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THE MANY FACES OF SEXUAL CONSENT

WILLIAM N. ESKRIDGE, JR.*

Pat Califia's short story, "Jessie,"¹ commences with the winding down of a womyn's beer dance. The narrator, Liz, lover of "butch-looking women,"² passes up several opportunities to go home with available one-night standing arounds. She has eyes only for the lean, leathered, electric Jessie, the bass guitarist for the band called "The Bitch."³

Jessie emerges from her dressing room. She claims Liz by threading her white silk scarf through a ring in Liz's nondetachable throat collar. During the drive to Jessie's apartment, Liz recounts her initiation, years earlier, into lesbian bondage and discipline (B&D). They arrive at Jessie's apartment in a deserted warehouse district. "I felt a twinge of alarm,"⁴ Liz narrates. "I hardly knew her. Anything could happen."⁵

At the apartment, Jessie slaps Liz hard enough to redden her face, caresses her back and thighs, binds her hands together, and forces Liz's mouth onto her genitals. "I am going to possess you utterly, for my own pleasure, make you completely and totally mine. Are you willing?"⁶ asks Jessie. "I've never wanted anything more,"⁷ is the response.

Jessie binds Liz to her poster bed and tortures her with hot

* Professor of Law, Georgetown University Law Center. This Article is a revised version of the Cutler Lecture delivered on February 28, 1995 at Marshall-Wythe School of Law at the College of William and Mary. I appreciate the stimulating questions posed after the Lecture, and especially the lead-off questions by Dean Thomas Krattenmaker.

1. PAT CALIFIA, *Jessie*, in *MACHO SLUTS: EROTIC FICTION* 28 (1988).

2. *Id.* at 29.

3. *Id.* at 31.

4. *Id.* at 48.

5. *Id.*

6. *Id.* at 50.

7. *Id.*

wax. "Oh! No, no, no!"⁸ cries the narrator. "The first rain of fire fell upon my skin. I struggled and cried for mercy. 'I can't stand this,' I wept."⁹ Liz begs Jessie to beat her, and the scene ends when Liz passes out in ecstasy.

The story of Jessie and Liz challenges our thinking about a concept as mystical as it is critical to the regulation of sexuality: consent. Legal as well as popular discourse about sexual intercourse focuses on whether both parties have consented, providing vivid evidence of Sir Henry Maine's assertion that modern law is a movement from status to contract, from a medieval, collectivist understanding of human relations to a liberal, individual rights one. Is "Jessie" the triumph of Maine's assertion, or is it the neo-Victorians' counterexample? When is consent the appropriate criterion for evaluating or regulating sexual interaction? What constitutes meaningful consent?

Returning from time to time to the Califia short story, this Article explores the role of sexual consent in American law. I first examine the many faces law finds for consent or its opposite; these many faces reveal the impossibility of divorcing consent from context and social policy. For this reason, the very meaning of consent has changed markedly in the last generation in response to women's increased power. My thesis is that the law of consent ought to and probably will change in other ways now that gay power joins and sometimes stands in opposition to women's power. "Jessie" illustrates one cutting edge—sado-masochism (S&M)—that serrates traditional liberalism, modern feminism, and gaylaw.

I. LIBERALISM CANNOT EASILY ACCOUNT FOR THE MANY FACES OF SEXUAL CONSENT

Most of the citizens of Virginia presume, with liberal theory, that human beings are autonomous decisionmakers. Each individual seeks to satisfy her or his preferences, and liberal theory gives the individual wide berth to make this search. The main limitation liberal theory would place on sexual intercourse is

8. *Id.* at 57.

9. *Id.*

that it be "consensual." Because sex is usually a joint enterprise, the parties ought to be able to engage in it if they both agree to it. Party One says "yes," and Party Two says "yes": legal intercourse. Party One says "no" or Party Two says "no": illegal intercourse. What if, as in the Califia short story, Party Two says both "yes" and "no"? This raises a puzzle that can be generalized immediately.

Whether sexual intercourse is legal in the state of Virginia¹⁰ depends surprisingly little on whether the parties both say "yes." It depends more critically on other considerations, especially the identities of the parties, their relationship, and precisely what form their intercourse takes. Note, for example, the following circumstances in which consent is either negated or rendered irrelevant under Virginia law.

1. *Consent Negated Only by Serious Physical Injury (Marital Rape)*. Vaginal sex between cohabiting husband and wife is presumed conclusively to be consensual in Virginia, so long as there is no "serious physical injury."¹¹ If Liz and Jess(i)e were cohabiting wife and husband, the bondage and discipline described would probably be immune from state regulation, even if Liz's protests constituted a withdrawal of her consent to sexual intercourse.

2. *Consent Negated by Physical Coercion (Rape)*. Sex between two unmarried adults, or a husband and wife who are not living together, is not consensual if it occurs over one party's objections, or if one party is coerced into sex by "force, threat or intimidation."¹² Economic threats (e.g., "I'll withhold money I owe you if you don't have sex with me") are not considered coercion in this context.¹³ Whether Jessie raped Liz in the short story is

10. I shall use Virginia law in this Article, but most of the points I make can be made for other states as well.

11. VA. CODE ANN. § 18.2-61(B)(ii) (Michie Supp. 1995); cf. Weishaupt v. Commonwealth, 315 S.E.2d 847, 855 (Va. 1984) (holding that spouse can revoke "implied consent" to sex by leaving husband and creating a de facto end to marriage). Between 1986 and 1994, Virginia law required spouses to report rapes within ten days of their occurrence. VA. CODE ANN. § 18.2-61(B) (Michie 1988). For a discussion of the marital rape allowance in other states, see Jaye Sitton, Comment, *Old Wine in New Bottles: The "Marital" Rape Allowance*, 72 N.C. L. REV. 261 (1993).

