Gender and Sexual License:
The Plot Might Change but the Message Remains the Same
(A Response to William Nelson)

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One way to describe William Nelson's "Criminality and Sexual Morality in New York" is to say that it is a grand historical narrative that chronicles the doctrinal progression toward the ultimate release of various forms of sexuality from their initial repression within the legal system. Nelson asserts that while the courts of the 1920s and 1930s evidenced repressive responses to a variety of "sexual" issues, they moved to more libertarian positions in later years. There were some readjustments eventually necessary in cases where social forces argued that the freedom had resulted in excesses and extremes, but Nelson's overall story about legal change expresses a belief in the desirability of "progress" and progression.

Nelson identifies as a "central insight" of the article his assertion that "during the 1940s, 1950s, and 1960s, seemingly disparate [legal] developments... were linked to each other... by a judicial commitment to conferring sexual freedom on individuals, even when that freedom was carried to excess" (p. 267). This ever-expanding freedom was stopped, occasionally even reversed, during the 1970s, however, as feminists began to articulate the harms they identified as caused by male excesses of freedom. Nelson describes these feminists as "radical" and casts them as...

* Isabel Karpin's invaluable assistance on this essay was cheerfully supplied and absolutely essential.
2. With the exception of gender-related violence, Nelson at several places characterizes the other issues he considers in this essay as "sexual." See, for example, Nelson's comments where he finds a commitment by judges to "conferring sexual freedom" in the context of the decriminalization of rape, prostitution, and pornography (p. 267). I would dispute the classification of most incidents of rape and many displays of pornography as "sexual," and have doubts about sexuality as a sufficiently nuanced general category in which to place prostitution.
3. In the cases of rape and family violence, the retreat from freedom is described as complete when such conduct is recriminalized. In the case of homosexuality, freedom continues to prevail...
the villains responsible for the hiatus in his historical drama.4

The ultimate moral of the Nelson tale is not a positive one (nor is it one of progression) in this regard. For the forces of radical feminism—unleashed in furious backlash to the increase in sexual freedom—have seemingly destabilized the legal system. In Nelson’s view, these women, by ceasing to demand equality (as exemplified by the “liberal” feminist goal of sameness of treatment or assimilation to male norms), have caused a “collapse” in equality “as a coherent concept in regard to gender issues” (p. 340). On the other hand, men whose self-interest is “inevitably at war” with the goals of radical women have articulated “diverse and competing sensibilities and interests [which] produced an ideological stalemate” (p. 341). The legal system (indeed, the progress of society itself) has thus been vanquished as “dynamic legal change became increasingly difficult to achieve, the status quo became reified, and a new conservatism set in” (p. 341). Thus, one is led to believe that, absent radical intervention, liberalism (and liberal feminists) would have won the day and ever-expanding notions of sexual freedom and individual autonomy would have continued to be expressed by courts.5

As an initial matter, I find it curious that such cataclysmic events as an “ideological stalemate” and/or the “collapse of equality as a coherent concept” are attributed to feminism in any of its forms. I am more skeptical about the force and extent of the impact that feminism has had on law (although I do admit to aspirations toward and fantasies about destabilization in my own work6). Law has always seemed to me to be a

and the conduct remains decriminalized. With prostitution and pornography, however, in spite of calls for recriminalization and opposing arguments for the continued progression toward freedom, Nelson tells us that little has happened. Nelson attributes the successes of the movements for recriminalization to the alignment of feminists with “conservatives.” On the other hand, when feminists opposed the conservative agenda (as with homosexuality) or when there emerged a split between “liberal” and “radical” feminists (as with prostitution and pornography), freedom prevailed. Clearly, the cohesive support of the feminists is a crucial component of Nelson’s analysis of legal movement and change. See Nelson, supra note 1, at 267-68.

4. Other contenders for this role would surely include governmental censors and purveyors of restrictive religious morality, that is, the “conservatives” mentioned in note 3, supra.

