

CONTRACTUAL PURGATORY FOR SEXUAL MARGINORITIES: NOT HEAVEN, BUT NOT HELL EITHER

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How does God reward or punish us after death?

After death God either makes us happy in Heaven, or punishes us in Purgatory or Hell, according to our deeds.

What is Hell?

Hell is the place of everlasting suffering.

What is Purgatory?

Purgatory is a place of punishment, where the souls of the just suffer after death, until they are entirely purified.

What is Heaven?

Heaven is a place of everlasting happiness for those who have loved God and served God in this life.¹

I. INTRODUCTION

Choosing between purgatory and hell is easy. I argue in this article that contract may offer sexual marginorities² a legal purgatory, where they suffer until they are sufficiently purified to enter the heavenly realm of public rights (or until the law is purified of anti-gay bias). By sexual marginority I mean groups generally associated with the gay rights movement (gay men, lesbians,

1. THE BALTIMORE CATECHISM No. 1, *Lessons 174-78* (1930) (footnote omitted). I am grateful to Mary Becker for bringing this source to my attention.

2. Marginority is a cross between marginality (which all women and people of color collectively experience) and minority (which describes gay people as well as particular racial or ethnic groups, but not straight women). The term marginority also corrects the inaccuracy of the phrases "women and gays," and "women and Blacks," which suggest that there are neither lesbians nor African-American women, and certainly not African-American lesbians. Depending on context, it can also include other disadvantaged groups, such as children. I discuss children as marginorities to the extent that I discuss the movement of child sexual abuse regulation in my model. For further discussion of relations between the categories of sex, gender, and sexual orientation, see Francisco X. Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

bisexuals, and transgendered people) and sometimes heterosexual women or children. My main point is that contractual purgatory is not everything, but it's not nothing, either.³

I challenge the conventional wisdom that contracting is hazardous for the health and wealth of people on the margins⁴ by asserting that sexual minorities may be a limited exception to the rule. Specifically, I explore whether contract may benefit sexual minorities by offering a purgatory between the hell of public condemnation and the heaven of public rights.

I began this project with a hunch that gay people may find an unexpected source of rights in contract. I found, as expected, both practical and theoretical benefits of gay-related contracts. Inspired by faculty discussions debating the nature and existence of New Private Law, I expanded the scope of my inquiry to test whether other sexual regulations might similarly pass through an intermediate stage between public condemnation and public rights. As expected, I found a progression between prohibition and license for many sexual regulations. This way station is most clearly contractual for gay people, in that gay cohabitation and non-discrimination employment contracts fit the classical definition of contract. While other regulations such as abortion and marital rape also hover between public condemnation and public rights, the way station for these regulations is less clearly contractual. Yet it often turns on consent, which is of course also a crucial element of contract. My project thus is more to suggest a general pattern than to announce that all sexual regulations are contractualized at some point.

Toward this end I offer a model that describes how selected sexual regulations progress between the public extremes of condemnation and rights, sometimes stopping along the way in contract. This contractual way station may grant rights to sexual minorities that are unavailable under public law because of majoritarian moral opposition. If so, contractual purgatory offers an unexpected safe haven in contract law, unexpected because contract is widely perceived as a tool for politically conservative ends.⁵

3. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 116 (1987) ("Law is not everything in this respect, but it is not nothing either.").

4. See, e.g., Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 444 (1979) ("[T]he doctrine of freedom of contract . . . legitimizes the natural tendency of the strong to prey on the weak . . ."); Kellye Y. Testy, *An Unlikely Resurrection*, 90 NW. U. L. REV. 219, 222 (1995) (Feminists have critiqued contract analysis' reliance on the bargain model of exchange which "presupposes norms of equality (of bargaining power) and freedom (to choose whether to contract)" and "fuel[s] a market-based economy . . . [by] encouraging unadulterated self-interest and commodification.").

5. E.g., Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996). Ann Estin describes the preference for private over collective decisionmaking as characteristic of economic thought, and the law and economics school is widely perceived as politically conservative. Ann L. Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 541 (1995). Law and economics analysis, of course, can also yield progressive results. See, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991); Jennifer Hertz, Note, *Physicians with AIDS: A Proposal for Efficient Disclosure*, 59 U. CHI. L. REV. 749 (1992).

In the descriptive part of this article, I explain how regulation of sodomy, abortion, miscegenation, fornication, and cross-dressing fit into my model, and suggest that regulations of child sexual abuse and marital rape traverse a predictable path in the opposite direction. Then I apply the model in some detail to gay-related regulations, concluding that gay people are currently at multiple places in the model, but generally in contractual purgatory.

Finally, after detailing the model and gay regulations' place in it, I suggest that contractual purgatory may be both practically and theoretically beneficial to gay people. It will not, however, benefit all minorities. Heterosexual women, for example, already benefit from public rights such as abortion. Practically speaking, they are able to obtain certain public rights, such as freedom from employment discrimination. In contrast, gay people are more likely to obtain modest contractual protections than they are expansive public rights. As a theoretical matter, the gay community may also benefit from using tools generally associated with the political right-wing, since doing so destabilizes categories and thus opens up social spaces that were formerly closed to gay people.

Another theoretical advantage of contractual purgatory for sexual minorities is that contract is an important element of the social construction of legal personhood, so that enforcing gay-related contracts is an essential step towards gay people becoming legal persons. Thus, contract serves a crucial function in shepherding gay people from a position where they are socially constructed as criminals to a place where they are constructed as full members of society.

My theory also offers a new role for contract within progressive thought, a somewhat counterintuitive proposal since contract has been roundly criticized by progressive scholars. Critical Legal Theorists and Realists have attacked the political underpinnings of contract on a number of grounds. Some claim contract law is not as private as it claims to be, but is instead public because elected or politically appointed judges decide which contracts are enforceable.⁶ This critique argues that private contracts are thus not truly private, but mere reflections of majoritarian values as voiced through judges who represent and implement class, race, and gender privilege.

A second critique of contract law challenges the legal fiction of consent in a situation where one or more of the parties did not fully understand the nature of the bargain, or were induced by economic or other inequality in bargaining power to agree to a particular contract.⁷ A third progressive critique

6. See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 586 (1933) ("[T]he law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction."); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1094, 1113 (1985) ("Doctrinal arguments cast in terms of public and private, manifestation and intent, and form and substance . . . encourage us to simplify in a way that denies the complexity, and ambiguity, of human relationships. . . . [T]he world of contract doctrine [is] . . . one in which a comparatively few mediating devices are constantly deployed to displace and defer the otherwise inevitable revelation that public cannot be separated from private, or form from substance, or objective manifestation from subjective intent.").

7. See, e.g., Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*,

of contract contends that contract favors "unadulterated self-interest and pure calculation" over trust and community.⁸ Generally, these critics claim that contract replaces public rights with market rights.⁹

In contrast, scholars on the political right often champion contract,¹⁰ which in itself makes contract theory and doctrine suspect to those scholars who focus on redistributive agendas as a means of benefitting have-nots. I focus on how contractual purgatory benefits one minority, arguing that gay-related contracts can benefit gay people despite the trenchant critique of contract offered by progressive theorists.

Contractual purgatory is of particular relevance to the New Private Law. New Private Law is a label a group of faculty at the University of Denver has coined to describe the recent trend in which government entities delegate their functions to private entities by, for example, privatizing prisons and schools. In this Symposium, Federico Cheever addresses conservation easements as environmentally sensitive manifestations of New Private Law, and Roberto Corrada and Katherine Stone explore some impacts of contractual arbitration clauses on employment and labor contracts. Clayton Gillette explores the competition between public and private provision of the same goods or services, and Gary Peller suggests that privatizing education could yield unexpected and progressive benefits. All of these papers, to a greater or lesser extent, focus on contract.

I also address contractual issues, but in the context of sexual regulations. I argue that at least for sexual minorities, New Private Law might offer a safe haven from the only other practical alternative: criminalization. Thus, at least some minorities might benefit from New Private Law, despite its public presentation as a politically conservative tool to replace public rights with market rights.¹¹

130 U. PA. L. REV. 1349, 1351-52 (1982) ("The 'free' 'private' market is really an artifact of public violence."); Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 764 (1981) ("[C]oercion, including legal coercion, lies at the heart of every bargain. Coercion is inherent in each party's legally protected threat to withhold what is owned. The right to withhold creates the right to force submission to one's own terms."); see also Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 498 (1993) (critiquing consent to caesarean sections as being "intimately tied to ideological structures" relating to race, class, and gender).

8. See, e.g., Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 644-45 (1983).

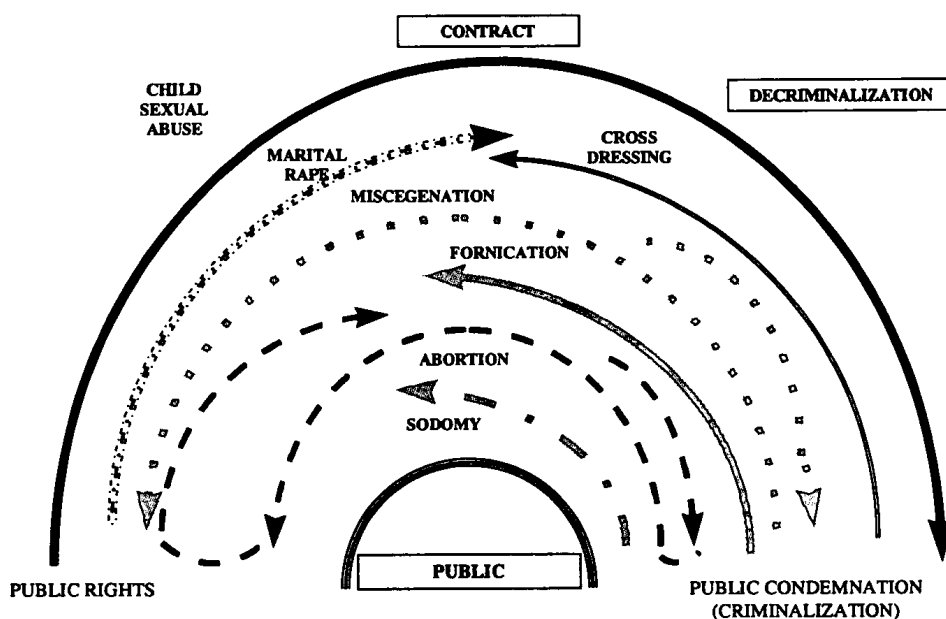
9. Patricia Williams has challenged the dichotomy between public rights and contract rights by pointing out that for some minorities the right to contract is an essential element of personhood, given that their ancestors were the object of contract rather than contracting parties. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 408 (1987) ("I am still engaged in a struggle to set up transactions at arms' length, as legitimately commercial, and to portray myself as a bargainer of separate worth, distinct power, sufficient rights to manipulate commerce, rather than to be manipulated as the object of commerce.").

10. See, e.g., RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 53 (1995) (arguing that voluntary exchange is one of six simple rules governing all law); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 1 (1981).

11. Any refuge New Private Law might offer some minorities contradicts the perception of it as a tool of the right which will inevitably hurt the have-nots. This perception is often grounded in concrete examples, such as Roberto Corrada's and Katherine Stone's prediction that employees and union members will enjoy fewer rights under private than public processes.

II. THE MODEL

In this model, public and private are separate spheres linked by a horseshoe progression at one end of which is public condemnation (usually through criminalization) and at the other, public rights.¹² Contract sits midway in the trajectory between the two public extremes, with decriminalization between contract and criminalization. The model also reflects the role of different branches of government. The judiciary perches at the top, enforcing private agreements, and the legislature¹³ sits at either end of the model, legislating morality through either public condemnation or public rights.



Public condemnation takes its most obvious form in criminal statutes. Contractualization is similarly straightforward, involving judicial enforcement of obligations agreed to by private parties.¹⁴ The category of public rights,

12. Another way to view my model is as an upside-down pendulum. The extremes are public rights or condemnation, but regulations often pass through private contract on their way to either extreme. Alan K. Chen, "Meet the New Boss . . .", 73 DENV. U. L. REV. 1253, 1259 n.46 (1996).

13. I describe public rights as legislatively created because some, such as the right to be free from some employment discrimination embodied in Title VII of the Civil Rights Act of 1964, are legislatively created. While other public rights, such as reproductive freedom, are recognized by courts if they are grounded in the Constitution, they can also be deemed legislative if the Constitution is conceived as a super-statute. The Constitution is, in any case, more like the text of a criminal statute than a contract between private parties, in that the Constitution and statutes are both government-created documents, while a private contract is created by private parties.

14. While contracts such as cohabitation contracts are in contractual purgatory, other consen-

however, is susceptible to many meanings. I use the term to include at least three things: (1) constitutional protection from invidious discrimination and protection of fundamental rights; (2) legislative protection from discrimination on the basis of race, gender, sexual orientation, or other categories of invidious discrimination; and (3) a privilege to take action without fear of punishment.¹⁵ While these public rights cover a broad range, they all reflect either freedom from state interference with an activity or protection from invidious discrimination. For example, there is a public right to marital rape where the state does not criminalize it,¹⁶ and a public right to be free from race

sexual relations also fall within the way station. Consent (rather than offer, acceptance, and consideration) is key to determining whether a regulated behavior is in the category of condemnation, public rights, or the contractual way station. For example, marital rape was a public right when the wife's consent was inferred from marriage vows. It has since been criminalized, but her consent is often inferred despite considerable evidence to the contrary. Abortion is similarly in contractual purgatory when a woman and her doctor can legally agree to terminate her pregnancy. But both these regulations tip toward criminalization when moral condemnation of the activity makes consent irrelevant.

15. The last meaning is illustrated by the progression of marital rape in my model. Until recently, marital rape was an oxymoron because rape was defined as forcible sex with a person not the defendant's wife. See SUSAN ESTRICH, *REAL RAPE* 8 (1987); RICHARD A. POSNER & KATHERINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* 35-43 (1996). But it has since progressed from a privilege toward a crime.

16. Under Wesley Newcomb Hohfeld's jurisprudential scheme, my use of the term *right* here may also mean *privilege* as I use it in my third example—to take action without fear of legal liability. The first two examples (constitutional and legislative protections against discrimination) are likely Hohfeldian rights because they confer an affirmative claim against another person. Hohfeld's privilege is an absence of duty to refrain. Under the marital rape exemption a husband has a privilege to rape his wife, which means that he has no duty to refrain from raping his wife. See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913), reprinted in WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED TO JUDICIAL REASONING AND OTHER ESSAYS* 23 (Walter W. Cook ed., 1923).

Sometimes right and privilege can apply to the same sexual regulation. If *Romer v. Evans*, 116 S. Ct. 1620 (1996), is read as granting gay people public rights through protection under the Equal Protection Clause of the U.S. Constitution, then they have both a privilege and a right. The privilege is that gay people no longer have a duty to refrain from being or acting gay to escape legal liabilities, and the right is that gay people have an affirmative claim against state entities denying them equal protection of the law on the basis of sexual orientation.

Hohfeld described eight categories in analytical jurisprudence: (1) right (an affirmative claim against another); (2) privilege ("one's freedom from the right or claim of another"); (3) no-right ("absence of right"); (4) power (legal ability to alter legal relations); (5) liability (experienced by the one whose legal relations are altered by power); (6) immunity ("exemption from legal power"); (7) disability (lacking power to alter someone's legal relations); and (8) duty (obligation). Hohfeld's opposites and correlatives further illustrate the right/privilege relationship regarding sexual regulations:

Hohfeld's jural opposites:

right	privilege	power	immunity
no-right	duty	disability	liability

Hohfeld's jural correlatives:

right	privilege	power	immunity
duty	no-right	liability	disability

The list above illustrates that where wives now have a right to be free from marital rape (i.e., an affirmative claim against their husbands), they formerly had no-right under the marital exemption (i.e., they could not bring a claim). As correlatives, the wife's right to claim marital

discrimination under Title VII. These public rights represent a dramatic change from prior law, a change which can be characterized as the transition of women and racial minorities from being legal objects to being legal subjects.

I mainly focus on contracts benefitting gay people, because gay people seem to be moving from public condemnation toward contractual purgatory, and thus provide a good example of movement within my model. Perhaps because they are in transition, gay people find themselves in multiple places on the continuum from criminalization to public rights. Sodomy is criminalized in many states,¹⁷ and yet contracts which benefit gay people are enforced, sometimes even in states with sodomy laws.¹⁸ Moreover, some legal landscapes show early signs of budding public rights for gay people such as state or municipal legislation affording protection from sexual orientation discrimination or granting domestic partnership benefits.

Two important and just-planted seeds of gay public rights are the Supreme Court's recent invalidation of Colorado's anti-gay constitutional amendment in *Romer v. Evans*¹⁹ and Hawaii's recognition of same-sex marriages under the Hawaii constitution in *Baehr v. Miike*.²⁰ The generativity of *Evans* became immediately apparent when the Court summarily vacated and remanded a similar case to the Sixth Circuit (the Circuit had upheld Cincinnati's city charter amendment which had denied protection against sexual orientation discrimination).²¹ But the long term impact of *Evans* and *Baehr* is uncertain; a legal or political backlash may keep gay people out of the heaven of public rights. In terms of my model, the contested legal status of homosexuality is evidenced by simultaneous criminalization, recognition through contract, and public right status, sometimes all in the same jurisdiction.²²

rape is paired with the husband's correlative duty to refrain from raping his wife. Similarly, the opposite nature of privilege and duty is illustrated by the husband's privilege to rape his wife (the absence of a duty to refrain) under the marital rape exemption and the opposite duty of a husband to refrain from raping his wife when the marital rape exemption has been repealed. Finally, marital rape fits into the Hohfeldian correlative of privilege and no-right in that when the husband has the privilege to rape his wife, the wife has no-right (i.e., she cannot make a legally recognized claim of marital rape). In sum, under the marital rape exemption the husband has a privilege to rape his wife and the wife has no-right (no claim). When the exemption is repealed the wife has a right (claim) and the husband has a duty to refrain from non-consensual sex.

This overlap of right and privilege in my definition of public rights is intended to craft a category which encompasses both *freedom to* and *freedom from*. To give another example, legal protection of reproductive choices represents both the freedom *from* state interference and the freedom *to* get an abortion.

17. Twenty-four states criminalize sodomy. Brenda S. Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-On Collision with Bowers v. Hardwick*, 58 ALB. L. REV. 725, 726 n.2 (1995).

18. See, e.g., *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992) (enforcing lesbian cohabitation contract and excluding all evidence of the relationship under the parol evidence rule).

19. 116 S. Ct. 1620 (1996).

20. No. 91-1394, 1996 Haw. Ct. App. LEXIS 138 (Dec. 3, 1996).

21. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 116 S. Ct. 2519 (1996) (granting certiorari, summarily vacating Sixth Circuit opinion, and remanding to Sixth Circuit for consideration in light of *Romer v. Evans*).

22. Georgia is remarkable in its concurrent treatment of homosexuality as a crime, a contractual right, and a public right. It criminalizes sodomy, yet enforces same-sex cohabitation contracts. See *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992); *Weekes v. Gay*, 256 S.E.2d 901 (Ga. 1979). Georgia also affords protection against discrimination

Contractual purgatory is important because it offers a resting place for gay people, safe from public condemnation, while they wait to achieve public rights. This safe harbor is particularly important since courts are rarely on the cutting edge of social change. Perhaps judicial reluctance to create social change (as compared to reflecting it) is due to the nature of law; it follows precedent rather than cutting new paths.²³

While *Brown v. Board of Education* and *Roe v. Wade* seem to contradict this point, in that they symbolize tremendous judicially-mandated strides for African-Americans and women, these cases in fact were the product of decades of litigation and public education efforts on racial segregation and illegal abortion. More recently, the U.S. Supreme Court in *Romer v. Evans* has indicated a willingness to recognize some constitutional protection for gay people, a dramatic shift from its position just a decade ago when it venomously upheld sodomy statutes as applied to gay people.²⁴ Perhaps the past decade has included sufficient social change in gay people's place in society that the Court could more comfortably join the growing social consensus supporting some gay rights in 1996 than it could go against the anti-gay consensus in 1986.

At first glance, contract may seem to be an unexpected refuge for sexual minorities. Decades of progressive scholarship have eloquently critiqued the classical liberal foundations of contract,²⁵ and classical liberalism's renaissance in the academy and in the courts is generally associated with political conservatism.²⁶ Like Rasputin, the theory of voluntary exchange continues to

on the basis of sexual orientation in Atlanta and Fulton County. HUMAN RIGHTS CAMPAIGN FUND, STATES, CITIES AND COUNTIES WHICH PROHIBIT DISCRIMINATION BASED ON SEXUAL ORIENTATION [hereinafter HRC LIST] (document on file with the author). *But see* City of Atlanta v. McKinney, 454 S.E.2d 517 (Ga. 1995) (holding that city grant of health insurance to domestic partners of city employees was *ultra vires*). The contested status of gay people in Georgia is further illustrated by Atlanta's passage of another domestic partnership ordinance in an attempt to grant the benefits within the parameters dictated by the Georgia Supreme Court in *McKinney*. Ronald Smothers, *Atlanta Sued over Its Law on Benefits to the Unwed*, N.Y. TIMES, Sept. 15, 1996, at 25. Minnesota is another jurisdiction in which gay people are at multiple places in my model: it has a state statute barring sexual orientation discrimination and a sodomy law. MINN. STAT. ANN. § 609.293 (West 1987 & Supp. 1996) (criminalizing "carnally knowing any person by the anus or by or with the mouth"); MINN. STAT. ANN. § 363.03 (1996) (extending protection from discrimination on the basis of sexual orientation in employment, real property transactions, public accommodations, public services, education, credit, and business). And like Atlanta, Minneapolis' domestic partnership benefits were ruled *ultra vires* in *Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. Ct. App. 1995).

23. Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1933-34 (1995) (discussing the "myth of the Court as 'countermajoritarian hero'"). I thank Clayton Gillette for bringing this point to my attention. For further discussion of the Court's role in breaking new social ground, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

24. *Romer v. Evans*, 116 S. Ct. 1620 (1996); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

25. See, e.g., Peter Gabel & Jay M. Feinman, *Contract Law as Ideology*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 172 (David Kairys ed., 1982); Morton Horowitz, *The Triumph of Contract*, in ALAN C. HUTCHISON, CRITICAL LEGAL STUDIES 104 (1989); Mensch, *supra* note 7.

26. See EPSTEIN, *supra* note 10, at 53 (1995) (suggesting voluntary exchange as one of six simple rules for a complex world); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (upholding contractual arbitration clause regarding age discrimination claim); *Federal Deposit Ins. Corp. v. Culver*, 640 F. Supp. 725 (D. Kan. 1986) (enforcing promissory note against an unsophisticated debtor who did not understand what he was signing).

live, despite the various allegedly fatal blows dealt it by Realists, Neo-Realists, and Critical Legal Theorists.²⁷ Richard Epstein is typical of conservative scholars in championing voluntary contractual exchange as one of his six simple rules for a complex world.²⁸ Epstein skirts problems of differential power by universalizing the "logic of mutual gain" and positing that contracting parties are differently situated only in their purportedly natural variation in skill and willingness to bear risks.²⁹ Power differences are thus either inevitable or matters of choice for Epstein and do not compromise the value of contract.

Without agreeing with Epstein's blithe acceptance of power differentials between contracting parties, I posit here that while contract is not everything, it's not nothing either.³⁰ Specifically, contract may be a useful way station for sexual regulations en route from public condemnation to public rights.

