1998

Women, Morality, and Sexual Orientation

Mary E. Becker

ARTICLES

WOMEN, MORALITY, AND SEXUAL ORIENTATION

Mary Becker*

ABSTRACT

In this Article, Professor Becker argues that heterosexual relationships are more problematic for women than lesbian relationships, particularly when such relationships are viewed in terms of their tendency to objectify the "other." She discusses how current "moral" norms concerning the inferiority of homosexuality to heterosexuality enable men to use women in immoral and subordinating ways. She explores moral taboos against lesbian relationships and asserts that these taboos facilitate heterosexual male exploitation of women's sexuality by obscuring from some women the possibility that they might prefer more equitable relationships with women rather than with men. She argues for greater acceptance of lesbian relationships because it will allow women to choose between heterosexual and same-sex relationships and will force men to commit to moral heterosexual relationships. She concludes by examining bans on lesbian marriages. She asserts that these bans not only discriminate between men and women on a formal level but also discriminate substantively by facilitating the ability of men to exploit women's sexuality as well as their emotional, domestic, and reproductive labor.

---

* Professor of Law at the University of Chicago Law School. I thank my partner, Joanne Trapani, for many helpful discussions and comments on this topic. I thank participants in the Chicago Feminist Colloquium Workshop, the Critical Tax Theory Workshop at Buffalo in September of 1995, and workshop participants at University of Arizona Law School, Boston University Law School, and the Chicago Feminist Colloquium for helpful comments on an earlier version of this Article. Particular thanks to Anette Appel, Carlos Ball, Ruth Chang, Mary Coombs, Beth Garrett, Anne Goldstein, John Knight, Andrew Koppelman, Martha Nussbaum, Bill Rubenstein, Jennifer Spruill, Nancy Staudt, and Robin West. I also thank Paul Bryan, Connie Fleischer, Caroline Goddard, Amy Hagan, Lyonette Louis-Jacques,

TABLE OF CONTENTS

Greg Nimo, William Schwesig, and Charles Ten Brink for research and other assistance. The Jerome F. Kutak Faculty Fund and The Arnold and Freida Shure Research Fund provided research support.

I. INTRODUCTION

People use moral and religious arguments for the worst of causes and the best of causes. Moral and religious arguments have supported and opposed violence, slavery, and patriarchy. A moral norm can spring from venerated traditions yet justify injustice.

The Supreme Court sometimes upholds statutes justified by traditional moral and religious norms and at other times strikes down such statutes as unconstitutional. In the nineteenth century, the Court accepted discrimination against women in bar admissions as justified by the "the law of the Creator,"[1] but since 1971, the Court has regarded laws that overtly classify on the basis of sex as unconstitutional unless the classification substantially furthers a legitimate and important governmental objective.[2]

The Court has not limited rejection of moral justifications to cases involving discrimination against women. In *Loving v. Virginia*,[3] the state of Virginia argued that its antimiscegenation statute was grounded in traditional moral and religious norms. The Court nevertheless held that the statute discriminated on the basis of race and struck it as unconstitutional.[4] Likewise, state regulations of contraceptives and abortion for married and unmarried couples were justified by traditional moral norms yet were held unconstitutional by the Court in *Griswald v. Connecticut*,[5] *Eisenstadt v. Baird*,[6] *Roe v. Wade*,[7] and subsequent privacy cases.[8]

Today, moral and religious arguments are used to justify discrimination against lesbians and gay men. In the two Supreme Court cases dealing with lesbian and gay discrimination, such arguments have succeeded once and failed once. In *Bowers v. Hardwick*,[9] the Supreme Court held that a Georgia statute

1. Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (stating that the "law of the Creator" demanded that a married woman accept her "paramount destiny and mission . . . to fulfill the noble and benign offices of wife and mother.").

2. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

3. 388 U.S. 1 (1967).

4. *Id.* at 12.

5. 381 U.S. 479 (1965).

6. 405 U.S. 438 (1972).

7. 410 U.S. 113 (1973), *modified*, 505 U.S. 833 (1992).

8. *E.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).

9. 478 U.S. 186 (1986).

criminalizing all anal and oral sex, whether heterosexual or homosexual could constitutionally be applied to homosexual sodomy because "[p]roscriptions against that conduct have ancient roots."[10] Justice White, writing for the Court, explained that "the law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[11] Justice Berger, concurring, cited Blackstone for the proposition that sodomy is "'an offense of deeper malignity' than rape."[12]

In *Romer v. Evans*,[13] the Court held that the Colorado Constitution could not bar any governmental statute, regulation, ordinance, or policy protecting lesbians, gay men, or bisexuals from discrimination. Justice Kennedy, writing for the Court, held that the challenged amendment to the Colorado Constitution — banning any governmental protection of lesbians and gay men — did not pass rational basis scrutiny because "the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests."[14] Kennedy simply ignored *Bowers v. Hardwick* and justifications for the amendment based on the ancient moral norms given great deference in that case.[15]

Many legal classifications, such as laws banning murder, theft, assault, rape, adultery, sexual abuse of children, and necrophilia, are based on traditional moral norms. That a classification has traditional moral roots does not necessarily mean that it is invalid. But neither can such roots establish that the law is nondiscriminatory and serves morality, despite Justice Scalia's belief in a constitution adopted to protect *all* moral norms from democratic encroachments.[16]

---

10. *Id.* at 192.