12. VA. CODE ANN. § 18.2-61(A)(i) (Michie Supp. 1995); see Bailey v. Commonwealth, 82 Va. 107 (1886).

13. The Model Penal Code has a crime of "gross sexual imposition," a third-degree

ambiguous. One might argue that although sex was forced upon Liz over her verbal objections, Liz had earlier "consented" to this sort of sexual relationship.

3. *Consent Negated by Economic Inducement (Workplace Harassment, Prostitution)*. Sex between an employer and employee is not consensual if it occurs over the employee's objections, or if the employee is coerced into sex by physical force or threats of force or is induced into sex by economic threats or promises.¹⁴ Economic inducement renders the interaction illegal if one party makes her or his living by trading sex for money.¹⁵ If either Jessie or Liz were a prostitute, their sex for pay would thus be illegal.

4. *Consent Irrelevant Because of the Form of the Activity (Sodomy, S&M)*. Sex between two parties is illegal if it involves sodomy (oral, anal, and oral-anal sex)¹⁶ or if it involves physical harm resulting from sadomasochistic role playing,¹⁷ even if both parties have said "yes." The easiest-to-spot illegality in "Jessie" is the couple's commission of sodomy.¹⁸

felony, which is based upon nonphysical coercion. MODEL PENAL CODE § 213.1(2) (1980). The commentary indicates that economic coercion would trigger this liability, *id.* § 213.1(2)(a) commentary at 312 (1980), but in the dozen or so states having a provision such as this one, *see, e.g.,* N.D. CENT. CODE § 12.1-20.03 (1993) (gross sexual imposition); OHIO REV. CODE ANN. § 2907.05 (Baldwin 1995) (gross sexual imposition), I have not seen a reported case invoking such a theory.

14. The Equal Employment Opportunity Commission (EEOC) considers this sexual harassment that violates Title VII and explicitly warns that a woman's agreement to economically induced sex excuses the violation. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(2) (1994).

In 1978, legislation was introduced in Virginia that would have imposed criminal liability in cases in which the defendant abused his "position of authority" to obtain sex from someone subordinate to him, including "occupation[al]" relationships. *See* S.B. 291, 1978 Sess. (1978), *discussed in* ROSEMARIE TONG, *WOMEN, SEX, AND THE LAW* 111 & n.70 (1984).

15. VA. CODE ANN. § 18.2-346 (Michie Supp. 1995). Every state but Nevada criminalizes prostitution. *See* Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 794 (1988).

16. Virginia quaintly calls this "crimes against nature," or "carnal knowledge," VA. CODE ANN. § 18.2-361(A) (Michie Supp. 1995), but has a separate crime that it calls "forcible sodomy," *id.* § 18.2-67.1.

17. Virginia law is not completely clear on this point, but this interpretation is suggested by *Martin v. Commonwealth*, 37 S.E.2d 43 (Va. 1946). In a leading S&M case, the Iowa Supreme Court interpreted and followed *Martin*. *State v. Collier*, 372 N.W.2d 303, 306 (Iowa 1985).

18. Virginia law considers it marital sexual assault if the husband forces sodomy

5. *Consent Irrelevant Because of the Relationship of the Participants (Adultery, Fornication, Incest)*. Sex between two parties is not legally permissible if they are not married to one another,¹⁹ or if they are related to one another.²⁰ "Jessie" provides another easy-to-spot illegality: as unmarried sex partners, Liz and Jessie have committed the crime of fornication.

6. *Consent Negated by the Identity of One of the Participants (Pedophilia, Bestiality, Mental Disability)*. Sex between two parties is not consensual if one of the parties is under the age of fifteen,²¹ is an animal,²² or was led into intercourse by reason of her mental or physical disability.²³ The legal incapacity of one of the parties to agree to the intercourse negates consent. In "Jessie," the question arises whether Liz's masochism is a mental disability targeted by Virginia's rape law.

This legal array poses intractable difficulties for liberal theory of sexuality. For example, sex is often illegal when both parties say "yes." Indeed, most of the above categories are ones in which formal acquiescence does not rescue the legality of the intercourse: prostitution, sodomy, sadomasochism, pedophilia, bestiality, sex with the mentally disabled, fornication, adultery, and incest. Conversely, intercourse between cohabiting spouses is legal, even when one partner says "no," as long as there is no serious physical injury. Likewise, it may also be legal in Virginia for a man to rape a woman if she says "no" after penetration.²⁴

or genital penetration by an inanimate object upon his wife against her will, *but only if* the couple is separated, or the abusive spouse causes serious physical injury. VA. CODE ANN. § 18.2-67.2(B) (Michie Supp. 1995). Even if Liz and Jess(ie) were a married husband and wife, forcible sodomy could thus pierce the marital rape allowance.

