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PROBLEMS WITH THE PRIVATIZATION OF HETEROSEXUALITY

MARY BECKER*

INTRODUCTION

"It is an ill wind that blows no good," my Irish great-grandmother would have replied if asked whether the New Private Law is always and only conservative. Martha Ertman explores a particularly intriguing aspect of this question: the progressive potential of the New Private Law in enforcing lesbian and gay cohabitation contracts at a time when every state denies legal validity to lesbian and gay marriages, and many still criminalize sodomy. In Georgia, for example, lesbian and gay marriages have no legal effect, and sodomy, understood as all—and only—same-sex sexual intimacy, is a crime.¹ Yet the Georgia Supreme Court has enforced a lesbian cohabitation contract in which neither the majority nor the dissent mentioned either "lesbian" or "cohabitation."²

Ertman describes this phenomenon in the context of a broader landscape in which the legal system swings from public condemnation to privatization to public rights and back again in regulating various kinds of sexual conduct. She presents private ordering—legal enforcement of private contracts—as a "way station" between the extremes of public condemnation (criminalization) and public rights (constitutional or civil rights independent of contract).

My comments begin with Ertman's explanations of why this might be so. Part I discusses Ertman's suggestion that this phenomenon (contract's serving as a way station for lesbian and gay rights) indicates that contract is not, in general, as conservative as is usually assumed. Part II addresses Ertman's suggestion that contracts are such a way station because a court can enforce a contract without indicating approval of it, thus providing "a route to skirting" moral rhetoric.³

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1. See *Bowers v. Hardwick*, 478 U.S. 186 (1986); Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993); Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992).

2. *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992).

3. Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but*

My comments in Parts I and II are related: both concern the quality of various sexual relationships. Part I explores differences between heterosexual and same-sex relationships with respect to the ability of contract to be progressive. I suggest that because a number of differences exist between bargaining conditions for individuals involved in heterosexual relationships compared to those in same-sex relationships, contract will generally not be progressive for "have-nots" (mostly women) in heterosexual couples. Furthermore, the progressive potential that contract offers same-sex couples may be only temporary. Once we win the right to marry, our contracts may become more like those of heterosexuals—waivers of rights by the economically weaker party.

Part II discusses what constitutes good or bad sexual relationships. I argue that contract's avoidance of moral issues severely limits its progressive potential. We need to begin to think about the morality of various kinds of sexual relationships. I propose, therefore, that we consider as one important factor the extent to which the autonomy of the sexual object is denied. From this perspective, heterosexual relationships tend to be far more troubling than same-sex relationships.

I. PROGRESSIVE CONTRACT ENFORCEMENT

Professor Ertman asserts that contract may not (generally) be "as dangerous for have-nots as is commonly thought."⁴ Whether contract is dangerous for have-nots depends on the relative power of the contracting parties vis-à-vis each other in terms of countless factors: the parties' power, money, aggressiveness, negotiating skills, social expectations, and self-confidence, together with their comfort level in bargaining in the particular situation, ability to control terms, alternatives to the contract, and the extent to which each "needs" the contract. Heterosexual have-nots (usually women) and same-sex have-nots are in quite different positions with respect to these key factors. In the discussion that follows I explore some of the reasons why cohabitation or marital contracts are much less likely to be progressive for have-nots in heterosexual relationships than for lesbians and gay men.

A. *Bargaining Differences Between Heterosexual and Same-Sex Couples*

1. Heterosexual Male Entitlement

Heterosexual men begin the bargaining process from a better position than either partner in a same-sex couple. Men are likely to be better bargainers in heterosexual relationships because only they (and not their partners) expect to enjoy those things heterosexual men generally enjoy in relationships with women and wives. Gender does not differentiate one member of a same-sex couple from the other the way it differentiates husband and wife. On a systemic basis, differences or perceived differences between women and men are social advantages for men and disadvantages for women.⁵ The husband is

Not Hell Either, 73 DENV. U. L. REV. 1107 (1996).

4. *Id.* at 1150.

5. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW*

likely to be older, taller, a higher wage earner, and raised to be assertive with the expectation of male heterosexual privilege: he will be the primary breadwinner and even if his wife works, she will be the primary caretaker of their home, their children, and himself. *He* will have the right to *her* home-making and sexual services.