11. *Id.* at 196.

12. *Id.* at 197 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 215).

13. 116 S.Ct. 1620 (1996).

14. *Id.* at 1627.

15. *See* Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361, 381 (1997). ("The [*Romer*] opinion also raises, but does not answer clearly, the critical question whether intolerance of homosexuality framed in terms of traditional values is the same thing as anti-gay animus.").

16. *See Romer*, 116 S.Ct. at 1629, 1634-35 (Scalia, J., dissenting) (insisting that constitutional provisions can disfavor a group for moral reasons and citing in support, Colorado's Amendment 2 and Arizona, Idaho, New Mexico, Oklahoma and Utah's state constitutional provisions which forever prohibit polygamy); *see also*

Moral justifications for discrimination against lesbians and gay men might seem to stand on a different footing from those used to support discrimination against racial minorities and women because lesbians and gay men can be defined by conduct traditionally considered immoral, i.e., sodomy,[17] whereas neither women nor racial minorities are defined in terms of conduct. However, antimiscegenation statutes banned conduct traditionally seen as immoral — interracial marriage in southern states — yet in *Loving v. Virginia,* the Court nevertheless held such a statute unconstitutional.

Moreover, the subordinate status of African-Americans and women was justified by their "immoral" natures, natures seen as especially weak with respect to sexual mores. In the end, these morality-based justifications exacerbated immorality. Because women and African-Americans had limited rights, white people and men were free to treat African-Americans and women in violent and immoral ways, including sexual abuse and rape of women as slaves or wives.[18] Thus, norms regarding the sexual immorality of certain groups facilitated violent and immoral sexual exploitation and subordination of many by members of the dominant "moral" group.

Despite the Supreme Court's acceptance of moral justifications for classifications in some equal protection and due process cases and rejection in others, the Court has never explained how it decides whether to accept or reject such justifications. It is easy to understand this failure; neither lawyers nor judges are trained to grapple with moral questions. Despite the explosion of scholarship on lesbian and gay issues in the legal literature

---

Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1066-67 (1990) (arguing that we should "respect the past because the world of culture that we inherit from it makes us who we are" and because "the very acts by which we satisfy our obligations to the past put the future in debt to us, and force us to depend upon the future for the preservation of whatever contributions we in turn make to the world of culture during our trusteeship . . . .").

17. Many commentators have noted that in fact the meaning of sodomy has varied tremendously over time and it has never included *only* sexual acts of lesbians and gay men (instead, many sexual acts between heterosexuals have been within the scope of such statutes) nor even any core act or acts performed by every "active" homosexual. Much modern heterosexuality would fall within traditional definitions of sodomy. *See* Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993); Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531 (1992).

18. Rape did not include nonconsensual coerced sex with wives or slaves.

over the last ten years,[19] most of this literature has avoided moral arguments.[20]

In this Article, I argue that we should assess the morality of sexual relationships[21] in terms of their tendency to objectify the "other" in autonomy-denying ways, that is, in ways that the object would rather avoid than endure were there no consequences. Judged by this metric, heterosexual relationships are more problematic for women than lesbian relationships. The problem is not simply that people in heterosexual relationships tend to objectify each other, but that men and women in heterosexual relationships tend to view women as men's sexual objects rather than as sexual subjects in their own right.[22] Such objectification is possible because women have less social power overall than men. Autonomy-denying objectification tends, therefore, to support and exacerbate women's subordinate status, perpetuating another moral wrong in addition to autonomy-denying objectification. In addition, the compulsory nature of heterosexuality in our culture today tends to hide from women options that might enable them to find more moral and more equitable intimate relationships with other women.

---

19. Many have argued that discrimination against lesbians and gay men is sex discrimination given the complex ways in which sex, gender, and sexual orientation are intertwined in our social norms and stereotypes. *See* Andrew Koppleman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) [hereinafter Koppelman, *Discrimination*] (discussing sexism as a *partial* explanation for homophobia); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Andrew Koppleman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination,* 98 YALE L.J. 145 (1988). On the confusion of sex, gender, and sexual orientation in legal analysis, see Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161 (1996); Francisco 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); Mary Ann C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995)

20. *But cf.* Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 81-83 (1996) (arguing that morality is the core issue).

21. As John Stuart Mill pointed out, it is in relationships of greatest intimacy that the desire to dominate is most powerful "for every one who desires power, desires it most over those who are nearest to him, with whom his life is passed, with whom he has most concerns in common, and in whom any independence of his authority is oftenest likely to interfere with his individual preferences." JOHN STUART MILL, THE SUBJECTION OF WOMEN 19 (1869).