The way station model may also work for other sexual regulations. I have tracked the progression of sodomy, abortion, miscegenation, fornication, and cross-dressing from criminalization to public rights, sometimes stopping in contractual purgatory. However, other sexual regulations, such as marital rape and child sexual abuse, have progressed in the opposite direction: from public rights to criminalized activities.³¹ Diagrammatically, these sexual progressions look like this:

A nice illustration of the tension between classical and more Realist contract interpretation is embodied in Judge Kozinski's defense of classical formalism in a case where he nevertheless followed the Realism established in California law by Justice Traynor 20 years earlier. In *Trident Ctr. v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564 (9th Cir. 1988), Judge Kozinski reluctantly allowed the parties to introduce parol evidence to the contract because he felt obliged to do so under *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968). In *Thomas Drayage*, Justice Traynor had allowed the parties to introduce extrinsic evidence to explain a contract term, reasoning that reliance on bare words on a page "is a remnant of a primitive faith in the inherent potency and inherent meaning of words Words, however, do not have absolute and constant referents." *Id.* at 644. In *Trident Center*, Judge Kozinski reluctantly followed *Thomas Drayage* because a federal court is bound to follow state substantive law, but roundly criticized it, stating that California has

turned its back on the notion that a contract can ever have a plain meaning discernible by a court without resort to extrinsic evidence . . . [so that] even when the transaction is very sizeable, even if it involves only sophisticated parties, even if it was negotiated with the aid of counsel, even if it results in contract language that is devoid of ambiguity, costly and protracted litigation cannot be avoided if one party has a strong enough motive for challenging the contract.

Trident Center, 847 F.2d at 568-69. For further discussion of the California parol evidence rule, see Susan J. Martin, *Yes, Judge Kozinski, There Is a Parol Evidence Rule in California—The Lessons of a Pyrrhic Victory*, 25 Sw. U. L. Rev. 1 (1995).

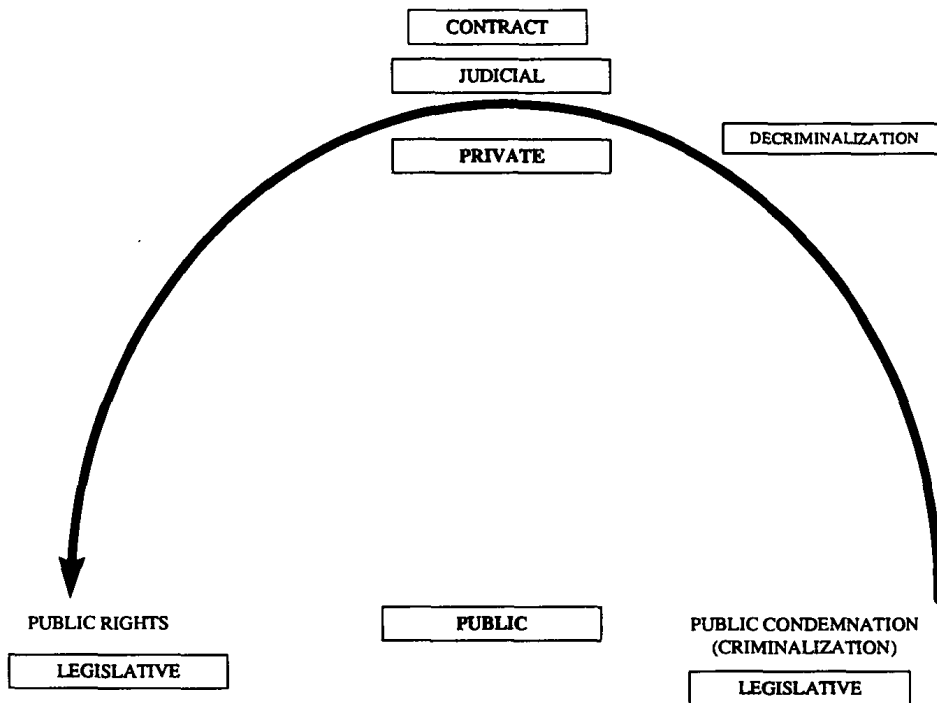
27. See *supra* notes 6-9 and accompanying text.

28. EPSTEIN, *supra* note 10, at 53. The rules are: (1) self ownership; (2) first possession; (3) voluntary exchange; (4) protection against aggression; (5) limited privilege for cases of necessity; and (6) compensated takings. *Id.*

29. *Id.* at 79.

30. See MACKINNON, *supra* note 3.

31. Space prevents me from addressing all sexual regulations. Among those I omit are those governing pornography, prostitution, and nude dancing. These regulations may well fit into my model. If social consensus recognizes a victim in prostitution, then the progressive move would be to criminalize it. But if the only victim in prostitution is the moral climate, or if the victimization of prostitutes is a function of criminalization, then the progressive move might be to contractualize prostitution, or at least decriminalize it.



In comparing the progressions of various sexual regulations, it appears that the direction in which the regulation is moving depends on whether the crime has an identifiable victim. Defining progressive as a move from politically conservative to politically progressive, victimless crimes should go from right to left in the model, while crimes with formerly legally invisible victims (women and children) should go from left to right.³² For example, sodomy

32. Abortion presents a harder case given the uncertain status of the fetus and the possibility of female victims. Anti-abortion laws were more likely to be enforced if a woman died, and thus was a victim. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 349 (1993). This pattern suggests that as long as abortion is perceived as victimless, it will not be criminalized. But, of course, anti-choice advocates would contend that the fetus is a full human being, and thus a victim of abortion. Pro-choice advocates, in contrast, would contend that the fetus is not fully human, or at least less human than the mother, and thus the fetus cannot be a victim. Perhaps this uncertain status question is part of the reason that abortion is all over my model. If there is no social consensus (let alone legal consensus) on whether abortion is a victimless crime, then abortion regulations would be expected to careen from public rights to public condemnation, perhaps stopping at contract in between. The uncertain status of abortion may also turn on whether being pro-choice is identified with a progressive position. While most people would put pro-choice positions under a progressive umbrella, some disabled rights advocates argue that terminating a pregnancy because of evidence that the child, if born, would suffer a disability, is eugenic rather than progressive.

Also relevant to my model is the fact that decriminalization of victimless crimes is a modern phenomenon, in that the very category of victimless crimes is modern. In the colonial period,

between consenting adults is a victimless crime, so a progressive trajectory prefers individual autonomy³³ over morality-based legislation and the arrow should go from criminalization toward public rights. In contrast, where there is an identifiable victim (as in marital rape and child sexual abuse) the progressive pattern is from public right to criminalization. In other words, the progressive effect of the pattern is that victims get legal protection from abuse, and that victimless crimes get reclassified as non-crimes or even public rights.

Under my model, the transition from criminalization to public rights may include a stop at contract, particularly if the victimless quality of the crime is contested. But, of course, the progression to contract will only benefit sexual minorities if the activity is currently criminalized, making the move to contract an opportunity to contract around an otherwise hostile and immutable rule. Mary Becker's discussion of differences between heterosexual and same-sex cohabitation contracting nicely illustrates this point.³⁴

Becker differentiates between gay and straight relationship contracts. She explains how these couples are differently situated both in terms of the partners' relation to one another and in terms of the couple's relation to the government. In relation to one another, gay couples are more likely equal because they share sexual identity and, particularly for lesbians, a normative preference for equality within the relationship. In contrast, a heterosexual couple by definition contains one man and one woman, so there is always a gender-based power imbalance between the partners. Thus, Becker points out, a heterosexual relationship contract is more likely tainted by unequal bargaining power of the parties, since the man has more social power and is also socialized to value individuality over the coupled unit. This heterosexual power imbalance is exacerbated, Becker notes, by female socialization to be giving rather than autonomous, resulting in a situation where heterosexual relationship contracts will likely benefit the more powerful (male) party at the expense of the less powerful (female) party. This outcome is obviously not progressive.

Becker further discusses the relationship of the couple to the state. Heterosexual couples, of course, are recognized through family law, and family law rules often protect weaker parties in a marriage through provisions such as temporary maintenance for a non-wage earning spouse. Gay couples, in contrast, are legally invisible, if not criminalized. As a result, heterosexual

in contrast, laws did not distinguish between sins and crimes. *Id.* at 34.

33. Autonomy per se has no set political valence. Classical contract theory valorized autonomy, as does liberal legal theory. See, e.g., EPSTEIN, *supra* note 10, at 53; Valdes, *supra* note 2, at 10, 31 (identifying autonomy as a goal and using the term liberal to describe feminist and critical race theories). Richard Posner has championed many of the contracts I advocate here, indicating that both progressive and conservative/libertarian thinkers have good reason for focussing on autonomy as a normative goal. See RICHARD A. POSNER, SEX AND REASON 265-66, 313 (1992). I thank Dan Farber for this insight.

34. Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169 (1996). Penelope E. Bryan has contended in a similar vein that women obtain better outcomes in lawyer-negotiated divorce settlements than in mediation. Penelope Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 445 (1992). If mediation is seen as negotiating a contract, then Bryan's arguments suggest that heterosexual women might suffer negative results in prenuptial contract negotiations for many of the same reasons that they suffer more under mediation than litigation.

relationship contracts are entered "in the shadow of family law rules"³⁵ and substantively tend to relieve the more powerful party of his obligations under those family law rules. Becker also contends that gay relationship contracts, unlike heterosexual ones, tend to promote equality between the parties rather than serve the powerful party's interest at the expense of the weaker party. As such, gay relationship contracts are progressive because they provide equality where the law would enforce inequality, while heterosexual relationship contracts are regressive because they chip away legal protections for weaker parties.

But the fact that heterosexual relationship contracting is often regressive does not impair my model's relevance. To the contrary, it illustrates the difference between a situation where contractual purgatory is progressive and one where contractual purgatory is regressive. Contracting benefits sexual minorities where the current rule is hostile. If, as in the case of heterosexual relationships, the public right benefits heterosexual women, then contract is regressive rather than progressive. In sum, the move to contract often does not benefit heterosexual women because it qualifies a friendly public right, but it does benefit gay people, because it offers an opportunity to contract around a hostile default rule of public condemnation.

While my focus is on progressions that benefit sexual minorities, the model is equally useful to understand changes in sexual regulations from a conservative perspective. The Religious Right, for example, would likely prefer that the arrows go in the opposite direction than they appear in my model. For example, the Christian Coalition would prefer that abortion be criminalized rather than considered a public right. But if reproductive choice is too politically popular to criminalize, the Christian Coalition could push it to contract as an intermediate measure. Implied conditions on abortion such as funding limitations and waiting periods arguably make parts of reproductive rights contractual, illustrating the efficacy of this strategy.³⁶ Once they have transformed a public right to a contractual one, the Christian Coalition could then continue to whittle away at the contract right, hoping to sufficiently erode the public view of it as an entitlement, thus making criminalization possible. While my approach takes the opposite position as a normative matter (favoring personal autonomy over morality-based legislation for victimless crimes), the model works just as well if the Christian Coalition makes the normative choice that victimless crimes should be criminalized to enforce majoritarian morality.³⁷

35. Becker, *supra* note 34, at 1174.

36. As in much of this article, I use contract loosely, rather than in the sense of mutual assent supported by consideration. Limitations on abortion access (particularly those related to funding) contractualize public rights to reproductive choice by providing that only women who can form a contract with a physician to perform the abortion have a right to one. Waiting periods and other qualifications on the abortion right similarly require the woman to agree to particular conditions in order to exercise her public right to abortion. In other words, the state provides many of the terms of the agreement between the woman and her doctor. While this is not a classical contract, it does reflect some conditions on the public right that could be characterized as limiting it by adding terms. Consent is key to contract, and also to my model. As conditions on abortion limit what a woman can (and cannot) agree to, abortion shifts away from a public right/privilege and toward the moralized public condemnation where her consent is irrelevant. It remains decriminalized, but is a much weaker public right than it was before.

37. Perhaps the Christian Coalition already recognizes the utility of contractual purgatory to

All conservatives, of course, do not take identical positions on contract as applied to gay people. Judge Posner, for example, seems to approve of the gradual replacement of marriage as status with cohabitation as contract.³⁸ He further proposes that domestic partnerships be available as an "intermediate step" between the ban on gay marriage and full legal recognition of gay relationships.³⁹ Moreover, unlike Becker, Posner suggests that contracts actually protect heterosexual women more than family law rules that allow no-fault divorce.⁴⁰ Thus, my model works for both conservatives and progressives, but it is important to keep in mind that not all conservatives (nor all progressives) will want the arrows to go in the same direction.

All marginorities, of course, are not similarly situated in all ways. Because more established groups are more likely to enjoy public rights, contracts may be most advantageous to the marginorities subject to more hostile public rules. For example, gay people may benefit from contractual purgatory because gay relationships are more likely to be criminalized than enjoy any public rights. On the other hand, heterosexual women would not benefit from contractual purgatory because abortion is a public right, and, as Becker points out, public rules governing heterosexual women often are more favorable than a contract would be. If contract can be a safe haven for gay people, then it (or parts of it) may present both strategic possibilities for subverting conservative agendas, and also open a pragmatic route to attain some legal protections until the general public is ready to recognize gay people's public rights.

There are two potential problems with my model: (1) it presupposes a distinction between public and private; and (2) it contains a normative assumption. The first problem turns on the public/private debate, which has raged for decades without real resolution. Rhetorical and legal organization continue to turn on a designation of spheres as either public or private, regardless of the indeterminate border between the two.⁴¹ My model, in turn, situates itself in

roll back public rights for sexual marginorities. If so, then it may have recognized that contract is a particularly valuable tool if progressives are shy about using it for their own purposes. I thank Julie Nice for this insight.

38. POSNER, *supra* note 33, at 264-65 ("The groundwork has been laid for the replacement of marriage by . . . contractual cohabitation Today, spouses who want a really durable relationship must try to create one by contract or by informal commitments."); *see also* Jane E. Larson, *The New Home Economics*, 10 CONST. COMMENT. 443, 450-51 (1993) (describing how Posner would replace marriage with contractual cohabitation and recognizing same-sex domestic partnerships as consistent with Posner's bioeconomic theory of sexuality).

39. POSNER, *supra* note 33, at 313; Martha M. Ertman, *Denying the Secret of Joy: A Critique of Posner's Theory of Sexuality*, 45 STAN. L. REV. 1485, 1501 (1993) (describing how Posner recommends domestic partnership as an "intermediate solution" to the problem of gay people seeking marriage rights).

40. Judge Posner has contended that heterosexual women are better able to protect themselves and their children from "abandonment by the child's father" under contract rather than family law. POSNER, *supra* note 33, at 266.

41. For a discussion of the public/private distinction, *see, e.g.*, Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1299 (1982); Cohen, *supra* note 6; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Frances Olsen, *The Myth of State Non-Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). For a recent progressive defense of the public/private distinction, *see* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992).

the context of the public and the private realms, since the discrete categories of private purgatory, public rights, and public condemnation presuppose some difference between public and private actors and rules. If public is the same as private because the judicial branch of government enforces contracts, then there is no public/private distinction between contract and either public condemnation or public rights. But the rhetoric of public condemnation and public rights remains markedly different from the rhetoric of private law. Whether the distinction is real or merely rhetorical, it has tremendous impact on actual lives, and may also offer possibilities for increased legal recognition for some minorities.

The second issue, the normativity inherent in my model, is a function of what I define as progressive. I focus on minorities, and define progressive to mean legal maneuvers that benefit the minority. The reason for my preference for minorities over majorities is simple: majorities are better able to protect their interests through the political process. People on the margins, in contrast, must either rely on the courts to protect them, or on the majority to be sympathetic.⁴² As a result, I am more concerned with gay people's rights to freedom from discrimination than with the Christian Coalition's contention that its members feel oppressed when gay people have equal rights.

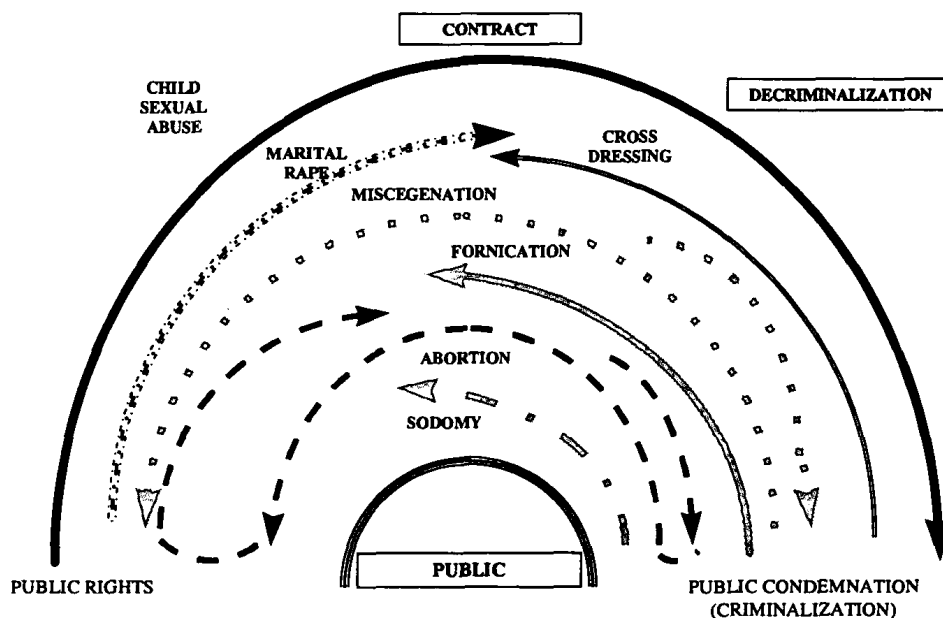
My preference is normative; I believe the marginalized group has a greater entitlement to equality than a majority group has to hegemony. But, as noted above, my model works for conservatives as well as for progressives. A conservative need only switch the direction of the arrows to return victimless crimes to the public condemnation category, and return to husbands the entitlement to rape their wives.

To summarize: my model suggests that contract offers minorities a private purgatory between public condemnation and public rights. If I am right, then contract offers sexual minorities some legal advantage. If sexual minorities find a home, however modest, in contract law, then contract cannot be an exclusive tool of the political right. Indeed, because contract is so often associated with conservatism, progressive appropriation of contract offers unique opportunities for subversion and ultimate social change.

42. Kenneth Sherrill, *The Political Power of Lesbians, Gays, and Bisexuals*, PS: POLITICAL SCI. & POL. 469 (Sept. 1996) ("In electoral politics [gay and bisexual] voters must be dependent on the support of heterosexuals in order to win elections."). Sherrill notes that while even New York City does not have an electoral jurisdiction in which gay people are a majority, gay people can still form critical masses in cities where they are sufficiently numerous and organized to bring about favorable legislation. The literature on collective action similarly suggests that minorities may be politically successful where they are in high density because they can monitor themselves, build coalitions, and avoid some free-riding by larger groups. Of course, the procedural advantages of collective action in a small group may be outweighed if the minority is more disadvantaged by majority hostility than it is advantaged by the ease of action in a small group. Perhaps gay people are more successful locally than nationally because the procedural benefits of being a small group are present locally but not nationally. Moreover, gay people are difficult to organize because identifying the interest group members can be hard since gay people, unlike people of color or many ethnic minorities, are generally not identifiable by sight or last name. Moreover, many gay people continue to obscure their sexual orientation even from other gay people in order to avoid discrimination. I thank Clayton Gillette for identifying the collective action benefits in being a minority.

III. PROGRESSION OF SEXUAL REGULATIONS

In an effort to test my hypothesis that contract is a private purgatory between public condemnation and public rights, I will briefly sketch the historical regulation of selected sexual regulations, including sodomy, abortion, miscegenation, fornication, cross-dressing, marital rape, and child sexual abuse. These regulations have gone in both directions on the diagram: from right to left (from criminalization toward public rights), and from left to right (from public rights to criminalization). As I've said, the overarching progressive pattern seems to be that victimless crimes go from right to left, and crimes where the female and child victims were only recently recognized as such go from left to right. But regardless of the starting point, contract is often the way station sexual regulations pass through en route to either extreme.



A. Salvation from Criminalization to Public Rights

1. Sodomy

Sodomy in some form has long been criminalized under both English and American common law.⁴³ In upholding Georgia's criminal sodomy statute,

43. WAYNE C. BARTEE & ALICE F. BARTEE, *LITIGATING MORALITY: AMERICAN LEGAL THOUGHT AND ITS ENGLISH ROOTS* 31-37 (1992). In "ancient times," sodomy was punished by ecclesiastical authorities, but was not a crime. MODEL PENAL CODE § 213.2 cmt. 1 at 358 (1980). Historian John Boswell suggests, however, that this criminalization is relatively recent. JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* 293 (1980) ("Between 1250

the U.S. Supreme Court in *Bowers v. Hardwick* explained that "sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen states when they ratified the Bill of Rights."⁴⁴ While scholars contest whether same-sex sexual conduct per se has been criminalized since colonial times,⁴⁵ the fact remains that the Supreme Court has upheld sodomy statutes as applied to gay consensual sex. I have accordingly placed sodomy on the criminal side of the diagram, based on *Bowers*. But I trace a dotted line between sodomy and contract to reflect some limited recognition of gay people's private contractual rights. Some courts have enforced gay cohabitation contracts and employment contracts forbidding sexual orientation discrimination. But other courts have refused to enforce same-sex cohabitation contracts because of anti-gay sentiments,⁴⁶ and even where the courts have enforced

and 1300, homosexual activity passed from being completely legal in most of Europe to incurring the death penalty in all but a few contemporary legal compilations."). American colonists enforced criminal prohibitions on sodomy, executing at least five men for sodomy or buggery in the late seventeenth century. JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 30 (1988).

44. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986). According to the Model Penal Code, sodomy "was received by the American colonies as a common-law felony." MODEL PENAL CODE § 213.2 cmt. 1 at 358.

45. Anne Goldstein has persuasively challenged the *Bowers* Court's reliance on the purported historical criminalization of same-sex sexual activity as justifying contemporary criminalization. Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988). Goldstein points out the flaws in the Court's interpretation of eighteenth and nineteenth century views of sodomy, arguing that homosexuality (i.e., sexuality as something a person *is* rather than simply *does*) as we now understand it did not exist prior to the late nineteenth century, so that before the "invention of 'homosexuality,' sexual touchings between men were determined to be licit or illicit according to criteria that applied equally to heterosexual practices, such as the parts of the body involved, the relative status of the parties, and whether the sexual drama conformed to sex role stereotypes." *Id.* at 1088 (citing Arthur N. Gilbert, *Conceptions of Homosexuality and Sodomy in Western History*, 6 J. HOMOSEXUALITY 57, 61 (1981) (homosexuals not conceptualized as identifiable segment of society until late nineteenth century); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: THE USE OF PLEASURE: VOL. 2*, at 220 (R. Hurley trans., 1985) (discussing ancient Greek position that "masculine" partner should dominate "feminine" partner regardless of biological sex); Jean-Louis Flandrin, *Sex in Married Life in the Early Middle Ages*, in *WESTERN SEXUALITY: PRACTICE AND PRECEPT IN PAST AND PRESENT TIMES* 120-21 (P. Aries & A. Bejin ed., 1985) (discussing acceptable sexual positions in fifteenth century Europe)). Historically then, until the 1870s, legal regulation of sodomy proscribed particular conduct, regardless of whether it occurred between same-sex or opposite-sex partners. It seems arguable, then, that criminalization of particular acts only if they are done by same-sex partners may be only a decade old. *Bowers* may be both the first and the highest legal authority allowing states to criminalize conduct by same-sex partners and protect the very same conduct if performed by opposite-sex partners. *Bowers*, 478 U.S. at 188. The *Bowers* Court explained,

John and Mary Doe were also plaintiffs in this action. . . . The District Court held, however, that because they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute, they did not have proper standing to maintain the action. . . . The only claim properly before the Court, therefore, is *Hardwick's* challenge to the Georgia statute as applied to consensual homosexual sodomy. *We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.*

Id. at 188 n.2 (emphasis added). Shortly after deciding *Bowers*, the Court denied certiorari in a case where the Oklahoma appellate court struck down a sodomy law as applied to a heterosexual couple. *Post v. State*, 715 P.2d 1105 (Okla. Crim. App.), *cert. denied*, 479 U.S. 890 (1986). Viewed as a decision redefining sodomy as an acceptable method of persecuting gay people, rather than upholding sodomy statutes as applied to gay people, *Bowers* is judicial activism in the extreme, rather than the banal recitation of millennia of moral teaching that it purports to be.