Many wives share these understandings. Indeed, for a woman raised in a society in which the role of sex in marriage is regarded as essential to the fulfillment of women as women and men as men, even imagining a more balanced relationship is difficult. Negotiating for it would sour many relationships and, even if an equitable bargain were reached in the abstract, it would be of little practical importance. Unless both partners are continuously willing to fight their own and their partners' inevitable and frequent tendency to slip into sex roles, their relationship will not be one of equality. Few men seem genuinely interested in such relationships and few women have the stamina or power to insist on such a relationship day after day.⁶

True, in same-sex couples, there may be many disparities: age, height, beauty, wealth, etc. But these will not be as likely to consistently favor one partner, and will not favor the one with a sense of heterosexual male entitlement to his wife's services, since *both* are either men or women. Nor will the other partner expect to play the role of wife to a "man" with this sense of entitlement. Even in a same-sex relationship with a fair amount of role playing, these points hold. Neither partner is likely to have the sense of entitlement vis-à-vis the other which is associated with heterosexual male privilege. Nor will either expect the other partner to find fulfillment in service to others as a "wife" and the mother of a man's children. Lesbian couples are particularly likely to be committed to equality and to ignore economic disparities in the distribution of power within the relationship.⁷

2. Relative Commitment to Marriage and Children

Although marriage generally improves men's happiness more than women's,⁸ women are socialized to place a higher value on committed intimate relationships and children than men do. Women's greater dedication to family life places women at a distinct disadvantage in bargaining over the terms of any marital or cohabitation contract. Since women tend to want long-

32-45 (1987); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 117-18 (1979).

6. See, e.g., ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989) (discussing a study of couples with two working parents and children under six). Hochschild finds that although many middle class couples maintain that they have an equal relationship, in fact the women in these relationships do most of the work of the "second shift," i.e., the work done at home, including child care. Women are more interested than men in changing traditional roles but are unable to maintain sufficient pressure over time to force such change.

7. PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 53-56 (1983).

8. Women are twice as likely to be depressed as men, and married women are more depressed than single women or married men. Full-time homemakers are particularly likely to be depressed. Hope Landrine, *Depression and Stereotypes of Women: Preliminary Empirical Analyses of the Gender-Role Hypothesis*, 19 *SEX ROLES* 527, 528 (1988).

term relationships and children more, women are likely to settle for less favorable contract terms than they would insist on were they no more interested than men in such relationships and children.⁹ Note that in most heterosexual couples this disparity will weaken the woman, the partner already systemically disadvantaged by the gender- and sex-linked differences discussed above.

In same-sex couples, there are either two women or two men, making it less likely that one partner has been socialized more than the other to value committed relationships and children more highly. Furthermore, any differences in commitment are more likely (than those in heterosexual couples) to cut in different directions from each other (one partner may be more committed to the relationship; the other to children) or from other factors (who earns more money), and in any event will not exacerbate the hierarchy created by sex and gender.

3. Comfort Level with Contracting in this Situation

Overall and on average, men are likely to feel more entitled to bargain for favorable terms than women because they are likely to be economically stronger than their partners. Not only does our culture generally value wealth and the wealthy more than other cultures, it also regards the ability to keep one's earnings as an essential component of personal freedom. Thus, the higher wage-earning partner—typically the man with all the other sex and gender advantages that come with being a man in our culture—is more likely to feel entitled to bargain for terms “protecting” *his* property, whereas his partner is likely to feel that she has no equal right to economic protection should the couple split up.

Women may also tend to be less effective bargainers because women, to a greater degree than men (on the average), may define themselves as “giving selves” rather than as “liberal selves.”¹⁰ As giving selves, many women define their wants in terms of others' needs rather than their own. To the extent men are more likely (on average) to behave as autonomous liberal selves, men will have an advantage in bargaining.

Some women are particularly ineffective bargainers in relationships with men because of the lessons internalized as a result of unwanted sex, such as a weakened sense of autonomy.¹¹ For women in some multicultural and religious communities, the difficulty of bargaining for rights in a heterosexual relationship may seem unimaginable given cultural traditions even more insistent on female deference to male authority than in many secular or mainstream communities.

9. VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 71-72 (1988).

10. Robin West contrasts the traditional liberal, selfish, rational, and independent self with the “giving” self: “many women, much of the time, consent to transactions, changes, or situations in the world so as to satisfy not their own desires or to maximize their own pleasure, but to maximize the pleasure and satiate the desires of others.” Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Theory*, 3 *WIS. WOMEN'S L.J.* 81, 93 (1987).

11. For a discussion of these harms, see *infra* note 25 and accompanying text.

In contrast, in same-sex couples, one partner may earn more than the other,¹² but that partner will not as often also enjoy the gender- and sex-related advantages as that of a man in a heterosexual couple. Finally, as discussed in greater detail in Part II, unwanted sex is disproportionately a heterosexual phenomenon; lesbians and gay men are therefore far less likely to have internalized its lessons.

4. Alternatives to Contract

For heterosexual couples, there is an alternative to contract: family laws will apply if they marry. The very availability of this alternative affects what kind of contracts heterosexuals are likely to enter. For heterosexual couples who marry, the alternative to contract is a set of state-made terms that tend to give homemakers and caretakers *some* protection. In part because this level of protection is legally imposed upon marriage (at least in the absence of a contract to the contrary), the economically vulnerable partner may feel that asking for *more* in a marital contract would be greedy and inappropriate or that bargaining in this situation would be inconsistent with romance. And a cohabiting heterosexual could have the option of marrying if they both agree that the weaker party should have these protections. One would not, therefore, expect many such couples to sign written agreements providing greater or equal protection for the homemaker.