19. If the two people are simply unmarried, the act is criminal "fornication," *id.* § 18.2-344 (Michie 1988), and if one or both are married to other people, it is "adultery," *id.* § 18.2-365.

20. Sex between related persons is the crime of "incest." *Id.* § 18.2-366 (Michie Supp. 1995).

21. To have sexual intercourse with a child under the age of 13 is statutory rape, *id.* § 18.2-61(A)(iii), and for an adult to have sex with a child between the ages of 13 and 15 is a Class Four felony, *id.* § 18.2-63. The act is a lesser offense if the defendant is also a minor. *Id.*

22. This acts falls under "crimes against nature." *Id.* § 18.2-361(A).

23. If sexual intercourse is accomplished "through the use of the complaining witness's mental incapacity or physical helplessness," it is rape. *Id.* § 18.2-61(A)(ii).

24. Perversely, the law in Maryland (and probably also the law in Virginia, although no case law is on point) is that a woman who says "no" has nonetheless

A more complex liberal perspective renders the categorical scheme more coherent, however. Consent might still be the organizing principle if understood in a more complicated way.

1. *Capacity*. Liberal theory denies the existence of consent if one of the parties has insufficient "capacity" to make autonomous decisions. The concept of insufficient capacity helps explain the law's rigidity in category six, in which the incapacity of a participant negates consent. This argument does not apply to the other categories, and may be a fuzzy justification even for category six. Should mental disability establish a presumption of rape? Given the wide range of mental disabilities, a liberal may find it hard to accept this proposition across the board. The proposition is easier for a liberal to accept in regard to children under age fifteen, but national surveys suggest that a large portion of children who are fourteen or fifteen have engaged in sexual intercourse. Do these adolescents not have the decisionmaking "capacity" to make decisions about sexual behavior?

2. *The Public-Private Distinction*. Categories one and three may be explained through liberalism's famed "public-private" distinction: the state should be most reluctant to interfere in zones of privacy (like marriage, category one) and most willing to interfere in zones of public intercourse (like the workplace, category three). This argument does nothing to justify the regulation of Liz and Jessie—categories four, five, and six—which usually regulates sex that occurs in contexts just as "private" as the marital bed. Such a distinction also seems like a particularly illiberal way to distinguish categories one and two: why should the victim of marital rape receive so much less protection than the victim of date rape? The liberal also has some trouble distinguishing date rape (category two) from prostitution (category three) because both involve action in the sexual "marketplace," and little reason exists, from a liberal point of view, to regulate prostitution so differently.²⁵

"consented" to the rape if she says "no" after penetration has occurred. *Battle v. State*, 414 A.2d 1266, 1270 (Md. 1980).

25. The john's spending \$300 to purchase the prostitute's intercourse directly is per se illegal, but the rich date's spending the same \$300 to purchase the poorer date's intercourse indirectly is illegal only if accompanied by physical threats. A more striking difference, of course, is that in the former situation the law tends to

3. *The Law Changes Slowly*. Liberal consent-based regimes of legal regulation do not spring full-grown from the brow of Zeus. They accrete over time, gradually displacing traditional status-based regimes. Categories two and three represent the core liberal regime, and categories one, four, five, and six are atavistic holdovers from the olden days. Like the human appendix, these holdovers might be harmless incoherences. This argument admits that we do not enjoy a liberal regime for regulating sexuality, and that the regime we do have reflects a mixture of consent-based and status-based rules. The ubiquitous language of consent is just a rhetorical device for discussing the issue, but a device masking the more complex reality.

The contention that the language of consent is a mere rhetorical device has both descriptive and normative bite. The exemption of marital rape from the law's concern (category one) has been under fire in recent years, and it is not clear how vigilantly the criminal justice system enforces the prohibitions in categories four (sodomy) and five (fornication, adultery) today.²⁶ Recent legislative attention, however, has relaxed only slightly the marital rape exemption and has left the sodomy prohibition entirely in place. Liz and Jessie could therefore be prosecuted for their actions. The prohibitions in category six are also as robust as ever. Furthermore, even when not enforced by a criminal arrest, these prohibitions continue to have legal consequences. For instance, the Virginia Supreme Court has held that the fornication prohibition bars a partner infected with herpes simplex from suing her unmarried lover.²⁷

II. THE LEGAL CONSTRUCTION OF SEXUAL CONSENT

The obvious implication of the foregoing analysis is that American law regulating sexuality is concerned with status as

go after the induced person (the prostitute) and not the inducer (the john), while in the latter situation the law goes after the inducer (the person who rapes) and not the induced person (the rape victim).

26. See *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986) (explaining that virtually no possibility exists that heterosexual consenting adults would be prosecuted for fornication).

27. *Zysk v. Zysk*, 404 S.E.2d 721 (Va. 1990).

well as with consent, even if it views the latter as dominant or ascendant. The less obvious implication is the connection between consent and status. Ultimately, both must be seen as legal constructions reflecting larger dynamics of ideology and power. The lesson of this analysis is that liberalism itself fails to explain the operation of consent in an apparently liberal society. The limits of consent as an organizing principle reflect the limits of liberalism itself.