22. *See infra* Part III.

Rules banning lesbian relationships facilitate male exploitation and expropriation of women's sexuality as well as emotional, domestic, and reproductive labor. These rules pressure women who might prefer more equitable relationships with women into relationships with men[23] and limit the political and social power of all women, particularly lesbians. Ancient moral norms should not, therefore, be regarded as a legitimate basis for these rules. Instead, such laws should be seen as facilitating immorality.

In light of the immoral function morality-based norms can play, I propose that in constitutional cases, the legitimacy of a justification based on traditional morality should depend on whether it contributes significantly to the subordination of one group to another. I do not just mean that one group is given a preference denied another, but that the law facilitates personal, even intimate, relationships of domination between members of the groups as well as the ability of one group to exploit another group's labor or sexuality for its own purposes. Because of the law, individuals in the favored group are able to form individual relationships with members of the disfavored group, relationships in which they dominate and are able to harness the sexuality or labor of the disfavored group for their own purposes.[24]

---

23. Much of my analysis derives from Adrienne Rich's classic essay on compulsory heterosexuality. In that essay, Rich describes the many ways in which men subordinate and exploit women and the connection between such phenomena and compulsory heterosexuality. Rich suggests that men's greatest fear — the fear that is at the base of compulsory heterosexuality — is not that women might be sexually insatiable but that "women could be indifferent to [men] altogether, that men could be allowed sexual and emotional — therefore economic — access to women *only* on women's terms, otherwise being left on the periphery of the matrix." Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631, 643 (1980). However, compulsory heterosexuality came to be part of our culture and law, its effect is to facilitate men's access to women's sexual, reproductive, emotional, and domestic labor on men's terms, no matter how unfair or immoral, as well as women's subordination to individual men in relationships of great intimacy.

24. This is a far narrower approach than that suggested as a possibility by Ronald Dworkin, namely that a moral majority cannot limit the liberty of other citizens simply because it disapproves of their choices. *See* Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. REV. BOOKS, Aug. 8, 1996, at 44.

For discussions of when the Court should not accept moral justifications in constitutional cases, see Koppleman, *Discrimination, supra* note 19, at 284 (stating that moral convictions should not be accepted as justifying discrimination when "predicated on a world view which deemed some persons intrinsically less worthy of concern and respect than others on the basis of race or sex or both."); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2320 (1997) ("[A]ssertions about what is moral and immoral, normal and deviant, honorable and dishonorable are not smokescreens for illicit motivation, but the very fabric of a system of social domination." Moral arguments for status hierarchies must be subjected to moral criticisms

Laws establishing slavery and denying property rights to married women could not be justified by traditional moral norms under this standard, because these laws facilitated the ability of whites and men to dominate slaves and women in personal relationships and to exploit their labor and sexuality.

On the other hand, laws banning necrophilia and polygamy[25] could be sustained under this standard. These laws prefer certain people over others but they do not facilitate the ability of nonnecrophiliacs to dominate necrophiliacs in personal and economic relationships. Laws prohibiting or refusing to recognize lesbian marriages would, however, be struck under this principle. Such laws violate the sex-equality provision of the Fourteenth Amendment since they discriminate on the basis of sex on both formal and substantive levels. Furthermore, they cannot be justified simply on the basis of "traditional American moral values."[26]

In this Article, my primary concern is the morality of sexuality with a focus on *women*.[27] Similar arguments have been made in support of lesbian and *gay* rights,[28] but new arguments emerge with the focus on women. These arguments are visible *if and only if* the focus is on women because these arguments describe the ways in which the current practice of compulsory heterosexuality contributes to and facilitates the ability of men to

---

and laws discriminating against lesbians and gay men should be rejected because they are "connected to the oppression" of one social group (women) by another (men)). Balkin's conclusion is broader than mine. I argue for the narrower proposition that moral arguments should be rejected when such arguments facilitate the immoral exploitation of the subordinate group's sexuality or labor by the dominant group. *See infra* notes 25-26 and accompanying text.

25. There are many arguments that can be made against polygamy from the perspective of women. *See* Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1502 (1997). For discussions of the history of polygamy, see Sarah Barringer Gordon, *"The Liberty of Self-Degradation": Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America*, 83 J. AM. HIST. 815 (1996).

26. Romer v. Evans, 116 S.Ct. 1620, 1629, 1636 (1996) (Scalia, J., dissenting) (arguing that the majority should have upheld Colorado's Amendment 2 since it is a "reasonable effort to preserve traditional American moral values.").

27. *Cf.* Mary Coombs, Comment, *Between Women/Between Men: The Significance for Lesbianism of Historical Understandings of Same-(Male) Sex Sexual Activities*, 8 YALE J.L. & HUMAN. 241 (1996) (focusing on homosexual men in available historical material and suggesting possible differences as well as similarities in experiences of lesbians and gay men today); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989) (discussing the tendency of feminist theory to focus only on heterosexual women).