Precisely *because* same-sex couples do not have the alternative of legally recognized marriage and divorce protections, they are more likely (than heterosexual couples) to bargain explicitly for formal contract terms to ensure protection of the more economically vulnerable party, including terms for the sharing of resources upon separation or death. Given the alternative, such a bargain is not looked at as inconsistent with love and romance but as motivated by such feelings. And in any bargaining, both partners are the same sex. One partner does not have the advantage of belonging to the privileged sex while the other suffers the disadvantages described above.

B. Differences in the Contracts of Heterosexual and Same-Sex Couples

Both anecdotal evidence and contracts described in litigated cases support my conclusion that same-sex and heterosexual partnership contracts are likely to be quite different in terms of their substantive provisions.¹³ Among heterosexual couples, generally only couples who are about to marry seek explicit contracts. Most such contracts protect the economically stronger (and/or previously married) party and consist of waivers of rights that would otherwise accrue to the economically weaker party with marriage.¹⁴ In contrast, explicit

12. For most lesbian couples, this problem appears to be eliminated by the strong commitment to equality regardless of economic power. See BLUMSTEIN & SCHWARTZ, *supra* note 7.

13. Compare, for example, *Crooke v. Gildea*, 414 S.E.2d 645 (Ga. 1992) (written cohabitation contract between lesbians giving rights to economically weaker party) with *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990) (written pre-marital contract consists of waiver of rights by economically weaker party).

14. Sometimes the protection is primarily for the benefit of the economically stronger party's

cohabitation contracts do occur between same-sex couples, and these are likely to provide more favorable terms to the economically weaker party than that party would otherwise obtain (given, of course, that a same-sex couple *cannot* marry into the protections of divorce law).

Thus far, I have suggested that although Ertman is right in noting the progressive potential of partnership contracts for same-sex couples, that same progressive potential is absent in most heterosexual partnership contracts for two reasons. First, for the many reasons described above, the two members of a heterosexual couple are more likely than a same-sex couple to have unequal bargaining power, giving the economically stronger party a great deal of control over the contract. Second, the two members of a heterosexual couple bargain in the shadow of family law rules which apply to marriage (in the absence of a contract); whereas the same-sex couple bargains in the shadow of a legal regime that gives no economic protection to either partner other than claims based on economic contributions to property titled only in one person's name. Thus, when same-sex couples fail to contract there is no court-ordered sharing of resources under marriage-like rules. There are no applicable rules other than the general presumption that property is owned by the title holder¹⁵ and the assumption that if property has been acquired with *economic* contributions from both, both own some share of the property.¹⁶ For these reasons, enforcement of cohabitation/marital contracts is likely *today* to be generally progressive for same-sex couples but regressive for heterosexual couples.

Although one could impose different rules on same-sex and heterosexual couples,¹⁷ such a line may well be effective only as long as same-sex couples are denied the right to legal marriage. Once same-sex couples are allowed to marry, they too will bargain in the shadow of rules that would give significant protections to the economically weaker party. Same-sex contracts *might* then look quite different, even though same-sex couples would continue to be members of the same sex and thus avoid the systemic skewing of power in favor of the partner *born* male.

In the short term, however, courts will not apply differential rules to same-sex and heterosexual couples. Traditionally, courts have refused to enforce all cohabitation contracts (because they are based in part on "meretricious"¹⁸ relationships),¹⁹ as well as all contracts entered into during marriage (since the couple was already married, there could be no consideration for

children by a previous marriage, ensuring that their inheritance will not go to a new spouse.

15. See *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) (when unmarried heterosexuals split up, property owned by the man not divided).

16. IRA M. ELLMAN ET AL., *FAMILY LAW: CASES, TEST, PROBLEMS* 818-23 (2d ed. 1991).

17. For example, one could hold that contracts between unmarried or married heterosexuals had to be at least as generous to the economically weaker partner as family law rules on divorce in order to be enforceable, whereas contracts between same-sex couples are presumptively enforceable absent evidence of unfairness, overreaching, etc.

18. "Of the nature of unlawful sexual connection." *BLACK'S LAW DICTIONARY* 988 (6th ed. 1990).

19. HOMER H. CLARK, JR., *LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 18 (2d ed. 1988).

such a contract).²⁰ Additionally, courts have applied a very high standard of fairness to pre-marital contracts, refusing to enforce such contracts in many, perhaps most, litigated cases.²¹ Today, courts have become much more willing to enforce heterosexual contracts in each of these situations,²² and have *therefore* become willing to enforce same-sex cohabitation contracts. Were it not for the increased willingness of courts to enforce heterosexual contracts, I doubt that there would be much chance of enforcing contracts in same-sex cases. Thus, the regressive reality for heterosexual women comes with, indeed makes *possible*, the progressive potential of the New Private Law for same-sex couples.