46. See, e.g., *Jones v. Daly*, 176 Cal. Rptr. 130 (Ct. App. 1981); *Seward v. Mentrup*, 622

same-sex cohabitation contracts, they often require that the contract look more like a business arrangement than a heterosexual marriage contract.⁴⁷

2. Abortion

The history of American abortion regulation suggests a progression from decriminalization to criminalization to public rights, and possibly back toward contractual purgatory. The common law did not interfere with a woman who chose to terminate her pregnancy before viability.⁴⁸ Abortion was thus essentially decriminalized through the first half of the nineteenth century.⁴⁹ There were no criminal statutes prohibiting the procedure, and professional abortionists widely advertised their services.⁵⁰ Early abortion laws restricted access to abortion after quickening, but were rarely enforced.⁵¹ Later abortion laws criminalized all abortion, penalizing both the woman and the person performing the abortion.⁵² Thus, abortion moved from being decriminalized⁵³ to being a crime between the colonial era and the late nineteenth century.

Then, in 1973, the U.S. Supreme Court recognized a public right to pre-viability abortion.⁵⁴ *Roe v. Wade*, understood within my model, shows the

N.E.2d 756 (Ohio Ct. App. 1993).

47. See e.g., *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992) (enforcing contractual agreement between former lovers and excluding all evidence of the relationship under the parol evidence rule).

48. *Roe v. Wade*, 410 U.S. 113, 132-36 & n.21 (1973); Brief of 250 American Historians as Amici Curiae in Support of Planned Parenthood of Southeastern Pennsylvania in *Planned Parenthood of Southeastern Pennsylvania v. Robert Casey*, reprinted in part in MARY BECKER, CYNTHIA GRANT BOWMAN & MORRISON TORREY, *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 364 (1993) [hereinafter *Historians' Brief*]. The *Historians' Brief* was written by Jane Larson, Clyde Spillinger, and Sylvia Law (complete copy of the Brief on file with the author).

Anti-choice briefs in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), argued that common law, did, in fact, criminalize abortion. BARTEE & BARTEE, *supra* note 43, at 28.

49. "In the early nineteenth century, neither doctors, women, nor judges necessarily condemned [abortion] as long as [it was] performed within the early months of pregnancy Laws enacted between 1820 and 1840 to regulate abortion retained the quickening doctrine and attempted to protect women from unwanted abortion, rather than to prosecute them." D'EMILIO & FREEDMAN, *supra* note 43, at 65-66.

50. *Historians' Brief*, *supra* note 48, at 10. In 1871, New York had a population of less than one million people, and supported 200 full-time abortionists (a figure which does not include doctors who occasionally performed abortions). Moreover, midwives had been providing women herbal abortifacients in America for at least a century, and there were no significant efforts to restrict abortion until the 1860s. But then the newly formed American Medical Association sought to gain control over abortion by urging legislators to criminalize it. *Id.* at 10-11.

51. *Id.* at 12-13.

52. See, e.g., *Roe v. Wade*, 410 U.S. 113, 118 (1973) (citing numerous anti-abortion statutes, including ARIZ. REV. STAT. ANN. § 13-211 (1956); CONN. GEN. STAT. §§ 53-29, 53-30 (1968); IDAHO CODE § 18-601 (1948); IND. CODE § 35-1-58-1 (1971); TEX. PENAL CODE ANN. §§ 1191-1196 (Vernon 1948)); see also D'EMILIO & FREEDMAN, *supra* note 43, at 66 ("Between 1860 and 1890 . . . 40 states and territories enacted anti-abortion statutes, many of which rejected the quickening doctrine, placed limitations on advertisements, and helped transfer legal authority for abortion from women to doctors.").

53. In the alternative, abortion was perhaps contractual if the professional abortionists and midwives could enforce claims for payment for their services.

54. *Roe v. Wade*, 410 U.S. 113 (1973). The confusing relationship between public and private spheres is illustrated by the fact that the Court used a doctrinal constitutional penumbra within the Bill of Rights to recognize a right to privacy. This right protected the decision whether to carry a child to term from state intervention. I call this privacy right a public right because it is based on the very public document of the Constitution and controls state action by requiring the

rapid transition of abortion from a crime to a public right. In the two decades since *Roe*, however, the Court has repeatedly qualified the extent to which abortion is a public right.

One can read the numerous encroachments on the right, such as waiting periods, parental consent, mandatory education on fetal development, and late-term abortion bans as state supplied terms to abortion contracts which arguably shift abortion away from a public right and back toward public condemnation.⁵⁵ Perhaps pre-viability abortion's move back towards public condemnation is most apparent in the Court's repeated holdings that Congress can constitutionally fund childbirth but need not fund abortion.⁵⁶ Funding limitations mean that a woman has a public right to a pre-viability abortion only if she can pay for it.⁵⁷ Adding funding restrictions to other state restrictions on abortion, such as requiring parental notification or requiring that a patient watch a fetal development video, further illustrates the contractualization of abortion through imposition of conditions on the right.⁵⁸ In other words, a woman's public right to an abortion is conditional on her ability to contract to have one performed. These limitations on the public right shifts abortion back toward contract.

But even these conditions do not make abortion fully contractual. It would be unlikely for a court to order specific performance of a premarital contract clause mandating abortion in the event that the couple conceives.⁵⁹ Even so, pre-viability abortion is currently somewhere between a public right and a crime in my model. As such, it hovers around contractual purgatory. Thus, the trajectory of abortion regulation goes from being decriminalized, to criminalization, to a public right, and in some cases, backtracks toward contract.⁶⁰

state to refrain from controlling reproductive decisions in the first trimester.

55. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding informed consent requirements, 24-hour waiting period, parental consent provision, and reporting and record-keeping requirements, but striking down spousal notification); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (upholding parental notification and waiting periods for minors); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (upholding restriction of public employees and facilities for abortions); *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) (upholding second physician requirement, second trimester hospitalization requirement, pathology report, and parental notification); *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding parental notification for unemancipated minors seeking abortions); *Williams v. Zbaraz*, 448 U.S. 358 (1980) (upholding funding restrictions on abortions); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding ban on public funding of abortions); *Maier v. Roe*, 432 U.S. 464 (1977) (upholding funding restrictions on abortions).

56. *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding the Department of Health and Human Services' regulation prohibiting Title X projects' use of federal funds for abortion counseling, referral, or advocacy of abortion as a method of family planning); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding state's refusal to fund medically necessary abortions while funding childbirth); *Maier v. Roe*, 432 U.S. 464 (1977) (upholding state's refusal to fund non-therapeutic abortions while funding childbirth).

57. In contractual terms, she must give consideration. I thank Nancy Ehrenreich for pointing out this distinction to me.

58. Many of these restrictions may be seen as arguably contractual in that they allow the state to impose limiting conditions such as parental notification on an abortion contract. I thank Julie Nice for this insight.

59. I thank Clayton Gillette for this example.

60. For a discussion of Hohfeld's view of rights and privileges, see *supra* note 16. In Hohfeldian terms, contractualized abortion may be viewed as a privilege (i.e., absence of duty to

3. Miscegenation

Like abortion, miscegenation has progressed from decriminalization to criminalization, with a rapid move to a public right in the late twentieth century. But the uncontested nature of the conduct as victimless has kept it out of contractual purgatory. Neither the common law nor English statutes banned interracial marriage. By the end of the nineteenth century, however, as many as thirty-eight states had anti-miscegenation statutes.⁶¹ Some states also punished interracial adultery and fornication more severely than adultery or fornication between members of the same race.⁶²

Just a few years before recognizing the public right to abortion in *Roe v. Wade*, the U.S. Supreme Court recognized the public right to interracial marriage in *Loving v. Virginia*.⁶³ *Loving* provides perhaps the most explicit public right language of all the sexual regulation cases. Chief Justice Warren wrote for the Court:

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. To deny this fundamental freedom on so insupportable a basis as . . . racial classification[.] . . is surely to deprive all the State's citizens of liberty without due process of law. . . . Under our Constitution, the freedom to marry or not marry a person of another race resides with the individual and cannot be infringed by the State.⁶⁴

The clarity of the miscegenation issue, coupled with the Court's strong language, may explain why *Loving* is the "definitive precedent for the equal protection standard."⁶⁵ While marriage is largely contractual, in that the parties must have the capacity to form and must explicitly agree to the marriage contract, it remains largely status-based. The status element of marriage is perhaps best illustrated by the statutory and common law limitations on the parties to a marriage contract: there must be one man and one woman, they must not be related by birth or affinity, and neither one can be married already.⁶⁶ These status-oriented characteristics of marriage, coupled with the

refrain), but not a right (an affirmative claim whereby a woman can make the government pay for exercising her reproductive decisions).

61. DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 56 (1980); see also D'EMILIO & FREEDMAN, *supra* note 43, at 14 (noting that "interracial marriage . . . seems to have been tolerated during the early years of settlement" in the Chesapeake area in the early seventeenth century).

62. See e.g., *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding Alabama's more severe criminal punishments for interracial fornication and adultery than intraracial fornication and adultery on the grounds that the differential punishment was applied to both races), cited in BELL, *supra* note 61, at 57. While colonial penalties were initially neutral as to race, Virginia in 1662 doubled fines for interracial sexual offenses such as fornication, adultery, and bastardy and banned interracial marriage in 1691. D'EMILIO & FREEDMAN, *supra* note 43, at 34-35.

63. 388 U.S. 1 (1967). A few years earlier, the Court had struck down Florida's more severe penalties for interracial cohabitation and adultery than for intraracial commission of these offenses. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

64. *Loving*, 388 U.S. at 12.

65. BELL, *supra* note 61, at 65.

66. See, e.g., UNIF. MARRIAGE AND DIVORCE ACT § 207(a), 9A U.L.A. 168 (1987),

language of *Loving v. Virginia*, establish the current place of interracial coupling on my model as a public right.⁶⁷

4. Fornication

Like sodomy, fornication has progressed from criminalization to regulation by contract. It may, however, have progressed more towards being a public right than sodomy. Cohabitation has long been criminalized as fornication, but was criminalized at common law only if it became a nuisance.⁶⁸ Like sodomy, the prohibition stems from interpretations of the Bible, and was prosecuted through ecclesiastical courts before the state assumed the responsibility. Although England abandoned secular punishment for adultery and fornication in the Restoration,⁶⁹ the Puritans reinstated the practice.⁷⁰ The trend is again reversing, and many jurisdictions recently have relaxed or repealed criminal punishments for adultery and fornication.⁷¹ Like abortion and sodomy laws, criminal prohibitions of adultery and fornication were rarely enforced.⁷² When they were enforced, it was often for satellite purposes, such as ha-

prohibiting:

(1) a marriage entered into prior to the dissolution of an earlier marriage of one of the parties; (2) a marriage between an ancestor and a descendant, or between a brother and sister, whether the relationship is by the half of whole blood, or by adoption; (3) a marriage between an uncle and a niece or between an aunt and a nephew, whether the relationship is by half or whole blood.

Typical of the cases denying same-sex couples the right to marry is *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974). Hawaii mandates that the state recognize same-sex marriage, but the case is currently being appealed. *Baehr v. Miike*, No. 91-1394, 1996 Haw. Ct. App. LEXIS 138 (Dec. 3, 1996). The ruling is stayed pending appeal. Susan Essoyan & Bettina Boxall, *Gay Marriages on Hold While Ruling Is Appealed*, L.A. TIMES, Dec. 5, 1996, at A3.

67. I use public right in the sense of something the government will not interfere with. For a discussion of how the marital rape exemption is a public right to rape since it prohibits the state from interfering with the husband's decisions regarding marital sex, see *infra* part III.B.

68. MODEL PENAL CODE § 213.6 note on adultery and fornication at 430, 431; Kathryn J. Humphrey, Note, *The Right of Privacy: A Renewed Challenge to Laws Regulating Private Consensual Behavior*, 25 WAYNE L. REV. 1067, 1069 (1979) ("Mere fornication was not indictable at common law; it was the public nature of the act, constituting a nuisance, which brought it within the common law's purview.").

69. MODEL PENAL CODE § 213.6 note on adultery and fornication (citing Geoffrey May, *Experiments in the Legal Control of Sex Expression*, 39 YALE L.J. 219, 240-44 (1929)).

70. POSNER, *supra* note 33, at 60-61. Many colonies adopted the death penalty for adultery, but it was rarely enforced. D'EMILIO & FREEDMAN, *supra* note 43, at 28. In the seventeenth century, colonists vigorously enforced fornication laws. FRIEDMAN, *supra* note 32, at 35.

71. MODEL PENAL CODE § 213.6 note on adultery and fornication at 430. A 1954 survey indicated that 18 jurisdictions criminalized a single sexual act between unmarried persons, four only by a fine. In most states only a continuous or "open and notorious" nonmarital relationship was criminalized. Eleven states did not make fornication a crime and only 30 states criminalized adultery, four only by a fine. *Id.* at 430-31. For further discussion of the trend away from criminal law imposing "a uniform standard of personal morals concerning intimate behavior," see William V. Vetter, *I.R.C. § 152(b)(5) and Victorian Morality in Contemporary Life*, 13 YALE L. & POL'Y REV. 115, 125 (1995) (listing state statutes criminalizing cohabitation, adultery, and fornication, as well as states with non-discrimination laws). According to FRIEDMAN, *supra* note 32, at 128, "In modern California, fornication is not a crime at all; it has been relabeled and repackaged, and is, if anything, an esteemed, accepted way of life." Friedman's description reflects the progression of fornication in my model from crime toward public right.

72. MODEL PENAL CODE § 213.6 note on adultery and fornication at 435. The 1880 census reveals that of 58,000 prisoners in the United States, only 161 were jailed for adultery, and 85 for fornication. FRIEDMAN, *supra* note 32, at 140.

rassment of interracial couples.⁷³ Because of abusive selective enforcement, and reasoning that "private immorality should be beyond the reach of the law," the Model Penal Code decriminalized fornication and adultery.⁷⁴ Many states have retained their fornication and adultery statutes.⁷⁵ Retention of these rarely enforced statutes, however, is far outweighed by judicial enforcement of implied contract claims between cohabitants, beginning with *Marvin v. Marvin* in 1976.⁷⁶

Fornication, then, has progressed from criminalization to decriminalization, and continues on to contract through enforcement of cohabitation contracts. While some states, such as New Jersey, are extending some traditional marital benefits to cohabitants, such as claims of emotional distress based on seeing a loved one injured, the general rule remains that special rights come only with marriage and cohabitants are not entitled to enjoy those rights.⁷⁷

5. Cross-Dressing

Cross-dressing was initially criminalized and has progressed toward being decriminalized. Its criminalization in the United States is a modern form of English sumptuary laws intended to regulate what clothing a person could wear based on her social class.⁷⁸ The prohibition in its more recent incarnation has been used to enforce gender norms. A number of municipal ordinances forbid cross-dressing.⁷⁹ Like other sexual regulations, regulation of cross-dressing has long been used to harass gay people for failing to dress in gender-appropriate clothing.⁸⁰ But the ordinances have been held unconstitutional

73. MODEL PENAL CODE § 213.6 note on adultery and fornication. Fornication laws in Minnesota and Illinois have also been used as justifications for refusing to enforce an ordinance requiring non-discrimination on the basis of marital status against a landlord who refused to rent to heterosexual cohabitators, *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990), refusing to enforce an implied contract between heterosexual cohabitators, *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979), and for taking custody of children away from a parent in a heterosexual cohabiting relationship, *Jarrett v. Jarrett*, 400 N.E.2d 421 (Ill. 1979); see also POSNER & SILBAUGH, *supra* note 15, at 98-99 (describing recent cases citing fornication statutes, including civil defamation and medical malpractice actions).

74. MODEL PENAL CODE § 213.6 note on adultery and fornication at 436, 439; see also Craig T. Pearson, Comment, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. TOL. L. REV. 811, 846 (1984) ("It may be shown that the law is discriminatory as applied, since sodomy statutes are most often enforced against homosexuals."); Note, *The Right of Privacy: A Renewed Challenge to Laws Regulating Private Consensual Behavior*, 25 WAYNE L. REV. 1067, 1070 (1979) (noting that sodomy laws are selectively enforced against gay people); see also Amicus Curiae Brief Filed by Lambda Legal Defense and Education Fund, *Louisiana v. Baxley*, 633 So. 2d 142 (La. 1994) (state admits selectively enforcing sodomy statute against gay people), published in 21 FORDHAM URB. L.J. 1012, 1046 (1995) (describing selective enforcement of facially neutral crime against nature statute).

75. Maureen E. Markey, *The Price of Landlord's "Free" Exercise of Religion: Tenant's Right to Discrimination—Free Housing and Privacy*, 22 FORDHAM URB. L.J. 699, 752 (1995) (noting that fornication is still a crime in approximately one-fourth of the states); see also Vetter, *supra* note 71, at 115 nn.2-7 (listing fornication, adultery, cohabitation, and sodomy statutes).

76. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

77. For a discussion of the limited rights cohabitants enjoy in relation to one another, see *infra* notes 160-61 and accompanying text.

78. MARJORIE GARBER, *VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY* 17 (1992).

79. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1564 & n.85 (1993).

80. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggrega-*

as applied to transsexuals, individuals in transition from one sex to another.⁸¹ However, transsexuals do not enjoy full public rights, as they remain unprotected by Title VII.⁸²

Cross-dressing seems less likely than homosexuality to play itself out in a contractual arrangement. Transgendered individuals, however, are as likely to be employed as gay people, and thus are candidates for protection in contractual purgatory where employment contracts can protect them from discrimination on the basis of failure to adhere to gender norms. As Mary Anne Case, Katherine Franke, and Francisco Valdes have argued, gender discrimination should be, but often is not, actionable under employment discrimination law.⁸³ One would expect contractual protection to fill this gap in statutory and constitutional employment discrimination law. But, despite the mini-explosion of queer theory that uses cross-dressing as a theoretical tool to deconstruct gender,⁸⁴ transgendered people are rarely protected by non-discrimination clauses.

6. Summary: The Trend Seems Progressive

The brief historical analysis above suggests that the pattern of development for sodomy, abortion, miscegenation, fornication, and cross-dressing from public condemnation toward public rights (including the move from criminalization to contract) is progressive. The core of its progressiveness is that victimless crimes become decriminalized, contractualized, or even public rights. This is progressive because it reserves the strong arm of the state to punish crimes with identifiable victims and leaves personal moral judgments to

tion of Sex from Gender, 144 U. PA. L. REV. 1, 63 n.257 (1995) (describing how butch lesbians were arrested in the 1950s if they were not wearing at least three pieces of female clothing) (citing LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS* 185 (1991); ELIZABETH L. KENNEDY & MADELINE D. DAVIS, *BOOTS OF LEATHER, SLIPPERS OF GOLD* 180 (1993); Cain, *supra* note 79, at 1564 & n.85).

81. *Doe v. McConn*, 489 F. Supp. 76 (S.D. Tex. 1980) (cross-dressing ordinance unconstitutional as applied to individuals undergoing therapy for sex-reassignment surgery); *City of Chicago v. Wilson*, 389 N.E.2d 522, 525 (Ill. 1978) (convictions reversed because "[t]here is no evidence . . . that cross-dressing, when done as part of a preoperative therapy program or otherwise, is, in and of itself, harmful to society"); see Franke, *supra* note 80, at 66-69 (discussing *City of Columbus v. Zanders*, No. 74AP-88 (Ohio Ct. App. Oct. 22, 1974) (LEXIS, States library, Ohio file); *City of Cincinnati v. Adams*, 330 N.E.2d 463 (Ohio Mun. Ct. 1974); *City of Columbus v. Rogers*, 324 N.E.2d 563 (Ohio 1975) (illustrating legal investment in maintaining gender differences through sumptuary laws)).

82. *Desantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (holding that discharge of male nursery school teacher for wearing earring not violative of Title VII); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (holding that discharge does not constitute Title VII sex discrimination when pilot changed from being a man to being a woman). Nor is gender dysphoria protected as a disability under Washington law. *Doe v. The Boeing Co.*, 846 P.2d 531 (Wash. 1993) (employee's gender dysphoria not a "handicap" under Washington law).

83. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law of Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (proposing that gender and sex be disaggregated to protect against gender discrimination); Franke, *supra* note 80; Valdes, *supra* note 2.

84. See, e.g., JUDITH BUTLER, *GENDER TROUBLE* (1990) [hereinafter BUTLER, *TROUBLE*]; JUDITH BUTLER, *BODIES THAT MATTER* (1993) [hereinafter BUTLER, *BODIES*]; Case, *supra* note 83; Franke, *supra* note 80; Valdes, *supra* note 2; Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973 (1995).

the individuals involved. But other sexual regulations, such as marital rape and child sexual abuse, move in the opposite direction: the progressive trajectory is from public right to public condemnation (with contract again being a progressive step).

B. *Damnation from Public Rights to Criminalization*

The victimless crimes (sodomy, abortion, miscegenation, fornication, and cross-dressing) tend to move from right to left in my model—from criminalization toward public rights. But other sexual regulations, such as marital rape and child sexual abuse, move in the opposite direction—from public rights to criminalization. One way to see moves in both directions as progressive is to recognize that criminalization of victimless crimes can be justified only by moral arguments, and personal autonomy trumps contested moral grounds in a progressive scheme.⁸⁵ Victims of marital rape and child sexual abuse, however, were virtually invisible legally until the 1970s and 1980s, so the progressive move for this conduct is from a perpetrator's public right to abuse toward criminalization.

1. Marital Rape

Rape was traditionally defined as non-consensual sexual intercourse, by force, with a woman other than the defendant's wife.⁸⁶ The marital rape exemption thus conferred on married men the public right to rape⁸⁷ their wives with impunity until the exemption was widely repealed in response to feminist activism. The absolute version of the marital rape exemption no

85. In the 1950s the Wolfenden Report, prepared for the British Parliament as a result of pressure by the Church of England's Moral Welfare Council, reached a similar conclusion. The Report recommended that British law retain criminal punishment for public gay sex, and gay sex with minors, but repeal prohibitions on private consensual same-sex sexual activity between adults. The Report reasoned, "We do not think that it is proper for the law to concern itself with what a man does in private unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as the guardian of that public good." COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT 42-43 (1963). The Report further reasoned that moral "revulsion" for homosexuality as "unnatural, sinful or disgusting" was insufficient justification for criminalizing consensual adult gay sex: "Many people feel this revulsion But moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the gambit of the criminal law private sexual behavior of this kind." *Id.* at 44.

86. ESTRICH, *supra* note 15, at 8. Another way to view the movement of marital rape from public right to crime is through the doctrine of implied consent. Marital rape was not criminalized until recently because the wife was deemed to have impliedly consented to all sexual relations with her husband when they exchanged vows. *See, e.g.,* Louisiana v. Haines, 51 La. 731, 732 (1899) ("[T]he husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract."). Feminists, however, have successfully argued that the marriage vow is not a blanket consent. This changed perception of marriage vows enabled a wife to claim her husband raped her because on that particular instance she refused sexual relations. So the progressive move in marital rape law is to reinstate lack of consent as an element of the offense, rather than imply consent from the victim's status as wife.