5. Moreover, Nelson’s narrative does not question the concept or normative constitution of the term “freedom.” It also embodies the unwarranted assumption that sex and sexuality are unproblematic categories, seemingly unaffected as social experiences by gender or other differentiating characteristics. For example, Nelson makes no reference to the possible relevance of gender, race, or class to his historical analysis. It seems clear to me, however, that many perspectives—not just one—must be brought to bear on the historical changes that Nelson describes in the regulation of “sexuality.” The notion that women and men experience sexuality as well as other social and cultural events differently, and that such experiences constitute differentiated and “gendered lives” for the two sexes, is explored in Martha L. Fineman, Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship, 42 FLA. L. REV. 25 (1990); and Martha Albertson Fineman, Feminist Theory in Law: The Difference it Makes, 2 COLUM. J. GENDER & L. 1 (1992).


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rather elastic discourse that is well able to absorb and deflect any "radical" challenges it may encounter. Nelson’s essay does not convince me otherwise. 7

Furthermore, I question Nelson’s assessment of the destructive inclinations of the radical feminists. Attributing to these women ambitions of repression rather than ambitions of transforming the legal system’s responses to sexuality, he describes them as “intend[ing] to end what they viewed as their subordination [to men] by establishing their domination” (p. 340). Nelson tells the reader:

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. . . [R]adical 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 (pp. 267-68; emphasis added).

He later states that

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” and to compel men to give women’s interests priority, even when they conflicted with the interests of men. 8

In fact, Nelson several times in the text moves from an initial position recognizing some legitimate claim on the part of women to a point of sheer alarm at the potential that such a recognition may lead to discrimination against men. Another example of this tendency occurs when Nelson quite inexplicably recharacterizes the reasonable statement he makes in his introduction that “[i]n order to free women from the threat of physical domination in the form of rape and gender-related assaults . . . radical feminists wanted to restrain aggressiveness on the part of men” (p. 267). In his conclusion, Nelson transforms “restraint” into “domination”: “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” (p. 340).

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7. For a discussion of the way dominant ideology transforms radical discourse in law, see Fineman, Images of Mothers in Poverty Discourses, supra note 6, at 289-93.

8. Nelson, supra note 1, at 321 (emphasis added) (quoting SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION 184 (1970)). Nelson’s use of the word “even” seems to imply an appropriate limit on women’s right to resist at the point at which their resistance infringes on men’s “interests.” It is not apparent in his analysis that Nelson considered the possibility that the granting of rights to people who previously did not have them might be viewed as imposing some expense on the persons who were previously infringing those rights.
As his text evolves, Nelson describes the activism of the radical feminists in increasingly threatening terms. At first, he uses their words to report how they demanded restraints on male aggressiveness. Then, using his words, he redescribes these restraints first as deprivations of men’s freedom and finally as resulting in the domination of men. The progression along this continuum in classifying the motivation and objectives of radical feminists seems inevitable, even ordained—his narrative writes itself, apparently revealing insights with which few could argue.9 This tendency to conflate his individual interpretation with historical “fact” is the major difficulty I have with Nelson’s essay. His style is that of the sweeping historical narrative cast in assertedly “neutral” and “objective” terms. I mean this to be much more than a mere criticism of style, however, for Nelson’s approach masks and obscures the important realization that, just like all intellectual constructions, this essay is an exercise in interpretation and is profoundly affected by its author’s biases. By ignoring these biases and proceeding without explicitly positioning himself, Nelson produces a narrative that is confusing and fails to come to grips with competing implications of change. The confusion is evident in his choices of both subject and language.

In Nelson’s discussion of rape, for example, it is possible to see the various levels on which the author’s particular predispositions and tendencies of selection, omission, and nuance shape this essay. First, a consideration of the interstices of Nelson’s language in this discussion shows his own failure even explicitly to consider gender, let alone to treat it as an essential analytic device. Yet, gender to a feminist would be central to any understanding of sex, sexuality, or claims about “freedom” in regard to the withering away of legal restraints on male behavior. Nelson’s use of “freedom” outside of the context of gender, then, is particularly troubling.10 For the freedom that Nelson identifies is that which (obviously) belongs to men—it is freedom “to engage in [rape, prostitution, pornography, and gender assaults], or at least not be severely punished if they overstepped legitimate bounds” (p. 268). Nelson further clarifies his notion of sexual freedom as encompassing the excesses of violence when he states that “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

9. It is not insignificant, then, that Nelson offers no citation for the asserted desire of the radical feminists to dominate men.

