Sanction*, 287.

347. "The Law: Sin & Criminality," *Time Magazine*, 30 May 1955, p. 13, col. 2, quoting speech of Learned Hand at ALI meeting considering proposal of Model Penal Code to decriminalize sex offenses.

348. Kadish, "Crisis of Overcriminalization," 157.

thirty-seven psychiatrists, psychoanalysts, medical doctors, and social workers compared to only six lawyers, and contained over two hundred pages on such topics as the "Psychoanalytic Theory of Sexuality" and the "Psychodynamics of Sexual Deviations and the Law."<sup>349</sup>

Although judges and other legal decisionmakers paid heed to the liberal demand for decriminalization of at least victimless sex crimes, they did not yield to the demand completely because it was counterbalanced by a new conservative opposition seeking to preserve established traditions and the established order. Thus, virtually every group seeking new rights or equality in the late 1940s and 1950s met with opposition and repression. Teens exploiting their new sexual freedoms, for example, met with substantial resistance from parents,<sup>350</sup> while gays met with outright discrimination, including an executive order by President Eisenhower barring them as security risks from all federal employment.<sup>351</sup> On a more theoretical plane, Judge John J. Parker argued that at least some victimless sex offenses ought to be "'denounced by the criminal code in order that society may know that the state disapproves.'"<sup>352</sup> Proposals for the abandonment of traditional norms, among which were those governing sexual behavior, were met again and again with the response, to quote Thomas E. Dewey's 1944 running mate, that "insidious and ominous . . . forces of communism linked with irreligion . . . are worming their way into national life . . . and will destroy the very foundations of the Republic."<sup>353</sup> Conservatives everywhere, even on the bench, were ready to resist what they viewed as the forces of evil and to fight for the preservation of morality and the republic.

### B. *The New Feminism and Sexuality*

Conservatives alone, however, could not halt the tendency toward decriminalization of sex offenses and gender-related violence. Decriminalization slowed only when feminists started to complain about the harm it was doing to women and began to demand redress.

With the 1963 publication of Betty Friedan's *The Feminine Mystique*,<sup>354</sup> the 1964 passage of Title VII of the Civil Rights Act, with its goal of equal employment opportunities for women, and the 1965 founding of NOW, the National Organization for Women, a new feminist movement was born.<sup>355</sup> In its earliest incarnation in the mid-1960s, the

349. See *Sexual Behavior and the Law*, ed. Slovenko, vii-xiv, 147-70, 397-608.

350. See Baily, *From Front Porch to Back Seat*, 51-55.

351. See Berube, *Coming Out under Fire*, 265-70.

352. "The Law: Sin & Criminality," *Time Magazine*, 30 May 1955, p. 13, col. 1, quoting speech of John J. Parker at meeting of ALI considering proposal of Model Penal Code to decriminalize sex offenses.

353. Senator John Bricker, quoted in Blum, *V Was for Victory*, 297.

354. Betty Friedan, *The Feminine Mystique* (New York: Norton, 1963).

355. See Sarah Evans, *Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left* (New York: Knopf, 1979), 18-19.

new movement seemed unconcerned with the issues of criminal law on which this essay focuses. But concerns about rape, family violence, pornography, and prostitution soon appeared in the late-1960s writings of more radical feminists. These concerns became an important part of the movement for women's liberation that was solidly in place by 1970 and remains perhaps the most potent political and social force in American public life today.

Although "the ideological complexity of the movement is too great to be categorized so simply,"<sup>356</sup> with disagreement over a myriad of issues ranging from the structures that should be adopted for the internal governance of women's groups, through the significance to be attached to lines of race and class, to the proper place of lesbian sexuality in a future feminist utopia,<sup>357</sup> some rough categorization of feminist ideology is essential in order to retain a focus on the main subjects of this article. However much women may have disagreed on other issues, their thinking about the law of rape, pornography, prostitution, and gender-related violence tended to fit into three main categories during the decade of the 1970s.

In the first category were thinkers who believed that women are essentially the same as men, that gender inequality resulted from arbitrary legal distinctions, and that with the elimination of those distinctions "the human qualities of male and female will merge in a new image of the ideal person."<sup>358</sup> Betty Friedan, the author of *The Feminine Mystique* and the founder of the National Organization for Women, exemplified this liberal version of feminism. In Friedan's view, "[t]he only way for a woman, as for a man, to find herself . . . is by creative work."<sup>359</sup> Women "need competition just like men do," and "must learn to compete . . . not as . . . wom[e]n, but as . . . human being[s]."<sup>360</sup> Accordingly, the goal of NOW was "to bring women into full participation in the mainstream of American society . . . in truly equal partnership with men." Friedan never saw "women, as an oppressed class, fighting to overthrow or take power away from men as a class, the oppressors"; she hoped men would "be part of" NOW and that the movement for women's rights would "include men as equal members."<sup>361</sup> She wanted to put an end to the world in which women had to "adjust" to prejudice and discrimination," but she did not intend to create a world in which a woman should

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356. Jo Freeman, *The Politics of Women's Liberation: A Case Study of an Emerging Social Movement and its Relation to the Policy Process* (New York: McKay, 1975), 51.

357. For a detailed analysis of the divisions in feminism in the years around 1970, see generally Alice Echols, *Daring to be Bad: Radical Feminism in America, 1967-1979* (Minneapolis: University of Minnesota Press, 1989).

358. Janet Z. Giele, *Women and the Future: Changing Sex Roles in Modern America* (New York: Free Press, 1978), 360.

359. Betty Friedan, *The Feminine Mystique*, 10th Anniv. ed. (New York: Norton, 1973), 344.

360. *Ibid.*, 374, quoting remarks of N.Y. State Assemblywoman Dorothy Bell Lawrence.

361. *Ibid.*, 384, quoting Statement of Purpose of National Organization for Women.

“expect special privileges because of her sex.”<sup>362</sup> Many other women thinkers have joined with Friedan in finding “more similarity than difference in the traits . . . [of] each sex” and in modelling gender relationships in accordance with “an image of human wholeness” involving “a spirit of reconciliation between the sexes,” leaving both with the “capacity for a ‘full range of experience.’”<sup>363</sup>

The second, more radical branch of feminists did “not believe that women should be integrated into the male world so that they can be ‘just as good as men,’” nor did they “believe that the oppression of women” would “be ended by giving them a bigger piece of the pie, as Betty Friedan would have it.” On the contrary, they believed that “the pie itself is rotten.”<sup>364</sup> Unlike the liberals, the radicals did “not see equality as a proper, or sufficient, or moral, or honorable final goal” for women; the ultimate goal of radical feminism was to force “men . . . to renounce their phallogocentric personalities, and the privileges and powers given to them at birth as a consequence of their anatomy, . . . [and] to excise everything in them that they now value as distinctively ‘male.’”<sup>365</sup>

The central fact on which radical feminists based their analysis was the fundamental “split between the two primary cultures of the world—the female culture and the male culture.”<sup>366</sup> It seemed clear to the radicals that cultural forces were “set by men, presenting only the male view,” and that women were thereby “kept from achieving an authentic picture of their reality.”<sup>367</sup> Thus, the goal for many radicals was to “eradicate the sexual division on which our society is based.”<sup>368</sup> These radicals wanted “a cultural revolution, which, while it must necessarily involve . . . political and economic reorganization . . . must go far beyond this as well” to include “true re-education,” the elimination of “sex [a]s a status category with political implications,”<sup>369</sup> and the destruction of “oppressive power structures set up by Nature and reinforced by man.”<sup>370</sup> At least in regard to issues of rape, prostitution, pornography, and gender-

362. *Ibid.*, 374.

363. Giele, *Women and the Future*, 327, 351, quoting Carolyn G. Heilbrun, *Toward a Recognition of Androgyny* (New York: Harper & Row, 1973), x. For a survey of the literature written prior to 1978 in support of this assimilationist view, see Giele, 325-28, 350-60.

364. Bonnie Kreps, “Radical Feminism 1,” in *Radical Feminism*, ed. Anne Koedt, Ellen Levine, and Anita Rapone (New York: Quadrangle Books, 1973), 234, 239.

365. Andrea Dworkin, *Our Blood: Prophecies and Discourses on Sexual Politics* (New York: Harper & Row, 1976), 11, 13.

366. Barbara Burris, “The Fourth World Manifesto,” in *Radical Feminism*, ed. Koedt, et al., 322, 341.

367. Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (New York: Morrow, 1970), 178. See also Kate Millett, *Sexual Politics* (Garden City, N.Y.: Doubleday, 1970), 232.