A. *Consent as Contextual and Status-Based*

A asks B to have intercourse, and B declines. The next day, A offers B a diamond ring if B will have intercourse with A, and B accepts the ring and has sex with A. This scenario may sound like the quintessential, and therefore legal, consensual sex, but my analysis suggests that the issue of consent, and of legality, is not clear until I provide further information about the context of this exchange:

- The intercourse between A and B is *consensual and legal* if A and B are dating or are married (categories one and two). Indeed, this example is the classic scenario by which the couple segues from dating to marriage.
- The intercourse between A and B is *legally problematic* if A is B's employer and is *criminally illegal* if B earns a living by trading sex for valuables (both category three). In the first variation, A, as B's employer, might be sued for sexual harassment. In the second, B might be arrested for prostitution.
- The intercourse between A and B is *criminally illegal* if A and B engage in sodomy or harmful sadomasochism (category four) or if A is married to C (category five). The intercourse is a *major crime* if B is related to A (category five) or is a child or mentally disabled (category six).

If the point were not clear before, this exercise reveals that consent is inherently contextual: the same conduct in one circumstance will be legal, while in a slightly different context it will be criminal. Consent is not a simple volitional category, as

it is typically treated. Instead, the issue of legal consent is inherently concerned with legal status and social policy.

The foregoing example reveals the intimate connection between consent and status. The same actions by *A* and *B* will have strikingly different legal meanings depending upon *B*'s status as a spouse, or as an employee or sex worker, or as a sodomite, relative, child, or mentally disabled person. What is recognized as a valid *choice* cannot, even in a liberal society, be separated from the *status* of the chooser(s) and the chosen. The connection between choice and status is not an historical accident, the chance perpetuation of status categories in the modern regulatory categories of consent. Instead, status and consent are both conceptions serving a larger cultural script.

A further variation suggests how this cultural script is socially regulatory. *A* asks *B* to have sexual intercourse, and *B* says "yes." This scenario would appear to be consensual, unless the intercourse falls under categories four, five, or six. Even if, however, *A* and *B* are complete strangers, with no status relationship, the "yes" might not mean "yes" and might be treated as a legal "no." For example, if *A* has a knife to *B*'s throat and that knife is an inducement to *B*'s agreeing to have sex, the law will regard the interaction as a rape, notwithstanding the verbalized "yes" (category two). Nevertheless, the knife to the throat will probably not be considered a rape if the threat is part of *Liz* and *Jessie*'s S&M game, as long as the parties have consented to the interaction. An assault or sodomy prosecution (category four) may follow, but even then a rape prosecution would be unlikely. These variations reveal the openly regulatory nature of the legal construction of consent. Consider next the regulatory regime instantiated by the many faces of sexual consent.

B. Consent as a Construction of Procreative Marriage

Once the law of consent is understood as a regulatory regime, it becomes more coherent. The key regulatory policy is procreative companionate marriage, an institution that became entrenched in Western culture during the late Roman Empire and the early Middle Ages.²⁸ Under this ideology, an important role

28. The ideology surrounding companionate marriage is developed in PETER

of the state is to protect the "sanctity" of marriage by refusing to regulate procreative sex within the union (the exemption for marital rape, category one) and by policing sex outside of marriage (namely, fornication and adultery, category five). Sexual activities not contributing to the procreative project (sodomy, category four, and bestiality, category six) are also disapproved. For reasons of eugenics and the sanctity of the family unit, marriage is not available to closely related people (category five) or to children and the mentally disabled (category six).

Once procreative marriage is seen as the organizing principle, Virginia's law of sexual consent is more explicable. Indeed, the thesis that procreative marriage is the common strand in sexual consent laws is supported strikingly by the most bizarre of Virginia's sexual consent rules. In Virginia, a child fourteen years or older can "retroactively" consent to sex with an adult if the adult later marries the child.²⁹ That is, marriage by the adult and the child is not only legally sanctioned pedophilia (otherwise quite illegal), but also retroactively absolves the adult from his prior crime of statutory rape.

Notwithstanding social changes that have diminished the inviolability and social significance of marriage, that institution remains critically important to the law of sexual consent. In turn, the law of sexual consent testifies to the robustness of marriage as an American institution. Marriage remains a legally protected terrain insulated from state interference and regulated to allow only certain couples to enter into it.

This proposition is both supported by and helps explain the Supreme Court's right to privacy cases and the robustness of Justice Harlan's dissenting opinion in *Poe v. Ullman*.³⁰ Writing in 1961, Justice Harlan maintained that the state could not regulate contraception and other "intimate details of the marital

BROWN, *THE BODY AND SOCIETY: MEN, WOMEN AND SEXUAL RENUNCIATION IN EARLY CHRISTIANITY* (1988); 3 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., 1986).