28. *See supra* notes 19-20.

subordinate women in personal relationships. Given this focus, I do not address an entirely different question debated within the lesbian and gay community, namely the pros[29] and cons[30] of advocating for marriage rights at this point in time, though I do consider this question briefly in my conclusion.

In Part II, I briefly discuss the traditional moral and religious arguments that homosexuality is immoral for either consequentialist reasons (it causes harm to those involved, their friends, families, and society) or inherent reasons (heterosexuality is inherently, necessarily, morally superior to lesbian sexuality). I begin with these arguments for two reasons. First, before making my moral argument about lesbian and heterosexual sexuality in sections III and IV, I want to explore traditional arguments against same-sex relationships and demonstrate how weak such arguments are when applied to lesbian relationships. Second, modern moral arguments about the inherent superiority of heterosexual intercourse within marriage do include, I believe, an important insight — immoral sex can alienate the conscious self from the physical self in harmful ways.

In Parts III and IV, I argue that traditional bans on lesbian relationships facilitate the ability of heterosexual men to exploit women's sexuality and their domestic and reproductive labor. In Part III, I begin with what initially seems a wholly different measure for assessing the morality of sexuality from those discussed in Part II, namely whether the subject objectifies the other in autonomy-denying ways. I analyze objectification and identify its more harmful forms. I then look across sexual orientation categories to determine which sexual orientation is most immoral to women based on its tendency to objectify women in harmful

29. For intracommunity arguments *for* seeking the right to marry, see WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT, 51-85 (1996); Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, NAT'L GAY & LESBIAN Q., Fall 1989, at 9, *reprinted in* LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES 13 (Suzanne Sherman ed., 1992) [hereinafter LESBIAN AND GAY MARRIAGE]; Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intracommunity Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994).

30. For intracommunity arguments *against* seeking the right to marry, see Paula Ettelbrick, *Since When is Marriage a Path to Liberation*, OUT/LOOK, NAT'L GAY & LESBIAN Q., Fall 1989, at 9, *reprinted in* LESBIAN AND GAY MARRIAGE, *supra* note 29, at 20; Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1994); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993).

ways. I suggest that autonomy-denying sex causes women to dissociate the bodily self from the conscious experiencing self and harms women in a number of ways. Women in heterosexual relationships are at greater risk of experiencing autonomy-denying sex than are women in lesbian relationships. I do not, however, propose any direct bans on hazardous relationships. Women engaged in such relationships, whether "sex workers,"[31] girlfriends, or wives, may well be right in thinking that such relationships are their best available option today.

In Part IV, I argue that for some (many?) women, sexuality is far more fluid than our current understanding of sexual orientation allows and that contemporary taboos on lesbian relationships have the effect of facilitating heterosexual men's exploitation of women.

In Part V, I briefly apply the principle developed here to the constitutional issue of whether bans on lesbian marriage discriminate on the basis of sex in violation of the equality provision of the Fourteenth Amendment. I conclude that the denial of marriage rights to lesbian couples constitutes sex discrimination against women on both formal and substantive levels.

II. TRADITIONAL ARGUMENTS

Traditional moral and religious arguments against same-sex relationships take one of two forms. One is the consequentialist argument that such relationships tend to cause real-world problems for those involved and their children, families, friends, and society. The other argument is that homosexuality is *inherently* immoral. I begin this Part with a brief discussion of the consequentialist arguments against lesbian relationships. I then describe and discuss the arguments that lesbian relationships are inherently immoral.

A. *Consequentialist Arguments Against Lesbian Relationships*

Arguments about the evils caused by same-sex relationships take one of five forms: (1) homosexuality causes high levels of promiscuity and sexually transmitted disease; (2) homosexuality leads to sexual abuse of children by adults; (3) acceptance of homosexual relationships will result in fewer good homes and confusing role models for children; (4) acceptance of same-sex

31. Sex workers refers to people who work for wages in the sex industry and includes nude dancers, prostitutes, and phone sex workers.

relationships threatens the stability of marriage; and (5) heterosexuality is necessary in order to civilize men. In this Subpart, I describe these objections to lesbian relationships and assess the extent to which they are supported by any evidence.

1. *Promiscuity and Disease.* Some moral conservatives base objections to same-sex relationships on the connections between homosexuality, promiscuity, and disease, citing evidence of the high prevalence of AIDS and other sexually transmitted diseases in the homosexual population.[32] In fact, lesbians have the lowest rates of sexually transmitted disease ("STD") of any sexually-active group, significantly lower than heterosexuals.[33] If a connection exists between sexually transmitted diseases and promiscuity, then lesbians are less promiscuous than either heterosexuals or gay men.[34]

2. *Sexual Abuse of Children.* Moral conservatives regard homosexual adults as more likely to prey on children than heter-

---

32. *See* GEORGE GRANT & MARK A. HORNE, LEGISLATING IMMORALITY: THE HOMOSEXUAL MOVEMENT COMES OUT OF THE CLOSET 34-37, 123-41 (1993); Roger Scruton, *Gay Reservations, in* THE LIBERATION DEBATE: RIGHTS AT ISSUE 122 (Michael Leahy & Dan Cohn-Sherbok eds., 1996).