87. For a discussion of the marital rape exemption under Hohfeld, *see supra* note 16. I believe the exemption is a privilege for the husband and no-right for the wife, while removing the exemption creates a right on the part of the wife and a duty on the part of the husband.

longer exists,⁸⁸ but many of the reformed statutes retain lower punishments for marital rape. Moreover, some states have added cohabitants and former spouses to the group of men benefitting from the remains of the marital exemption.⁸⁹ Given the difficulty of proving lack of consent when the defendant is the victim's spouse,⁹⁰ the current state of marital rape law seems to fall somewhere between public condemnation and contract.⁹¹ In sum, marital rape has progressed from being a public right to somewhere between contract and public condemnation.

2. Child Sexual Abuse

Sexual intercourse with children has long been criminal, but only expansion of the offense to include other sexual contact and evidentiary reforms have made prosecutions feasible in many cases.⁹² At common law, child sex-

88. By 1990, no state had an absolute marital rape exemption, but 35 states had special requirements in marital rape prosecutions, such as aggravated force or non-cohabitation. By 1991, 25 states had limitations on offenders, and by 1994, 24 states abolished any form of marital rape exemption. However, at least 13 states continue to give preferential treatment to spousal defendants. Lisa R. Eskow, Note, *The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677, 682 (1996); see also BECKER ET AL., *supra* note 48, at 241 (citing Helaine Olen, *The Law: Most States Now Ban Marital Rape*, L.A. TIMES, Oct. 22, 1991, at 7) (describing how by 1991 every state except North Carolina and Oklahoma had repealed their marital rape exemptions).

89. BECKER ET AL., *supra* note 48, at 241.

90. *Id.* at 242. Professors Becker, Bowman, and Torrey describe problems in obtaining a conviction in one of the first marital rape cases under South Carolina law. A husband [d]ragged [his wife] by the throat into a bedroom, tied her hands and legs with rope and a belt, put duct tape on her eyes and mouth, and dressed her in stockings and a garter belt. He then had intercourse with her, sexually assaulted her with foreign objects, and threatened her with a knife. . . . The jury saw this transpire because the husband had made a 30 minute video tape of the event

Id. at 241-42.

The jury acquitted, apparently believing the husband's defense that the sex was consensual. The judge permitted the wife's former husband to testify that she allowed him to tie her up and enjoyed violent sex, but excluded testimony from the husband's former wife establishing that he assaulted and raped her, too. Additional facts which the jury apparently disregarded included the fact that the couple had agreed to separate the night before and the husband "did not untie his wife when he left the house so she had to struggle to get loose before she ran naked to a neighbor's house for help." *Id.*

91. If marital rape were to explicitly stop at contract, it might take the form of evidentiary issues related to contract. Perhaps a husband would need evidence of consent in written form, akin to the statute of frauds.

92. See Karla-Dee Clark, Note, *Innocent Victims and Blind Justice: Children's Rights to Be Free from Child Sexual Abuse*, 7 N.Y.L. SCH. J. HUM. RTS. 214, 223 (1990). The prior lack of emphasis on child sexual abuse stemmed from the historical view that children were considered proprietary interests. JEFFREY J. HAUGAARD & N. DICKON REPPUCCI, *THE SEXUAL ABUSE OF CHILDREN* 1 (1988). According to the Roman law concept of *patria potestas*, the father had absolute power over his children. *Id.* Though the Judeo-Christian tradition did not condone child sexual abuse, it endorsed the idea that parents had possessory rights over their children. MARY DEYOUNG, *THE SEXUAL VICTIMIZATION OF CHILDREN* 103 (1982). For example, according to Talmudic law, sexual intercourse with a girl over three years old was not a crime as long as the child's father consented. *Id.* The American colonial tradition inherited the notion that the father was legally entitled to control the family. Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 300 (1972). This principle was weakly tempered by the Roman law concept of *parens patriae*, which allowed the State to assert the rights of children who were incapable of asserting their own rights. HAUGAARD & REPPUCCI, *supra*, at 2. However, the State's right to intervene in the family had to

ual abuse by strangers fell into three offenses: seduction, statutory rape, and sodomy.⁹³ Until the late nineteenth century, statutory rape law only protected girls under ten years of age.⁹⁴ But many instances of child sexual abuse went unreported and unprosecuted both because of limited notions of sexual abuse and the mistaken belief that child sexual abuse was an exclusively extra-familial occurrence.⁹⁵

Incest was not criminalized at common law, leaving enforcement of the social prohibition to ecclesiastical courts.⁹⁶ Some colonial statutes outlawed incest,⁹⁷ but many states did not pass anti-incest statutes until the mid-nineteenth century.⁹⁸ Even these statutes, however, were not calculated to protect victims of incest. Instead, their main purposes were to prevent inbreeding and uphold the legitimate exercise of patriarchal authority within the family.⁹⁹ To

be balanced against family sanctity and the right of privacy. *Id.*

93. The Model Penal Code commentary on sexual assault points out that "[t]he common law made no special provision for indecent sexual contact but covered such conduct as a form of assault and battery." MODEL PENAL CODE § 213.4 commentary at 398; JOEL P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW §§ 1159-1164, at 1088 (describing carnal knowledge of a consenting girl between 10 and 12 as a common law misdemeanor and of a girl under 10 "probably" a felony), and §§ 1172-1174 (describing how both a boy and a man could be indicted for sodomy under common law) (4th ed. 1868).

94. Jane E. Larson, *Even a Worm Will Turn at Last: Rape Reform in Late Nineteenth Century America*, 8 YALE J.L. & HUMAN —, 3. (forthcoming 1996-97) (citing 75 C.J.S. Rape § 13 (1952)) (draft on file with the author). Contemporary rape statutes remain underenforced. Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 N.W. J.L. & CRIMINOLOGY 15 (1994).

95. Clark, *supra* note 92, at 222-23. But some colonies criminalized incest, an offense that included consensual sex and marriage between relatives; the colony of New Haven made incest a capital offense, but the Massachusetts Bay Colony did not. ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 24-25 (1987).

96. Peter Bardaglio, *An Outrage upon Nature: Incest and the Law in the Nineteenth-Century South*, in IN JOY AND SORROW: WOMEN FAMILY AND MARRIAGE IN THE VICTORIAN SOUTH, 1830-1900, at 32, 34 (Carol Bleser ed., 1991) (stating that "common law . . . traditionally did not recognize incest as a crime and left its regulation to church authorities" and referring to the "new anti-incest statutes" in the nineteenth century South). Ecclesiastical courts could annul consanguineous marriages, excommunicate the parties, and declare offspring illegitimate. *Id.* at 35.

97. D'EMILIO & FREEDMAN, *supra* note 43, at 18; PLECK, *supra* note 95, at 24-25 ("The Bible called for capital punishment for those who committed incest, but the English law did not. The Colony of New Haven followed the Bible and made incest a capital offense; the Colony of Massachusetts Bay copied English law.").

98. Bardaglio, *supra* note 96, at 39 ("By the mid-nineteenth century, most Southern states had laws on the books making incest either a felony or high misdemeanor."); see also Laura F. Edwards, *'If I Had Not Been As Strong As I Am': African-American and Poor White Women's Legal Claims in Post-Emancipation North Carolina* 8 (presented at Annual Meeting of the American Society for Legal History, Richmond, Virginia, Oct. 1996) (describing how North Carolina did not criminalize incest until 1879) (copy on file with the author).

99. Bardaglio, *supra* note 96, at 39 ("The main objective in the anti-incest legislation was to prohibit matrimony and inbreeding between near kin, not to protect women or children from sexual abuse."). Bardaglio notes:

In general, the impact of incestuous assault on women and children was only a secondary consideration, if that, in antebellum decisions. Sexual abuse appeared to disturb Southern judges primarily because it undermined the family as an effective institution of social control. More specifically, sexual abuse exposed the coercion that underlay the exercise of patriarchal authority and, hence, threatened the legitimacy of this authority.

Id. at 43.

serve these purposes, early incest laws only punished intercourse.¹⁰⁰ Southern judges reinforced the narrowly drafted statutes by strictly construing them and punishing only those defendants who used physical force to assault their relatives.¹⁰¹ A consenting victim was treated as an accomplice, which Peter Bardaglio has described as "a legal fiction that allowed judges to express their disapproval of incest while restricting convictions for the crime mainly to those indisputable instances of assault which exposed the coercion inherent in the exercise of patriarchal authority and which thus called into question its legitimacy."¹⁰² Thus, men generally had a public right to considerable sexual access to children in their families until the late nineteenth century, and even then protecting the child victims was not the motivation behind criminal prohibitions of incest.

By the early nineteenth century, state statutes began in earnest to criminalize child sexual abuse, but prosecution remained difficult due to evidentiary problems related to the victim's testimony and statutes of limitations.¹⁰³ Consequently, reform legislation beginning in the early 1980s focused on altering evidentiary rules to facilitate child sexual abuse prosecutions.¹⁰⁴ While child sexual abuse now seems to fall squarely in the public

100. *Id.* at 39.

101. *Id.* at 49 (explaining that Southern judges often required physical force to convict but Northern judges were more willing to recognize psychological coercion).

102. *Id.* at 51 (concluding that "[d]espite the judicial rhetoric of outrage, then, the reality was that during the nineteenth century, the sexual access of men to women and children in their family remained largely unchallenged").

103. Timothy J. McCarvill & James M. Steinberg, Note, *Have We Gone Far Enough? Children Who Are Sexually Abused and the Judicial and Legislative Means of Prosecuting the Abuser*, 8 ST. JOHN'S J. LEGAL COMMENT. 339, 339 (1992). Often a child will not or cannot testify against the alleged perpetrator. See Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 806-07 (1985) [hereinafter *Legislative Innovations*] (describing how children are often incompetent to testify, unable to recall specific events, and may be frightened by the courtroom experience).

104. *Legislative Innovations*, *supra* note 103, at 808-09, 811, 813; see also Josephine Bulkley, Introduction: *Background and Overview of Child Sexual Abuse*, 40 U. MIAMI L. REV. 5, 7 (1985) (describing how, in 1982, only Kansas and Washington had statutory hearsay exceptions dealing with child-victim testimony and how in 1981, only four states' statutes allowed videotaped testimony in child sexual abuse cases). Other legislative reform allowed expert testimony, physical separation of the victim and the accused in the courtroom, and extension of statutes of limitations for civil and criminal prosecution of child sexual abuse. See generally AMERICAN BAR ASSOCIATION, PAPERS FROM A NATIONAL POLICY CONFERENCE OF LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES (1985) (discussing emerging legal issues, trends, and recent reforms in the area of child sexual abuse). The current focus on child sexual abuse has expanded to the international arena, addressing such issues as the sex tourism trade involving children. See, e.g., Patricia D. Levan, Note & Comment, *Curtailing Thailand's Child Prostitution Through an International Conscience*, 9 AM. U. J. INT'L L. & POL'Y 869 (1994). In 1974, Congress passed the Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 (1988), which funded programs to prevent and treat child abuse. Terese L. Fitzpatrick, Note, *Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Sexual Abuse*, 12 U. BRIDGEPORT L. REV. 175, 178-79 (1991). To be eligible for funding, the statute required states to pass mandatory reporting laws dealing with child abuse. JESSE A. GOLDNER, CHILD ABUSE NEGLECT AND THE LAW 39 n.3 (1979). In 1976, the Child Abuse and Neglect Project of the States' Education Commission proposed model legislation conforming to the Child Abuse Prevention and Treatment Act. However, the model legislation left to state courts and legislatures the task of defining sexual abuse. *Id.* at 47. In 1986, Congress criminalized sexual abuse of children by enacting the Sexual Abuse Act, 18 U.S.C. § 2241(c) (1986).

condemnation category, its regulation is not uncontroversial. Accused perpetrators have successfully sued therapists who have testified on behalf of victims, claiming that the therapists planted abuse memories in the accusers' minds.¹⁰⁵ And while commentators argue persuasively that such liability is contrary to the interests of all but the perpetrator,¹⁰⁶ other commentators question whether the evidentiary changes improperly preference the victim's interest over the accused's constitutional rights.¹⁰⁷

In sum, child sexual abuse follows a similar trajectory as that of marital rape. While sexual intercourse with children has been criminalized since the colonial era, the criminalization left many children unprotected from assault, so that only recent understandings of child sexual abuse and amendments to evidentiary rules have facilitated serious prosecutions.¹⁰⁸ This brief history suggests that, like marital rape, child sexual abuse has gone from left to right in the diagram, directly from a public right to public condemnation. The reason this trajectory is progressive is that, as with marital rape, children who were previously invisible as victims of sexual abuse are now legally recognized as victims.

3. Summary: The Trend Also Seems Progressive

The trend from public rights toward criminalization seems progressive in the cases of marital rape and child sexual abuse. Fornication, for example, seems to harm only society generally (if anyone), and therefore is a victimless crime. Thus it has moved from right to left on the diagram, as legal mechanisms have begun to favor individual autonomy over collective morality. But child sexual abuse has moved from left to right in the diagram, because recent expansion of the definition of sexual abuse and evidentiary reforms made the (female and child) victims legally visible.

Political progressives see both directions as appropriate, because both increase protection for persons who need it: sexual minorities and children. Heterosexual women and children need protection from abuse by family members, while sexual minorities need protection from state imposition of a majoritarian morality. Political conservatives, however, would likely prefer a movement in the opposite direction, toward public regulation of morality and state enforcement of paternal rights in the traditional family.¹⁰⁹ While my

105. Cynthia G. Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse and Survivor Therapy*, 109 HARV. L. REV. 549 (1996).

106. *Id.* at 551.

107. See, e.g., Danielle Goblrirsch, *Balancing the Rights of Child Sexual Abuse Victims as Witnesses and the Constitutional Rights of Defendants: Has the Iowa Legislature Gone Too Far to Protect the Child Victim?*, 14 HAMLINE J. PUB. L. & POL'Y 227 (1993).

108. Social recognition that children are sexually abused in significant numbers had to predate the evidentiary accommodation. In 1953 Kinsey found that one out of four girls and one out of ten boys were sexually assaulted before the age of eighteen. See CHRISTOPHER BAGLEY & KATHLEEN KING, *CHILD SEXUAL ABUSE* 32 (1990). Both the Civil Rights and women's movements of the 1950s and 1960s contributed to the social and political climate that led to prosecutions of child sexual abuse. *Id.* at 33. The deliberate speed with which American culture recognized child abuse is reflected by the fact that the ASPCA was formed shortly before the American Society for the Prevention of Cruelty to Children. Thomas, *supra* note 92, at 307-08 (describing how the ASPCA formed eight years before the ASPCC).

109. Colorado recently considered the Parental Rights Amendment, a ballot initiative which

model is descriptive, it also reflects a normative judgement that personal autonomy should trump majoritarian morality where there is no identifiable victim.

IV. QUEER NATION: THE MODEL AS APPLIED TO GAY PEOPLE

Having set out the model as it applies to various sexual regulations, I now apply it to one area in some detail. The way the law regulates gay people nicely illustrates how one group can be at multiple places in my model, but generally closer to contractual purgatory than the public extremes (condemnation and rights).

A. *Crimes of Passion: Public Condemnation of Homosexuality*

Almost half of the states criminalize sodomy. And as a result of *Bowers v. Hardwick*, there is nothing unconstitutional about criminalizing the conduct of gay people, while refusing to criminalize the same conduct when performed by heterosexual sex partners.¹¹⁰ In the military, gay service members are subject to court martial and imprisonment for identifying themselves as gay.¹¹¹ Moreover, facially neutral criminal statutes against fornication, vagrancy, and public indecency are often enforced against gay people.¹¹² In addition, city ordinances that criminalize cross-dressing have long been applied to harass and prosecute gay people.¹¹³

While the legitimacy of criminalizing homosexuality is hotly contested,¹¹⁴ and criminal sodomy statutes are rarely enforced to punish consensual

would have effectively exchanged at least parts of children's public right to be free from child abuse for parents' public rights to discipline their children as they saw fit. The proposed Amendment provided: "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of . . . parents to direct and control the upbringing, education, values, and discipline of their children." Michelle D. Johnston, *Hidden Agenda in Amend. 17?*, DENV. POST, Nov. 3, 1996, at A1. The constitutional amendment, however, did not pass. Michelle D. Johnston, *Of the People Faces Hearing on Election Law*, DENV. POST, Nov. 14, 1996, at B1 (noting that proposed amendment was defeated, 58% to 42%).

110. *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986).

111. RUTHANN ROBSON, LESBIAN (OUT)LAW 93 (1992) (describing an investigation of women Marines suspected of lesbianism at Parris Island in 1986 through 1988, which involved questioning almost half of the 246 women at the training facility, discharging 27 women, and penalizing 3 women with prison sentences, forfeitures, reductions in rank, and dishonorable discharges).

112. See, e.g., *People v. Hale*, 168 N.E.2d 518 (N.Y. 1960) (vagrancy law applies equally to "loitering pimps and prostitutes . . . and loitering homosexuals"); Shannon Minter, Note, *Sodomy and Public Morality Offenses Under U.S. Immigration Law Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771, 772 (1993).

113. See, e.g., *People v. Gillespi*, 204 N.E.2d 211 (N.Y. 1964) (defendants convicted under vagrancy statute for cross-dressing); *People v. Archibald*, 296 N.Y.S.2d 834 (App. Div. 1968), *aff'd*, 260 N.E.2d 871 (1970) (male youth convicted of vagrancy for dressing as female in subway station). Both vagrancy and cross-dressing statutes have often been used to harass gay people. GARBER, *supra* note 78, at 32; KENNEDY & DAVIS, *supra* note 80, at 180 & n.29 (relating that Buffalo, New York police in the 1950s arrested and threatened to arrest lesbians socializing in bars or on the street if the women had on less than three pieces of women's clothing).

114. See CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION 81-84 (1991); Thomas Coleman, Jr., *Disordered Liberty: Judicial Restrictions on the Rights to Privacy and Equality in Bowers v. Hardwick and Baker v. Wade*, 12 T. MARSHALL L. REV. 81 (1986); David O. Conkle, *The Second Death of Substantive Due Process*, 62 CONTENTS 215 (1986-87);

adult conduct, the fact that gay conduct remains criminal in so much of the country has tremendous significance for the legal life of gay people. Gay parents have lost custody of their children, and qualified people have been excluded from military service or employment, at least in part due to sodomy laws.¹¹⁵ Moreover, the symbolic power of criminalizing gay conduct serves to quell arguments for contractual or public rights to employment or housing opportunities, marriage, or political participation.

The pervasive effects of *Bowers v. Hardwick* are further evidenced in Justice Scalia's assertion in his dissenting opinion in *Romer v. Evans*: "If it is constitutionally permissible for a state to make homosexual conduct criminal, surely it is constitutionally permissible for a state to enact other laws merely disfavoring homosexual conduct."¹¹⁶ While Justice Scalia's opinion did not prevail, and the Court struck down Amendment 2 as violative of the Equal Protection Clause,¹¹⁷ his blustery dissent illustrates one danger of sodomy laws: the existence of sodomy laws somewhere might justify any discriminatory treatment of gay people anywhere, as long as the actions were leveled at gay people as gay people.¹¹⁸ Had Scalia's argument persuaded a majority of the Court, Amendment 2 would have had a staggering legal effect.

Under Scalia's reasoning, not only would Amendment 2 arguably have prevented Colorado state courts from recognizing a claim (even a purely pri-

Goldstein, *supra* note 45; Janet Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993); David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800 (1986); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 747-70 (1989); Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987); Mitchell L. Peart, Note, *Chipping Away at Bowers v. Hardwick: Making the Best of an Unfortunate Decision*, 63 N.Y.U. L. REV. 154 (1988); Yvonne Tharpes, Comment, *Bowers v. Hardwick and the Legitimization of Homophobia in America*, 30 HOW. L.J. 537 (1987); Joseph R. Thornton, Note, *Bowers v. Hardwick: An Incomplete Constitutional Analysis*, 65 N.C. L. REV. 1100 (1987).

115. Note, *Patriarchy Is Such a Drag*, *supra* note 84, at 1985-86 (describing how sodomy laws contribute to gay parents losing custody of their children, gay employees losing their jobs, and foreclose strict scrutiny under equal protection doctrine). It must be remembered, however, that actual enforcement of sodomy laws waxes and wanes. In Chicago in 1908, for example, police made 73 felony arrests for the "crime against nature," while in 1909 they made only 31 such arrests. Similarly, the number of appellate cases on same-sex sexuality increased between 1870 and 1900, and continued to increase in the first half of the twentieth century. FRIEDMAN, *supra* note 32, at 344.

116. *Romer v. Evans*, 116 S. Ct. 1620, 1630 (1996) (Scalia, J., dissenting); see also Lyle Denniston, *Scalia Takes Charge in Gay Rights Case*, AM. LAW., Dec. 1995, at 106 (describing how Justice Scalia "worked so hard to argue [Colorado Assistant Attorney General Timothy Tymkovich's] case for him that the lawyer nearly became a bystander. Scalia then argued that since *Bowers* has upheld the criminalizing of homosexual conduct, then states surely could take action short of that, as Colorado had done in 'denying special protection' for the same kind of conduct") *Id.* at 107.

117. *Romer v. Evans*, 116 S. Ct. 1620 (1996).

118. Scalia's reasoning, of course, does not interpret Amendment 2 to prevent granting an African-American gay person protection from racial discrimination. But Scalia's interpretation would prevent African-American gay people from seeking protection from discrimination as gay people. In other words, if a police officer refused to assist a gay African-American man, saying, "No way, I hate gays," that would be permissible conduct under Scalia's reading of Amendment 2, whereas it would *not* be permissible for the same police officer to refuse help, saying, "No way. I hate Blacks." But the fact remains that Amendment 2 singles out one class of citizens for special second-class status. The tremendous impact of Amendment 2 was the targeting of this characteristic as one that is not a basis for protection.

vate contractual one)¹¹⁹ of discrimination brought by a gay person, but even more oppressive regulations would have been justified. Thus *Romer v. Evans* is a landmark case not only for constitutional jurisprudence, but also for documenting gay people's progress from public condemnation toward public rights. While *Evans* did not overrule *Bowers v. Hardwick*,¹²⁰ it may be interpreted to mandate that gay people have access to a level playing field as they seek public rights. As such, *Evans* is a tentative move in the direction of gay public rights, and further protects gay presence in the contractual way station.

B. *Contracts: Where Like Minds Meet*

Despite widespread criminalization, gay people enjoy private, contract-based protection of their relationships with lovers and employers. Ruthann Robson divides gay relationship contracts into three categories: (1) estate planning tools such as wills, trusts, and powers of attorney; (2) cohabitation contracts; and (3) quasi-marriage contracts through domestic partnership legislation.¹²¹ I focus on the second category—cohabitation contracts—and briefly address employment contracts which protect against sexual orientation discrimination. While only a small corner of the universe of gay-related contracts, these two examples address some variety of gay-positive contracting in that they cover voluntary exchanges for both love and money.

1. Contracts for Love: Cohabitation

Cohabitation contracts between same-sex partners tend to be enforced where the parties structure their agreement like a business arrangement. They are less likely to be enforced, however, when they mirror traditional marriage.

119. An example of a purely private contract would be an employment contract with non-discrimination or domestic partnership policies. While this contract seems enforceable under Amendment 2, a court could conceivably refuse to enforce it (or a gay cohabitation contract) by seeing recognition of the contract as enforcement as a "policy whereby homosexual . . . orientation . . . entitl[es] [a] person . . . to claim . . . protected status or . . . discrimination," as forbidden by Amendment 2. The full text of Amendment 2 provides:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Romer v. Evans, 116 S. Ct. 1620, 1623 (1996); Sue Chrisman, Commentary, *Evans v. Romer: An "Old" Right Comes Out*, 72 DENV. U. L. REV. 519 (1995).