True, as Ertman illustrates with the example of the New Private Law's enforcement of same-sex cohabitation contracts, the New Private Law is not always and only bad for have-nots. But her example involves contracts *between have-nots of the same sex denied the right to marry*. Overall, the force of the New Private Law's enforcement of contracts in intimate relationships is regressive, hurting many have-nots, chiefly heterosexual women. Also, when same-sex couples do obtain the right to marry, whether our contracts will continue to be progressive is unknown. On balance and over the long term, the New Private Law probably does more harm than good from the perspective of have-nots even in the area of cohabitation and marriage contracts.

Ertman discusses a second reason for the progressive potential of the New Private Law in enforcing same-sex cohabitation contracts. Contract enforcement (like free speech in constitutional law) gives decision makers the ability to afford some legal protection to same-sex couples without necessarily "approving" of their "life style." Part II discusses the limits of such tactics and suggests an alternative approach.

II. MORAL OBJECTIONS TO MALE HETEROSEXUALITY

Ertman is clearly right when she states that many heterosexuals are more comfortable protecting lesbians and gay men when they can do so without indicating approval of lesbian and gay relationships. Ertman herself, however, would probably agree with me that we must ultimately address the "merits" of lesbian and gay relationships if we are to achieve equal acceptance and respect. I doubt that we will be able to obtain even formal legal equality without talking about what is good about our relationships. To the extent that what makes heterosexuals uncomfortable is a distaste for our sexual intimacy, the feelings underlying opposition to lesbian and gay rights cannot be addressed without talking about the merits of our relationships.²³

20. *Id.* at 301-02.

21. ELLMAN ET AL., *supra* note 16, at 676-82.

22. See CLARK, *supra* note 19, at 301-02; ELLMAN ET AL., *supra* note 16, at 676-82.

23. See, e.g., URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY & LESBIAN LIBERATION 191-95 (1995) (making a similar point, "[t]o win against the right wing, we have to fight back on the sexual battleground, not run away"). *Id.* at 192. But see Mary A. Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993) (arguing that it is "coupling" ["copulation"] that makes many uncomfortable with lesbian and gay rights and increased emphasis on either coupling

Many Americans believe that heterosexual relationships are morally superior to same-sex relationships and hence only the former are entitled to the sanction and legitimation of state-recognized marriage. Demonizing homosexual relationships and idealizing heterosexual relationships is one way in which heterosexually-identified women and men project all that is harmful or troubling in their own relationships onto another group, rather than facing and addressing their own sexual immorality. In reality, many heterosexual relationships are abusive. Many lack real emotional intimacy and mutually desired physical intimacy. In this section, I discuss one important aspect of what makes relationships "good" or "bad"—whether one of the partners is objectified in an autonomy-denying manner. Along this metric, heterosexual relationships in our culture are more troubling than same-sex relationships.

A. *Objectification*

To make this point, I begin with the word "objectification," often used but seldom defined in contemporary discussions of sexuality. Literally, "objectification" means treating another as a thing, an object, a means to one's own ends. "Objectification" is not synonymous with any and all relationships which serve a function in one's life, in which one "gets" something, such as pleasure or entertainment or emotional or other support. Were this objectification's meaning, it could do no work since all voluntary relationships are rewarding in *some* way; we do not pick our friends out of the phone book at random because of a commitment to absolute nondiscrimination and perfect selfless disinterestedness. We pick our friends on the basis of our enjoyment of their company, conversation, humor, etc. We get something out of voluntary relationships or we would not be in them.

To repeat, objectification occurs when the actor (the sexual subject) treats another as a thing or sexual object rather than as the person she or he actually is. In most sexual encounters, even the most objectifying, the object is not literally regarded as a "thing," i.e., a non-person. The sexual actor would not be as well satisfied with a blow-up plastic doll. It is important that the object be a person, but not her own or his own independent autonomous person. Instead, the object is a projection of the sexual actor's desires, wishes, and fantasies onto another, so that the other (the object) is no longer an actual person but only that person imagined by the sexual agent (the subject).

Not all sexual encounters are objectifying in this sense. In non-objectifying encounters, both participants see the other as the individual she or he is and the encounter affirms their actual personhood as well as remains consistent with the feelings, needs, and desires of both. Non-objectifying encounters are likely to occur when people know each other *and* their encounter is neither commercial nor involves rigid scripts.

I do not mean to suggest that any love or enjoyment of or pleasure in a partner's body is necessarily objectifying. One can, I believe, give and receive

love physically without treating one's lover as someone she is not. And one can appreciate another's body without denying their actual personhood and regarding her or him as primarily a trophy. Indeed, one's love for another person is likely to affect and heighten one's appreciation for the real physical beauty of the beloved's body. We never (rarely?) love the beloved as though she were only a mind or soul.