10. His reference to domination is also troubling. Again, nowhere in the essay is this assertion documented. In subsequent parts of the essay Nelson discusses a few feminists whom he designates as “radical,” but these women, in their rejection of the values of a phallocentric society, did not advocate domination of women over men. They did (and do) argue for the rejection of norms of individualism and autonomy with their potential for exploitation and domination. Nelson incorrectly confuses the desire of radical feminists to “change men” and end male domination with the establishment of female domination. See Nelson, supra note 1, at 340.
women” (p. 267; emphasis added). Describing these kinds of assaults within the context of sexual freedom (even if taken to excess) co-opts the term and positions feminist demands for the termination of male abuse and domination as demands for a relinquishment of male freedom.\textsuperscript{11} Given the unstated and presumed cultural and moral value of “freedom” as a constituted right, to have one’s freedom taken away (even to benefit another) is an assumed impermissible harm. In other words, Nelson’s narrative positions the feminist demand that women be “free” of abuse in inevitable opposition to the articulation of another right—that of male sexual freedom. This characterization of competing freedoms enables Nelson to conclude at the end of his article that “the radicals stood against individualism as they strove to unmask liberalism’s goal of sexual freedom as a mere veil for male sexual aggression” (p. 340).

This tactic of casting radical feminist demands as polar to norms of individualism and equality in regard to male sexual “freedom” also leads Nelson to conclude erroneously that radical feminists wanted (and, in the cases of rape and gendered violence, eventually won) inequality or the ability to dominate men. This is evident in Nelson’s discussion of the changes in the rules requiring corroboration in rape cases. He begins sympathetically enough, carefully detailing why the corroboration rules were untenable and the injustice to which they gave rise. Nonetheless, the essay does not go on to support reform because such requirements are archaic vestiges of a misogynist society that consistently reinforced the idea that women are not the equals of men in veracity or, for that matter, in any other area. Nelson’s characterization of the statutory changes in the corroboration requirements carried out in the 1970s is that they “completely flipped over the law’s formal values on the subject of rape.”\textsuperscript{12} He further concludes that, “[i]n regard to the law of corroboration..."
ration, traditional moral values and newer feminist ones triumphed completely" (p. 327).

Nelson's concern is with the changes in the law that made it theoretically possible for a man to be convicted solely on the testimony of a woman. Of course, prior to this reform a man's denial of rape alone was sufficient to cancel out a woman's complaint. To pursue a rape prosecution a woman needed corroboration; something more than just her own testimony was essential to overcome male denial. What the reform in fact accomplished was equality between male and female testimony in a case of rape: corroboration was not required for either. Far from seeing this as attaining equality, Nelson describes this change as giving rise to women's "theoretical legal superiority."13

As a final point, I find Nelson's almost total focus on law and legal discourse strangely disingenuous in an article that purports to take into serious account the impact of "socio-political forces" on the process of legal change.14 While it is true that there is some reference in Section III to the lessons of sexual freedom learned during World War II, they are all of a liberationist mode. Freedom gained gives rise to the demands for more: "People who had lived through those years—and this is the important parallel between homosexual and heterosexual liberation during World War II—simply could not go back to their old lifestyles encrusted by the old traditions" (pp. 314-15). Larger cultural forces remain mostly ignored, however. I suspect that if a focus on society and culture had been more apparent some of the oversights in analysis I have

13. Nelson, supra note 1, at 329. Also disturbing is the fact that mere doctrinal change is viewed as "real" change. Nelson barely acknowledges that far more significant than doctrine is the impact of prosecutorial discretion and jury nullification on rape prosecutions.

Nelson is surely attempting to disguise his politics in a seemingly neutral project of description and exposition; however, despite himself, he cannot help but reveal his true colors. For instance, on the same page where he claims that women have ascended to a theoretical position of legal superiority if not an actual one, he declares that with the acceptance by the courts of the concept of date rape women gained "the theoretical capacity to send their lovers to jail." Id. (emphasis added). One has to wonder what he was hoping to convey by using the word "lover" to describe those men who perpetrate date rape. It is a clumsy abbreviation that underplays and undermines the violence of the act of date rape.