33. *See* ANN DUECY NORMAN ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., LESBIAN AND BISEXUAL WOMEN IN SMALL CITIES — AT RISK FOR HIV? (1996); American Academy of Pediatrics, Committee on Adolescence, *Homosexuality and Adolescence*, 92 PEDIATRICS 631, 632 (1993) (women who have sex only with other women have low rates for all STDs). Most lesbians who contract HIV sexually acquire the infection through unprotected heterosexual activity (often with gay or bisexual men or injection drug users). *See* S. MILLS ET AL., SAN FRANCISCO DEP'T OF PUBLIC HEALTH, HEALTH BEHAVIORS AMONG LESBIAN AND BISEXUAL WOMEN: A COMMUNITY-BASED WOMEN'S HEALTH SURVEY (1993) (on file with author); P.E. STEVENS, LYON-MARTIN WOMEN'S HEALTH SERVS., HIV RISK REDUCTION FOR THREE SUBGROUPS OF LESBIAN AND BISEXUAL WOMEN IN SAN FRANCISCO (1993) (on file with author). The medical literature reports only isolated incidences of woman-to-woman transmission of the virus. *See* S.Y. CHU, CENTERS FOR DISEASE CONTROL & PREVENTION, ORAL COMMUNICATION (1993); S.Y. Chu et al., *Epidemiology of Reported Cases of AIDS in Lesbians*, 80 AM. J. PUB. HEALTH 1380-81 (1990); Maria T. Sabatini et al., *Kaposi's Sarcoma and T-cell Lymphoma in an Immunodeficient Woman: A Case Report*, 1 AIDS RES. 135 (1983); Josiah D. Rich et al., *Transmission of Human Immunodeficiency Virus Presumed to Have Occurred Via Female Homosexual Contact*, 17 CLINICAL INFECTIOUS DISEASES 1003 (1993); Peter Greenhouse, Letter to the Editor, *Female-to-Female Transmission of HIV*, LANCET, Aug. 15, 1987, at 401; Michael Marmor et al., Letter to the Editor, *Possible Female-to-Female Transmission of Human Immunodeficiency Virus*, 105 ANNALS INTERNAL MED. 969 (1986); Samuel Perry et al., Letter to the Editor, *Orogenital Transmission of Human Immunodeficiency Virus (HIV)*, 111 ANNALS INTERNAL MED. 951 (1989).

34. There is no data directly comparing promiscuity among lesbians and among heterosexuals.

osexual adults.[35] Although this fear is primarily directed at gay men, it is occasionally directed at lesbians. Reliable data on child abuse is notoriously difficult to obtain because of problems with memory, underreporting, shame, and denial. However, existing data suggests that heterosexual men are overwhelmingly responsible for child abuse.[36] Most child abuse involves adult male abuse of a young female,[37] and gay men appear no more likely than heterosexual men[38] to abuse children.[39] There is no evidence suggesting that lesbians pose any special danger to children.[40]

---

35. *See* GRANT & HORNE, *supra* note 32, at 38-43; The Ramsey Colloquium, *The Homosexual Movement,* 41 FIRST THINGS 15, 19 (1994) (advocating discrimination against lesbians and gay men in education programs when "the intent is to prevent predatory behavior").

36. *See* Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1034 (1992).

37. *See* CHILDREN'S DIV., AM. HUMANE ASS'N, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS 216-17 (Vincent De Francis ed., 1969) (stating that 90% of victims of sexual abuse are female); Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41, 42 (1994) (in a study of 352 cases of suspected child sexual abuse, 269 cases involved abuse by adults. Of those cases, 81.5% of the victims were female).

38. *See* Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. & SEXUALITY 133, 156 (1991) (reviewing the literature relating to adult sexual orientation and molestation of children and concluding that gay men are not more likely than heterosexual men to molest children); Jenny et al., *supra* note 37, at 42 (in 269 suspected cases of child sexual abuse, 96.4% of the abusers were heterosexual males). In fact, the most dangerous group of abusers appear to be heterosexual relatives of abused children and heterosexual partners of their close relatives. *See id.* (noting that over 80% of abusers were heterosexual partners of a close relative of the victim); *see also* Glen Kercher & Marily McShane, *Characterizing Child Sexual Abuse on the Basis of a Multi-Agency Sample*, 9 VICTIMOLOGY 364, 370-79 (1984) (reporting that 40.6% of male perpetrators were fathers or stepfathers of the victim).