Non-objectifying encounters are, in themselves, moral goods and part of what many want in a fulfilling life as a human person.²⁴ The morality of an objectifying sexual encounter depends on whether the objectifying sexuality is autonomy-denying or autonomy-respecting. Let me explain.

Autonomy-respectful (objectifying) encounters are consistent with the object's desires and wishes. For example, both a brief sexual encounter between strangers who interact for a short period of time and a rigidly scripted S&M scenario are likely to be objectifying in that the object is not seen as the person she or he is but as a projection of some kind. In both situations, however, this reality may be entirely consistent with the object's wishes and therefore autonomy-respecting.

In contrast, autonomy-denying encounters are inconsistent with the object's desires in that the object would prefer to skip the sexual encounter were it possible to do so cost-free. Autonomy-denying sexuality includes not only rape, but also sexual harassment on the job or at school and other forms of *unwanted sex*, i.e., sex inconsistent with what the object would choose were there no costs associated with saying an effective "no."

1. Autonomy-Denying Encounters

By unwanted consensual sex I mean sex that one participant would rather avoid than experience. I do not mean necessarily to include every encounter in which one partner is more interested in sexual intimacy than the other at the beginning of the encounter. Such an encounter might or might not be autonomy-denying unwanted sex, depending on whether one of the participants would prefer to skip the encounter.

Unwanted consensual sex is likely to be dangerous to the personhood of the uninterested participant, particularly when endured repeatedly, not just on one night but night after night. When a man assumes that what *he* wants is what *she* wants (much pornography insists that women desperately want to be taken and abused in the way the pornography does), the sex is likely to be autonomy-denying for the real woman, whose feelings and experiences are irrelevant to what takes place. Most commercial sex would be in this category since generally the sex worker would not engage in the sexual activity but for the money.

In a recent essay, Robin West identifies four injuries to women's sense of selfhood when they allow their bodies to be used by men in autonomy-denying but consensual sex: (1) injury to their capacity for self assertion, for connect-

24. They may, however, pose moral problems because of particular circumstances, such as breach of a committed monogamous relationship.

ing their feelings and experiences into actions to increase their pleasure or decrease their pain; (2) injury to their sense of themselves as subjects, becoming instead giving selves (defined by others needs and wants) rather than beings with their own legitimate needs and wants; (3) injury to their sense of autonomy; and (4) injury to their sense of integrity when they lie and say that they desired and enjoyed the experience.²⁵

We all endure, of course, many injuries along these lines in other contexts. For example, at work one might be obligated to be nice or even deferential to a powerful person who is actually a fool or worse. Denying the reality of one's bodily desires (or lack thereof) is, however, often likely to be far more damaging. A person who regards her own bodily experiences as irrelevant to whether she should consent to another's use of her body for his sexual pleasure is more likely to internalize her own relative worthlessness (why else would her feelings be irrelevant to his use of her body) than the wage worker who consciously chooses to be obsequious to a boss.

The harm of repeatedly agreeing to such sex is likely to be exacerbated for women by our culture's attitude toward women's sexuality and women who have sex. The harm of unwanted consensual sex is likely to be far worse for a woman in this position than for a man (e.g., a female versus a male prostitute) because our culture tends to regard women as degraded by sex, a feeling that is particularly likely to be internalized by a woman who agrees to another's use of her body for sexual activity she would rather skip (were it cost-free effectively to say no). Women in abusive relationships often internalize a sense that they are worthless when their partners use sexual and verbal abuse. For example, abusers routinely call their sexual partners "whores" or worse.

Studies of girls involved in sports support my belief that for a girl or a woman in our culture, her sense of self-esteem and self-worth is likely to be profoundly affected by her bodily experiences and the extent to which they reflect her own agency. These studies consistently report that girls who play team sports are more likely to avoid teenage pregnancy, graduate from high

25. In a recent essay, Robin West described these four harms:

First, they may sustain injuries to their capacities for self-assertion: the "psychic connection," so to speak, between pleasure, desire, motivation, and action is weakened or severed. *Acting* on the basis of our own felt pleasures and pains is an important component of forging our own way in the world—of "asserting" our "selves." Consenting to unpleasurable sex-acting in spite of displeasure—threatens that means of self assertion. Second, women who consent to undesired sex may injure their sense of self-possession. When we consent to undesired penetration of our physical bodies we have in a quite literal way constituted ourselves as what I have elsewhere called "giving selves"—selves who cannot be violated, because they have been defined as (and define themselves as) being "for others." Our bodies to that extent no longer belong to ourselves. Third, when women consent to undesired and unpleasurable sex because of their felt or actual dependency upon a partner's affection or economic status, they injure their sense of autonomy: they have thereby neglected to take whatever steps would be requisite to achieving the self-sustenance necessary to their independence. And fourth, to the extent that these unpleasurable and undesired sexual acts are followed by contrary to fact claims that they enjoyed the whole thing—what might be called "hedonic lies"—women who engage in them do considerable damage to their sense of integrity.