368. Kreps, “Radical Feminism 1,” 239.

369. Millett, *Sexual Politics*, 24, 362-63.

370. Firestone, *Dialectic of Sex*, 16. On the opposition of Friedan and other feminists, who saw men and women as essentially the same, to the “manhating sex/class warfare” radicals, see Friedan, *Feminine Mystique*, 388-89.

related violence, the ultimate goal of radical feminists was to make every man appreciate that every woman is "a complex human being with a self-interest not identical with his"<sup>371</sup> and to compel men to give women's interests priority, even when they conflicted with the interests of men.

The third group of women thinkers in the 1970s, typified by Phyllis Schlafly, agreed with the second group that there were "fundamental difference[s]"<sup>372</sup> between men and women both in regard to "sexual drive" and to "emotional and psychological" matters.<sup>373</sup> However, the differences between man and woman, according to Schlafly, did "not in any sense make her inferior";<sup>374</sup> on the contrary, women in America had been "'exalted'" and granted "a status . . . unknown in the rest of the world."<sup>375</sup> "It [was] on . . . women that . . . civilization depend[ed],"<sup>376</sup> Schlafly wrote. For this reason, women in the third group opposed the liberation agendas of those in the first two, since liberation of women would drive them from a position of "'superiority to equality.'"<sup>377</sup> They also opposed women's liberation as an attack on marriage, the home, and the family.<sup>378</sup>

These three different approaches on the part of women in the late 1960s and the 1970s produced some significant divergences of opinion on issues of sexual morality. Although all women found rape and male violence against women and children abhorrent, disagreement emerged over prostitution and, especially, pornography. Liberals like Friedan who found men and women essentially the same believed that women should have equal sexual liberty with men. Thus, it was possible for at least some feminist writers to recognize that "pornography is not a homogenized discourse expressing only women's oppression"; in the view of one author, "[m]ultiple meanings coexist within pornography," including both "fantasy and rebellion," which "can be experienced as a liberating feeling" by many women.<sup>379</sup> Likewise, a woman judge could object to the prosecution of women for prostitution on the ground that such prosecutions rested on "archaic notions that a woman's place is in the narrowly circumscribed, nonpublic world" and that women have no business "wander[ing] out of this protective sphere into the public" and "self-determin[ing] to whom and when they shall bestow their 'sexual

371. Firestone, *Dialectic of Sex*, 184.

372. Phyllis Schlafly, *The Power of the Positive Woman* (New Rochelle, N.Y.: Arlington House, 1977), 54.

373. *Ibid.*, 16-17.

374. *Ibid.*, 54.

375. *Ibid.*, 30, 33, quoting statement of Rose Totino, Vice President of Pillsbury Co.

376. *Ibid.*, 139.

377. *Ibid.*, 30, quoting statement of Rose Totino, Vice President of Pillsbury Co.

378. See *ibid.*, 54, 159-63. See also Rayna Rapp and Ellen Ross, "The 1920s: Feminism, Consumerism, and Political Backlash in the United States," in *Women in Culture and Politics: A Century of Change*, ed. Judith Friedlander, et al. (Bloomington: Indiana University Press, 1986), 52.

379. Zillah R. Eisenstein, *The Female Body and the Law* (Berkeley: University of California Press, 1988), 163-64.

favours.' ”<sup>380</sup> In this judge’s view, a woman, whether a prostitute or not, should have the same right as a man to engage in “private consensual sexual conduct.”<sup>381</sup>

In contrast, both the radical feminists and women like Phyllis Schlafly associated with the new right adopted positions opposed to both pornography and prostitution. For many radicals, their opposition grew out of their perspective on the “sexual act” itself, which, as they saw it, conferred “the feeling of power and prestige for the male, [and] of impotence and submission for the female.”<sup>382</sup> For radicals, sexual intercourse and violence represented “act[s] of freedom and strength” for “the male population,”<sup>383</sup> whereas for the “class of women,” they constituted “a strange lesson” in “*the objective, innate and unchanging subordination of women relative to men.*”<sup>384</sup> Especially “[i]n rape, the emotions of aggression, hatred, contempt, and the desire to break or violate personality, [took] a form consummately appropriate to sexual politics.”<sup>385</sup> Radical feminist theory thus demanded not only the reform of the law governing rape and gender-oriented violence—a reform with which virtually all women agreed—but also a thoroughgoing and much more problematic reconstitution of sexual habits and values.

For the radicals, the existence of pornography was linked closely to rape and gender violence. They began to “make the connections between media violence to women and real-life violence to them” and to recognize that while it was necessary to “deal directly with acute . . . problems like rape and wife-beating,” it was equally important to “remove the images which promote a climate in which these crimes are possible.”<sup>386</sup> In their view, “pornography is the ideology of a culture which promotes and condones rape, woman-battering, and other crimes of violence against women,”<sup>387</sup> all of which “involve the acting out of male power over, and often hatred toward, women.”<sup>388</sup>

Prostitution raised similar concerns. One connection between pornography and prostitution was the ease with which pornography models became prostitutes—by, for instance, engaging in “‘simulated sex’—even sometimes when it’s not simulated.” As one model argued, both pornog-

380. *In re P.*, 400 N.Y.S.2d 455, 461 n.11 (Fam. Ct. N.Y. County 1977) (opinion of Margaret Taylor, J.), *rev'd*, 418 N.Y.S.2d 597 (App. Div. 1st Dep’t 1979).

381. *Ibid.*, 468.

382. Barbara Mehrof and Pamela Kearon, “Rape: An Act of Terror,” in *Radical Feminism*, ed. Koedt, et al., 228, 229.

383. *Ibid.*, 233.

384. *Ibid.*, 230 (emphasis in original).

385. Millett, *Sexual Politics*, 44.

386. Laura Lederer, “Introduction,” in *Take Back the Night: Women on Pornography*, ed. Laura Lederer (New York: Morrow, 1980), 16.

387. *Ibid.*, 19-20.

388. *Ibid.*, 17, quoting Dianna E.H. Russell, “Pornography: A Feminist Perspective,” in unidentified source. For further radical critiques of pornography, see Andrea Dworkin, *Woman Hating* (New York: Dutton, 1974), 51-90; and MacKinnon, *Feminism Unmodified*, 127-213.

raphy and prostitution were “all a form of rape because the women who are involved in it don’t know how to get out.”<sup>389</sup> As another radical argued in testimony to a committee of the New York Legislature considering whether to recognize prostitution as a victimless crime, women were its victims. “[W]omen with ambition” were victims because they had to “sell their bodies” in order to earn an independent living.<sup>390</sup> As the witness continued,

There was a time when I was an unemployed actress, and working to support myself as a waitress and a file clerk. The disparity between my reality situation and my ambition for a better life was so great that I gave serious consideration to the social pressure to do a little hustling. And that is something, gentlemen, I really don’t think that you comprehend. I don’t think that anyone has ever asked you to sell your body, or presumed that your body was for sale. I wonder if a cab driver has ever turned around to you and remarked, “I see you’re a little short of change. Perhaps we could work together. I could steer some customers your way.” I wonder if a man has ever walked up to you in a hotel lobby, and muttered, “What’s your price? Ten? Twenty? I’ll pay it. I’ll pay it.” That happened to me in the Hotel Astor. I wonder if you’ve ever applied for work in a bar-restaurant, and the owner, or perhaps he was only the manager, looked you up and down and said, “Are you sure you’re over twenty-one? Why don’t you come downstairs with me and prove it?” . . . It is women who are being harassed on these streets in New York City, day and night, and they are being harassed by men and not the reverse. Yes, there is a prostitution problem, and it is expressed by . . . [men] who daydream . . . about women in clean little stalls, medically approved and at a price a workingman can afford.<sup>391</sup>

The existence of prostitution thus reflected “a serious problem”—that men found “access to the female body . . ., if not a divine right, at least a monetary right”—and this serious problem would prevent women from being “equals until there’s an end to prostitution.”<sup>392</sup>

In their challenges to the law of rape, sexual violence, pornography, and prostitution, as that law existed at the outset of the 1970s, the radical feminists took a stand remarkably close to that of the new right, with its opposition to the alleged “liberation of the new morality”—a morality which the new right, like the radicals, saw as “a cheat and a thief.” In speaking for the right, Phyllis Schlafly in fact echoed many themes from

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389. Laura Lederer, “Then and Now: An Interview with a Former Pornography Model,” in *Take Back the Night*, ed. Lederer, 57, 64.

390. Susan Brownmiller, “Speaking Out on Prostitution,” in *Radical Feminism*, ed. Koedt, et al., 72, 76.

391. *Ibid.*, 74, 76.