39. *See* A. Nicholas Groth & Ann Wolbert Burgess, *Male Rape: Offenders and Victims*, 137 AM. J. PSYCHIATRY 806 (study of 22 male rape cases finding only 2 perpetrators who led predominantly homosexual lifestyles); A. Nicholas Groth & H.J. Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, 7 ARCHIVES SEXUAL BEHAV. 175 (1978); Jenny et al., *supra* note 37, at 42 (noting that of 269 incidents of child abuse, 18.5% of the victims were male and 81.5% of the victims were female. For males only 1 abuser (2%) was gay. For females none of the abusers were gay); Mary J. Spencer & Patricia Dunklee, *Sexual Abuse of Boys*, 78 PEDIATRICS 133, 135 (1986) (in 140 cases of male child abuse studied, 4 of the male perpetrators were known homosexuals).

40. *See* Jenny et al., *supra* note 37, at 42 (of 219 incidents of female child abuse, 1 was committed by a lesbian (0.4%) and 6 were committed by heterosexual women (2.7%). For additional authority, see BARBARA MCCOMB JONES ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., SEXUAL ABUSE OF CHILDREN: SELECTED READINGS; E.M. DiLapi, *Lesbian Mothers and the Motherhood Hierarchy, in* HOMOSEXUALITY AND THE FAMILY 101 (Frederick W. Bozett ed., 1989); David Finkelhor & D. Russell, *Women as Perpetrator: Review of the Evidence, in* CHILD SEXUAL ABUSE:

3. *Acceptance of Homosexuality Will Result in Fewer Good Homes and Confusing Role Models for Children.* Many believe that, all else being equal, children are best raised by two biological parents. Children adopted by strangers are at greater risk than children living with their biological parents along a number of dimensions,[41] and sometimes feel abandoned by their genetic parents, particularly their mothers.[42] The argument that children should be raised by their natural parents was the main justification offered at trial by the state of Hawaii for its ban on same-sex marriage.[43] Adoption problems arise with adoption, however,

---

NEW THEORY AND RESEARCH 171 (David Finkelhor ed., 1984); Patterson, *supra* note 36; E.P. Sarafino, *An Estimate of Nationwide Incidence of Sexual Offenses Against Children*, 58 CHILD WELFARE 127 (1979). One study reports that children of gay or lesbian parents are less likely to become victims of parental sexual or physical abuse. *See* A.H. Fishel, *Gay Parents*, 4 ISSUES HEALTH CARE WOMEN 139 (1983).

41. *See* David M. Brodzinsky, *Adjustment to Adoption: A Psychosocial Perspective*, 7 CLINICAL PSYCHOL. REV. 25, 29 (1987) ("on average adopted children are more likely to manifest psychological problems than nonadopted children"); Deborah A. Frank et al., *Infants and Young Children in Orphanages: One View from Pediatrics and Child Psychiatry*, 97 PEDIATRICS 569, 573 (citing B. Tizard & J. Hodges, *The Effect of Early Institutional Rearing on the Development of Eight-Year-Old Children*, J. CHILD PSYCHOL. & PSYCHIATRY 99 (1978) (study of children who had been institutionalized, then adopted in the first two years of life. The children did adapt well to adoptive homes but a disproportionate number had psychiatric problems)). On bonding and attachment see CHRISTINE ADAMEC & WILLIAM L. PIERCE, THE ENCYCLOPEDIA OF ADOPTION 71 (1991) (referencing study showing that children adopted before age four bonded well with their parents while children who were adopted over age four experienced problems bonding); MIRIAM REITZ & KENNETH W. WATSON, ADOPTION AND THE FAMILY SYSTEM 133 (1992) (unlike birth bonding, attachment is ordinarily learned through nurturing interaction between parent and child during the first three years of life and if that nurturing has been inadequate, intermittent, or traumatically interrupted, a child may suffer from an attachment disorder); Leslie M. Singer et al., *Mother-Infant Attachment in Adoptive Families*, 56 CHILD DEV. 1543, 1550 (1985) (mother-infant attachment is the same in adoptive and nonadoptive families of infants but the older the child is at the time of adoption, the more likely he or she is to have behavioral problems).

42. Paul M. Brinich, *Some Potential Effects of Adoption on Self and Object Representations*, 35 PSYCHOANALYTIC STUDY CHILD 107 (1980); Steven L. Nickman, *Challenges of Adoption*, 12 HARV. MENTAL HEALTH LETTER 5 (1996) (adoptees have lower self-esteem because of apparent abandonment or rejection by birth parents).

43. *See* Baehr v. Miike, No. CIV.91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). The trial court reported:

> [d]efense counsel acknowledged Defendant's burden of proof and, in pertinent part, stated the following in his opening statement. "The State has a compelling interest in promoting the optimal development of children .... It is the State's policy to pursue the optimal development of children, to unite children with their mothers and fathers, and to have mothers and fathers take responsibility for their child."

Id. at *3.

not lesbian parenting. Children adopted by unrelated lesbian couples, like children adopted by unrelated heterosexual couples, would not live with a genetic parent regardless of whether the adoption is allowed or whether their parents are allowed to marry. Fewer and fewer children have the ability to live out their childhoods with both biological parents.[44] The more we stress the overwhelming importance of living in two-biological-parent homes, the more we harm children and their parents who cannot live in such ideal families by telling them that they do not have a "real" parent-child relationship.