Robin West, *The Harms of Consensual Sex*, 94 AM. PHIL. ASS'N NEWSLETTERS 52, 53 (1995).

school, have higher levels of self-esteem, avoid abusive relationships, and be healthier.²⁶ These studies suggest that feeling that one is in control with respect to one's own body is extremely important to the well-being of girls and women in our culture.

2. Autonomy-Respecting Encounters

Objectification respectful of autonomy is not troubling in the same way and may be entirely moral. Autonomy-respecting objectification occurs when a person treats another as an object or thing but yet in a manner consistent with the object's own wishes and desires. Such objectification can take a number of forms. For example, autonomy-respecting objectification occurs when the subject sees the other merely as "body parts" for the subject's use because the object's desires are consistent with the subject's own. As a collection of useful body parts, the other might be fungible with similar objects, and treated as an object in the sense of fungibility, though the two meet with a common goal. Similarly, controlled, consensual S&M can be objectifying because of the script, which requires certain roles and forms of interaction based on those roles. Such interaction is objectifying in that one actor treats the other, not as the actual human being she is but as a mental abstraction, a fantasy, a role. Such sex may, of course, be mutually desired and consistent with and respectful of the autonomy of each.

In contrast, as noted earlier, non-objectifying sex is both mutually desired *and* entirely consistent with the actual personhood of the partner, affirming the partner as the person she is. I do not know whether non-objectifying sexual interactions are necessarily morally problematic. It may be that for some people, their best and most fulfilling life would include some objectifying sex or only objectifying sex. My point is only that autonomy-denying sexuality is morally problematic because of the harm it causes the sexual object, whereas autonomy-respecting objectification and non-objectifying sexuality are not inherently troubling on a moral level for this reason.

The three categories I have described are not firm and distinct. Participants in the same sexual encounter may have different understandings of what kind of encounter occurred and may even be unsure how to classify an encounter. To the extent that women define themselves as "giving,"—as wanting to give that which would otherwise be taken from them²⁷—women will often be unable to identify sex as wanted or unwanted because those concepts have no meaning. In addition, each of these kinds of sexual interaction shades into the others; the lines between them are not clear or sharp. These concerns do

26. See Joanne Korth, *Survey: Image, Support Still Lag*, ST. PETERSBURG TIMES, Oct. 23, 1994, at 2C; Nancy Lieberman-Cline, *Sports Can Teach Women to Compete in the Workplace*, DALLAS MORN. NEWS, June 29, 1995, at 4B; Andrea Martin, *As You Were Saying; Sports Help Girls Grow Strong*, BOSTON HERALD, Feb. 4, 1996, at 26; Wendy Parker, *Women's Notebook; Just Overdo It: Sales Pitch to Girls Cites Sports' Real, Mythical Benefits*, ATLANTA J. & CONST., Sept. 9, 1995, at 12D; Elizabeth Weil, *Good Sports; It's Seen as an Offensive Move Against Self-Esteem Problems, Depression and Drug Abuse, Great Reasons, the Experts Say, to Team Up Girls and Athletics*, L.A. TIMES, Jan. 2, 1996, at E1.

27. West, *supra* note 10, at 96-97.

not affect my analysis because I do not suggest that we adopt laws or policies creating categories along these lines. My use of these categories, as will be seen below, is quite limited.

B. *Mapping Sexuality*

Sexuality can be viewed as a continuum. At one end is rape, an extreme form of autonomy-denying sex, during which the sexual actor is wholly indifferent not only to the actual subjective desires and pleasures of the object but even to the object's expressed desires. Regardless of what the subject feels and says, the rapist is likely to see her only as a projection of his own desire, whether it be that she really does or does not want "it." Unwanted sex, sex which one would rather skip than endure, could one do so without costs, comes next, then autonomy-respecting objectifying sex, and at the other extreme, non-objectifying sex.

Place sex/sexual orientation groups (heterosexual men, heterosexual women, bisexual men, bisexual women, gay men, and lesbian women) along this continuum. Heterosexual men are the group responsible for most autonomy-denying sex in the United States today. Rape is the clearest evidence of such a sexuality. And it is overwhelmingly men who rape, and they overwhelmingly rape women. In the recent *National Health and Social Life* sex survey (NHSLs), the authors report that whereas 21.6% of women report having been forced to do something sexual by a man, 0.3% women report having been forced by a woman, 1.3% of men report being forced by a woman, and 1.9% of men report being forced by a man.²⁸ This is consistent with anecdotal reports that, though some gay men are (like other men) quite promiscuous in certain settings (such as bathhouses or the Ramble in Central Park), treating strangers as sexual objects fungible one with the other, they are generally respectful of each other's autonomy, hence the relatively low number of complaints of rape on gay cruising grounds.²⁹

Rape is not unheard of in the gay community. But it is far less common than among heterosexuals. Indeed, the form of homosexual rape that comes most readily to mind, prison rape, is also in most instances a "heterosexual" male phenomenon in that the rapist is someone who, when out of prison, regards himself and acts as a heterosexual male.