29. VA. CODE ANN. § 18.2-66 (Michie Supp. 1995).

30. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting). For the story of this dissent and its subsequent influence, see DAVID J. GARROW, *LIBERTY & SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 131-95, 597 (1994).

relation,³¹ thereby anticipating the Court's decision four years later in *Griswold v. Connecticut*.³² He excepted from constitutional protection "[a]dultery, homosexuality and the like."³³ This exception directly anticipated the Court's decision twenty-five years later in *Bowers v. Hardwick*³⁴ and provides an explanation for why fornication, adultery, and incest laws have not received serious constitutional challenges under *Griswold*. Although not anticipating the Court's application of the privacy right to protect a woman's right to an abortion, Justice Harlan's opinion formed the explicit intellectual foundation for the Court's reaffirmation of a diluted right to abortion in *Planned Parenthood v. Casey*.³⁵

The constitutional right to privacy cases stand for the proposition that the state presumptively cannot regulate what goes on inside the marital bedroom. These cases find a parallel in the law's allowance for marital rape in circumstances not allowed in dating or employment. The constitutional cases allow the state to criminalize sodomy, a form of sex not traditionally linked to marriage because it is not useful for procreation. These cases also allow the state to perpetuate traditional barriers to marriage: when a party is underage, closely related to the other party, or mentally disabled. Those barriers to marriage are mirrored in the law of sexual consent. My case of Liz and Jessie falls outside the adamantine protections of the right to privacy: the state is free to terrorize them because what they do is not procreative, and as a same-sex couple, they are not even potentially married.

C. Consent as a Construction of Social Power

If the law of sexual consent is a policy- rather than logic-based construction, then one must ask what has informed or motivated

31. *Poe*, 367 U.S. at 548 (Harlan, J., dissenting).

32. 381 U.S. 479 (1965). The majority opinion in *Griswold* expressly relied on Justice Harlan's *Poe* dissent. *Id.* at 484. The Court later extended the privacy right to unmarried couples. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

33. *Poe*, 367 U.S. at 553, quoted in *Griswold*, 381 U.S. at 499 (Goldberg, J., concurring).

34. 478 U.S. 186 (1986).

35. 112 S. Ct. 2791 (1992) (plurality opinion) (O'Connor, Kennedy, and Souter, J.J.).

that construction. The starting point for such an inquiry is obvious. Modern American law generally has been constructed by striving middle-aged men, and the law of sexual consent has been no different. Therefore, one should expect that the law of sexual consent would reflect a partial, and not universal, point of view. The most striking thing about the *Griswold* line of cases, as well as the law of sexual consent, is that it reflects a vision of marriage that embodies an ideology of traditional masculinity that views man as hunter and woman as helper and breeder. Marriage can be the refuge of the rapist, and the images that are most threatening to middle-class heterosexual males—the sodomite, the child molester, the homewrecker—are placed cleanly beyond the realm of sexual consent. The law of sexual consent is primarily a law responsive to Victorian male fantasies.

Primarily, but no longer entirely. The last generation has witnessed a significant change in social power relations as a result of the women's rights movement. Although women have not achieved anything like equal economic, social, or political rights, they have made collective and individual progress and are now a legal force to be reckoned with. If the law is a social construction, one would expect the women's power movement to affect and move law in ways that reflect the desires and preferences of the newly empowered group. Indeed, *Roe v. Wade*³⁶ and *Casey*³⁷—the Court's only robust expansion of the right to privacy beyond the Harlan position³⁸—are scarcely conceivable absent a potent women's movement.

The law of sexual consent has changed in at least three important ways in response to women's voices during the last half generation. First, states have either abolished the common law's complete exemption of marital rape or have replaced the exemption with a more narrowly formulated marital rape allowance (category one). Those allowances, in turn, are under constant pressure and will likely be narrowed or eliminated in most

36. 410 U.S. 113 (1973).

37. 112 S. Ct. 2791.

38. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), expanded *Griswold* to allow unmarried couples access to contraceptives and therefore goes beyond the Harlan position, but *Eisenstadt* has not generated a vigorous line of Supreme Court follow-ups.

states over time.³⁹ Second, the law of rape (category two) has been liberalized greatly in Virginia and every other state. This liberalization has resulted in an expansion of the list of inducements that constitute rape and an easing of proof at trial. This process of liberalization can also be expected to continue.⁴⁰ Third, federal prohibitions against sexual harassment on the job (category three) have developed, virtually from scratch, in the last fifteen years.⁴¹ These prohibitions reflect the polity's realization that women are in the workplace for good and that old-fashioned workplace norms must adjust to this reality.

Considering the potentially revolutionary implications of women's power, the above is a modest list. Even the "reformed" areas contain glaring loopholes in the protection of women's interests.⁴² The modesty of the list reflects the fact that the women's power movement has mounted no unified challenge to the primacy of marriage as the basis for the regulation of sexual consent and has had little effect on the rules in categories four, five, and six, the categories that most affect women like those about whom Pat Califia writes. Feminist theory has addressed these issues, criticizing the institution of marriage, the selective enforcement of prostitution laws, and the taboo against sodomy, to take the main examples. Feminist theoreticians, however, are themselves divided on the first two issues, and middle-class women, as a group, have shown insufficiently sustained interest in any of these issues to move the law very much. Hence, they remain firmly entrenched in a regulatory regime grounded in traditional status classifications.

39. On the marital rape allowance, see DIANA E.H. RUSSELL, *RAPE IN MARRIAGE* (1982); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990); Anne C. Dailey, Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255 (1986); Sitton, *supra* note 11.

40. On recent reforms and their inadequacy from a feminist perspective, see SUSAN ESTRICH, *REAL RAPE* 80-91 (1987); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 172-83 (1989).

41. The law was all but created by CATHARINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* (1979), which was considered unthinkable radical in 1979 and is today considered conventional wisdom.