Most children raised by lesbian parents are the biological child of one of their mothers. If the biologic mother has lived throughout the child's life in a stable family unit with another person to whom the child is not biologically linked (stepfather, adoptive father, adoptive second mother, or nonadoptive second mother), we know nothing about whether the child — like the child adopted by strangers[45] — will be at greater risk than if the biological mother were living with the biological father. The most analogous situation would be a child born within a stable heterosexual relationship as a result of artificial insemination. In this situation, the absence of a biological link to the father may be of relatively little importance. Artificial insemination of a woman in a heterosexual relationship is allowed although the child will not live in a home with two biological parents. Indeed, even Hawaii's experts conceded that risky situations arise routinely with heterosexuals today without any legal prohibitions. For example, in second marriage situations, children of the mother's first marriage live with an adoptive or stepfather to whom they are not biologically related rather than with their biological father with whom they lived earlier.[46] Yet we do not therefore pro-

44. *See* Kay Weiler & Lelia B. Helms, *Who's in Charge? Guardianships and Children*, 17 MCN AM. J. MATERNAL CHILD NURSING 232 (1992) (between 1970 and 1989 the proportion of children in the United States living with both parents dropped from 85% to 73%).

45. *See supra* notes 41-42 and accompanying text.

46. *See* W.D. Erickson et al., *The Life Histories and Psychological Profiles of 59 Incestuous Stepfathers*, 15 BULL. AM. ACAD. PSYCH. & L. 349-57 (1987) (incest is both more common and more severe in stepparent families); Stephanie Kasen et al., *A Multi-Risk Interaction Model: Effects of Temperment and Divorce on Psychiatric Disorders in Children*, 24 J. ABNORMAL CHILD PSYCHOL. 121 (1996) ("In comparison with youths in intact families, youths living in stepfamilies were at increased risk for ADHD and conduct disorders."); Diana E.H. Russell, *The Prevalence and Seriousness of Incestuous Abuse: Stepfathers vs. Biological Fathers*, 8 CHILD ABUSE & NEGLECT 15 (1984) (finding that in random sample of 930 adult women, 17% of

hibit divorced mothers from remarrying or living again with a man, though there is evidence that children in such homes are at special risk.

Part of the concern about lesbians as parents, caretakers, or teachers of children is that lesbians cannot be effective role models of (heterosexual) women and men. Children "exposed" to lesbians may be confused about gender and sexuality. This concern often affects custody following a divorce.[47] Many courts routinely award custody to a heterosexual father rather than a lesbian mother for fear that child might have difficulty becoming heterosexual, might be teased by other children, or might be injured in some unspecified way.[48]

There are a number of empirical studies of children raised by lesbian mothers.[49] Most studies report that the children of

---

those who had lived with a stepfather in childhood were sexually abused while 2% of those who lived with a biological father were abused by him. These statistics illustrate that the abuse by stepfathers was more severe). On the prevalence of the risk that a child will live in a heterosexual stepfamily, see Virginia Rutter, *Lessons from Stepfamilies*, PSYCHOL. TODAY, May-June 1994, at 30 (noting that by the year 2000, stepfamilies will outnumber all other family types).

47. For empirical evidence of risk in children in stepfamilies, see, for example, Donald H. Stone, *The Moral Dilemma: Child Custody When One Parent is Homosexual or Lesbian — An Empirical Study*, 23 SUFFOLK U. L. REV. 711, 722-25 (1989); Robert G. Bagnall et al., Comment, *Burdens on Gay Litigants and Bias in the Court System*, 19 HARV. C.R.-C.L. L. REV. 498 (1984).

48. *See* Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (awarding custody of child to grandmother in part because the mother is a lesbian); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) ("the conditions under which this child must live daily are not only unlawful but also impose an intolerable burden" upon the child because of "social condemnation . . . which will inevitably afflict her relationship with her peers and with the community at large."); Jacobson v. Jacobson, 314 N.W.2d 78, 79, 81 (N.D. 1981) (awarding custody to heterosexual father stating that "we cannot lightly dismiss the fact that living in the same house with their mother and her [lesbian] lover may well cause the children to 'suffer from the slings and arrows of a disapproving society.'"); *In re* Marriage of Williams, 563 N.E.2d 1195, 1197 (Ill. App. Ct. 1990) (supporting heterosexual father's claim to custody over the claim of the child's lesbian mother, noting father's wish to provide for the child's "moral upbringing, self-esteem, and the traditional type family setting. . . ."); M.J.P. v. J.G.P., 640 P.2d 966, 968-69 (Okla. 1982) (court worried about many potential detrimental effects).