The more widespread form of autonomy-denying objectification—having sex with someone who does not want it and whose feelings and desires are irrelevant to the encounter—is also common for heterosexual men. Many women in heterosexual relationships speak of having unwanted sex because it is their obligation or duty or to avoid a partner's anger or resentment or because saying no is awkward or difficult.³⁰ Often, heterosexual women want a

28. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 336 (1994) (Table 9.7).

29. See RICHARD D. MOHR, *GAY IDEAS: OUTING AND OTHER CONTROVERSIES* 129-218 (1992).

30. See LILLIAN B. RUBIN, *WORLDS OF PAIN: LIFE IN THE WORKING-CLASS FAMILY* 148-53 (1976) [hereinafter RUBIN, *WORLDS OF PAIN*] (relating women's feelings about sex using a study

cuddle or a hug but engage in genital sex to get it.³¹ Many women in heterosexual relationships fake orgasms.³² Many ordinary heterosexual women have lots of unwanted sex. The phenomenon of unwanted sex does not seem as widespread among lesbians and gay men, though there is doubtless some unwanted sex in some of these relationships, particularly when economic and other power differentials exist. But there are a number of reasons to think that unwanted sex should occur less often than in heterosexual relationships.

Unwanted sex may be particularly low in lesbian relationships because neither partner has been raised with a male sense of entitlement to sex from a partner. For example, one study, describing a lesbian couple in which one partner desired more genital sex than the other, reports that Sally, the person who wanted more sex, said that "now I'm more discreet. I edit how much I ask in order not to get rejected as much. Also, she sometimes says no, but more often than not she says yes. But then I don't ask all the time."³³ The authors conclude: "If Sally were a traditional heterosexual man, she would not hesitate to ask, because it would be both her right and her duty to do so. Nor would she be so hurt when refused."³⁴ Indeed, the problem many lesbians discuss is not unwanted sex but the opposite: "bed death," i.e., too little sex once the relationship is no longer novel. Most "experts" regard "bed death" as related to the fact that both partners are women, raised in a culture in which they are not expected to be sexual agents, and therefore uncomfortable initiating sex once the initial passion has diminished. Thus, the problem for lesbians is likely to be too little sex (partners experiencing bed death do not tend to be happy celibates), rather than unwanted sex.

of working class marriages). Rubin reports that

[o]nce in a while, a woman says: "I tell him straight I'm not in the mood, and he understands." Mostly, however, women say: "I don't use excuses like headaches and things like that. If my husband wants me, I'm his wife, and I do what he wants. It's my responsibility to give it to him when he needs it."

Id.; see also LILLIAN B. RUBIN, *EROTIC WARS: WHAT HAPPENED TO THE SEXUAL REVOLUTION* 72-73, 75, 93-95, 98-108, 110-12 (1990) [hereinafter RUBIN, *EROTIC WARS*]. Rubin also told the story of a 39-year-old woman who had slept with a number of men while looking for a permanent relationship and expressed regret:

Sex is supposed to mean something, and not just be this transitory activity. Most of the time I wasn't really doing what I wanted to do. I'd have sex with someone because it seemed like it was easier to go through with it and do it than it was to say no and get out of the situation. Do you know what it feels like to wake up to some stranger from the night before and think: "Oh God, why? What am I doing here?" The guy's happy, he feels like a conqueror, and you feel humiliated because you know you'll probably never hear from him.

Id. at 110.

31. BLUMSTEIN & SCHWARTZ, *supra* note 7, at 198 (telling the story of a wife who reports that she initiates sex most of the time "because I am not always serious"). She explained that "sometimes I just want to cuddle or kiss and I don't always mean, 'Keep going'. . . . Sometimes he thinks I am initiating that and I am not. I just want to be close." *Id.*; see also RUBIN, *EROTIC WARS*, *supra* note 30, at 73 (the gratification many teenage girls find in casual sex is "being touched, held and hugged" and not orgasmic).

32. LAUMANN ET AL., *supra* note 28, at 116 (Table 3.7) (43.5% of men report that their partner always had an orgasm, though only 28.6% of women reported always having an orgasm). Compare the quite similar estimates when 75% of men reported that they always had an orgasm and 78% of women reported that their partner always had an orgasm. *Id.*

33. BLUMSTEIN & SCHWARTZ, *supra* note 7, at 214.

34. *Id.* at 214-15.

Also, women in lesbian relationships, like women in heterosexual relationships, "prize nongenital physical contact—cuddling, touching, hugging" and lesbians "are much more likely to consider these activities as ends in themselves, rather than as foreplay leading to genital sex."³⁵ Because both partners in a lesbian relationship are likely to value non-genital touching as an end in itself (rather than as *always* leading to genital sex), both are less likely (than most men) to assume that any physical contact is an attempt to initiate genital sex. This too may result in less unwanted sex.