Thus, a broad interpretation of Amendment 2 might have forbidden Colorado Courts from enforcing private contracts not to discriminate on the basis of gay sexual orientation. If so, my contract arguments would have been eviscerated in Colorado, since no court could have enforced gay cohabitation or employment contracts that bar sexual orientation discrimination.

120. The majority opinion does not cite *Bowers*, which is one of only two or three gay rights cases ever heard by the United States Supreme Court.

121. Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511, 520 (1990). Arguably, the municipal nature of a domestic partnership ordinance makes contracts arising from it more like public right than a purely private transaction.

An Ohio court, for example, refused to award any remedy regarding assets accumulated over nine years by a lesbian couple, reasoning that one partner's belief that the relationship resembled a marriage was insufficient reason for recovery.¹²² Similarly, the California Court of Appeals refused to enforce an implied cohabitation agreement between two men where the plaintiff referred to himself as having been the other man's lover, reasoning that the meretricious elements of the contract could not be severed from its business aspects.¹²³

But courts are more likely to enforce implied contracts couched in business terms.¹²⁴ A California court enforced an oral cohabitation contract between two men despite sexual elements to the contract because there were also business elements. The court explained its reason for awarding damages only for the business-related services:

[W]here services provided by the complaining homosexual partner were limited to "lover, companion, homemaker, travelling companion, housekeeper and cook" . . . plaintiff's rendition of sex and other services naturally flowing from sexual cohabitation was an inseparable part of the consideration for the so-called cohabitation agreement . . . In contrast, [plaintiff here] . . . itemizes services contracted for as companion, chauffeur, bodyguard, secretary, partner, and business counsellor. These, except for companion, are significantly different from those household duties normally attendant to non-business cohabitation and are those for which monetary compensation ordinarily would be anticipated.¹²⁵

This language suggests that the best way to maximize the likelihood of judicial enforcement of gay couples' cohabitation contracts is to expressly formulate them as business agreements, omitting any mention of the parties' relation-

122. *Seward v. Mentrup*, 622 N.E.2d 756, 758 (Ohio Ct. App. 1993) ("[A]ppellee never promised . . . that appellant would be reimbursed for improvements to appellee's residence. Appellant assumed that she would be entitled to a division of the improvements' value simply because she viewed the parties' relationship as similar to a marriage. . . . In the absence of a marriage contract or other agreement, the trial court correctly granted summary judgment to appellee on appellant's breach of contract and unjust enrichment claims.").

123. *Jones v. Daly*, 176 Cal. Rptr. 130, 134 (Ct. App. 1981) (holding there was no severable portion of a gay cohabitation contract supported by independent consideration).

124. See, e.g., *Bramkett v. Selman*, 597 S.W.2d 80 (Ark. 1980) (imposing constructive trust based on lesbian couple's oral cohabitation agreement); *Weekes v. Gay*, 256 S.E.2d 901, 904 (Ga. 1979) (imposing implied trust regarding assets of gay male couple because "the evidence was inconclusive as to the exact nature of the relationship"); *Small v. Harper*, 638 S.W.2d 24 (Tex. Ct. App. 1982) (reversing summary judgment so plaintiff could pursue partnership claims regarding lesbian relationship).

125. *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 410 (Ct. App. 1988) (distinguishing *Jones v. Daly*). But artist Robert Rauschenberg's former lover and business partner was allowed to pursue his oral contractual claim after their 22-year relationship ended, and the court held it irrelevant whether the services were personal or commercial, as long as they were not exclusively sexual. *Van Brunt v. Rauschenberg*, 799 F. Supp. 1467, 1471 (S.D.N.Y. 1992).

ship,¹²⁶ since courts have shown more willingness to enforce contracts arising out of a love affair if it is structured like a business affair.

a. *Express Cohabitation Contracts*

The cases above involve claims arising out of implied rather than express contracts. Many gay couples have entered written cohabitation contracts, and courts have occasionally enforced them. Even in Georgia, which enforces its sodomy law more aggressively than most states,¹²⁷ a same-sex cohabitation contract has been enforced.¹²⁸ Enforcement, however, is less than a contractual slam dunk for gay people. Like implied cohabitation contracts, express cohabitation contracts are more likely to be enforced if they are structured like a business relationship and are silent about the love relationship.

In *Crooke v. Gilden*, the Georgia Supreme Court enforced a lesbian cohabitation contract over one partner's objections that the contract should not be enforced because it was based on "immoral or illegal" consideration.¹²⁹ The court excluded evidence of the partners' lesbian relationship, reasoning that the parol evidence rule barred admission of evidence varying an integrated contract.¹³⁰ *Crooke* thus reveals contractual purgatory as a place where many gay people can take refuge only if they go there in disguise.¹³¹ Only if the partners' agreement does not reference their romantic relationship—as long as they are willing to be closeted—will it be enforced as a contract.¹³² But contractual purgatory is perhaps a haven where the alternative is damnation to criminalization, or no recovery at all.

126. See *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992) (enforcing contractual agreement between former lovers and excluding all evidence of the nature of the relationship through the parol evidence rule); see also HAYDEN CURRY & DENIS CLIFFORD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 2:1 (5th ed. 1989) ("[I]f a contract states (or even implies) that a promise was made in exchange for sexual services, the contract won't be enforced. So don't make any references to sexuality; identify yourselves as 'partners,' not 'lovers.' The less cute you are the better.").

127. *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995) (relying on sodomy statute to fire assistant attorney general for celebrating Jewish marriage ceremony with same-sex partner).

128. *Crooke*, 414 S.E.2d at 645. I would likely not have found this case had Mary Becker not called my attention to it. Because it does not mention the parties' relationship or discuss the contract as a cohabitation contract, it likely would be buried in generic contract key numbers. The Georgia Supreme Court masqueraded a gay cohabitation contract as an ordinary commercial contract in order to enforce it, but in doing so the court also obscured the value of the case as precedent by making it difficult to find and thus difficult to cite in subsequent cases.

129. *Id.*

130. The cohabitation contract at issue included an integration clause: "This Agreement sets forth the entire agreement between the partners with regard to the subject matter hereof." *Id.* at 646.

131. The partner opposing enforcement, of course, did not want to benefit from contractual purgatory, in that she resisted judicial enforcement of the contract. She did perhaps benefit from the relationship if it was enhanced by the agreement reached in the cohabitation contract, or she may have benefitted as a gay person but not as an individual property holder.

132. This concern about enforcing contracts based on meretricious consideration underlies even *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), the landmark case recognizing cohabitation contract claims. Contract enforcement, then, does not necessarily benefit gay people generally because it demands closetedness.

Moreover, the court in *Crooke* may have ignored the nature of the parties' relationship merely as a matter of formalism. If in fact everyone knew that Crooke and Gilden had been lovers and that the contract arose out of that relationship, then perhaps the court's legal blinders in the name of formalism are not entirely destructive to a gay rights agenda. Viewed as such, gay cohabitation cases may be essential to gay rights litigation, in that the major battle-front of gay people's lives is achieving legal recognition of their relationships. But the power of self-identification as gay is absolutely central to virtually every effort to obtain legal protection for gay people. For example, President Clinton's compromise "Don't Ask/Don't Tell" exclusion of gay people in the military was received as being as equally oppressive as the old blanket exclusion. In other words, most gay people deem it less than full recovery when they can enjoy a benefit only if they remain silent about the fact that they are gay.

Even this modest victory, however, may be vitiated by practical considerations. The importance of a contractual way station is questionable if almost nobody stops there. Like heterosexuals, most gay couples cohabit without any explicit statement of their intentions regarding financial arrangements upon dissolution. This is why we have default marriage rules: most people do not bother to contract at all, let alone contract around the default. But maybe even rarely used cohabitation contracts benefit gay people. First, they are better than nothing, because they create the possibility of legal recognition. Second, if some couples are contracting and courts are enforcing the contracts, perhaps more couples will enter contracts in order to avoid inefficient *ex post* disputes. The fact that few gay couples explicitly contract or bring claims based on contract shows one useful aspect of contractual purgatory: just as society may get used to gay couples by increased exposure through courts enforcing gay cohabitation contracts, gay people themselves might increasingly claim the social space of couplehood if more couples entered contracts and courts enforced those contracts. These acclimations may in turn lead society to grant gay people public rights.

In sum, cohabitation contracts provide some protection and recognition for relationships that would otherwise be socially and legally invisible. Perhaps this contractual purgatory is a way station that precedes recognition of gay marriage as a public right.¹³³ The modest claims of contractual purgatory (given the low numbers of people that expressly contract) may be bolstered if implied contracts are added to the machinery that delivers gay people to contractual purgatory. But whereas *Crooke* was based on legal formalities of the parol evidence rule, implied contracts do not rest on classical formalism.

133. Perhaps the public right of marriage will be made more contractual. Jeffrey Stake has argued that privatization arguments are so strong that they suggest substituting mandatory prenuptial agreements for the state-mandated marriage contract. Jeffrey E. Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397 (1992). Epstein and other proponents of New Private Law would also likely prefer that parties be held to terms they actually negotiated and agreed to, rather than default rules supplied by the state. As Katherine Franke pointed out to me, marriage may not be a progressive step for gay people. Thus perhaps contract is more progressive than marriage for both gay and heterosexual partners.

b. *Implied Cohabitation Contracts*

Courts have recognized implied cohabitation contracts for at least twenty years.¹³⁴ Contracts can be implied-in-fact or implied-in-law. An implied-in-fact contract is similar to an express contract in that the parties intended to reach an enforceable agreement but failed to expressly say so.¹³⁵ Contracts implied-in-law, however, do not require the classical contractual meeting of the minds. While implied-in-fact contracts are justified by contractual consent, implied-in-law contracts are justified to prevent unjust enrichment.¹³⁶

If contractual purgatory is run by classical contractarians rather than Legal Realists, only the implied-in-fact cohabitation contract delivers travelers to the way station. Generally, while classical contract theory does not always require that contracts be written to be enforceable, they must still be grounded in mutual intent of the parties to contract. Implied-in-law contracts, however, do not require mutual assent, and thus seem to breach Epstein's simple rule of voluntary exchange.¹³⁷ Of course, tort-like theories of unjust enrichment might masquerade as contract. But if entry to contractual purgatory requires classical contract identity papers, quasi-contracts might not earn one admittance.

If contractual purgatory only embraces implied-in-fact contracts, then perhaps few people will enter it, resulting in a limited legal effect of the way station. Like heterosexuals, most gay couples succumb to the power of inertia and rely on good faith and continuity rather than negotiate express promises for property distribution in the event that they break up. As a result, contracts implied-in-law might be the most common claims of partners seeking judicial remedies. Claimants could mitigate this effect, however, by producing evidence of a contract even absent express agreement. Some companies, universities, and municipalities accord insurance and other benefits for employees' domestic partners.¹³⁸ Because the forms the domestic partners fill out aver that the partners cohabit, share finances and support, and intend to do so indefinitely, the domestic partnership benefit application form may itself become the grounds for an implied contract.¹³⁹ Because the partner signing the

134. The landmark implied cohabitation contract case is *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

135. See, e.g., ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 18, at 41 & n.42 (1963). Carol S. Bruch presented a paper comparing judicial enforcement of heterosexual and gay implied cohabitation contracts at the Joint Session of the Contracts and Gay and Lesbian Issues Sections, AALS, San Antonio, Tex., Jan. 5, 1996. She concluded that courts are equally reluctant to enforce same-sex and opposite-sex implied cohabitation contract claims. The paper is not published.

136. *Id.*

137. EPSTEIN, *supra* note 10, at 53.

138. At the 1996 AALS Joint Session of the Contracts and Gay and Lesbian Issues Sections in San Antonio, Tex., San Francisco practitioner Paul Wotman described a number of his implied cohabitation contract cases, and many of his clients fell into the implied-in-law category. Wotman suggested using domestic partnership forms as evidence of a cohabitation contract.

139. Domestic partnership eligibility often resembles that for heterosexual marriage. Usually the parties must be eighteen, capable of contractual consent, not closely related, and not in a marriage or domestic partnership already. They also frequently require the partners to state that they are in a committed relationship and share basic living expenses. Berkeley requires the partners to

form is likely a wage earner, and thus likely economically independent, the domestic partnership form may provide a non-wage earning partner evidence necessary to sustain an implied-in-fact contract claim.¹⁴⁰ Thus, more gay people may enter contractual purgatory even if a cursory glance at their situation suggests that they do not have any contract claim. As social rituals such as applying for domestic partnership benefits embrace gay people, legal evidence accumulates. This evidence may well create a contract even where the parties did not precisely agree on the nature of the agreement. If implied contracts continue to gain recognition, gay people will move more firmly into contractual purgatory, and thus further toward public rights.

2. Contracts for Money: Employment

Having discussed contracts for love, I now turn to contracts for money. The most common gay-oriented contract for money is an employer or university's contractual protection against sexual orientation discrimination and/or provision of domestic partnership benefits.

Domestic partnership and non-discrimination contractual protections arise in universities and other workplaces. The employer or educational institution agrees not to discriminate against gay people in employment or education, and/or agrees to extend benefits enjoyed by employees' or students' heterosexual partners to same-sex partners.¹⁴¹

The University of Denver, for example, recently established domestic partnership benefits, three years after it adopted a non-discrimination policy. As with other contractual protections, the fate of this purely private contractual benefit turned on the validity of Amendment 2. If Amendment 2 had become law, it would have foreclosed any state entity in Colorado enacting or enforcing any ordinance, regulation, statute, or *policy* that protected against discrimination on the basis of homosexuality.¹⁴² Thus while private contractual rights

state their intention to remain in the partnership indefinitely. Minneapolis requires that partners state they are "committed to one another to the same extent as married persons are to each other." Note, Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1192-94 (1992).

140. If the Statute of Frauds applies, it requires a writing signed by the person against whom the contract will be enforced. RESTATEMENT (SECOND) OF CONTRACTS §§ 134-135; JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 19-31 (3d ed. 1987).

141. The Association of American Law Schools, for example, requires accredited law schools not to discriminate on the basis of sexual orientation. Since membership in the AALS is voluntary, this rule is more akin to a contract than a regulation or statute. As such, it fits squarely into contractual purgatory in my model. See Roberto L. Corrada, *Of Heterosexism, National Security, and Federal Preemption: Addressing the Legal Obstacles to a Free Debate About Military Recruitment at Our Nation's Law Schools*, 29 HOUSTON L. REV. 301 (1992).

142. For the text of Amendment 2, see *supra* note 119. Amendment 2 does not prohibit heterosexuals from seeking a remedy from discrimination on the basis of heterosexual orientation. Denver, Boulder, and Telluride have ordinances that forbid discrimination on the basis of "sexual orientation." Thus, if it had been upheld by the United States Supreme Court, Amendment 2 would have prevented existing ordinances in Denver, Boulder, and Telluride from being enforced to deter anti-gay discrimination, but would have allowed them to be enforced to deter anti-heterosexual discrimination. Thus, under Amendment 2, the sole use of the ordinances would be to allow people with power (heterosexuals) to harass gay people, the very people intended to be protected by the ordinances.

would have been literally all that gay people could have relied on in Colorado when they were treated unfairly based on their sexual orientation,¹⁴³ courts might have interpreted Amendment 2 broadly to prohibit state courts from enforcing even these entirely private contracts according protections against sexual orientation discrimination or granting domestic partnership benefits. Thus, some forms of public condemnation can foreclose contractual purgatory as an option.

At least one court has enforced a sexual orientation non-discrimination clause.¹⁴⁴ In *Tumeo v. University of Alaska*, a university refused to extend health benefits to employees' same-sex partners, despite a university policy not to discriminate on the basis of marital status.¹⁴⁵ While the actual holding of *Tumeo* may be based on a state statute prohibiting marital status discrimination, the court explicitly discussed the non-discrimination contract language, and invoked contract law to aid its analysis.¹⁴⁶ The end result of *Tumeo* was that a non-discrimination contract was partially responsible for equalizing compensation between gay and married heterosexual employees by mandating that the university could not discriminate between the two classes by granting one group's partners health benefits and denying that benefit to the other group.

Tumeo has added significance for contractual purgatory. The *Tumeo* court distinguished cases where courts refused to enforce sexual orientation/marital status non-discrimination clauses¹⁴⁷ on the grounds that those cases involved

143. The text of Amendment 2 is broad enough that a court could conclude a court is barred from recognizing a purely private, contractual claim because Amendment 2 prohibits any state entity from recognizing claims of discrimination against gay people.

144. *Tumeo v. University of Alaska*, No. 4FA-94-43 Civ., 1995 WL 238359 (Alaska Super. 1995) (holding university's health plan violates Board of Regents' policies against marital status discrimination by refusing to extend health insurance benefits to employees' same-sex partners). *Tumeo* is an example of contractual purgatory, of course, only if the Board of Regents' policy against marital status discrimination is a contract, rather than a regulation akin to a statute. The Vermont Labor Relations Board also enforced a sexual orientation non-discrimination policy, forcing the University of Vermont to extend domestic partnership benefits to faculty members on the same basis that it extended benefits to partners of married employees. Grievance of B.M., S.S., C.H. and J.R., No. 92-32 (Vt. Lab. Rel. Bd. June 4, 1993) (copy on file with the author). An Oregon trial court has similarly ordered the state to grant benefits to gay couples under state constitutional and statutory prohibitions of sex discrimination. The decision, however, is being appealed and the parties do not expect a final resolution until 1998. *Domestic Partners: Oregon Attorney General to Appeal Ruling on Benefits to Same Sex Partners*, 1996 DAILY LAB. REP. 171 d9 (Sept. 4, 1996).

However, other tribunals have refused to accord employees domestic partnership benefits on the basis of a sexual orientation and/or marital status non-discrimination clause in a union contract. *In re Michigan State Univ.*, 104 Lab. Arb. 516 (1995) (declining to extend domestic partnership benefits based on union and management's prior negotiations); *In re Kent State Univ.*, 103 Lab. Arb. 338 (1994) (holding that faculty member was not discriminated against on the basis of sexual orientation by university refusing to extend domestic partnership benefits despite sexual orientation non-discrimination clause in collective bargaining agreement).

145. *Tumeo*, 1995 WL 238359, at *4. The Board of Regents' Regulation provided in relevant part, "The University of Alaska does not engage in impermissible discrimination. . . . The University of Alaska makes its programs and activities available without discrimination on the basis of . . . marital status." ALASKA STAT. § 18.80.220(a)(1) also prohibited marital status discrimination. *Id.*

146. *Tumeo*, 1995 WL 238359, at *3 ("[T]his appeal involves questions of contract law, constitutional law, and statutory interpretation.") (emphasis added).

147. *Id.* at *8 (citing *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121 (Wis. Ct.

conflicting statutes that had to be harmonized so as not to nullify either statute. But if a gay employee's claim is based on contract rather than statute, then the court can recognize a gay-related contract benefit without nullifying a statute.

A specific case illustrates how contract may sometimes be better for gay people than public rules. *Ross v. Denver Department of Health and Hospitals*¹⁴⁸ involved one ordinance providing medical leave to care for family members and another barring sexual orientation discrimination. Had Mary Ross been able to assert a contractual rather than an ordinance-based non-discrimination provision (in other words, a private rule instead of a public rule), then perhaps the Colorado Court of Appeals might have granted her medical leave to care for her ailing life partner by construing the contract clause to provide more protection since a contract can define spouse without reference to state law. As it was, the court was left to construe two public rules consistently, and chose to nullify the non-discrimination provision in order to enforce the definition of family in the sick leave provision.

A non-discrimination clause in a contract, however, cannot guarantee judicial enforcement. In *Rovira v. AT&T*, a federal district court upheld AT&T's denial of ERISA death benefits to a lesbian employee's partner.¹⁴⁹ Although AT&T's personnel policies forbade sexual orientation and marital status discrimination, the court concluded that AT&T could discriminate on this basis in according benefits since the ERISA plan did not incorporate the non-discrimination policies.¹⁵⁰ While this invocation is confusing given the court's finding that the ERISA plan was a "contract between private parties"¹⁵¹ for benefits and AT&T contracted not to discriminate on the basis of sexual orientation or marital status, it also illustrates the way that public rules often operate to the detriment of gay couples. But while courts may find some public or contract rule to nullify a contract benefitting gay employees, the possibility of contractual protections still outweighs the current state of near certainty of lack of public rules protecting gay people.

The above examples of gay cohabitation contracts and employment/education contracts illustrate that contracts for both love and money can serve a progressive agenda for gay people. These examples illustrate that when the government default rule is hostile to gay people, any opportunity to contract around that rule is advantageous. As long as the contract is not against public policy, judges generally do not second-guess the contractual intentions of two or more consenting adults.

App. 1992) (refusing to grant benefits to same-sex partner because non-discrimination statute harmonized with statute defining spouse as legally married to the employee)).

148. 883 P.2d 516, 518 (Colo. Ct. App. 1994).

149. 817 F. Supp. 1062 (S.D.N.Y. 1993).

150. *Rovira*, 817 F. Supp. at 1071.

151. *Id.* at 1069.

C. Public Rights

Having discussed gay people's place in both public condemnation and contractual purgatory, I will now address the extent to which gay people have public rights. I have already defined public rights as including constitutional or statutory protections against discrimination and freedom to take certain actions without fear of penalty.¹⁵² Public rights can also be defined as "one's affirmative claim against another."¹⁵³ Either way, gay people enjoy almost no public rights to be free from discrimination.

When the issue of gay rights comes up for public debate, gay people generally lose. In 1993, for example, President Clinton initiated a national debate on the military's ban on gays instead of keeping his campaign promise to simply lift the ban. The end result of the debate was, in effect, a substantially similar ban on gay people in the military, popularly known as Don't Ask/Don't Tell.¹⁵⁴ Along the way gay people had to stomach virulent homophobia every day in the press, as person after person articulated his or her venomous sentiments against gay people.¹⁵⁵ This vitriolic national debate about gay people in the military illustrated that gays are far from having public rights. But there are occasional pockets of potential at state, local, and, to a lesser extent, federal levels. Below I outline several vehicles for public rights, and analyze their current efficacy for gay people.

1. Gay Marriage

Hawaii courts have recently recognized gay marriage, but the recognition is currently stayed pending appeal.¹⁵⁶ Before Hawaii took this action, Utah led the charge to limit the effect of Hawaii's action by refusing to recognize same sex marriages performed in another state;¹⁵⁷ Colorado, Illinois, South

152. See discussion *supra* in part II.

153. Walter W. Cook, *Introduction* to HOHFELD, *supra* note 16, at 7-8. Under Hohfeld's analysis, gay people generally have "no-right," i.e., the absence of a right. Hohfeld picked the term to resemble "nobody" and "nothing," which seems to capture the legal status of gay people as underserving of protection from discrimination on the basis of sexual orientation. Under Hohfeld's analysis, those who discriminate against gay people are accorded a privilege to do so. Gay people's no-right and heterosexuals' privilege are Hohfeldian correlatives, since they are opposite sides of the same coin. *Id.* at 5. For a further discussion of Hohfeld's analysis in relation to my model, see *supra* note 16.

154. John Lancaster, *Final Rules on Gays Set*, WASH. POST, Dec. 23, 1993, at A1 (rules outlining revised ban on gay people in the military suggests marching in a gay rights parade by itself is likely not grounds for investigation, but two men holding hands off-duty is grounds for investigation). But recent evidence suggests that the Don't Ask/Don't Tell ban on gays in the military has resulted in more, rather than fewer, discharges and investigations for being gay. Philip Shenon, *Armed Forces Still Question Homosexuals*, N.Y. TIMES, Feb. 27, 1996, at 1 (prosecutions up 17% under the Don't Ask/Don't Tell policy). President Clinton similarly aligned himself with anti-gay Republicans by publicly promising to sign the Defense of Marriage Act the same week the Supreme Court decided *Romer v. Evans*. Todd S. Purdum, *President Would Sign Legislation Striking at Homosexual Marriages*, N.Y. TIMES, May 23, 1996, at A1.