392. *Ibid.*, 76.

the radical left as she urged that the new morality "rob[bed] the woman of her virtue, her youth, her beauty, and her love—for nothing, just nothing."<sup>393</sup> Of course, the new right and the radical left differed sharply in their assessments of the institution of marriage, with the right viewing it as the ultimate protection for women, and the left, as the ultimate oppression.<sup>394</sup> But the two extremes were able to march toward the same ends, together with virtually all women, with regard to rape and family violence, and with each other on the issues of pornography and prostitution. When the right and the left marched together, significant political pressure for change in the law of prostitution and pornography emerged, and when all women stood in solidarity, important changes occurred in legal doctrine making it easier to criminally prosecute male perpetrators of rape and violence. In response to new ideas from women, the story of sex crimes in the 1970s thus would be the reversal of the trend of the 1950s and 1960s toward decriminalization. It would even bring about the reemergence of judicial support for vigorous criminal prosecution.

#### IV. THE RECRIMINALIZATION OF SEXUAL BEHAVIOR

##### A. Rape

In response to feminist demands whose legitimacy went virtually unchallenged, fundamental doctrinal change occurred in the law of rape. One area of change during the second half of the 1970s was in judicial attitudes toward the doctrine of consent. Judges in these years continued, of course, to find lack of consent and to affirm convictions without specifying the evidence,<sup>395</sup> as well as to hold that intercourse with mentally retarded women amounted to rape.<sup>396</sup> The marked change came in what would come to be conceptualized as date rape cases, especially those in which women claimed that they had yielded, out of fear of being seriously hurt, to men who were larger and stronger. After 1975, the appellate courts, contrary to the spirit of the earlier cases, uniformly affirmed the convictions that came before them, ruling that submission to larger and stronger men did not constitute consent<sup>397</sup> and, therefore, that men did have to "take no for a final answer." Indeed, post-1975 cases held that even a prostitute could complain of rape when her customer failed to pay her fee,<sup>398</sup> and that a man could be convicted of first-degree

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393. Schlafly, *Power of the Positive Woman*, 16.

394. See Eisenstein, *Female Body and the Law*, 4, 70-73, 164.

395. See *People v. Hadden*, 410 N.Y.S.2d 375 (App. Div. 3d Dep't 1978); *People v. Moore*, 410 N.Y.S.2d 726 (App. Div. 3d Dep't 1978).

396. See *People v. Easley*, 396 N.Y.S.2d 635 (Ct. App. 1977); *People v. Dixon*, 412 N.Y.S.2d 42 (App. Div. 3d Dep't 1978).

397. See *People v. Ayers*, 410 N.Y.S.2d 377 (App. Div. 3d Dep't 1978); *People v. Bianchi*, 391 N.Y.S.2d 29 (App. Div. 3d Dep't 1977); *People v. Vicaretti*, 388 N.Y.S.2d 410, 414-15 (App. Div. 4th Dep't 1976).

398. See *People v. Gonzalez*, 409 N.Y.S.2d 497 (Crim. Ct. N.Y. County 1978).

sexual abuse when, over his date's protests, he partially disrobed her and placed his hand on her breasts and other intimate parts while his co-defendant forced her to touch his penis.<sup>399</sup>

Another dramatic change in the law of rape occurred quickly as a result of legislation enacted in 1975. Until that time, the settled rule was that evidence showing that a complainant had engaged in sexual intercourse with the defendant or other men prior and/or subsequent to the alleged rape was admissible to prove the complainant's consent;<sup>400</sup> the rule's effect, in the view of women's advocates, was to make it virtually impossible for women with histories of sexual relations outside of marriage to bring complaints in rape cases. In that year the legislature by statute excluded evidence of a victim's sexual activities with anyone other than the defendant, unless the evidence rebutted certain specific evidence introduced by the district attorney, showed the victim to have been convicted of prostitution within three years of the alleged rape, or was found by the court "to be relevant and admissible in the interests of justice."<sup>401</sup> The statute was received favorably by the courts and applied routinely with statements that a "complainant's prior sexual history is not relevant and should be excluded."<sup>402</sup> The statute was even applied retroactively in trials begun after, but concerning crimes allegedly committed before, its passage.<sup>403</sup>

Perhaps the most important change occurred in the reversal of the rule, originally adopted in the *English* and *Radunovic* cases, requiring corroboration of a victim's testimony in order to obtain a conviction for rape or any lesser included offense under circumstances in which a rape had actually occurred. In view of the perversity of the *English/Radunovic* rule, it is not surprising that some courts had always tried to avoid its consequences. One court held, for instance, that, although a jury should be instructed that corroboration was required on a charge of assault with intent to commit rape, the interests of justice required that a conviction not be reversed when the defendant had failed to object to an erroneous instruction.<sup>404</sup> Other judges held that, in the absence of corroboration, a defendant who had intercourse with his daughter could be convicted of incest, a crime for which corroboration was not required;<sup>405</sup>

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399. *Bianchi*, 391 N.Y.S.2d 29, 30.

400. See *People v. Thompson*, 212 N.Y. 249 (1914); *Woods v. People*, 55 N.Y. 515 (1874); *People v. Hornbeck*, 101 N.Y.S.2d 182 (App. Div. 2d Dep't 1950); *People v. Oathout*, 265 N.Y.S. 535 (App. Div. 3d Dep't 1933).

401. N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992).

402. *People v. Bronson*, 419 N.Y.S.2d 329, 330 (App. Div. 3d Dep't 1979).

403. See *People v. Patno*, 390 N.Y.S.2d 468, 470 (App. Div. 3d Dep't 1977); *People v. Conyers*, 382 N.Y.S.2d 437, 439-41 (Sup. Ct. N.Y. County 1976), *aff'd*, 405 N.Y.S.2d 409 (App. Div. 1st Dep't 1978).

404. See *People v. Palmer*, 274 N.Y.S.2d 648 (App. Div. 4th Dep't 1966), *aff'd*, 342 N.Y.S.2d 377 (Ct. App. 1973).

405. See *People v. Telles*, 243 N.Y.S.2d 440 (Sup. Ct. Kings County 1963).

that a defendant charged with both rape and robbery could be convicted of robbery without corroboration;<sup>406</sup> and that a defendant charged with both rape and sodomy could be convicted of an assault with intent to commit sodomy, since conviction could be had without corroboration for forcible sodomy.<sup>407</sup> A defendant could also be convicted without corroboration of the crime of sexual abuse in the third degree if he had committed only that crime,<sup>408</sup> as by placing his hands on the private parts of a nine-year-old girl<sup>409</sup> or by exposing himself and inviting two young girls to feel his private parts,<sup>410</sup> but not if he had actually consummated sexual intercourse.<sup>411</sup>

Within a few years of its decision in *Radunovic*, a changing majority of the Court of Appeals also began to pull back from its holding in that case. Under growing objections, the court now observed that the corroboration requirement was "of minuscule practical value" and produced "disconcerting, if not mischievous consequences." The rule "frustrate[d] the prosecution of an inherently furtive act," "establishe[d] a system of false distinctions between offenses" against women, created a "'motivation for falsehood,'" and "expresse[d] almost an irrational doubt toward the claims of women who ha[d] been victimized sexually."<sup>412</sup> In response to concerns such as these, the legislature between 1972 and 1975 enacted a series of piecemeal statutory changes<sup>413</sup> that ultimately left New York with a corroboration requirement only in cases of consensual sodomy and in cases of sex offenses against children too young or others too incapacitated to appreciate the significance of the crimes against them and thus either to give their consent or to provide reliable testimony.<sup>414</sup>

The courts reacted positively to the new legislation and in appropriate instances held that corroboration was no longer required for convictions of rape and sexual abuse.<sup>415</sup> Even in cases in which corroboration was possibly required, the courts required far less evidence than they had

406. See *People v. Jenkins*, 291 N.Y.S.2d 368 (Ct. App. 1968); *People v. Lennon*, 291 N.Y.S.2d 369 (Ct. App. 1968). But see *People v. Scruggs*, 298 N.Y.S.2d 194 (App. Div. 2d Dep't 1969) (defendant charged with rape and burglary could not be convicted of burglary without corroboration if the breaking and entering had occurred with an intent to commit rape).

407. See *People v. McCullough*, 280 N.Y.S.2d 931, 933-34 (App. Div. 2d Dep't 1967) (dissenting opinion).

408. See *In re Byron D.*, 320 N.Y.S.2d 467 (App. Div. 2d Dep't 1971); *People v. Doyle*, 300 N.Y.S.2d 719, 727 (App. Div. 2d Dep't 1969), *aff'd*, 309 N.Y.S.2d 199 (Ct. App. 1970).