In another such instance of linguistic self-revelation, Nelson renders the horror of the radical feminist vision so obvious as to require no explanation. He says: "Indeed, post-1975 cases held that *even* a prostitute could complain of rape when her customer failed to pay her fee, and that a man could be convicted of first-degree 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." Id. at 324-25 (emphasis added). Nelson uses the word "*even*" as if there is no dispute that allowing a prostitute to claim rape in such a circumstance is an absurdity. There are many of us who would simply not agree.

14. See Nelson, supra note 1, at 266. This focus in and of itself is not troubling. In fact, it could have produced a very interesting article. For example, Nelson in his introduction sets forth various models of legal change in his analysis of shifts in the legislative and judicial responses to rape, prostitution, pornography, homosexuality, and gender-related violence. He does not follow through on this analytic scheme, however; nor does he explore the limitations and strengths of the methods of movement in relation to the changes sought or accomplished. One slight exception to this is in the allusion to intra-governmental negotiation carried out through the medium of judicial language. See id. at 294-95. Unfortunately, this interesting point and many other possible insights into the process of change are not developed.
described above would not have occurred.¹⁵ For example, what would have been yielded by a serious consideration of the message of the Mitch Miller song Nelson quotes in the context of trying to define social attitudes toward rape? What are the societal and sexual implications of the litany claiming that while "Your Lips Tell Me No! No! . . . There's Yes! Yes! in Your Eyes" (p. 310)?

Nelson's predominantly legal and doctrinal perspective allows him to define narrowly the parameters of his narrative and to wrap things up very neatly into evolving eras of judicial action and reaction. Looking at only one set of societal discourses facilitates the detailing of the progression from the repressive nature of the decades of the 1920s and 1930s to the freedom of the decades that followed, and sets up as problematic the feminist reaction against the "progression" that occurred during the 1970s.¹⁶

Yet, even within the legal context, Nelson fails to go beyond the language in opinions. He does not tell the reader what has happened in the post-feminist wake. I suspect, for example, that "freedom" has not been as derailed as Nelson indicates in regard to rape and domestic violence. Prosecutors still exercise discretion and juries still fail to convict even where cases do make it to trial. The idea that (some) men are free to abuse (some) women has not been eradicated from legal processes and will not be so long as it remains a viable notion in segments of our society.

Thus, the question asked in Louis Henkin's 1963 article, "Morals and the Constitution: The Sin of Obscenity,"¹⁷ is still the right one: What is the secular, utilitarian, or social purpose of a law? In other words, how do we as a society legitimately define harm? Even more important, at least after reading Nelson's history, is this question: Who in this society gets to define what constitutes harm as distinct from expressions of freedom? Given that there are different realities which evoke very different answers and interpretations, whose perspective counts?

¹⁵ In fact, in the end I think that Nelson's whole scheme could be replaced by a simple assertion: The legal tradition of male domination and exploitation was altered in those instances where feminists were convincing in their arguments that men's freedom was harmful to women. When feminists were able at once to make women the center of reform focus and to resist their relegation to mere objects of male desire, the march toward sexual "freedom" was halted.

¹⁶ One thing that is missing from this pared-down account of repression, however, is the freedom that those same judges blithely afforded to certain members of society to discuss matters of sexuality with openness and candor and to consume explicit material withheld from more common folk. The cases of the 1920s and 1930s might represent an era when judges did not openly write about certain expressions of sexuality in their opinions, but that is not the same as saying that the larger society eclipsed all discourses about sex and sexuality. In fact, Nelson quotes from a 1938 case distinguishing from generalconsumption the needs of "the classroom of the law school, the medical school and clinic, the research laboratory, the doctor's office, and even the theological school" (p. 277). This narrow focus is particularly surprising since Nelson does refer (on p. 279) to Foucault's discussion of the "criminalization" of "bucolic pleasures" in The History of Sexuality, Volume 1: An Introduction.