42. See *supra* notes 39-40 for a catalog of sources discussing both the marital rape allowance and the practical, as well as theoretical, deficiencies in rape law.

This inertia has been rattled by a further social development—gay power. Just as women asserted their rights and their political power in the 1960s and early 1970s, so gay people—lesbians, gay men, bisexuals, transgendered people—have spoken out in the 1980s and early 1990s. Bisexual, lesbian, and gay male thinkers have joined feminist thinkers in questioning the traditional regulatory assumptions of the laws of marriage and sexual consent. More importantly, gay experiences are in the process of diversifying our understanding of sexuality itself. Building upon feminist understandings, gaylaw suggests a reconception of the law of sexual consent.

III. SEXUAL CONSENT FROM A GAY PERSPECTIVE

Although building upon feminist theory, gay theory flows from gay experience. That experience is now characteristic of a significant segment of American—and Virginian—society, straight and undecided, as well as gay. The gay experience fights against the current status-based law more deeply than women's collective experience has done thus far. On the whole, the gay experience offers American law the opportunity to work toward a more unified approach to issues of sexual consent, but an approach that is also more tolerant of sexual diversity.

A. How the Gay Experience Is Different

No stereotypical "gay lifestyle" exists, but the gay experience has been systematically different from the straight experience in late-twentieth-century America. The main difference is that for gay people, sexual intimacy is disconnected from procreation. Lesbians and gay men have children and raise families, and bisexuals often have children with primary sexual partners. On the whole, however, gay people's children come through prior relationships, artificial insemination, surrogacy, and adoption, not as a consequence of their primary intimate relationships. Many consequences flow from this fact. Having no relationship to procreation, same-sex intimacy, such as that described in "Jessie," is more insistently and openly connected to other values: self-expression, bonding with another person, and pleasure. Without an anchor (even if only rhetorical) in procreation, same-

sex intimacy is more openly committed to sexual diversity than is different-sex intimacy.

A further difference is related to the coming-out process. In our society, maturing adolescents are presumed, and strongly hoped, to be developing heterosexuals. For the adolescent or young adult who feels attraction to people of the same sex, the maturing experience is doubly hard because the person must deal not only with confusing feelings and society's anxiety about sexuality, but also with society's, and especially parents', anxiety about sexual deviation. The tension between one's secret orientation and society's expectations yields a continuum of responses, from the "closet" to "coming out" as a gay person.

For an openly gay person, sexual orientation is more strongly constitutive of identity—one's self-image as well as the way other people see one—than it is for a straight person. By tying sexual preferences firmly to personal identity, this phenomenon has contributed to open explorations of sexual diversity. The first-generation coming-out stories, by literary pioneers such as Edmund White, are stories of homosexual deviation. In contrast, the second-generation stories, by writers such as Paul Monette and Pat Califia, often involve coming out as a person with AIDS or with HIV, or as a sadist or masochist. Most people with AIDS and most sadists or masochists are heterosexual, but the ones who are willing to talk about it tend to be homosexual.

A consequence of these two differences is that the lesbian, gay male, and bisexual community is more relentlessly "liberal" about sexuality than is the straight community, including most straight women. As people who have been considered "sexual outlaws" to some degree, we naturally have less commitment to traditional status-based regulations and are more tolerant of sexual diversity. As people who have gone through the difficult coming-out process, we tend to be individualists rather than traditionalists. Often repelled or shunned by our blood families, we have formed "families of choice" that meet our emotional needs. Sex contributes to our personal flourishing and our craving for interhuman connection.

A third difference, felt primarily and recently by the bisexual and gay male community, is generated by the AIDS epidemic. If gay sex sidesteps the creation of life, it now also waltzes in the

shadow of death. The far-reaching consequences of AIDS are still soaking into our culture. That Califia does not mention AIDS in her short story is much more remarkable now than it was in 1988 when the story was published, and Califia is now best-known for her no-nonsense health and sex column in *The Advocate*, a gay journal. Califia's column reflects the new values that are being developed as the gay community responds to the epidemic. Those values include insistence upon not only safer sex, but also candid conversations about HIV status, a nonjudgmental attitude that encourages disclosure of HIV status and prior partners, and a responsibility toward one's partner, especially if he is sick.

B. Implications of Gay Experience for Theories of Sexual Consent

The gay experience combines a self-interested antitraditionalism with a libertarian respect for sexual diversity and an egalitarian insistence upon mutuality. Consider the ramifications gay theory might have for the regulation of sexual consent. I shall explore these ramifications explicitly in connection with feminist theory, which has marked the conceptual frontiers of thinking about sexual consent. On some issues, gaylaw will follow the path marked by feminism. On other issues, they will tend to diverge. On still other issues, gaylaw will take the lead.