409. *People v. DeFrancesco*, 273 N.Y.S.2d 770, 772-73 (Sup. Ct. Queens County 1966).

410. *People v. Nisoff*, 369 N.Y.S.2d 686 (Ct. App. 1975).

411. See *Byron D.*, 320 N.Y.S.2d 467; *Doyle*, 300 N.Y.S.2d 719, 727.

412. *People v. Linzy*, 335 N.Y.S.2d 45, 47-48 (Ct. App. 1972), quoting concurring opinion of Breitell, J., in *Radunovic*, 287 N.Y.S.2d 33, 38.

413. See William C. Donnino, "Practice Commentaries" to N.Y. PENAL LAW § 130.16 (McKinney 1987).

414. See N.Y. PENAL LAW § 130.16 (McKinney 1987).

415. See *People v. Weyant*, 419 N.Y.S.2d 200 (App. Div. 3d Dep't 1979); *In re David M.*, 403 N.Y.S.2d 178 (Fam. Ct. Bronx County 1978).

demanded before the legislation's passage. Thus, in *People v. Fuller*,<sup>416</sup> the Court of Appeals held that medical evidence that a ten-year-old's hymen was gone, together with a redness at the entrance to the vagina consistent with, though not necessarily produced by, a recent act of intercourse, corroborated the girl's claim that a man with whom her mother was living in a common-law relationship had raped her. Similarly, in *People v. St. John*,<sup>417</sup> a divorced father was convicted of sexually abusing his two daughters, aged nine and seven, as well as a friend of the daughters, at a time prior to his divorce. The only evidence corroborating the girls' claims of sexual touching was the father's admissions that they had once seen him "exposed" and that on one occasion he had brushed urine off his daughter's friend and on another checked to see if his daughter had wet the bed, together with an earlier statement to his wife of "his intention to break the kids in and have intercourse with them . . . before they started menstruation."<sup>418</sup> On this evidence the court sustained two counts of the defendant's conviction. And in other cases, the courts held that evidence of vaginal intercourse corroborated a claim of forcible sodomy<sup>419</sup> and that semen on a girl's panties corroborated a charge of rape.<sup>420</sup> They also returned to the pre-1950 rule permitting the introduction of evidence of similar crimes to provide corroboration of the crime charged.<sup>421</sup>

Thus, the statutory changes in the corroboration requirements carried out in the 1970s completely flipped over the law's formal values on the subject of rape. A system that had been gradually emerging for a quarter century, with the object of preventing the entrapment of pleasure-seeking men, though often at devastating cost to the women and children who provided the pleasure, was suddenly and surprisingly transformed into a system calculated to prevent victimization, though at the risk of subjecting innocent men to "the mercy" of "designing" women.<sup>422</sup> In regard to the law of corroboration, traditional moral values and newer feminist ones triumphed completely.

A final line of cases during the late 1970s which displayed the law's protective attitude toward women, as well as toward traditional moral values, dealt with the claim that New York's rape laws were unconstitutional because they discriminated against men. One alleged deficiency was that the laws made only men subject to conviction as principals for forcible rape; the courts, however, upheld this distinction as constitu-

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416. 431 N.Y.S.2d 357 (Ct. App. 1980).

417. 426 N.Y.S.2d 863 (App. Div. 3d Dep't 1980).

418. *Ibid.*, 864-65.

419. See *People v. DeBerry*, 429 N.Y.S.2d 268 (App. Div. 2d Dep't 1980).

420. See *People v. Brown*, 413 N.Y.S.2d 482 (App. Div. 3d Dep't 1979).

421. See *People v. Grady*, 413 N.Y.S.2d 995 (Albany County Ct. 1979).

422. *People v. Yannucci*, 15 N.Y.S.2d 865, 866 (App. Div. 2d Dep't 1939) (*dictum*), *rev'd on other grounds*, 283 N.Y. 546 (1940).

tional on the ground that only men were physiologically capable of committing the crime of rape.<sup>423</sup> The second claim of unconstitutionality arose in the context of the statutory rape laws, which barred men over 21 and 18 from engaging in sexual intercourse with women under 17 and 14 respectively.

*People v. Whidden*,<sup>424</sup> which came to the same result as earlier lower court cases,<sup>425</sup> upheld the laws. One obvious justification for the legislation, found by the Court of Appeals to be "ample," was the prevention of pregnancy.<sup>426</sup> A second alleged justification "was to protect the morals of young girls . . . even from their own immature indiscretions"<sup>427</sup> as well as to protect them from "psychological" damage.<sup>428</sup> Judges found "[a]dolescence . . . a period of . . . emotional turbulence," a time when young girls are "subject to a variety of emotional and psychological wants which can often be *exploited* by an 'older man,'"<sup>429</sup> and they therefore understood statutory rape laws as a protection against exploitation and victimization. The Court of Appeals, however, found this justification unconstitutional, since it was "rooted" in the "stereotypical" and "unfounded assumption that underage women are more vulnerable to emotional harm than are their male counterparts."<sup>430</sup>

The statutory and case law developments discussed in this section completely overturned the policy direction of the law of rape in a mere ten-year period. At the beginning of the 1970s, a woman who had intercourse with a man with whom she was acquainted was presumed to have given consent, her testimony was deemed untrustworthy in the absence of corroboration, and her chastity became an issue if she made a legal complaint. In any case resting solely on the testimony of a man and woman who had engaged in intercourse, the man would thus be acquitted of a rape charge, especially if the woman had had prior sexual experience. By 1980, in contrast, chastity was no longer an issue, formal legal doctrine no longer presumed consent, and a man could be convicted of rape solely on a woman's testimony; in any case of uncorroborated intercourse, the man would be without defense and would go to prison if the woman could convince a jury that he had raped her. The doctrinal infer-

423. See *People v. Davoli*, 407 N.Y.S.2d 432 (Onondaga County Ct. 1978); *People v. Reilly*, 381 N.Y.S.2d 732, 738 (Westchester County Ct. 1976).

424. 434 N.Y.S.2d 936 (Ct. App. 1980), *appeal dismissed*, 454 U.S. 803 (1981).

425. See *People v. Dozier*, 424 N.Y.S.2d 1010 (App. Div. 1st Dep't), *aff'd*, 436 N.Y.S.2d 620 (Ct. App. 1980); *People v. Mndange-Pfupfu*, 411 N.Y.S.2d 1000 (Tompkins County Ct. 1978); *People v. Weidiger*, 410 N.Y.S.2d 209 (Oneida County Ct. 1978); *People v. Fauntleroy*, 405 N.Y.S.2d 931 (Westchester County Ct. 1978), *rev'd on other grounds*, 424 N.Y.S.2d 736 (App. Div. 2d Dep't 1980).

426. *Whidden*, 434 N.Y.S.2d 936, 938.

427. *Weidiger*, 410 N.Y.S.2d 209, 211.

428. *Mndange-Pfupfu*, 411 N.Y.S.2d 1000, 1005.

429. *Dozier*, 424 N.Y.S.2d 1010, 1014-15 (emphasis added).

430. *Whidden*, 434 N.Y.S.2d 936, 938.

iority of women was thus transformed into a position of theoretical legal superiority.

Of course, the social effects of this doctrinal change were far less transforming. Just as most men at the outset of the 1970s did not rape their dates even though the law did not stand in their way, so too most men who committed date rape at the decade's close were never brought to trial. Custom and social practice were at both times more determinative of sexual behavior than the law. Nonetheless, by undermining the power of men to coerce sex from women and by instead giving women at least a theoretical capacity to send their lovers to jail, the doctrinal upheaval in the law of rape amounted to a powerful symbolic statement in support of new attitudes widely shared by nearly all women and even many men.

### B. *Family Violence*

Acting again in conjunction with tradition-minded conservatives, feminists won another victory when they succeeded in obtaining judicial and legislative support for the recriminalization of acts of family violence. The first steps were taken by conservative judges, when they began to halt the extension of the Family Court Act's conciliation and treatment provisions to men and women who were living together without the benefit of a formal marriage. These judges could not understand how the goal of the Family Court Act, which was the " 'restoration and preservation of marriages,' " could be accomplished by providing assistance to " 'persons who are living in a meretricious relationship.' " <sup>431</sup> To assist such people would "make the court a party . . . to an immoral relationship," would "impair the . . . morals" of children, and "would not change the moral atmosphere generated by these people living together under one roof." <sup>432</sup>

When the issue first came before the Court of Appeals, it ruled that, if parties had contracted a common-law marriage in a state which recognized the legality of such marriages and had subsequently moved to New York, then their relationship would "qualif[y] for treatment as a spousal or family relationship" under the Family Court Act. <sup>433</sup> But the majority would go no further. In the leading case of *People v. Allen*, <sup>434</sup> in which Judges Bergan and Fuld in dissent were prepared to extend decriminalization to a case of a man who had committed an act of sodomy on a woman with whom he had lived unmarried for three years, Judge Jasen writing for the majority halted the decriminalization movement in its

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431. *People v. Ostrander*, 295 N.Y.S.2d 293, 297 (Dutchess County Ct. 1968), *aff'd*, 302 N.Y.S.2d 998 (App. Div. 2d Dep't 1969), quoting *People v. Dugar*, 235 N.Y.S.2d 152, 153 (Dist. Ct. Nassau County 1962).