155. See Shenon, *supra* note 154.

156. *Baehr v. Miike*, No. 91-1394, 1996 Haw. Ct. App. LEXIS 138 (Dec. 3, 1996) (ruling that equal protection clause of Hawaii constitution requires state to allow same-sex marriage). *Essoyan & Boxall, supra* note 66, at A3.

157. UTAH CODE ANN. § 30-1-2 (1995) (marriages between persons of the same sex declared prohibited and void); UTAH CODE ANN. § 30-1-4 (1995) ("A marriage solemnized in any other

Dakota, and many other states have either passed similar legislation or considered doing so.¹⁵⁸ Congress and President Clinton similarly acted preemptively to limit the effect of Hawaii's action by enacting the Defense of Marriage Act (DOMA). Under DOMA, federal law only recognizes opposite-sex marriages, and no state need recognize a same-sex marriage under the Constitution's Full Faith and Credit Clause.¹⁵⁹

But even if some states redefine marriage in an attempt to avoid recognizing same-sex marriages performed in Hawaii, the single act of a single state recognizing same-sex marriage could catapult gay people into the realm of public rights in numerous states, since at least some states will likely recognize Hawaiian gay marriages. The numerous statutory rights attendant on marriage illustrate the social and legal impact of recognizing gay marriage anywhere. These benefits include intestacy rights; workers' compensation and unemployment benefits; maintenance, child support, visitation and property distribution upon relationship dissolution; evidentiary privileges; and joint filing for bankruptcy.¹⁶⁰ Moreover, courts recognize common law claims, such as loss of consortium and wrongful death, only for married heterosexuals.¹⁶¹ Thus, Hawaii's recognition of same-sex marriages could be a major public rights victory for gay people. But until the Hawaii litigation is resolved, gay people remain in contractual purgatory for most purposes.

country, state, or territory, if valid where solemnized, is valid here, unless it is a marriage: (1) that would be prohibited or declared void in this state under 30-1-2(1) [bigamy], . . . (3) [either party under 14 years of age], . . . or (5) [both persons are the same sex]."); see also David W. Dunlap, *Some States Trying to Stop Gay Marriages Before They Start*, N.Y. TIMES, Mar. 15, 1995, at A18 ("Utah legislators voted overwhelmingly this month to deny recognition to marriages performed elsewhere that do not conform to Utah law. This would include same-sex unions.").

158. See, e.g., David W. Dunlap, *Foes of Gay Marriage Foiled in California Senate*, N.Y. TIMES, Sept. 6, 1996, at A24 (noting that 35 states have considered anti-gay marriage legislation) [hereinafter Dunlap, *Foes*]; David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, N.Y. TIMES, Mar. 6, 1996, at A13 (noting that 19 states have considered anti-gay marriage legislation, including Alabama, Alaska, Colorado, Georgia, Idaho, Illinois, Iowa, Kentucky, Maryland, Missouri, Rhode Island, South Carolina, Tennessee, Virginia, Washington, Wisconsin, and Wyoming and that the states where anti-gay marriage measures became law include Alaska, Arizona, Georgia, Idaho, Illinois, Kansas, Louisiana, North Carolina, South Carolina, South Dakota, Tennessee, and Utah). While the Colorado legislature passed an anti-gay marriage bill, Governor Romer vetoed it, reaffirming in the same breath that "marriage 'should be reserved for the union of a man and a woman.'" Thomas Frank, *Same Sex Ban Vetoed: Romer Strives to Find Some Middle Ground*, DENV. POST, Mar. 26, 1996, at A1. Undeterred, the Colorado legislature re-introduced a similar measure as this article was going into publication. Michelle D. Johnston, *Gay-Marriage Ban Ok'd*, DENV. POST, Feb. 14, 1997, at 1B, 3B.

159. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

160. WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 66-70 (1996) (listing practical benefits of marriage for gay couples). Additionally, a heterosexual couple may jointly file for bankruptcy relief, but a same-sex couple may not. *In re Allen*, 186 B.R. 769 (Bankr. N.D. Ga. 1995).

161. But see *Dunphy v. Gregor*, 642 A.2d 372 (N.J. 1994) (recognizing negligent infliction of emotional distress for cohabitant of the injured person). However, no state recognizes loss of consortium for unmarried couples. Alexander J. Drago & Dean M. Monti, *Expanding the Family: Testing the Limits of Tort Liability*, 61 DEF. COUNS. J. 232, 239 n.18 (1994) (citing federal district courts recognizing loss of consortium claims for unmarried couples, but noting that the state courts in which the federal courts sat subsequently refused to allow consortium claims regarding unmarried couples); see also GEORGE CHRISTIE & JAMES E. MEEKS, *CASES AND MATERIALS ON THE LAW OF TORTS* 766 (1990); PROSSER ET AL., *CASES AND MATERIALS ON TORTS* 552 (1994).

2. Non-Discrimination and Domestic Partnership Legislation

Another public right is statutory freedom from invidious discrimination. A handful of states afford some public rights to be free from some forms of sexual orientation discrimination. As of February 1996, nine states and the District of Columbia had statutory protections against discrimination on the basis of sexual orientation.¹⁶² But these protections are often interpreted narrowly: classified ads are not a "public accommodation" for gay people;¹⁶³ refusal to accord gay couples insurance on the same basis as heterosexual couples is marital status rather than sexual orientation discrimination;¹⁶⁴ and marriage remains an exclusively heterosexual privilege even in jurisdictions with civil rights laws protecting gay people for some purposes.¹⁶⁵

Some cities and municipalities also protect sexual minorities against discrimination and/or extend benefits to the domestic partners of city employees. At least 163 cities and counties have accorded public rights to gay people through ordinances prohibiting sexual orientation discrimination.¹⁶⁶ Similarly, three states and 52 municipalities, school districts, or other government entities recognize domestic partnerships and extend some benefits.¹⁶⁷ These ordinanc-

162. HRC LIST, *supra* note 22. The states are: California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Rhode Island, Vermont, and Wisconsin. In addition, at least eight states have executive orders protecting state employees from sexual orientation discrimination. Stephanie L. Grauerholz, Comment, *Colorado's Amendment 2 Defeated: The Emergence of a Fundamental Right to Participate in the Political Process*, 44 DEPAUL L. REV. 841, 855 (1995).

163. *Hatheway v. Gannett Satellite Info. Network, Inc.*, 459 N.W.2d 873 (Wis. Ct. App. 1990). Apparently, newspaper advertising is not a public accommodation for gays, but is a public accommodation for labor unions. In contrast to *Hatheway*, a union survived a newspaper's motion to dismiss the union's complaint that the newspaper violated the public accommodation statute by refusing to publish its advertisements. The newspaper had argued that the newspaper was not a public accommodation. *Local Painters Union Local 802 v. Madison Newspapers, Inc.*, No. 3165 (Equal Opportunities Comm'n, Madison, Wis. file closed Dec. 24, 1987). However, the issue was never conclusively determined because the parties settled out of court. P. Cameron Devore & Robert D. Sack, *Advertising and Commercial Speech*, in COMMUNICATIONS LAW 1996, at 545 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3980, 1996). In 1995, the Supreme Court similarly struck down Massachusetts' application of its public accommodations statute to allow the organizers of a St. Patrick's Day parade to exclude gay Irish marchers. Thus at least two state's public accommodations laws have been explicitly applied to exclude gay people. *Id.* at 547 (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 115 S. Ct. 2338 (1995)).

164. *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121 (Wis. Ct. App. 1992); *Beaty v. Truck Ins. Exch.*, 8 Cal. Rptr. 2d 593 (Ct. App. 1992). The Court in *Beaty* reasoned:

[T]here is nothing arbitrary about defendant's issuance of joint umbrella policies only to married persons. Given the legal unity of interest and the shared responsibilities attendant upon a marriage, an insurer could reasonably conclude there is no significant risk in covering both an insured and his or her spouse. . . . With regard to unmarried couples of whatever sexual orientation, an insurer could conclude the relationship lacks the assurance of permanence necessary to assess with confidence the risks insured against in a joint umbrella policy.

Id. at 598-99.

165. See, e.g., *Dean v. District of Columbia*, 653 A.2d 307, 320 (D.D.C. 1995) (holding marriage license bureau's refusal to issue marriage license to same-sex couples does not violate the District of Columbia's Human Rights Act). Marriage will not be exclusively heterosexual if the Hawaii Supreme Court upholds the lower court's recognition of gay marriage in *Baehr v. Miike*, No. 91-1394, 1996 Haw. Ct. App. LEXIS 138 (Dec. 3, 1996).

166. HRC LIST, *supra* note 22.

167. *Smothers*, *supra* note 22, at 25.

es have been enforced to remedy a restaurant's refusing to seat a lesbian couple¹⁶⁸ and a health club's terminating a gay man's membership.¹⁶⁹ But the very same ordinance that prohibited discrimination in health club membership did not prevent Big Brothers, Inc. from asking prospective big brothers about their sexual orientation, and outing any gay prospective big brothers to all prospective little brothers and their mothers.¹⁷⁰

Ordinances recognizing gay rights also face preemption challenges. Several courts have found that municipal protections for gay people are preempted by state law. Thus, if a state has no statute banning sexual orientation discrimination, enforcement of any local ordinance can be barred because the state civil rights statute may be deemed to occupy the field and prevent protection against sexual orientation discrimination by its silence.¹⁷¹ Or the municipality's action according domestic partnership benefits might be found to be *ultra vires* and in conflict with state statutes.¹⁷² The same preemption arguments levelled against local ordinances can perhaps be aimed at state laws, leaving only federal protections against anti-gay discrimination. But no federal law protects gay people against discrimination.¹⁷³ At the end of the day, gay people have slim public rights through state statutes and municipal ordinances, leaving contract as the only practical alternative vehicle for obtaining legal relief until the Supreme Court decided *Romer v. Evans*.

168. Rolon v. Kulwitzky, 200 Cal. Rptr. 217 (Ct. App. 1984).

169. Blanding v. Sport & Health Club, Inc., 373 N.W.2d 784 (Minn. Ct. App. 1985).

170. Big Brothers, Inc. v. Minneapolis Comm'n on Civil Rights, 284 N.W.2d 823, 827, 828 (Minn. 1979) (requiring Big Brothers, Inc. to inform mothers of sexual orientation of all prospective big brothers would unduly burden mothers by forcing them to determine relevance of sexual orientation).

171. See, e.g., Delaney v. Superior Fast Freight, 18 Cal. Rptr. 2d 33, 38 (Ct. App. 1993) (holding that legislature expressed its intent to exclude local regulation from the field of fair housing and employment regulation); Under 21 v. City of New York, 482 N.E.2d 1 (N.Y. 1985) (holding that Mayor of New York City was preempted from issuing an executive order banning sexual orientation discrimination by city contractors because the state legislature did not ban sexual orientation discrimination); Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties*, 10 DAYTON L. REV. 459, 481 (1985).

172. See City of Atlanta v. McKinney, 454 S.E.2d 517 (Ga. 1995) (invalidating domestic partnership benefits to city employees as *ultra vires*); Lilly v. City of Minneapolis, 527 N.W.2d 107 (Minn. Ct. App. 1995) (holding that city exceeded its authority in authorizing reimbursement to city employees for health care insurance costs for same-sex domestic partners). Atlanta's City Council recently passed domestic partnership benefits again, in an effort to grant the benefits in compliance with *McKinney*. As before, opponents have challenged the action. Smothers, *supra* note 22, at 25. But Denver's domestic partnership ordinance recently survived a taxpayer challenge similar to those in Minneapolis and Atlanta. Howard Pankratz, *Denver's Gay Benefits Stand*, DENV. POST, Dec. 20, 1996, at 1.

173. Rivera, *supra* note 171, at 465 (gay people not protected by Title VII). But gay people do have some limited protection from discrimination in federal employment. *Id.* at 483. President Clinton did not sign a government-wide Executive Order prohibiting sexual orientation discrimination in federal employment as he promised during his first campaign. Instead such policies are being implemented on an agency-by-agency basis. Al Kamen, *The Federal Page*, WASH. POST, Jan. 24, 1994, at A15.

3. Taking the Anti-Gay Initiative

Anti-gay initiatives were the strongest weapon for opposing gay public rights until *Evans*. They are sodomy laws with bite, particularly in relation to my model. Even if sodomy laws are on the books, they are rarely enforced. But an initiative such as Colorado's Amendment 2, which provided no state entity could accord protection from discrimination on the basis of sexual orientation, would have barred gay people from any real civil rights in a far more comprehensive way than sodomy laws. If Amendment 2 had gone into effect, Colorado could have enforced any statute solely against gay people, without any fear of liability for sexual orientation discrimination. The Denver Public Library could deny library cards to any gay person. Public schools could ban gay students from attending. Police could ticket only owners of cars with rainbow flag stickers¹⁷⁴ for traffic violations. Finally, any efforts to contract around the anti-gay default rule might not have been enforceable.¹⁷⁵

Romer v. Evans may put to rest the anti-gay initiative movement, at least measures such as Amendment 2 that impose on gay people alone the burden of getting protections against discrimination through the state constitution. *Evans* is remarkable for at least two things. First, it states that Colorado cannot classify gay people "to make them unequal to everyone else."¹⁷⁶ Second, it provides that animosity against gay people is not a legitimate state purpose under the Equal Protection Clause.¹⁷⁷ After *Evans*, defenders of anti-gay measures from the military ban to anti-gay-marriage statutes will likely have to explain how their laws are motivated by an interest other than anti-gay animosity.

But even after *Evans*, the journey for gay public rights is decidedly uphill. When gay rights came to a popular vote in Colorado, Amendment 2 passed. Americans feel more negative toward gay people than toward any other group save illegal immigrants.¹⁷⁸ But not every state's voters have accepted the invitation to impose state-wide legal disabilities on gay people: Oregon and Maine narrowly defeated such measures in recent years,¹⁷⁹ and proponents in

174. The rainbow flag is a symbol of affiliation with the gay rights movement.

175. In a jurisdiction that does not protect gay people against discrimination, of course, all of these acts might be permissible. And Amendment 2, had it become law, may well have precluded Colorado courts from enforcing any gay-friendly terms in contracts, even contracts between private parties. See *supra* note 119.

176. *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996).

177. *Id.*

178. Sherrill, *supra*, note 42, at 469, 470 (documenting National Election Study data based on a zero score for most extreme cold feelings, 50 for neither cold nor warm, and 100 for extremely warm feelings). The data indicate that in 1994, 28.2% of Americans felt absolutely cold toward gay people, 51.4% felt generally cold toward them, with a mean "temperature" of 35.7. *Id.* In contrast, 24% of Americans' temperature with reference to illegal immigrants was zero, with a mean temperature of 32.3. *Id.* In contrast, Americans felt warm toward Christian fundamentalists: only 6.2% gave them a zero, and only 28.4% felt more cold than warm toward them. *Id.* Sherrill contends that the only indicator for a jurisdiction passing gay rights legislation is gay bars per capita, suggesting that only where gays concentrate can they hope for public rights. *Id.* at 472.

179. David W. Dunlap, *Gay Politicians and Issues Win Major Victories*, N.Y. TIMES, Nov. 12, 1995, at 34 ("A ballot initiative in Maine that would have denied civil rights protections to homosexuals was rejected, 53 to 47 percent. . . . Similar measures were rejected last year in Oregon and Idaho, by narrower margins.").

Washington and Nevada have failed to get sufficient signatures to place an anti-gay initiative on the ballot.¹⁸⁰ However, voters may be more reluctant to vote *for* gay rights than *against* measures to limit gay rights.¹⁸¹ Many editorial responses to *Evans* favored Scalia's vitriolic dissent, suggesting that numerous voters disagree with the majority decision in *Evans*.¹⁸² *Romer v. Evans*' invalidation of Amendment 2 is a crucial step in gay people's progress toward public rights under my model, but will not prevent anti-gay groups from proposing new initiatives and other anti-gay measures.¹⁸³ At this point, *Evans* stands most clearly for the simultaneously modest and radical proposition that gay people may not be relegated to second class citizenship as a matter of law. Future cases will determine whether *Evans* is to sexual orientation discrimination what *Brown v. Board of Education*¹⁸⁴ was to racial discrimination.

4. Conclusion: Inchoate Public Rights

In short, gay people are generally somewhere between public condemnation and contractual purgatory in my model, and in all three places on the diagram in some jurisdictions such as Georgia.¹⁸⁵ They exist on the margins

180. Joni Balter, *The Son of 608? Please Spare Us*, SEATTLE TIMES, June 14, 1994, at B1 ("Backers of two anti-gay-rights initiatives announced they couldn't collect enough signatures to qualify for the ballot."); Maria L. La Ganga, *Anti-Gay Initiative Fails to Make Nevada Ballot*, L.A. TIMES, June 22, 1994, at A3 (reporting that an anti-gay initiative failed to get sufficient signatures to gain a place on ballot); see also Bettina Boxall, *Despite Losing in '92, an Oregon Group Is Backing a Revised Measure to Ban Laws Protecting Homosexuals*, L.A. TIMES, Nov. 7, 1994, at A14 (anti-gay initiative failed in Oregon in 1992 and Idaho Attorney General issued opinion that similar anti-gay initiative in Idaho was unconstitutional).

181. "Of the 67 anti-gay initiatives since 1972, 76% have resulted in losses for gay rights supporters. Of the 11 initiatives seeking to expand gay rights, 90% have resulted in losses for supporters of gay rights." Donald P. Haider-Markel & Kenneth J. Meier, *Legislative Victory, Electoral Uncertainty: Explaining Outcomes in the Battles of Lesbian and Gay Rights*, POL'Y STUD. J. (forthcoming Dec. 1996).

182. See, e.g., George F. Will, *Terminal Silliness*, WASH. POST, May 22, 1996, at A21 (describing Amendment 2 as the resistance of heterosexual Coloradans "provoked by the aggressive and successful campaigns of homosexuals and bisexuals for state and local laws protecting them against discrimination" and agreeing with Scalia's description of Amendment 2 as a "modest attempt . . . to preserve traditional sexual mores against the efforts of a politically powerful minority").

183. Anti-gay activists in Idaho intended to put a measure on their November 1996 ballot, which would have been similar to Colorado's Amendment 2. The organizers, however, were unable to obtain enough signatures to place it on the ballot. Perhaps their failure was due in part to the Idaho Attorney General's opinion that the measure would be unconstitutional. Boxall, *supra* note 180, at A14.

184. 347 U.S. 483 (1954).

185. Georgia's Attorney General recently fired an attorney for having a same-sex Jewish wedding, *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995), *reh'g granted*, 78 F.3d 499 (1996) (First Amendment intimate association claims remanded to be determined under strict scrutiny test and intimate expression claim under compelling interest test), yet Atlanta protects gay people from discrimination. While Atlanta was recently enjoined from extending health benefits to partners of unmarried city employees, *City of Atlanta v. McKinney*, 545 S.E.2d 517 (Ga. 1995), it recently passed a similar measure in an attempt to grant domestic partnership benefits and comply with *McKinney*. Lewis Becker, *Recognition of Domestic Partnerships by Governmental Entities and Private Employers*, 1 NAT'L J. SEX. ORIENT. L. 1 (1996); Smothers, *supra* note 22, at 25. Finally, Georgia has enforced same-sex cohabitation contracts, both express and implied. See *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992); *Weekes v. Gay*, 256 S.E.2d 901 (Ga. 1979).

of contract to the extent that enforcement of a cohabitation contract may require disguising the parties' entire relationship as a business affair to avoid public policy problems and potential conflict with sodomy laws.¹⁸⁶ But *Evans* is perhaps the most major move toward public rights gay people have ever enjoyed, and makes equal protection for gay people a possibility under the Constitution. Progress and setbacks occur so quickly, though, that gay rights may be fully demoted to public condemnation or catapulted to public rights in a single court decision.

Perhaps gay people have generally fared better under contractual than public rights due to principles underlying judicial interpretation of contracts as opposed to interpretation of legislation. On the margins, judges are arguably more free to examine moral considerations when interpreting legislation than when interpreting contracts, since statutory interpretation involves one branch of government interpreting the work of another branch. Courts have been, after all, in the business of reviewing legislation for potential constitutional violations since *Marbury v. Madison*.¹⁸⁷ Judicial interpretation of contracts, in contrast, is often informed by a hands-off rhetoric. Judges are supposed to enforce voluntary agreements of private parties (absent extreme circumstances such as lack of capacity or duress), regardless of whether they view the agreement as good, bad, or indifferent. The fact that gay cohabitation contracts are sometimes enforced, even in states with sodomy laws, is striking in comparison with judicial and legislative resistance to interpret non-discrimination statutes as granting gay public rights such as marriage.

Doubtless many judges enforce only the so-called plain language of statutes, and others delve into the intentions behind integrated contracts.¹⁸⁸ But at least some courts have given broad effect to what they deem to be legislative intent, particularly when doing so yields a socially popular result.¹⁸⁹ Two

186. Sodomy laws are not ubiquitous; some states have invalidated sodomy statutes under their state constitutions. See, e.g., *People v. Onfre*, 51 N.Y.2d 476 (N.Y. 1980) (striking down New York sodomy law as violative of state and federal constitutions). Since *Bowers v. Hardwick*, at least three states have struck down their sodomy laws under the state constitution. LESBIANS, GAY MEN, AND THE LAW 153 (William B. Rubenstein ed., 1993) (listing Michigan, Kentucky, and Texas as states that struck down their sodomy laws post-*Bowers*).

187. 5 U.S. 137 (1803). But some courts and commentators urge judges to restrict themselves to the so-called plain meaning of a statute rather than interpreting its terms on any moral beliefs held by the judges. The feasibility of identifying plain meaning has in turn been questioned by other commentators.

188. Compare, e.g., *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968) ("If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents.") with *Trident Ctr. v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564 (9th Cir. 1988) (applying, "reluctantly," the *Thomas Drayage* rule despite the court's preference for enforcing the plain language of the contract).

189. Patterns of statutory and contract interpretation are essentially empirical, and a full survey is beyond the scope of this article. However, several opinions by Judge Easterbrook, known for his political conservatism, suggest that even a self-described textualist may be willing to massage a statute on occasion to achieve a particular result but strictly enforce the language of a commercial contract. In *Freeman United Coal Mining Co. v. Foster*, Judge Easterbrook broadly interpreted regulations determining eligibility for benefits in order to deny benefits to a disabled worker whose pneumoconiosis was not the sole cause of his disability. *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834 (7th Cir. 1994). To reach this result, Judge Easterbrook quoted from another one of his opinions:

cases suggest this pattern, one from the nineteenth century concerning a statute barring testimony against whites, and a recent one interpreting a non-discrimination statute.

First, the racial case. George Hall was convicted of murder based on the testimony of Chinese witnesses.¹⁹⁰ Hall appealed, arguing that the testimony was inadmissible under a California statute barring the testimony of anyone "black," "Mulatto," or "Indian" against whites. The California Supreme Court agreed with Hall, reasoning that the legislature intended the statute to bar testimony of Chinese witnesses, since Columbus had mistaken Indians for Asians upon his arrival in North America.¹⁹¹ The court further asserted that the statute was intended to "shield [whites] from the testimony of the degraded and demoralized caste[s]," and that allowing Chinese people to testify would lead to full civil rights, which would be disastrous given Chinese people's "prejudice . . . mendacity . . . inferior[ity], and . . . incapa[city for] progress or intellectual development."¹⁹² While extreme in its racism, *People v. Hall* also illustrates my more mundane point that judges are sometimes willing to use considerable poetic license in statutory interpretation when popular sentiment mandates a particular result.¹⁹³

The extent of public rights for unmarried couples is perhaps as intense a social concern now as Chinese people were to white Californians in the 1850s.