Feminist theory rejects marriage as the organizing principle for issues of sexual consent, on the ground that marriage has been constructed as a patriarchal institution. Mutuality is offered as a better organizing principle. Gaylaw will and ought to follow feminism's lead. From our point of view, marriage is a rotten organizing principle, first, because same-sex couples are excluded from marriage.⁴³ Even if gay marriage were recog-

43. The Virginia marriage statute explicitly prohibits same-sex marriages, VA. CODE ANN. § 20-45.2 (Michie 1995), one of only about a half-dozen states that I know have an explicit prohibition, see, e.g., IND. CODE ANN. § 31-7-1-2 (Burns 1987); LA. CIV. CODE ANN. art. 89 (West 1993); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West Supp. 1995) (the 1989 Historical and Statutory Notes explain that "[n]othing in this act shall be construed so as to legitimize or validate a 'homosexual marriage'"); N.H. REV. STAT. ANN. §§ 457:1-2 (1992); TEX. FAM. CODE ANN. § 1.01 (West 1993); UTAH CODE ANN. § 30-1-2 (1995).

nized, however, gaylaw would still follow feminist objections to the centrality of marriage, to the extent that the institution carries with it the assumption that sex is for procreation. Allied with most feminist theorists,⁴⁴ gaylaw presses for the repeal of state sodomy and fornication laws.

More importantly, gaylaw ought to and will embrace the feminist insistence that the lodestar precept be mutuality rather than formality.⁴⁵ Thus, gaylaw is sympathetic to feminist criticisms of rape law's willingness to tolerate episodes in which *B* acquiesces in, but does not welcome, sex with *A*. Similarly, gaylaw, as I see it, is hostile to laws allowing unwanted sex within marriage (the marital rape allowance). Gaylaw suggests new arenas for applying the feminist concept of mutuality. One such arena brings gaylaw into direct conflict with a prominent segment of feminism—S&M or B&D, the theme of "Jessie."

Feminists, including lesbian feminists, have criticized B&D as embodying a male-oriented view of sex as domination, pain, and conquest.⁴⁶ Many feminists who do not subscribe to Andrea Dworkin's charge that all male-penetrative sex is rape are nonetheless sympathetic to the position that sex involving bondage and torture is not truly consensual. Gay experience is, on the whole, more sympathetic to B&D practices.⁴⁷ To begin with, many gays find that verbal and physical drama (including domination and bondage) is what makes sex "sexy," and many others accept this as a preference others may legitimately feel. Feminist objections to B&D per se are contradicted by the experience some have with this array of sexual practices. Indeed, gay theorists such as Gayle Rubin charge that Dworkin and other radical feminists have an unhealthily narrow view of sexual expression.⁴⁸

44. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 284-87 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 206-18; Beverly Balos, Book Review, 8 CONST. COMMENTARY 317 (1991).

45. See Chamallas, *supra* note 15, at 814-43.

46. See, e.g., AGAINST SADOMASOCHISM: A RADICAL FEMINIST ANALYSIS (Robin R. Linden et al. eds., 1982).

47. See CALIFIA, *supra* note 1; LEATHERFOLK: RADICAL SEX, PEOPLE, POLITICS, AND PRACTICE (Mark Thompson ed., 1991) (especially the contributions by Guy Baldwin, Pat Califia, Gayle Rubin, and Carol Truscott).

48. See Gayle S. Rubin, *Thinking Sex*, in THE LESBIAN AND GAY STUDIES READER

A recurring theme in the perhaps idealized B&D literature is that giving one's body entirely over to the bonds and whips of another person represents sex at its most deeply consensual because the surrender of one's body to the control of another is an act of extraordinary trust that requires an equally extraordinary responsibility.⁴⁹ The B&D literature suggests both procedural and substantive methods by which to achieve the feminist goal of mutual benefit from sex in a society of diverse sexual preferences. Procedurally, a discussion of what is enjoyable and what is unwelcome for each party is supposed to preface the B&D encounter. The participants are expected to agree upon a "safe word" that stops the action when it has gone too far for either one. Substantively, the play of bondage and discipline is supposed to be limited to the scene and not reflected in daily life. Apologists for leathersex claim that their form of interaction liberates its participants and, if anything, diffuses social aggression and violence.⁵⁰ This claim has yet to be evaluated, but gaylaw ought to be open to it.

On the other hand, the B&D decisions in the case law remind us that trust is often abused and suggest that some B&D relationships, even if formally agreed to, have malignant long-term effects on one or both partners. The few reported cases tend to reject arguments of consent when the relationship has produced serious physical injury and has taken on a dynamic similar to that of sexual battering.⁵¹ A challenge for gaylaw is to develop

1, 28-30 (Henry Abelove et al. eds., 1993).

49. See Carol Truscott, *S/M: Some Questions and a Few Answers*, in LEATHERFOLK, *supra* note 47, at 15, 25.

50. See LEATHERFOLK, *supra* note 47.

51. See *State v. Collier*, 372 N.W.2d 303, 304, 307-08 (Iowa Ct. App. 1985) (upholding assault conviction of male out-call model (prostitute) coordinator (pimp) who tied up and beat female model); *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1053-54, 1061 (Mass. 1980) (upholding assault conviction arising out of two-year S&M relationship in which the victim claimed that he had not consented to the repeated beatings); *State v. Brown*, 364 A.2d 27, 28, 31 (N.J. Super. Ct. Law Div. 1976) (upholding assault conviction of husband who beat his wife when she consumed alcohol, notwithstanding her apparent consent). Some of the older cases appear to be wrongly decided under the standard I am suggesting. See, e.g., *People v. Samuels*, 58 Cal. Rptr. 439, 446-47 (Cal. Ct. App. 1967) (upholding assault conviction of maker of S&M fantasy films, notwithstanding apparent consent and lack of serious physical injury).

a better-articulated line between sadomasochistic fantasies and simply sadistic battering, for same-sex battering is just as pervasive and just as destructive as different-sex battering.