432. *Best v. Macklin*, 260 N.Y.S.2d 219, 221 (Fam. Ct. Dutchess County 1965).

433. *People v. Haynes*, 308 N.Y.S.2d 391, 392 (Ct. App. 1970).

434. 313 N.Y.S.2d 719 (Ct. App. 1970).

tracks. Jasen simply thought that "making available conciliation procedures" under the Family Court Act to "informal and illicit relationships . . . would clearly be contrary to public policy."<sup>435</sup>

The 1970 majority opinion in *People v. Allen* marked the beginning of a sharp change in the judiciary's approach to family offense proceedings. When one judge was asked, for example, to "follow the broad construction of the statute as enunciated in many lower court decisions," he refused, observing that "in *People v. Allen*, . . . our highest court narrowed further the construction of these categories . . . [and] limit[ed] the jurisdiction of the Family Court" to cases involving a " 'legal interdependence' " between the parties.<sup>436</sup> Thus, the judge held that an assault by a stepfather upon his stepson could be tried in criminal court without any initial reference to family court,<sup>437</sup> while other judges held the same in reference to assaults by a woman on her sister-in-law<sup>438</sup> and by a 40-year-old man on his 74-year-old mother.<sup>439</sup> Several judges meanwhile followed the *Allen* case in its specific holding that absent a lawful marriage between a man and a woman, the family court had no jurisdiction over any problems arising out of their relationship.<sup>440</sup> Finally, with the Court of Appeals in 1972 leading the way, it became the uniform rule that incest and other sex crimes between parents and children were cognizable only in criminal and not in family court.<sup>441</sup>

As the decade of the 1970s drew to a close, feminists were successfully publicizing "societal concern" about brutality to women at the hands of their husbands,<sup>442</sup> as well as to young children at the hands of their fathers. In particular, concern arose that police would not respond to requests for safeguarding made by or on behalf of a battered or threatened wife, apparently because they did not want to become involved in domestic disputes.<sup>443</sup> In one case, in which a woman's husband had brandished a straight razor, torn off her blouse, and gouged her face, neck, shoulders, and hands with his nails, in full public view, the police advised her that " 'since this was a "family" matter there was nothing they could do.' " Another woman, whose arm had been

435. *Ibid.*, 723.

436. *People v. Weisman*, 339 N.Y.S.2d 482, 483-84 (Crim. Ct. N.Y. County 1973), quoting *Allen*, 313 N.Y.S.2d 719, 722.

437. See *Weisman*, 339 N.Y.S.2d 482, 483-84.

438. See *Sarno v. O'Toole*, 383 N.Y.S.2d 527 (Fam. Ct. Suffolk County 1976).

439. See *Mouguin v. Mouguin*, 398 N.Y.S.2d 211 (Fam. Ct. Rockland County 1977).

440. See *Potter v. Bennett*, 334 N.Y.S.2d 511 (App. Div. 2d Dep't 1972); *People v. Dorns*, 390 N.Y.S.2d 546 (Justice's Ct. Westchester County 1976), *aff'd*, 409 N.Y.S.2d 956 (App. Term 9th & 10th Dist. 1978); *People v. Monsanto*, 335 N.Y.S.2d 451 (Sup. Ct. Bronx County 1972).

441. See *People v. Lewis*, 329 N.Y.S.2d 100 (Ct. App. 1972); *People v. Webb*, 382 N.Y.S.2d 369 (App. Div. 3d Dep't 1976); *People v. Abrams*, 341 N.Y.S.2d 515 (Nassau County Ct. 1973). Cf. *Matter of Patrick B.P.*, 427 N.Y.S.2d 694 (Fam. Ct. Kings County 1980) (family court may not drop quasi-criminal jurisdiction over 15-year-old who had raped and sodomized his younger sisters).

442. *Bruno v. Codd*, 419 N.Y.S.2d 901, 906 (Ct. App. 1979).

443. *Ibid.*, 905.

sprained by her husband, was told by the police that “‘there is nothing wrong with a husband hitting his wife if he does not use a weapon,’” while a third woman who had been struck by her husband with a knife heard an officer who refused her request to arrest him exclaim, “‘Maybe if I beat my wife, she’d act right too.’” As a result of the decriminalization of family offenses, the only remedy these women possessed was to go to family court and seek a protection order, but when they got to the court they experienced little assistance and great delay.<sup>444</sup> Even if a woman obtained a protection order, it often did little good.

An egregious case was chronicled in *Sorichetti v. City of New York*.<sup>445</sup> It involved Frank Sorichetti, who prior to November 6, 1976 had been arrested six times for drunkenness and family assaults. After he had assaulted his wife Josephine with a knife in July 1975, she instituted a divorce action, only to be threatened by him “‘that he would kill her and the children if she proceeded with the divorce.’” In September she obtained a protection order, but, on November 6, the order was amended over Josephine’s objections to allow Frank weekend visitation rights with his daughter, Dina. On November 8, after Josephine had delivered Dina to Frank at a police precinct, he threatened that he would kill both Josephine and Dina before the weekend was over. Josephine informed the police of the threats, showed them her protection order, and demanded that they arrest Frank, but they refused. When on the next day Frank failed to return Dina on time, Josephine again went to the police and demanded repeatedly that they arrest Frank; when she showed the protection order to a police lieutenant and demanded its enforcement, he responded, “‘So what, what have you got there—they mean nothing.’” Several hours later, when Frank’s sister entered his apartment, she found that Frank had attacked Dina with a fork, a knife, and a screwdriver and had attempted to saw off her leg; Dina had been slashed from head to toe and she had sustained severe multiple internal injuries.<sup>446</sup>

In response to disasters such as these, the courts gave victims of serious family violence a cause of action for damages against the municipality that had negligently failed to protect them.<sup>447</sup> More importantly, the legislature, in order “‘to afford more effective relief to the ‘battered spouse,’”<sup>448</sup> amended Article 8 of the Family Court Act to give the victim of a family assault the option of instituting criminal proceedings

444. *Bruno v. Codd*, 396 N.Y.S.2d 974, 976-77 (Sup. Ct. N.Y. County 1977), *rev'd*, 407 N.Y.S.2d 165 (App. Div. 1st Dep’t), *aff’d*, 419 N.Y.S.2d 901 (Ct. App. 1979).

445. 408 N.Y.S.2d 219 (Sup. Ct. Bronx County 1978), *aff’d*, 417 N.Y.S.2d 202 (App. Div. 1st Dep’t 1979), *aff’d*, 492 N.Y.S.2d 591 (Ct. App. 1985).

446. *Ibid.*, 221-22.

447. See *ibid.*; see also *Baker v. City of New York*, 269 N.Y.S.2d 515 (App. Div. 2d Dep’t 1966).

448. 1977 N.Y. LAWS 2501 (Governor’s memorandum of approval of chapter 449 of N.Y. Laws of 1977).

rather than seeking conciliation in family court.<sup>449</sup> This 1977 amendment has been administered so as to give victims an effective choice of the court in which they want to proceed and to make it easy for them to proceed in criminal court.<sup>450</sup> As a result of the 1977 amendment, together with the earlier judicial narrowing of the original Article 8, the curious attempt during the 1960s to decriminalize acts of family violence in large part came to an end.

### C. Prostitution

Just as conservatives and radical feminists had joined forces to transform the law of rape and recriminalize family violence, the same forces struggled to prevent the dawn of "those halcyon days"<sup>451</sup> sought by male libertines, when prostitutes would be available "in clean little stalls, medically approved and at a price a workingman can afford."<sup>452</sup> It seemed clear to radicals and conservatives alike that, even if "[s]ociety may not be able to enforce morality, . . . it clearly can legislate it" and that judges were "constrained to follow the current law,"<sup>453</sup> not to void it as unconstitutional or gut it through statutory interpretation.