Statutes have meanings, sometimes even "plain" ones, but these do not spring directly from the page. Words are arbitrary signs, having meaning only to the extent writers and readers share an understanding Language in general, and legislation in particular, is a social enterprise to which both speakers and listeners contribute, drawing on background understandings and the structure and circumstances of the utterance. Slicing a statute into phrases while ignoring their contents . . . is a formula for disaster.

Id. at 838 (quoting *Hermann v. Cencom Cable Assocs., Inc.*, 978 F.2d 978, 982 (7th Cir. 1992)). In *Hermann*, Judge Easterbrook denied a former employee insurance coverage under ERISA, explicitly "massaging" the statute to account for congressional errors due to hasty drafting, while in the same breath denying that he based the decision on legislative history. *Hermann*, 978 F.2d at 982. These cases show that even judges known for textualism can be quite liberal in interpreting a law or regulation in order to give effect to what they believe is an underlying statutory purpose.

But in *Kham & Nate's Shoes No. 2, Inc. v. First Bank*, 908 F.2d 1351 (7th Cir. 1990), Judge Easterbrook enforced the language of a loan agreement, reasoning that "[f]irms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of 'good faith,'" and "knowledge that literal enforcement means some mismatch between the parties' expectations and the outcome does not imply a general duty of 'kindness' in performance, or a judicial oversight into whether a party had 'good cause' to act as it did. Parties to a contract are not each others' fiduciaries." *Id.* at 1357. For further discussion of Judge Easterbrook's revitalization in *Kham* of a classical approach to contracts which disregards the Uniform Commercial Code's approach to contracts, see Dennis M. Patterson, *A Fable from the Seventh Circuit: Frank Easterbrook on Good Faith*, 76 IOWA L. REV. 503 (1991).

190. *People v. Hall*, 4 Cal. 399 (1854).

191. *Hall*, 4 Cal. at 400 ("When Columbus first landed upon the shores of this continent, . . . he imagined . . . that the Island of San Salvador was one of those Islands of the Chinese Sea . . . near . . . India . . . [and] he gave to the Islanders the name of Indians From that time, down to a very recent period, the American Indians and the Mongolian, or Asiatic, were regarded as the same type of the human species."); PATRICIA N. LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 261-62 (1987).

192. *Hall*, 4 Cal. at 403, 405.

193. LIMERICK, *supra* note 191, at 259-69 (describing white antipathy to Chinese, Japanese, and other people of color in the nineteenth century American West).

In *Cooper v. French*, the Minnesota Supreme Court interpreted a statute prohibiting marital status discrimination to only protect people who are married, not unmarried cohabitants.¹⁹⁴ The court reasoned that a landlord could refuse to rent an apartment to an unmarried heterosexual couple on religious grounds because the statutory intent was to discourage fornication and protect marriage rather than protect unmarried couples from discrimination.

By reading the non-discrimination statute in the shadow of an antiquated fornication statute, the court gave legal effect to its view that cohabitation "corrodes the institutions which have sustained our civilization, namely, marriage and family life."¹⁹⁵ The Minnesota Supreme Court's passionate defense of the traditional family suggests that even without a fornication statute the court would have found a way to interpret the non-discrimination statute to allow marital status discrimination. Both *People v. Hall* and *Cooper v. French* suggest that, at least when interpreting statutes governing incendiary issues like race relations and sex, courts may skirt statutory plain language and resort to broad readings of legislative intent in order to reach a result favoring majoritarian morality.¹⁹⁶

Perhaps there is something about contract doctrine or rhetoric that makes it easier to protect gay people as a matter of contract than it is to protect them with public rights. The following section suggests some possible reasons why

194. *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990).

195. *Id.* at 8. The court explained (without citing any authority) why it found the state's argument "astonishing" since cohabitation causes numerous social ills:

There are certain moral values and institutions that have served western civilization well for eons Before abandoning fundamental values and institutions, we must pause and take stock of our present social order: millions of drug abusers; rampant child abuse; a rising underclass without marketable job skills; children roaming the streets; children with only one parent or no parent at all; and children growing up with no one to guide them in developing any set of values. How can we expect anything else when the state itself contributes, by arguments of this kind, to further erosion of fundamental institutions that have formed the foundation of our civilization for centuries?

Id. at 11. With language like this, it is hard to imagine how any statute could be drafted in such a way that the Minnesota Supreme Court would recognize the rights of unmarried cohabitants against discrimination.

196. A third case involves an issue less socially dramatic than race or sex. Instead, it involves a promissory note signed by a borrower who did not understand what he was signing. In *FDIC v. Culver*, 640 F. Supp. 725 (D. Kan. 1986), a federal court in Kansas enforced a promissory note against a farmer who signed it when it was blank and thought it was only a receipt for \$30,000 that a bank had loaned him through the man managing his farm. By the time the FDIC tried to enforce the note, it had been filled in for \$50,000, and the FDIC claimed a right to enforce it as a holder in due course because the circumstances of Culver signing the note did not amount to fraud in factum. U.C.C. § 3-305 defines fraud in factum as the lender's misrepresentations inducing the borrower to sign "with neither knowledge nor reasonable opportunity to obtain knowledge of [the instrument's] character or knowledge," and the Official Comment to § 3-305 includes being "tricked into signing a note in the belief that it is merely a receipt" as fraud in factum, which would defeat a holder in due course's claim. However, rather than apply the plain language of U.C.C. § 3-305 and its Comment, the court followed an 1884 case where an essentially illiterate farmer was liable under a note despite fraud that would certainly amount to fraud in factum under the U.C.C. *Culver* is relevant for our purposes here because it demonstrates judicial willingness to disregard the plain language of a statute (here one meant to protect a debtor from liability on a note obtained by fraud in factum) in order to enforce the plain language of a contract. In doing so, the court arguably demonstrates a greater willingness to disregard statutory language than contractual language.

gay people have often fared better under contract than public rights, and posits the theoretical implications of those successes.

V. CONTRACTUAL PURGATORY'S SUBVERSIVE POTENTIAL: HOW *GILDEN* MAY STILL BE GOLD

The subversive potential of my model is both practical and theoretical. As a practical matter, contractual purgatory offers gay people a means to the desired end of legal protections for four reasons: (1) contractual rights may be an incremental step to achieving public rights; (2) it is generally easier to convince a smaller group to protect an unpopular minority; (3) contract rhetoric often skirts majoritarian morality; and (4) contractual purgatory may habituate heterosexuals to the notion of gay rights, setting the stage for public rights for gay people.

On the theoretical side, contractual purgatory is subversive for two reasons: (1) it contributes to the social construction of gay people as persons because the ability to contract is a crucial component of legal personhood; and (2) it destabilizes hierarchical categories when progressives use a conservative tool to accomplish progressive ends. Both practical and theoretical implications of contractual purgatory are discussed below.

A point to consider prior to discussing the advantages of contractual purgatory is the general question of whether it benefits sexual minorities more than it harms them. On the one hand, contract validates closeting when judges enforce only those cohabitation contracts that are structured to mask the parties' relationship. On the other hand, though, contractual purgatory may be either the best gay people can expect for the moment, or an essential step in the process of obtaining public rights. The optimism of my proposal turns on whether one believes public rights are a realistic expectation.¹⁹⁷ If so, contractual purgatory is just crumbs. If not, the contractual way station is better than criminal hell. I address both of these implications, suggesting that even if *Romer v. Evans* and *Baehr v. Miike* suggest the possibility of public rights for gay people, contractual purgatory offers an essential and immediate benefit for gay people in that it establishes a crucial foundation to their legal personhood by recognizing their contracts.

A. *Practical Implications of Contractual Purgatory*

1. The (Half) Loaf You Save May Be Your Own¹⁹⁸

Contract may not always be as dangerous for have-nots as is commonly thought. Instead, it may offer a happy medium between the extremes of public

197. Mary Becker apparently is more optimistic than I am. She suggests in her comments to this paper that gay people will win marriage rights, at which time contractual rights will not only pale in comparison, but will actually disserve have-nots in their relationships if contracts are used the way they are now to contract around family law rules protecting weaker parties. Becker, *supra* note 34.

198. I purloined this heading from a bread truck in Seattle. A sign on the truck admonished other drivers to "drive carefully, for the loaf you save may be your own."

condemnation and public rights. Of course, contractual purgatory only benefits those who would otherwise suffer public condemnation. If gay people are closer to the right side of my diagram (criminalization) than the left (public rights), contract may have particular pull under queer theory. If, however, *Romer v. Evans* and *Baehr v. Miike* signal the dawn of public rights for gays, then perhaps the best strategy is to seek public rights directly instead of settling for the private way station.

But contract may have some advantages even if *Evans* and *Baehr* do ultimately lead to gay public rights. Contract may benefit minorities in some circumstances.¹⁹⁹ Kellye Testy draws on the work of Ruthann Robson to suggest that lesbians can contract around hostile public rules through relationship-oriented contracts.²⁰⁰ While Testy defends contract doctrines such as promissory estoppel and unjust enrichment as consistent with feminism,²⁰¹ I would embrace contract a step beyond the equitable contract doctrines she discusses. In a homophobic society, perhaps the rigidity of classical contract theory can sometimes benefit gay people, contrary to the general belief that classical contract theory tends to benefit people with power at the expense of those on the margins. In *Crooke v. Gilden*, for example, the plaintiff prevailed on her express cohabitation contract claims only because the parol evidence rule excluded evidence of the lesbian relationship from judicial consideration.²⁰² The victory is sweet when closeted relief is compared to the only alternative: no relief. Testy correctly observed that “[c]ontract has no essence—it is a social construct and will mutate based on its time, place and users.”²⁰³ Since I am skeptical about gay people obtaining meaningful public rights soon, contract seems to be a workable alternative, particularly if the only other option is public condemnation.

That, of course, is not to say that contract is the best alternative. Certainly the plaintiff in *Crooke v. Gilden* paid a price by obscuring her relationship from judicial view in order to recover.²⁰⁴ But perhaps that price is outweighed by the actual recovery. Perhaps Gilden should have the option of disguising (and enforcing) her relationship if her only other option is to stomach societal refusal to acknowledge any part of that relationship except to single it out for criminal attention.²⁰⁵ This remains true even if it results in

199. See, e.g., Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 CHI.-KENT L. REV. 303 (1993) (applying four feminist approaches to the problem of surrogacy contracts and concluding, “there are advantages and disadvantages both to nonenforcement and specific enforcement” of surrogacy contracts); Testy, *supra* note 4, at 229-30 (suggesting that contract may be a tool to counteract patriarchy).

200. Testy, *supra* note 4, at 225-27 (citing Robson & Valentine, *supra* note 121).

201. *Id.* at 228-29 (discussing confluence of feminist theory and relational and communitarian interpretations of contract propounded by scholars such as Ian MacNeil).

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

203. Testy, *supra* note 4, at 229.

204. Mark Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 595-96 (1992) (discussing the costs of concealing gay sexual orientation to self-esteem, mental health, and community building).

205. See *id.* at 571 (“Gay men and lesbians are tolerable *only if* they keep their secret.”); “Society tolerates gay men and lesbians so long as they carefully hide their sexual orientation.” *Id.* at 583; and “If gay people lead clandestine lives, others need not admit they know of them or

accommodation and perpetuation of institutional homophobia. As illustrated in the recent movie *Babe*, a pig faced with either visiting the slaughterhouse or functionally disguising himself as a border collie feels fortunate to avoid the axe by any means necessary.²⁰⁶ While *Babe's* action may be scant solace to the pigs that do end up at the slaughterhouse, at least *Babe* escaped this fate. Moreover, *Babe's* sheepherding disguise may transform others' conceptions of which animals can do sheepdogs' work.

2. Safety in (Small) Numbers

The second practical advantage of contractual purgatory turns on the fact that majoritarian morality is the major obstacle to gay rights. Contracts provide a serviceable tool for counteracting majoritarian morality because by definition only the contracting parties and the court need to agree to create a legal rule. This aspect of contract makes it a particularly attractive tool for minorities because by definition they are few in number and/or politically weak. As a result, minorities are often too marginalized to obtain public benefits from the legislature or courts.²⁰⁷ Certainly judicial enforcement of gay cohabitation contracts may be hindered by homophobia if a judge views the contract as meretricious or against public policy.²⁰⁸ But contract doctrines such as the parol evidence rule may keep out evidence that the parties are lovers, thus skirting public policy concerns.²⁰⁹ Contract rhetoric that a judge should en-

approve of them. The extravagant demand inherent in public acknowledgement of a gay sexual orientation is forcing onlookers to take sides." *Id.* at 590 (internal quotes omitted).

206. As Alan Chen pointed out to me, *Babe* does not explicitly choose between these two options. Instead, he affiliates with the sheepdogs because one is kind to him in a maternal way, and he only discovers late in the movie that pigs' sole purpose is to feed people. But I read *Babe's* initial choice as being in line with barnyard hierarchy. A sheep is also kind to *Babe* early on, but he chooses instead to model himself after the more socially powerful border collies. Moreover, he does seem to have a sense from the beginning that being a working animal is more prestigious. *Babe's* role as ingenue is central to the film's message; the duck who tries to function as a rooster to avoid the chopping block fails and must leave the farm. Only *Babe*, who passes as a sheepdog in innocent imitation successfully inverts the barnyard hierarchy to show that a pig can do a sheepdog's work. In short, *Babe* redefines the identities of both pig and sheepdog.

207. It may be easier for some rights to be obtained through the courts than through the legislature. Heterosexual marriages are statutorily recognized. *See, e.g.,* COLO. REV. STAT. § 14-2-104 (1987) ("A marriage between a man and a woman licensed, solemnized, and registered as provided in this part 1 is valid in this state."). However, judicial intervention was required to extend the public right of marriage to interracial couples in *Loving v. Virginia*, 388 U.S. 1 (1967), and to people delinquent in their child support obligations in *Zablocki v. Redhail*, 434 U.S. 374 (1978). Hawaii is the first state to recognize same-sex marriage, based on a state constitutional challenge. *Baehr v. Muike*, No. 91-1394, 1996 Haw. Ct. App. LEXIS 138 (Dec. 3, 1996). Even if Hawaii's Supreme Court affirms and recognizes same-sex marriage, other states likely will not recognize those unions under the Full Faith and Credit Clause of the United States Constitution. The anticipated grounds for the anti-gay states' refusal is that a number of states have the right to decline to give full faith and credit to other state's judgments if doing so would violate the recognizing state's public policy. The 24 states that have statutes criminalizing sodomy have ready-made grounds for determining that same-sex marriage is contrary to their public policy. And several states have already indicated their unwillingness to recognize same-sex marriages performed in Hawaii. *See supra* notes 157-58. Congress and President Clinton have given federal statutory support to these arguments through the Defense of Marriage Act. *See supra* note 159.

208. *See supra* note 123 and accompanying text (describing *Jones v. Daly*, in which a California court found that no part of a same-sex cohabitation contract could be severed from the overall meretricious nature of the contract).

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

force the parties' actual intent regardless of the judge's subjective view of the moral valence of their intent further protects gay people who seek to fill statutory gaps through contract. Contract may not be everything gay people have wished for, but it beats getting nothing or jail time.

The number of federal, state, and local protections for gay people nicely illustrates that it may be easier for gay people to obtain protection from small rather than large groups. No federal law protects gay people from sexual orientation discrimination.²¹⁰ In contrast, nine states and the District of Columbia protect against sexual orientation discrimination.²¹¹ Moreover, 163 municipalities have ordinances protecting gay people from discrimination.²¹² Finally, at least 350 companies and universities contractually protect their employees or students from discrimination on the basis of sexual orientation.²¹³

These numbers are of course partially a function of the fact that there is only one federal government, only 50 states, many more than 163 municipalities, and many, many more than 350 companies and universities in the United States. But the Human Rights Campaign data regarding numbers of companies with non-discrimination clauses is underinclusive. It does not, for example, list the University of Denver, which has granted protection against sexual orientation discrimination since 1992, as all accredited American law schools are required to do.²¹⁴

Of course the smallness of the group does not guarantee that gay people will succeed in their arguments. If the judge or corporate president is an anti-

210. *But see* Rivera, *supra* note 171 (discussing limited protection from sexual orientation discrimination enjoyed by federal employees). Moreover, in 1995, President Clinton issued Executive Order 12968 (Aug. 2, 1995), adding sexual orientation to the list of prohibited grounds for denying a security clearance. John J. Ross, *The Employment Law Year in Review*, in 25TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 67 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5237, 1996). Recently 49 United States Senators in a Republican-controlled Congress voted in favor of the Employment Non-Discrimination Act (ENDA), which, if passed, would have added gay people to the list of groups protected against employment discrimination. But ENDA did not pass, and the same day Congress passed the Defense of Marriage Act, defining marriage as the union between a man and woman and allowing states to refuse to recognize same-sex unions. Eric Schmitt, *Senators Reject Both Job-Bias Ban and Gay Marriage*, N.Y. TIMES, Sept. 11, 1996, at A1.

211. HRC LIST, *supra* note 22.

212. *Id.*

213. *Id.* Jake Barnes pointed out that my statistics may not withstand strict scrutiny, and may instead suggest that gay people are more likely to get rights from the states than elsewhere. Another way to think of the safety in small numbers rationale is that the least common denominator may get smaller the larger a group gets. Suppose Americans have 13 possible characteristics, labelled A-M. City residents may have A-M in common, state residents have only A-F in common, while Americans as a whole only have A-C in common. Thus cities may protect rights associated with A-M, states protect rights associated with A-F, and the federal government would protect only rights associated with A-C.

214. The AALS requires law schools to not discriminate on the basis of sexual orientation in order to maintain their accreditation. However, there may be some exception for religious schools founded on discriminatory principles. If all accredited law schools contractually protect their employees and students from discrimination on the basis of sexual orientation, then at least 150 or 200 entities are added to the HRC list of 350. There are likely other omissions, both in business and in education. For example, Coors Brewing Co. is not on the list, but accorded its employees domestic partnership benefits in 1995. Editorial, *Separate God and Caesar in Domestic Relations Law*, DENV. POST, Mar. 21, 1996, at B6.

gay evangelical Christian, or someone like Justice Scalia, gay people have little likelihood of obtaining any protection.²¹⁵ But gay people are perhaps better able to shop around for a receptive audience in contract than in legislation. If an employer refuses to extend contractual protection from sexual orientation discrimination, for example, a lesbian employee could seek work with another company that is willing to extend the protection. It seems likely that the same lesbian will find it easier to shop around for another job in the same area, thus changing only her job, than to move to another city or state when her city council or state legislature refuses to accord her protection against sexual orientation discrimination. This second move would require her to make two major adjustments rather than just one (the job)—if she moved, she would have to find both a new home and a new job. The financial and non-economic burdens of changing cities or states seem to be greater than merely changing jobs in most circumstances. Moreover, Americans cannot shop for a new federal government, other than by electing new representatives. The fact that there is only one federal government, which accords almost no protection to gay people, illustrates the importance of contractual protections where there are few or no public federal rights.

The relative protections for gay people at the federal, state, municipal, and corporate levels indicate that as a practical matter, gay people are more likely to convince one small group which is accountable to another small group (such as a university or corporation) to afford protection from sexual orientation discrimination than to obtain this protection from Congress (a fairly large group answerable to a huge group). This same reasoning suggests that judges who enforce gay-related contracts are easier to convince under the safety in small numbers reasoning than legislatures, or even city councils. Thus contractual purgatory is both feasible and may be the only possible way for gay people, a despised numerical minority, to obtain any legal protections.

3. Navigating Around Morality

The third practical advantage of contractual purgatory also turns on the fact that any agenda for equal rights for gay people must skirt morality as well as majoritarian sentiment, since most anti-gay arguments are largely or exclusively morality-based. Thus a distinct advantage of contractual purgatory is that it sidelines moral arguments cloaked as public policy. While some contracts, including those based on meretricious consideration, are not enforceable because of moral concerns, contracts are generally less susceptible to moral rhetoric than legislation.

215. Speaking at the University of Colorado before *Romer v. Evans* was decided, Justice Scalia told the audience that gay people are not constitutionally protected. Sue Anderson, *Knight's Claim of No Injured Parties Wrong*, DENV. POST, Oct. 19, 1995, at B6 (referring to Scalia's "recent" statement that "gays have no constitutional rights"); Robert A. Sirico, *Scalia's Dissenting Opinion*, WALL ST. J., Apr. 19, 1996, at A12 (describing Scalia's remarks at a Mississippi prayer breakfast defending Christians counteracting secular humanism by being "fools for Christ's sake"); Scott McLarty, Letters to the Editor: *What Worries Justice Scalia*, WALL ST. J., Apr. 30, 1996, at A19 (expressing concern that Justice Scalia's admonition to graduates that they be "fools for Christ's sake" indicates that Scalia makes judicial decisions based on religion rather than the Constitution).

Perhaps resorting to contract because it sidelines moral rhetoric is giving in too soon to the argument that gay relationships are somehow morally inferior to heterosexual ones. Mary Becker persuasively argues in her comment to this paper that gay relationships may in fact be morally superior to heterosexual ones because heterosexual male objectification of women is immoral.²¹⁶ While Becker's arguments carry considerable weight given the gender hierarchy in heterosexual relationships, I am less optimistic about winning that particular battle in my lifetime. Many conservatives see nothing immoral about male entitlement to female sexuality, and in fact they likely think autonomous sexuality itself is immoral, in total opposition to Becker's position. It is precisely because completely opposite positions can both be argued on moral rhetoric that I find contract more tempting than moral arguments. Moreover, if advocates for gay personhood argue on multiple fronts (moral, contractual, and others), the multiple approaches themselves may increase the chances of success.

Criminal penalties for victimless crimes are grounded only in morality,²¹⁷ as is opposition to gay marriage and other public rights for gay people. The frequency of Biblical justifications offered by the Religious Right in favor of anti-gay initiatives and other anti-gay efforts vividly illustrates that the only imaginable objection to homosexuality is on moral grounds. A recent example of morality-instigated fervor against gay rights is the recent rash of legislative action attempting to stem any effect of same-sex marriages which might be performed in Hawaii. At least 35 states considered and/or passed legislation explicitly providing that only opposite-sex marriages will be recognized.²¹⁸ Thus any method which rests on rhetoric other than moral rhetoric is well suited to pursue gay interests.

Once morality is sidelined, gay people have a chance of obtaining some legal recognition which similarly situated heterosexuals routinely enjoy. Classical contract rules such as the parol evidence rule provide one route around moral rhetoric. These classical contract rules are particularly powerful because they may counteract the majoritarian morality conservative judges otherwise might be inclined to insert into a contract case.

Assuming judges who are politically conservative are likely to invoke majoritarian morality to deny gay people rights,²¹⁹ and the parol evidence

216. Becker, *supra* note 34.

217. See MODEL PENAL CODE § 213.6 note on adultery and fornication at 439 ("The Model Penal Code takes the position that private immorality should be beyond the reach of the penal law."); FRIEDMAN, *supra* note 32, at 10 ("Criminal justice tells us where the moral boundaries are.").

218. Dunlap, *supra* note 158, at A24; Smothers, *supra* note 22, at 25 (16 states recently passed legislation refusing to recognize same-sex marriage); see also William Eskridge, *Credit Is Due*, NEW REPUBLIC, June 17, 1996, at 17 (describing how, in anticipation of Hawaii recognizing same-sex marriage, "nine states—and counting—have adopted legislation to block their courts from giving full faith and credit to Hawaii same-sex unions. The last time so many states declined to recognize marriages performed elsewhere was the Southern refusal to accord full faith and credit to different-race marriages."). Congress and President Clinton attempted to achieve the same result by enacting the Defense of Marriage Act.

219. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, J., concurring) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to

rule is often popular among this brand of judges,²²⁰ the parol evidence rule may counteract these judges' tendency to moralize. Thus, the very judges who are inclined by personal moral feelings to deny gay rights may be the same ones who would be swayed by classical contract doctrines such as the parol evidence rule. As a result, gay people may paradoxically obtain legal protections from conservative jurists, as long as the parties can cloak their claims in conservative legal doctrine.

4. Tolerance on the Way to Support

An additional benefit to moderating the public extremes through contractual purgatory is that it might pave the way for future gay public rights. For example, assuming that some judges recognize same-sex cohabitation contracts, they will realize that the world continues to turn despite their recognition. The greater heterosexual community may, in turn, see that an enforced same-sex cohabitation contract does not bring on the destruction of western civilization. In the terms of my model, enforcing gay cohabitation and non-discrimination contracts will demonstrate that there is no inherent harm in same-sex relationships, and since there is no victim, criminalization is not justified. In time, perhaps these realizations will lead to the logical conclusion that public rights can be accorded gay people without rending the fabric of society.

Many years after these realizations occur, perhaps Congress will be willing to enact gay rights legislation and judges be willing to enforce it without qualifying it to accommodate invidious stereotypes.²²¹ If the hands-off rhetoric of contract enables lawmakers to entertain the notion that gay people have lives and loves which deserve legal recognition just as heterosexuals do, then perhaps with time these same judges will recognize constitutional claims to equal protection of gay people beyond merely granting a level playing field as established in *Romer v. Evans*. And perhaps legislators will be more likely to lift the bans on gay marriage, family, and military service.

Purgatory is generally conceived as a place where sinful souls are purged of sin in order to be fit for heaven. Viewed in this lens, contractual purgatory may purge sexual minorities of their sinfulness to prepare them for public rights. But purgatory may be seen instead to purge the sinfulness of the law. If the law is unjustifiably biased against sexual minorities, then it should spend some time in purgatory to cleanse itself of that sin. In time, then, the

cast aside a millennia of moral teaching."); *Romer v. Evans*, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting) ("Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is . . . an appropriate means to that legitimate end.").

220. See e.g., *Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564 (9th Cir. 1988), and discussion of its approach to the parol evidence rule *supra* note 26. Perhaps the objective label on classical contract rules appeals to conservative judges. As far as gay people are concerned, it does not matter whether objectivity is possible if the label objective dampens judges' willingness to impose their subjective moral judgments on parties.

221. See, e.g., *Big Brother, Inc. v. Minneapolis Comm'n on Civil Rights*, 284 N.W.2d 823 (Minn. 1979) (refusing to enforce Minneapolis gay rights ordinance to prevent Big Brothers from inquiring into prospective big brothers' sexual orientation and telling mothers of little brothers that a prospective big brother is gay).

law will be fit to recognize gay public rights.²²² But contractual purgatory may not be a heavenly solution.

A downside of contractual purgatory is that it might be permanent instead of a way station. Catholic doctrine suggests that purgatory is a place souls go to be purged of evil prior to passing on to heaven. But limbo is the place that souls go permanently when they do not qualify for eternal salvation. Limbo is perhaps better than eternal damnation, but it does not hold much hope for the future.²²³ If my model of contractual purgatory is in fact contractual limbo, then it is likely not worth much, particularly since *Romer v. Evans* and *Baehr v. Miike* suggest the possibility that gay people may indeed achieve public rights sometime in the near future. But until we can determine whether the contractual way station is purgatory or limbo, it seems contractual purgatory is something valuable to consider in the arsenal of arguments in favor of gay rights.

It may even serve a movement's long term interests to spend some time in contractual purgatory. The progressions of other sexual regulations suggest that perhaps some sexual issues can be purged of controversial content by spending some time in contractual purgatory rather than going directly from public condemnation to public rights. Abortion, for example, is literally all over the map on my model.

Abortion has progressed from being decriminalized, to being criminalized, to being briefly a public right, and is now arguably inching toward contract given restrictions on public funding. There are at least two explanations for abortion's peripatetic status. Perhaps the lack of consensus about whether a victim is implicated in abortion has sent it careening between public rights and public condemnation. Or perhaps the contested status of the fetus is due to the quick transition in 1973 when abortion went rapidly from being a crime to a public right through *Roe v. Wade*.²²⁴ Certainly the Religious Right has accumulated much of its vast war chest on moral rhetoric condemning abortion. Anti-choice activists are raising arms against abortion providers and supporters, and anti-abortion legislation is regularly introduced at the state and federal level. If *Roe* was supposed to be a quick fix to transform abortion from a crime to a public right, perhaps the *Roe* backlash suggests that gay people may be better served by seeking refuge in contractual purgatory rather than further raising the crusader hackles of the Religious Right.

On the other hand, the Christian Right makes so much money on the basis of its anti-gay maneuvers that it is unlikely that any intermediate step would cool their ardor. But an intermediate step is not easy fodder for rhetoric and fundraising. Perhaps granting contractual rights for gay people obscures the

222. I thank Julie Nice for this insight.

223. Sheryl Scheible-Wolf made this point in her comments on this article at the New Private Law conference.

224. Supreme Court Justice Ruth Bader Ginsburg has suggested that perhaps abortion should have been accorded constitutional protection more gradually. Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) (*Roe* may have encouraged anti-abortion measures by holding so broad a right to abortion).

target, potentially frustrating the Right's crusade to maintain marriage and family (not to mention military service) as exclusively heterosexual rights.

B. Theoretical Possibilities

Contractual purgatory may be theoretically subversive in addition to being practical. Its subversive potential is twofold: (1) it may contribute to the social construction of gay people as persons, and thus deserving of legal subjecthood and equality; and (2) it may destabilize hierarchical categories of progressive and conservative if conservative tools are used for progressive ends. If either or both of these is true, then contractual purgatory furthers a progressive agenda by altering how society constructs gay identity and eroding hierarchy.

1. Constructing Personhood

Perhaps contract is essential to the social construction of personhood, and thus contractual purgatory is not only useful as a pragmatic intermediate step to gay people, but may be essential to constructing gay legal personhood.²²⁵ If a legal person is one who has both legal rights and duties,²²⁶ then gay people are legal persons if they have both rights and duties. Certainly gay people have the duties all other citizens have, including the obligation to pay taxes and exercise reasonable care in their personal and business affairs. Gay people also have additional duties, such as the duty to refrain from making sexual proposals to heterosexuals. Failure to observe this duty has proved deadly for some gay men, and their assailants have successfully mounted a so-called gay panic defense.²²⁷

Personhood, like many other things, is socially constructed rather than natural. Supernatural beings, inanimate objects, and animals have at various times under various legal regimes been treated as legal persons.²²⁸

225. Mary Becker and I focus on different aspects of legal personhood. Her commentary on this article suggests that moral arguments do not always harm gay rights, but rather can further the gay rights agenda by exposing the moral superiority of gay over heterosexual relationships. She reasons that there are more autonomy-denying sexual relations in heterosexual relationships, and since control over one's sexuality is moral and taking it away is immoral, gay relationships are morally superior. This reasoning is not inconsistent with my argument, in that we both focus on personhood.

I contend that personal autonomy should trump majoritarian morality, so that victimless crimes should be decriminalized, contractualized, or made into public rights. Similarly, Becker posits that sexual autonomy requires that one have respect for the personhood of a sexual partner. If men do not respect the autonomy of their female partners, the men deny the women's autonomy and personhood. I agree with her model, but I focus on another aspect of personhood: contracting. Sexual autonomy and ability to contract are, of course, only two aspects of legal personhood.

226. JOHN C. GRAY, *THE NATURE AND SOURCES OF THE LAW* 27 (1983) ("The technical legal meaning of a 'person' is a subject of legal rights and duties.").

227. For further discussion of the defense, see Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the 'Reasonable Man' Standard*, 85 N.W. J. CRIM. L. & CRIMINOLOGY 726 (1995) (defending defense as applicable to reasonable heterosexual men); Robert B. Misson, Note, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient*, 80 CAL. L. REV. 133 (1992) (critiquing the defense as "institutional homophobia").

228. GRAY, *supra* note 226, at 41-42, 45, 46-48 (describing how in Europe during the Middle Ages, God and the saints were legal persons and animals were "summoned, arrested, and impris-

Gender²²⁹ and sex²³⁰ are also socially constructed. Indeed, according to Judith Butler, a person who refuses or fails to conform to sex and gender identity is often treated as if he or she were not a person at all.²³¹ If gender is defined in part as conduct intended to attract the opposite sex,²³² then gay people are likely to fall outside gender norms since they aim to attract the same sex. As such, gay people are less likely to be deemed legal persons (or less full legal persons than their heterosexual counterparts). Since states can criminalize conduct by gay people that would be constitutionally protected were they heterosexual,²³³ gay people are clearly less than full legal persons. But opportunities to enforce gay-related contracts may contribute to the process of developing gay people's legal personhood.

Marginorites' legal personhood is constructed in part through legislation extending rights to them. African-Americans were not persons under American law until the Civil War Amendments to the Constitution made them so. Similarly, women were not constitutional persons entitled to vote until the 19th Amendment allowed it. These crucial Amendments formed the cornerstones of African-American and female legal personhood.

Federal and state statutes further developed African-American and female personhood. Under U.S.C. § 1981, African-Americans have the same rights to contract and own property as white people.²³⁴ Similarly, the Married

oned, had counsel assigned them for their defence, were defended, sometimes successfully, [and] were sentenced and executed").

229. BUTLER, TROUBLE, *supra* note 84, at 25 ("Gender proves to be performative—that is constituting the identity it is purported to be. . . . There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results.").

230. *Id.* at 7 ("If the immutable character of sex is contested, perhaps this construct called 'sex' is as culturally constructed as gender; indeed perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all."). Butler has further elaborated on this point:

When the sex/gender distinction is joined with a notion of radical linguistic constructivism . . . the "sex" which is referred to as prior to gender will itself be a postulation, a construction, offered within language, as that which is prior to language, prior to construction. . . . If gender is the social construction of sex, and if there is no access to this "sex" except by means of its construction, then it appears not only that sex is absorbed by gender, but that "sex" becomes something like a fiction, perhaps a fantasy, retroactively installed as a prelinguistic site to which there is no direct access.

BUTLER, BODIES, *supra* note 84, at 5; *see also* Franke, *supra* note 80, at 63 (observing that "sexual identity . . . must be understood not in deterministic, biological terms, but according to a set of behavioral, performative norms").

231. BUTLER, TROUBLE, *supra* note 84, at 17 ("The very notion of 'the person' is called into question by the cultural emergence of those 'incoherent' or 'discontinuous' gendered beings who appear to be persons but who fail to conform to the gendered norms of cultural intelligibility by which persons are defined."). In other words, one becomes a subject within sex and gender, when one is sexed and gendered.

232. Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 163 (Rayna Reiter ed., 1975) ("Gender is not only an identification with one sex; it also entails that sexual desire be directed toward the other sex.").

233. *Compare* Bowers v. Hardwick, 478 U.S. 186 (1986) (states may criminalize homosexual sodomy) with Eisenstadt v. Baird, 405 U.S. 438 (1972) (states may not interfere with unmarried heterosexuals' practices regarding birth control).

234. 42 U.S.C. § 1981 (1994) ("All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."). Contracts have been a double-edged sword for African-Americans. Former slaves were kept in conditions resembling slavery under the

Women's Property Acts allow married women to own property and make contracts.²³⁵ More recent statutes, such as Title VII of the Civil Rights Act of 1964 and the Equal Credit Opportunity Act,²³⁶ provide that private parties may not discriminate on the basis of race or sex in employment or in extending credit. These statutes illustrate that certain classes of human beings were not legally full persons until the law made them so. Similarly, gay people are not full legal persons because they lack many of the protections that everyone else enjoys, such as the freedom to marry or to serve in the military. In this sense full legal personhood would be a collection of public rights in my model.

This brief outline of the constitutional and statutory developments establishing African-American and female legal personhood suggests that one is not necessarily born a legal person, but rather becomes one.²³⁷ Judith Butler has suggested that gender is performative rather than essential: that drag reveals femininity to be a social construct that can be performed by males or females.²³⁸ Butler reasons that drag queens are biological men who perform feminine gender, and in doing so destabilize the categories of male and female by representing the feminine via a male body. She has further argued that sex,

terms of post-Civil War surety and peonage contracts. Julie A. Nice, *Welfare Servitude*, 1 GEO. J. ON FIGHTING POVERTY 340, 351-53 (1994). But contracts between freedmen and their employers both harmed and benefited newly free former slaves. On one hand the contracts gave "extremely low or nonexistent" wages, allowed planters to interfere with employees' personal lives, allocated all risk of loss to the employee, allowed the planter to fine the employee for offenses such as "impudent" language, and mandated that the employee work for a full year. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 164-67 (1988). These harsh terms were hardly freely chosen by the freed men, given the gross inequality in bargaining power and the Freedmen's Bureaus agents threatening to arrest those who would not sign the contract or leave the plantation. *Id.* at 165. However, some Bureau agents facilitated more favorable labor contracts, and the very presence of the agents (and the Bureau) to oversee planter conduct made it clear that the planter no longer exercised the absolute authority of a slave owner. *Id.* at 168. Thus, while the ideology of freedom to freely enter contracts is not always (or even rarely) reflected in material reality, the process of bargaining can confer legal personhood on one formerly a legal object. I thank Katherine Franke for this insight.

235. See, e.g., 1848 U.S. Laws ch. 200 (1848) ("The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female."). For further discussion of the importance of the Married Women's Property Act for American women, see BECKER ET AL., *supra* note 48, at 7-8; Richard H. Chused, *History's Double Edge: A Comment on Modernization of Marital Status*, 82 GEO. L.J. 2213 (1994); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994).

236. 42 U.S.C. § 2000e (Title VII of 1964 Civil Rights Act); 15 U.S.C. § 1691 (Equal Credit Opportunity Act).

237. This point is literally true when one considers that children have fewer speech and due process rights than adults. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (allowing schools the power to inculcate moral values by controlling students' speech on pregnancy and divorce in school newspaper) to inculcate moral values); *Bethel Sch. Dist. No. 403 v. Frazer*, 478 U.S. 675 (1986) (allowing school to discipline student for sexual innuendo in speech to students); *Ingraham v. Wright*, 430 U.S. 651 (1977) (recognizing students' liberty interest in procedure prior to corporal punishment but holding that after-the-fact tort remedy sufficed).

238. BUTLER, *TROUBLE*, *supra* note 84. Katherine Franke notes that performativity of gender is constitutive rather than casual, in that most people do not look in the closet and decide what gender they will be that day. Franke, *supra* note 82, at 50 n.211.

as well as gender, is socially constructed.²³⁹ Mary Anne Case, Katherine Franke, and Francisco Valdes have applied arguments based on the social construction of sex and gender to the employment discrimination context, arguing on various grounds that prohibitions of sex discrimination should also encompass gender discrimination.²⁴⁰ While both Case and Franke propose that the law recognize discrimination based on socially-constructed gender as opposed to only biological sex, Case's analysis applies more directly to my proposal of contract as an essential element of personhood.

Case reasons that if effeminate men and masculine women are protected from employment discrimination, the social construction of femininity will change. Specifically, Case contends that masculinity is valued more highly than femininity because men are more likely to be masculine and men are valued more than women. As a result, protecting effeminate men will lead to protecting feminine women. My argument extends Case's reasoning to the construction of personhood.

Just as Case argues that protecting effeminate men will be an incremental move that ultimately benefits feminine women, I argue that enforcing gay-related contracts is an incremental move that seems like crumbs in comparison to public rights but will ultimately benefit gay people because it contributes to the social construction of gay people as legal persons. In other words, it contributes to their transformation from legal objects to legal subjects.

As gay people form cohabitation and gay-related employment contracts, and as judges enforce them, the social construction of gayness may change. Specifically, gay people may move along my model away from criminalization, into contractual purgatory, and toward public rights. This transition from legal object to legal subject is a 180-degree transition that may require a mid-way stop to account for the extreme nature of the change. Under this analysis, contractual purgatory is not merely the half loaf gay people must settle for because they cannot afford a full one, but rather an essential step in the social transformation from people who do not count to people who do.

2. Master Carpentry

The second theoretical implication of contractual purgatory inverts Audre Lorde's famous quip that the master's house cannot be taken apart with the master's tools.²⁴¹ The film *Babe* again illustrates the potential power of contractual purgatory.

One radical reading of *Babe* is that no animals should be food for people; this interpretation suggests to children that there is something terribly wrong with eating meat (particularly pork). Another radical reading of the film challenges barnyard hierarchy à la George Orwell²⁴² to suggest that even the

239. BUTLER, TROUBLE, *supra* note 84, at 7.

240. Case, *supra* note 83; Franke, *supra* note 80; Valdes, *supra* note 2.

241. Nancy Ehrenreich makes a similar point in her commentary in this Symposium: *The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235 (1996).

242. GEORGE ORWELL, *ANIMAL FARM* (1946). The famous line, "All pigs are equal but some pigs are more equal than others" satirizes the doublespeak of those simultaneously asserting power

most lowly member of the barnyard may have untapped talents. Generalizing this point leads to a generic rationale for equal opportunity under law: every one has unique contributions to make and opening up the field to new contenders will yield new methods of problem solving and perhaps better results. Both readings are essentially anti-hierarchical, and as such seem to serve a progressive agenda. *Crooke v. Gilden* yields numerous similar messages.

Just as Babe won the sheepherding competition against all odds, Gilden won her case. As Babe escaped the slaughterhouse (and the social status of proto-bacon), Gilden escaped the netherworld of social invisibility where an ended romance is socially constructed as totally insignificant. Finally, Babe showed the world that pigs (or at least this pig) can herd sheep better than sheepdogs, using coping skills developed to get along with barnyard animals who perceived him as dimwitted proto-pork. Similarly, Gilden might find that her enforced business/relationship agreement shows the world that she can carve out a place for her relationship to be socially (if incompletely) recognized. In doing so, Gilden elevates the romance from total invisibility or condemnation to legal visibility where the partners' agreement is enforced by the judiciary.

On a more theoretical level, *Babe* makes apparent the injustices of barnyard hierarchy, while *Crooke v. Gilden* demonstrates the advisability of allocating loss according to prior agreement in romance, just as is done in a commercial context. In doing so, *Crooke v. Gilden* illuminates the underlying economic arrangements in most romantic relationships, and may even lead some heterosexuals to contract and thus protect themselves from sacrificing finance to romance. In sum, judicial enforcement of same-sex cohabitation contracts may well contribute to the reshaping of gayness from something criminal toward something worthy of public rights, stopping at contract along the way. Moreover, *Gilden* shows the advisability of relationship contracting just as Babe developed new sheepherding techniques.

Adding Judith Butler to the *Babe/Crooke v. Gilden* analysis yields yet another level of theoretical significance to contractual purgatory. Butler has applied her gender performativity theory to suggest that the people I call sexual minorities might subvert power dynamics by using the very tools that are used against them.²⁴³ Inverting legal norms may thus further a feminist agenda by undermining the current social construction of power.²⁴⁴ By that reasoning, gay people using contractual tools that have been widely assumed to be the master's tools may chip away at the master's house.²⁴⁵ If most of

and claiming all are equal.

243. BUTLER, TROUBLE, *supra* note 84, at 45 ("There is only a taking up of the tools where they lie, where the very 'taking up' is enabled by the tool lying there.") and 47 ("The critical task [for feminism] is . . . to locate strategies of subversive repetition enabled by those constructions [of identity], to affirm the local possibilities of intervention through participating in precisely those practices of repetition that constitute identity and, therefore, present the imminent possibility of contesting them.").

244. See Note, *Patriarchy Is Such a Drag*, *supra* note 84, at 1973.

245. See Testy, *supra* note 4, at 230 (using the familiar statement of Audre Lorde to suggest that "perhaps it is *only* the master's tools that will dismantle the master's house. That is, perhaps it is more effective to reconstruct contract rather than to pretend we can ignore or abandon this

us assume only powerful people use contractual tools to get around hostile default rules, and gay people are not generally powerful, then gay people using contractual tools blurs the distinction between powerful people and less powerful ones, or at least between each group's tools.

This subversion may counteract the dangers inherent in closeting oneself to obtain contractual relief as Gilden did in Georgia. For perhaps Gilden will be like Babe, the pig in collie's clothing, who will contribute to a transformation of the social construction of relationships from being understood as purely emotional and romantic to being recognized as having pragmatic economic elements as well.²⁴⁶ More ambitious is the additional possibility that contractual recognition of sexual minorities' lives might contribute to a broadening of the definition of family from the heterosexual dyad with biological offspring to multiple parties and various forms of roles and responsibilities.

Finally, Gilden's use of business planning to protect her personal interests destabilizes elements of hierarchy by obscuring the players through use of each other's tools.²⁴⁷ Thus the dyads of left/right and commercial/personal may be destabilized by contractual purgatory. In doing so, contractual purgatory creates social space for redefining the categories, perhaps in a way that enhances minorities' personhood. Contractual purgatory may further contribute to a reconceptualization of what contract means if the individualistic tool becomes essential to the liberation struggle of groups of sexual minorities.²⁴⁸

VI. CONCLUSION

Classical contract is apparently amenable to progressive uses, at least regarding regulation of gay sexuality through the private purgatory of contract. Since New Private Law is firmly grounded in a preference for private contracts over public entitlements, gay-related contracts paradoxically serve the interests of New Private Law despite its association with a right-wing political agenda. Thus, New Private Law is apparently amenable to progressive uses, at least regarding regulation of gay sexuality. It may provide gay people a way station en route to public rights such as gay marriage. Or perhaps it is a re-

basic institution.").

246. Martha Fineman and Cynthia Starnes have both advocated a contractual or business model of romantic relationships. See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER 20TH CENTURY TRAGEDIES* (1995) (proposing business model for romantic relationships and family definition by parent and child rather than marriage); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993) (proposing partnership buyout model for marital dissolutions).

247. Of course Gilden wins at Crooke's expense. Both are lesbians and the contest between them is largely zero-sum. However, Gilden wins visibility (partial though it may be) and some measure of equity flowing from enforcing their previous agreement. Had she won, Crooke's gain would have been completely individual, and as such is less likely to fit into a progressive agenda, particularly when it would harm other gay people by ratifying majoritarian moral condemnation of gays.

248. I thank Dan Farber for this insight.

spite from the criminalization of sodomy laws. Either way, New Private Law offers a way for gay people to contract around hostile public default rules grounded in public moral condemnation of homosexuality. In other words, it may offer sexual marginorities an opportunity to contract around the hostile terms of the social contract.

Other sexual regulations seem also to fall into contractual purgatory, particularly when there is no public consensus on whether there is a victim of a particular sexual activity. Abortion seems headed for the private way station, and may slip back to criminalization. But miscegenation, which is widely seen as a victimless offense, has remained a public right since it was established. If sexual marginorities can prevail in characterizing their gay sexual orientation as truly victimless, then perhaps their visit to the way station of contract will be short-lived.

I have tried to show that sexual regulations often travel a trajectory between public extremes of condemnation and rights, sometimes finding a middle ground in contract. And for sexual marginorities, otherwise criminalized and unlikely to obtain public rights in the near future, that private purgatory is a strategic tool for exercising rights and escaping majoritarian moral condemnation. Theoretically, it may be essential to the construction of gay people as subjects rather than objects, and also offer a means of using the master's own tools to reshape power relations. In these circumstances, then, New Private Law may serve progressive ends.