An interesting, but not intractable, issue for gaylaw is sex with people under the age of consent. The American gayocracy (Robert Raben's term) has distanced itself from "man-boy love," even while American jurisdictions have progressively lowered the age of consent. What has been missing in the American hysteria about sex with children has been fact-based theorizing about children's sexual development and the effects of sex with older people on that development. On the one hand, substantial evidence shows that adolescent "children" are, in fact, sexual beings for whom experimentation is both natural and healthy. The coming-out literature, the most popular form of gay autobiography, is replete with examples of sexual experimentation by adolescents under the age of fifteen,⁵² Virginia's age of consent.⁵³ The medical literature systematically supports this impression and raises persistent doubts about American folk efforts to repress adolescent sexuality; as adolescent suicide rates attest, the repression may be a bigger problem than the possible exploitation.

On the other hand, the gay experience suggests reasons to be cautious. One of them is AIDS. The HIV virus has infected the adolescent population through adolescent sex with older infected people who take advantage of adolescent immaturity to induce unsafe practices.⁵⁴ Moreover, it may well be fair to do what Virginia has done, and to err on the side of caution in regulating sex between adolescents and adults, while leaving sex among adolescents essentially unregulated.⁵⁵

52. See, e.g., PAUL MONETTE, *BECOMING A MAN: HALF A LIFE STORY* (1992); FELICE PICANO, *AMBIDEXTROUS: THE SECRET LIVES OF CHILDREN: A MEMOIR IN THE FORM OF A NOVEL* (1985); EDMUND WHITE, *A BOY'S OWN STORY* (1982).

53. VA. CODE ANN. § 18.2-63 (Michie Supp. 1995).

54. See, e.g., MARY KITTREDGE, *TEENS WITH AIDS SPEAK OUT* 35-36 (1991); see Karen Basen-Engquist & Guy S. Parcel, *Attitudes, Norms, and Self-Efficacy: A Model of Adolescents' HIV-Related Sexual Risk Behavior*, 19 HEALTH EDUC. Q. 263 (1992).

55. See VA. CODE ANN. § 18.2-63 (Michie Supp. 1995).

C. *Implications of Gay Experience for the Law of Sexual Consent*

The regulatory regime envisioned by gaylaw would start with the bedrock liberal precept that human decisionmakers ought to be free to engage in the sexual activity of their mutual choice. Gaylaw should urge rejection of traditionally status-based categories that render consent irrelevant. I would characterize gaylaw's campaign for repeal or invalidation of sodomy laws in the following manner. First, when both parties desire to commit sodomy, they should have that choice. Conversely, sodomy forced upon one participant against her will should be illegal. What most states call "forcible sodomy" should be treated the same as forms of rape or sexual assault. Indeed, this treatment has been the trend, even in states that retain general sodomy laws.⁵⁶ A substantially consent-based regime is one that respects the autonomy of each participant and best fulfills the feminist goal of mutuality, expanded by the gay experience of sexual diversity. Liz and Jessie would be able to enjoy their unusual fantasies, as would numerous other citizens of various sexual orientations.

A libertarian baseline is only the starting point, however. Gaylaw should insist that "choice" be viewed realistically and should explore the many ways in which sexual choice is or can be "impaired." Choice can be impaired through (1) incapacity, (2) undue pressure, or (3) fraud. The first category of impaired choice reflects the current law of incapacity, and I would be inclined to disturb little of it. Although I am open to medical and psychiatric arguments about intergenerational sex, I am attracted to Virginia's complex solution, criminalizing sex between adults and children under age fifteen.

The second category, undue pressure, starts with the core concept of rape law—that consent is negated by physical coercion or threats of coercion. Undue pressure would expand upon this concept, however, and consider other forms of coercion. At this point, conceptions of status reenter the policy calculus—not to render consent irrelevant, but instead to consider whether apparent consent ("yes") has been rendered meaningfully. In

56. See Larry C. Backer, *Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 AM. J. CRIM. L. 37, 95-124 (1993).

situations in which one party stands in a position of authority or power over the other party,⁵⁷ the latter's acquiescence in sexual relations might be doubted and more easily negated.

The third category, fraud, derives from the insight that sexual relations are often induced by representations. While it is surely unrealistic to penalize most sexual misrepresentations, the law ought to do so when they involve harm to the deceived party. The most obvious example is that if one party has a communicable venereal disease, especially HIV infection, the law ought to impose upon that party an obligation to volunteer that information to the other party. Thus, if Liz were infected with the HIV virus, my view is that she had a legal duty to disclose that fact to Jessie.

The regime I have outlined is unthinkable in today's politics, but the strides made by feminism were unthinkable thirty years ago. The keys to achieving such a regime are storytelling and political visibility. Gay people must tell their own stories of sexual intimacy, even if they tend to be greatly more conventional than Pat Califia's. Equally important, gay people need to be visible in the political process and to form alliances with other groups, especially women's groups, whose regulatory agenda we generally share.

57. I am thinking specifically about employer-employee, minister/rabbi/priest-religious observant, guardian-ward, psychiatrist/doctor-patient, or teacher-student relationships.