Indeed, some judges in prostitution cases even went beyond current law as they strove to reverse the process of decriminalization and thereby enforce morality and protect women's rights. Thus, lower court judges continued, even as they sometimes had during the 1950s and 1960s, to distinguish both *Gould* and *Choremi*,<sup>454</sup> in order to sustain prostitution convictions based on evidence obtained through tapping the telephones of call girls<sup>455</sup> or through conversations held between defendants and undercover police,<sup>456</sup> even in cases in which sexual activity did not occur or was not directly observed. Lower courts also extended prostitution statutes to cover nontraditional defendants, such as the owner of an employment agency who offered jobs requiring women to submit to unlawful sexual intercourse or other lewd acts with their employers,<sup>457</sup> and the owners of a massage parlor "where the female employees . . . manipulated the private parts of male customers to climax."<sup>458</sup>

In part, the resistance to decriminalization of prostitution emerged out of a conservative, moralistic sense that the activity constituted "an age-

449. See 1977 N.Y. LAWS 449. See also 1978 N.Y. LAWS 628, 629.

450. See *People v. Daniel T.*, 408 N.Y.S.2d 214 (Crim. Ct. Kings County 1978); *People v. Revell*, 402 N.Y.S.2d 522 (Dist. Ct. Nassau County 1978).

451. *Costello*, 395 N.Y.S.2d 139, 142.

452. Brownmiller, "Speaking Out on Prostitution," 76.

453. *Costello*, 395 N.Y.S.2d 139, 142.

454. See *Catalano*, 205 N.Y.S.2d 618, 620 (distinguishing *Gould*); *People v. Hansuld*, 114 N.Y.S.2d 243, 246 (Magis. Ct. N.Y. County 1952) (distinguishing *Choremi*).

455. See *Hansuld*, 114 N.Y.S.2d 243.

456. See *Catalano*, 205 N.Y.S.2d 618; *People v. Williams*, 237 N.Y.S.2d 527 (Oneida County Ct. 1963); *People v. Bronski*, 351 N.Y.S.2d 73 (Crim. Ct. N.Y. County 1973).

457. See *Catalano*, 205 N.Y.S.2d 618, 620.

458. *People v. Block*, 337 N.Y.S.2d 153, 155 (Nassau County Ct. 1972).

old problem" for society that had to be "eradicate[d]."<sup>459</sup> Solicitation by prostitutes "'caused citizens who venture into . . . public places to be the unwilling victims of repeated harassment'" with the result that "'such public places . . . become unsafe'" and "'neighborhoods'" become "'disrupted and . . . deteriorat[e].'"<sup>460</sup> Prostitution, it was said, "spread . . . disease, [led] . . . to ancillary criminal conduct, encourage[d] criminal organization," and thereby constituted "anti-social behavior offensive and injurious to the community."<sup>461</sup>

As the decade of the 1970s drew to a close, however, a new, radical feminist opposition to prostitution began to emerge as the main force behind the expansion of the criminal law. The new radical feminists focused on prostitution not as an evil to society in general but as a harm to women in particular; in the radical view, it was the prostitutes themselves who were victimized and exploited and needed to be protected. Prostitution became a feminist issue, as women explained to the nation that the housekeeper who had sex with her employer, or the teenager who left home and hitchhiked to Manhattan, was not an equal who was voluntarily engaging in sex with the men who provided her with money. In this view, "'men create[d] the market,'" but "'the women who suppl[ied] the demand [paid] the penalty.'"<sup>462</sup> There was, according to radical feminists, an "important state interest in proscribing" prostitution—an interest that was "emphasized," as one court noted, when the prostitute before it was, as was the case in an increasingly massive number of instances, "a fourteen year old child."<sup>463</sup> The "imputation that females who engage in misconduct, sexual or otherwise, ought to be more censured . . . than males"<sup>464</sup> had to be put to rest and the women, usually minors, who worked as prostitutes "protected . . . rather . . . [than] penally punished."<sup>465</sup>

New York had taken a step in that direction as early as 1965, when the legislature declared patronizing a prostitute a crime,<sup>466</sup> and occasional cases had been brought under this statute against male customers.<sup>467</sup> Then, in several brief experiments in New York City in the late 1970s, female undercover police officers were assigned to catch male customers and names of male customers were publicized,<sup>468</sup> but the experiments

459. Bronski, 351 N.Y.S.2d 73, 75.

460. *People v. Smith*, 407 N.Y.S.2d 462, 464 (Ct. App. 1978), quoting 1976 legislative findings to N.Y. PENAL LAW § 240.37 (McKinney 1989).

461. *In re P.*, 400 N.Y.S.2d 455, 466 (Fam. Ct. N.Y. County 1977) (dictum), *rev'd sub nom. In re Dora P.*, 418 N.Y.S.2d 597 (App. Div. 1st Dep't 1979).

462. *Ibid.*, 461, quoting *People v. Edwards*, 180 N.Y.S. 631, 634 (Ct. Gen. Sess. N.Y. County 1920).

463. *In re Dora P.*, 418 N.Y.S.2d 597, 604.

464. *A. v. City of New York*, 335 N.Y.S.2d 33, 37 (Ct. App. 1972) (dictum).

465. *In re P.*, 400 N.Y.S.2d 455, 468.

466. See N.Y. PENAL LAW § 230.02 (McKinney 1989).

467. See Bronski, 351 N.Y.S.2d 73.

468. See "Female Officers Arrest Men Searching for Prostitutes," *N.Y. Times*, 4 July 1978, p. 8,

ended in a wave of protest<sup>469</sup> and law enforcement returned to a norm in which prostitutes were ten times more likely than their customers to be arrested.<sup>470</sup> At the end of the decade the law of prostitution thus remained in stasis, as feminists and proponents of decriminalization fought to a standstill, with the result that moral traditionalists who found "something offensive about having women perform sex for money"<sup>471</sup> continued to hold sway.

#### D. Pornography

Like the law of prostitution, the law of pornography remained in stasis during the decade of the 1970s. This was true even though the two traditional "sides to the pornography issue: the conservative approach . . . and the liberal approach" were supplemented by "a third and feminist perspective: that pornography is the ideology of a culture which promotes and condones rape, woman-battering, and other crimes of violence against women."<sup>472</sup>

Perhaps the most important reason for the static nature of pornography law during the decade was that New York courts and especially the New York legislature could do nothing to change it. The precise lines separating lawful pornography from illegitimate obscenity had become a matter for federal constitutional adjudication under the direction of a deeply divided United States Supreme Court, which retained the same basic test throughout the decades in question. In the 1950s the test was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest,"<sup>473</sup> while in the 1970s it was "whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."<sup>474</sup>

This formula, which one commentator has called "as unstable as it is unintelligible,"<sup>475</sup> required judges to search for a community consensus by which to delimit the bounds of legitimate sexual expression. But, as long as liberals saw "pornography as just one more aspect of our ever-expanding human sexuality," while conservatives found it "immoral"

col. 1; "First 'John Hour' on WNYC Names Clients of Prostitutes," *N.Y. Times*, 24 October 1979, p. B3, col. 5.

469. See "Jail Terms Planned for Vice Customers," *N.Y. Times*, 16 November 1977, p. D17, col. 5; "The 'John' Minute," *N.Y. Times*, 26 October 1979, p. 30, col. 1; "WNYC May Discontinue Broadcasts of 'John Hour'," *N.Y. Times*, 9 November 1979, p. B3, col. 5.

470. See *In re P.*, 400 N.Y.S.2d 455, 460.

471. *Ibid.*, 468.

472. Lederer, "Introduction," in *Take Back the Night*, 19-20.

473. *Roth v. United States*, 354 U.S. 476, 489 (1957).

474. *Miller v. California*, 413 U.S. 15, 24 (1973), quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972).

475. Laurence H. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1978), 656.

and feminists understood it to “promote . . . violence against women,”<sup>476</sup> no consensus could emerge and the judicial search for one would be in vain. Moreover, the federal constitutional stature of the community consensus rule prevented the state legislature from doing what it had done in regard to the law of rape and gender violence: altering the status quo with a new, reform-oriented dynamic that produced a complete turn-about in doctrinal direction. The ultimate result was that doctrine remained incoherent, and pornography cases continued to be resolved during the 1970s in the same unprincipled, ad hoc fashion that we observed in Part II-D above.