For both lesbians and gay men, neither partner begins a relationship with the understanding that because she and only she (or he and only he) has a penis, sex is defined by and centered on his or her orgasms, nor does only one partner have the advantage of a male wage while the other has the disadvantage of being expected to be the primary caretaker or any of the other social differences discussed in the first section of this essay. And since *both* are women or men, one does not have the disadvantage vis-à-vis the other of thinking that her sexuality is primarily for the pleasure of her (male) partner rather than herself, a lesson drummed continuously into women by our culture. Also, because both are men or women, they may be more likely to desire sex at similar frequencies or for similar amounts of time and under similar circumstances.

To be sure, other differentials may be present and important in terms of power dynamics in a particular relationship: age, wealth, athleticism, physical endowments, or beauty—so that sex is primarily about satisfying the desires and needs of the dominant partner (autonomy-denying) rather than mutually desired and fulfilling. But in heterosexual relationships, there are more socially-constructed power differentials systematically favoring one partner than there are in same-sex relationships, as noted in the first section of this essay.

Also, the double standard does not pose the problem for lesbians and gay men that it does for women in heterosexual relationships, since both participants are of the same sex. Neither partner in a lesbian or gay relationship is as likely as a heterosexual woman to be inhibited by the fear that their partner will have a double standard regarding women who are too active or who initiate too much as "bad," or usurping male prerogatives.³⁶ This can be a major problem for women's development as sexual agents, since it is difficult to keep oneself in check one instant and to let go the next.

I have not been able to find any lesbian or gay discussions of the problem of unwanted, autonomy-denying sex, though there are many books on lesbian and gay sex and heterosexual women routinely describe such sex.³⁷ I suspect, therefore, that this is less of a problem for lesbians and gay men than for heterosexual women, for the reasons just given. There is evidence of unwanted

35. *Id.* at 197.

36. For a discussion of male resentment of women who initiate too much or are specific about their sexual desires, and women's resulting reluctance, see *id.* at 209-14; RUBIN, *WORLDS OF PAIN*, *supra* note 30, at 142-44.

37. *See supra* notes 30-32.

same-sex sexual harassment, particularly in employment settings, and sexual harassment is the expression of an autonomy-denying sexuality. But even in that context, *most* sexual harassment on the job is by heterosexual men.

In sum, of the three forms of autonomy-denying sexuality described here—rape, sexual harassment on-the-job, and other unwanted sex—rape is overwhelmingly a heterosexual male phenomenon, as is sexual harassment at work.³⁸ Unwanted sex also seems primarily a heterosexual male phenomenon, though it doubtless occurs in all sorts of relationships.

In light of this reality, the claim of many heterosexuals to “deserve” preferential treatment by the state in marriage because of their moral superiority over same-sex couples is unwarranted, since such encounters are least likely to be autonomy-respecting and hence good for the human personhood of both participants. Talking about the morality of various kinds of sexual encounters is, I think, necessary if the goodness of many lesbian and gay relationships is to become visible and ultimately entitled to full legitimation by the state in marriage.

CONCLUSION

In this essay, I have suggested that the progressive potential of the New Private Law is limited. The New Private Law’s willingness to enforce lesbian and gay cohabitation contracts (a progressive change) is more than offset by the increased willingness to enforce pre-marital and marital contracts for heterosexuals (a regressive change). I have also argued that legal recognition and social respect for lesbian and gay relationships requires talking about what is good and bad about sexual relationships.

In the final section of the paper, I suggested that the morality of sexual encounters turns, not on the sex of participants, but on whether the encounter is autonomy-respecting or autonomy-denying. I argued that autonomy-denying sex includes not just rape and sexual harassment at work but also unwanted sex, i.e., sex a participant would rather avoid than live through were it more cost-effective to say “no.” Autonomy-denying sex is primarily a heterosexual male phenomenon. Demonizing all same-sex relationships and idealizing heterosexual relationships—including unwanted sex routinely experienced by many ordinary women in marriage—is one way in which we fail even to identify immoral sex as such. Ultimately, we should work for legal rules and social policies that would minimize immoral, autonomy-denying sexual relationships and give legal recognition and social respect to moral sexual relationships.³⁹ We must, therefore, address what is good and bad about sexual relationships whether heterosexual, gay, or lesbian.

38. The relatively low rates of same-sex sexual harassment on the job may, of course, be the result of taboos against same-sex sexuality (and the subsequent closeting) rather than reflecting a difference in the extent of objectification.

39. I am not suggesting that we should criminalize autonomy-denying objectification or that we should adopt any rules using as legal categories the distinctions I have drawn in this paper between autonomy-denying objectifying sex, autonomy-respectful objectifying sex, and non-objectifying sex. We might, however, design rules to minimize autonomy-denying sex in other ways, such as by giving homemakers and caretakers better economic protections at divorce.