### E. Sodomy

The judiciary’s liberalization of criminal laws prohibiting homosexual acts also met with conservative, moralistic opposition during the 1960s. Thus, when the Appellate Division in *People v. Maggio*<sup>477</sup> extended the *Randall* case to cover oral as well as anal sex, holding that “only the one whose penis is inserted into a body orifice of another” is guilty of sodomy,<sup>478</sup> it generated a sharp dissent, premised on the linguistic distinction in the Penal Law that while anal sodomy could be committed only by the anus, oral sodomy could be committed “not only ‘by the mouth’ but also ‘with the mouth.’” To keep this “language” from “becom[ing] superfluous,” the dissent believed it necessary to hold that “the one whose mouth is used may also commit the crime.”<sup>479</sup> When the Court of Appeals, in a 4-3 vote, reversed *Maggio* on the basis of this dissenting opinion,<sup>480</sup> it was clear that something other than the parsing of language was going on. What had occurred was that the legislature, in response to conservative moralistic pressures, had amended the Penal Law to make all participants in anal or oral sex guilty of sodomy,<sup>481</sup> and that legislation, together with the “overrul[ing]” of *Randall* by *Maggio*, “cleared up” the “doubt” that “the language of some parts of the opinion” in *Randall* had created.<sup>482</sup>

As the courts continued, as they always had, to face cases involving oral and anal sex acts in public rest rooms<sup>483</sup> and solicitations for such sex made to police officers,<sup>484</sup> to other men,<sup>485</sup> and to children as young

476. Lederer, “Introduction,” in *Take Back the Night*, 19-20.

477. 228 N.Y.S.2d 791.

478. *Ibid.*, 793.

479. *Ibid.*, 794, quoting statutory language (emphasis in original).

480. *Maggio*, 235 N.Y.S.2d 377.

481. See *People v. Katt*, 234 N.Y.S.2d 988, 989-90 (App. Div. 2d Dep’t 1962).

482. *People v. Henry*, 239 N.Y.S.2d 146, 148 (App. Div. 4th Dep’t 1963).

483. See *People v. Sanabria*, 249 N.Y.S.2d 66 (App. Term 1st Dep’t 1964); *People v. Anonymous*, 415 N.Y.S.2d 921 (Justice’s Ct. Westchester County 1979).

484. See *People v. Hale*, 203 N.Y.S.2d 71 (Ct. App. 1960).

485. See *People v. Willmott*, 324 N.Y.S.2d 616 (Justice’s Ct. Suffolk County 1971).

as eight,<sup>486</sup> conservative concerns for the "rights" of "the 'public'" continued to surface.<sup>487</sup> In particular, the courts worried that "infants of tender years" might witness sex acts.<sup>488</sup> Worst of all in the eyes of conservatives, the courts continued to confront cases in which men had sex with boys "of vulnerable early adolescence, 13 and 14 years of age," and they began to perceive these teens as "child victims"<sup>489</sup> rather than the "half-witted youth[s]"<sup>490</sup> they had once appeared to be. In an effort to protect such victims, the Court of Appeals *sub silentio* even overruled *People v. Doyle*, by holding that a boy under the age of consent was incapable of consenting to an act of sodomy, was thereby incapable of being an accomplice in such an act, and could accordingly provide all the testimony that was needed, without corroboration, to convict an adult defendant of the act.<sup>491</sup> And finally, as the courts began to perceive children participating in homosexual acts as victims, they began to see the men of "economic status" and "good positions" who appeared before them charged as defendants not as upstanding citizens of education and culture but as exhibitionists hoping to be "observed by an innocent member of the public."<sup>492</sup>

Nonetheless, there remained judges who supported claims for the decriminalization of private, consensual sodomy, and in the late 1970s they began to write opinions proclaiming the existence of a constitutional right of privacy or an equal protection right to engage privately in oral and anal sex.<sup>493</sup> Other judges, in contrast, continued to find homosexual acts a fit subject for legislative prohibition,<sup>494</sup> even if they believed that unmarried heterosexuals had a constitutional right to engage in anal and oral sex.<sup>495</sup> In the face of this division of lower court opinion, the Court of Appeals in 1977 initially refused to pass upon the issue of the legisla-

486. See *People v. Spencer*, 322 N.Y.S.2d 266 (Crim. Ct. Queens County 1971).

487. Anonymous, 415 N.Y.S.2d 921, 923.

488. *Ibid.*, 924.

489. *Fielding*, 385 N.Y.S.2d 17.

490. *Deschessere*, 74 N.Y.S. 761, 764.

491. See *Fielding*, 385 N.Y.S.2d 17. *Fielding*, it should be noted, was decided after the statutory changes in the law of corroboration of sex crimes discussed in the text at notes 413-22 above. Like the cases discussed in that section, *Fielding* should be read as a response to the new legislative policy. As late as 1972, the court was applying the old rule requiring corroboration in the case of consensual but not forcible sodomy. See *People v. Thompson*, 335 N.Y.S.2d 832 (1972).

492. Anonymous, 415 N.Y.S.2d 921, 924.

493. See *In re P.*, 400 N.Y.S.2d 455, 464-66. See also *People v. Jose L.*, 417 N.Y.S.2d 655 (Crim. Ct. N.Y. County 1979), declaring prohibitions on private, consensual sodomy "archaic" and a result of a "legislative failure of courage" when the Penal Law was amended in 1965, and hoping "that we in this state have come a long way in the fifteen years since." *Ibid.*, 658-59. However, the judge in *Jose L.* refused to decide whether a constitutional right existed to engage in sodomy in private, since *Jose L.* had engaged in his act with a female prostitute in the rear of a van parked on a public street and open to public view.

494. See *People v. Mehr*, 383 N.Y.S.2d 798 (App. Term 9th & 10th Dists. 1976); *People v. Rice*, 383 N.Y.S.2d 799 (App. Term 9th & 10th Dists. 1976); *People v. Johnson*, 355 N.Y.S.2d 266, 268 (Buffalo City Ct. 1974) (dictum).

495. See *Johnson*, 355 N.Y.S.2d 266.

ture's power to prohibit private, consensual homosexual acts.<sup>496</sup> But then three years later, in *People v. Onofre*,<sup>497</sup> the court did decide the question, holding unconstitutional the state's legislation criminalizing consensual homosexual relations.

The majority opinion by Hugh R. Jones, an upstate Republican appointed to the court by Nelson Rockefeller in 1973, held that the legislation violated the right to privacy, which was itself derived from several textual sources, including the federal due process clause.<sup>498</sup> Jones began by observing that the right of privacy "is not, as a literal reading of the phrase might suggest, the right to maintain secrecy with respect to one's affairs or personal behavior; rather it is a right of independence in making certain kinds of important decisions."<sup>499</sup> Given that courts had extended the right of privacy to cover "individual decisions as to indulgence in acts of sexual intimacy by unmarried persons" and the "satisfaction of sexual desires by resort to material condemned as obscene . . . when done in a cloistered setting," Jones could see no reason for not extending the right further to people seeking "sexual gratification from what at least once was commonly regarded as 'deviant' conduct."<sup>500</sup> Nor did three justifications put forward by the state in support of its legislation carry any credence with him. He rejected out of hand the first claim that sodomy led to physical injury, finding no evidence in support thereof. Since courts sustaining privacy rights in other contexts had given no weight to the "moral indignation among broad segments of our community" arising from the private viewing of pornography or the use of contraceptives by unmarried people,<sup>501</sup> Jones rejected the second justification that "disapproval [of sodomy] by a majority of the populace" could constitute "a valid basis for intrusion by the State in an area of important personal decision."<sup>502</sup> Finally, he rejected the argument that prohibiting sodomy would protect "the institution of marriage, venerable and worthy as is that estate," observing:

Certainly there is no suggestion that the one is a substitute or alternative for the other nor is any empirical data submitted which demonstrates that marriage is nothing more than a refuge for persons deprived by legislative fiat of the option of consensual sodomy outside the marital bond.<sup>503</sup>

With its decision in *Onofre* the Court of Appeals carried to ultimate fruition, but only for gay men, the new sexual liberalism that developed

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496. See *People v. Rice*, 395 N.Y.S.2d 626 (Ct. App. 1977).

497. 434 N.Y.S.2d 947 (Ct. App. 1980), *cert. denied*, 451 U.S. 987 (1981).

498. U.S. CONST. amend. XIV, § 1.

499. *Onofre*, 434 N.Y.S.2d 947, 949.

500. *Ibid.*, 951.

501. *Ibid.*, 951 n.3.

502. *Ibid.*, 952.

503. *Ibid.*

after 1940. In the cases involving homosexuals, the Court of Appeals was prepared, when only consenting adults were involved and sex acts between them took place in private, initially in cases like *Doyle* to manipulate procedural rules and construe statutes, and ultimately in cases like *Onofre* to create a constitutional right under the rubric of privacy so as to give men freedom to engage with each other in whatever sexual behavior they enjoyed. In the one limited area of homosexuality, New York law recognized the legitimacy of *men's* ever-expanding sexuality and the illegitimacy of governmental attempts to dominate men and transform them into something other than what they made of themselves.

## V. CONCLUSION

It is necessary to conclude by asking the same question about the changes in the law of sex crimes occurring during the 1970s as that which was asked earlier about the changes occurring in the 1950s: what deeper, parallel transformations in society and ideology can help explain them? More specifically, we must ask why the impetus in the 1950s for sexual autonomy and fulfillment came to full fruition only in regard to homosexuality, whereas on other issues—prostitution and pornography—the impetus came to a halt, while on still others—rape and gender-related violence—its direction was totally reversed.

Any analysis of the uniqueness of *Onofre's* outcome must begin by recognizing that New York is not simply the United States in microcosm. As noted at the outset of this article, the forces that impinge on the law would come together differently in New York than in the nation at large. In particular, New York City would have less weight in the nation's councils than in the state's. Thus, when the United States Supreme Court in *Bowers v. Hardwick*<sup>504</sup> considered the same issue that the Court of Appeals had resolved in *Onofre*, it reached the opposite result. There was simply less support in New York and on the Court of Appeals than in the nation at large and on the Supreme Court for what Chief Justice Warren Burger labelled "millennia of moral teaching."<sup>505</sup> The liberal disposition in favor of granting men freedom to pursue an ever-expanding sexuality could more readily triumph over traditional, conservative moral values in New York than in the nation as a whole.

Explaining why the liberal value of individual autonomy triumphed in New York whereas it failed to triumph in the nation at large does not, however, solve any important, interesting puzzle. The real puzzle arising out of *Onofre* is why liberal individualism triumphed more completely in the context of homosexual than heterosexual privacy. Addressing that

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504. 478 U.S. 186 (1986).

505. *Ibid.*, 197 (concurring opinion).

puzzle, in turn, demands recourse to the central concepts at the core of this essay—the concepts of equality, freedom, and domination.

Gay men were without question an underclass in New York as recently as the 1970s. Homosexuals as late as that decade still had to hide their orientation if they wanted to practice most professions, reside in most neighborhoods, or otherwise participate in mainstream economic and social life. Heterosexual domination took the form of driving gay men into the closet.<sup>506</sup> And the liberal paradigm's response to that domination was easy: grant gay men equality with heterosexual men, give them the freedom to engage in the sexual practices they desired and to live the same lives as others, and thus put an end to domination. *Onofre*, which was a step toward equality, freedom, and an end to domination, fit neatly into the liberal paradigm. While gay liberation called for the rejection of millennia of Judeo-Christian moral teaching, its achievement seemingly would hurt no one.

Hence most New Yorkers could easily accept homosexual equality, and no one except the conservative supporters of conventional morality would stand in opposition to it. Conservatives, moreover, would take their stand not on the basis of tangible self-interest but only in support of claimed moral truths. Thus, the battlelines over homosexuality were cast between a minority seeking to attain equality, in order to end domination and attain its freedom, and a majority standing for nothing but continued adherence to received traditions.

It should also be noted that “a healthy interplay [developed] between the gay movement and the feminist movement,”<sup>507</sup> as radical feminists joined with homosexuals to demand “an end to social degradation and violence against lesbians and gay men.”<sup>508</sup> Some of these radicals, it should further be noted, acted out of self-interest. Finding “[i]ntercourse with men as we know them . . . increasingly impossible” and “conventional heterosexual behavior” to be “the worst betrayal of our common humanity,”<sup>509</sup> some radical women began to “consider the fact that there's no reason why one shouldn't love a woman.”<sup>510</sup> In addition, many feminists supported male as well as female homosexuality out of a different self-interest, rooted in an understanding that men were “personally threatened” by “homosexuality” since it “contained an implicit threat to sexist ideology” and thereby cast doubt upon men's “place of power in society with women.”<sup>511</sup>

506. See D'Emilio, *Sexual Politics*, 115-25, 158-75, 207-09, 219, 238-39.

507. “Loving Another Woman,” transcript of radio broadcast, in *Radical Feminism*, ed. Koedt, et al., 85, 93.

508. Charlotte Bunch, “Lesbianism and Erotica in Pornographic America,” in *Take Back the Night*, ed. Lederer, 91.

509. Dworkin, *Woman Hating*, 184.

510. “Loving Another Woman,” 91.

511. Anne Koedt, “Lesbianism and Feminism,” in *Radical Feminism*, ed. Koedt, et al., 246, 257.

It was only on the issue of homosexuality, however, that radical feminists stood in support of the liberal individualist paradigm of sexual freedom. On all the other issues considered in this essay—pornography, prostitution, rape, and gender-related violence—the radicals stood against individualism as they strove to unmask liberalism's goal of sexual freedom as a mere veil for male sexual aggression. In the language of one radical, "the much acclaimed 'sexual freedom' of the last few decades" amounted to nothing more than a conversion of "woman to 'cunt'—thing, commodity, matter"; sexual freedom was merely a "masculine sensibility" focusing upon "the disgust, the contempt, the hostility, the violence, and the sense of filth" through which men "just 'fuck' women and discard them, much as one might avail oneself of sanitary facilities—Kleenex or toilet paper, for example."<sup>512</sup>

By their effort to unmask male sensibilities and interests, radical women, of course, declared their own different sensibilities and interests. By pointing to the "truth that there is a split between the female and the male,"<sup>513</sup> that "women's concepts of the world are much different than men's," and that any "male view of the world ha[d] its opposite in a female view,"<sup>514</sup> the radical feminists proclaimed their faith that the interests and sensibilities of men and women were inevitably at war. The only way by which women could, in the radicals' view, prevent men from triumphing over them and dominating them, was for them to triumph over and dominate men. In announcing their goal to "change men"<sup>515</sup> and make men "excise everything in them that they now value as distinctively 'male,'"<sup>516</sup> the radicals made it plain that they intended to end what they viewed as their subordination by establishing their domination.

Once radical feminists ceased demanding equality in the form of obtaining the same rights as men, equality collapsed as a coherent concept in regard to gender issues. Indeed, the identification of interests and sensibilities on the part of men and women which were inevitably at war with each other destroyed the possibility that any moral or legal concept could mediate the conflict between the sexes. As different groups—men and women; homosexuals and heterosexuals; radicals, liberals, and conservatives—developed competing and incommensurable paradigms of sexuality, the specific theoretical concepts that they appropriated to the paradigms, such as conventional ideas of sexual morality, classical goals

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512. Millett, *Sexual Politics*, 294-97.

513. Barbara Burris, "The Fourth World Manifesto," in *Radical Feminism*, ed. Koedt, et al., 322, 355.

514. *Ibid.*, 340.

515. Carol Hanisch, "A Critique of the Miss America Protest," in *Notes from the Second Year: Women's Liberation: Major Writings of the Radical Feminists* (New York: Radical Feminism, 1970), 88, quoted in Judith Hole and Ellen Levine, *Rebirth of Feminism* (New York: Quadrangle Books, 1971), 124.

516. Dworkin, *Our Blood*, 13.

of autonomy and equality, and newer visions of an end to subordination, ceased to serve as instruments for persuading each other. Instead, the concepts became rhetorical ploys for keeping the committed in the fold and for translating self-interest into arguments that were acceptable in the political process. In the face of divergent paradigms that often made it impossible for competing groups even to communicate with each other, the only thing opposing groups could do was to join in rhetorical efforts to express their self-interest in politically acceptable dialogue, to see which group could make the greatest political noise, and thereby to enlist government institutions to decide issues in their favor.

The developments of the 1970s in the law of rape, gender-related violence, pornography, and prostitution must be understood as responses to such rhetorical battles. When feminists proposed changes in the law of rape and gender violence and gave politically viable arguments in support of their proposals, men who profited by such rape and violence could find nothing acceptable to say in response. The result was a series of statutory changes and judicial extensions beneficial to women. In contrast, when radicals sought to alter the law of prostitution and pornography, men and even some women who valued existing practices talked loudly about sexual freedom and freedom of speech. Their rhetoric was loud enough to neutralize the talk both of radicals and of conservative moralists, and to keep the law in stasis.

These conclusions suggest larger hypotheses to which I shall turn in work to come. They suggest that demands for equality, individual freedom, and an end to habits of domination, constituted a cohesive ideology during the 1940s, 1950s, and 1960s. That ideology, in turn, produced transformative legal change during the decades in question. In the late 1960s, however, ideological cohesion collapsed, and different groups began to articulate diverse and competing sensibilities and interests. That competition, in turn, produced an ideological stalemate. With this stalemate, dynamic legal change became increasingly difficult to achieve, the status quo became reified, and a new conservatism set in.