49. Like all work in this area, much of this research suffers methodological problems. For example, some studies compare single-divorced heterosexual women with lesbians in stable lesbian relationships. *See* Susan Golombok et al., *Children of Lesbian and Single Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHOL. & PSYCHIATRY 551 (1983); Richard Green, *The Best Interests of the Child with Lesbian Mother*, 10 BULL. AM. ACAD. PSYCH. & L. 7, 7-15 (1982) [hereinafter Green, *Best Interests*]; Richard Green et al., *Lesbian Mothers and their Children: A Comparison with Solo Parent Heterosexual Mothers and their Children*, 15 ARCHIVES OF SEXUAL BEHAV. 167 (1986) [hereinafter Green, *Lesbian Mothers*]. Others rely on mothers' reports, and mothers may be unlikely to perceive or report

lesbian mothers do not differ in statistically significant ways from the children of heterosexuals with respect to sexual orientation,[50] gender identity,[51] gender role,[52] self-esteem,[53] psychological

---

problems related to either divorce or their sexuality. *See* Golombok, *supra*. Some use samples so small that differences are dismissed as statistically insignificant. More fundamentally, problems may not be measurable. Questions have also been raised with regard to sampling issues, statistical power, and other technical matters. *See* Phillip A. Belcastro et al., *A Review of Data Based Studies Addressing the Affects of Homosexual Parenting on Children's Sexual and Social Functioning*, 20 J. DIVORCE & REMARRIAGE 105 (1993) (citing lack of external validity because of difficulty of determining the universe of gay parents, poor control groups, and small sample sizes). Little is known about development of the offspring of gay or lesbian parents during adolescence or adulthood. Longitudinal studies that follow lesbian and gay families over time are badly needed. *See* Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 Duke J. Gender L. & Pol'y 191, 203 (1995) [hereinafter Patterson, *Adoption*].

For a discussion of methodological problems from an opponent of same-sex marriage, see Lynn Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833. But Wardle himself makes a number of questionable assumptions. He views a girl growing up to be lesbian rather than heterosexual as problematic. *Id.* at 621. He reports that:

> [T]hree of the thirteen lesbian mothers [in one study] preferred for their daughters to become homosexual, compared to none of the fifteen heterosexual single mothers, and all of the heterosexual mothers (100%), hoped their children would marry and have children, but only nine of thirteen lesbian mothers (69%) wanted their children to have children.

Id. Although the lesbian mothers are much more open than the heterosexual mothers to their children growing up with a sexuality different from their own, Wardle sees the only possible problem is that more lesbian mothers would like their daughters to be lesbians. In this Article, I argue that there are good reasons for that preference. I also assert that heterosexual marriage and children under contemporary arrangements are problematic for women. Wardle assumes that having a mother who sees such problems is a disadvantage for a daughter.

50. *See* M. Neil Browne & Andrea Giampetro, *The Contribution of Social Science Data to the Adjudication of Child Custody Disputes?*, 15 CAP. U. L. REV. 43, 48-49 (1985); Nanette Gartrell et al., *The National Lesbian Family Study*, 66 AM. J. ORTHOPSYCHIATRY 272-73 (1996); Golombok, *supra* note 49, at 564; Mary B. Harris & Pauline H. Turner, *Gay and Lesbian Parents*, 12 J. HOMOSEXUALITY 101, 103 (1986); Ann O'Connell, *Voices from the Heart: The Developmental Impact of a Mother's Lesbianism on Her Adolescent Children*, 63 SMITH C. STUD. SOC. WORK 281 (1993); Patterson, *supra* note 36, at 1031-32.

51. *See* Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692, 696 (1978).

52. *See* Gartrell et al., *supra* note 50, at 272-73; Charlotte J. Patterson, *Families of the Lesbian Baby Boom: Parent's Division of Labor and Childrens' Adjustment*, 31 DEVELOPMENTAL. PSYCHOL. 115 (1995) [hereinafter Patterson, *Families*]; Charlotte J. Patterson, *Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concept, and Sex Role Identity*, *in* LESBIAN AND GAY PSYCHOLOGY: THEORY, RESEARCH AND CLINICAL APPLICATIONS 156, 169 (Beverly Greene & Gregory M. Herek eds., 1994) [hereinafter Patterson, *Baby Boom*].

health,[54] and social adjustment.[55] Researchers have also found that children of lesbian mothers do not differ from other children in terms of "personal development, including separation-individuation, locus of control, self-concept, intelligence, or moral judgement,"[56] and many studies show that "children of lesbian mothers have normal, healthy relationships with other children as well as with adults."[57]

Children living with lesbian or gay parents do report some teasing and harassment by other children,[58] but their problems are probably no different from those of children in households in which members encounter discrimination based upon race, culture, ethnicity, or socioeconomic class.[59] Lesbian and heterosexual mothers do not differ markedly in their approaches to child rearing.[60] Children of lesbian mothers reported greater stress but also a greater overall sense of well being.[61] The children of

53. *See* Patterson, *Adoption*, *supra* note 49, at 199 (reporting that twelve studies found no differences in measures of self-esteem, behavior adjustment, or psychiatric disorders).

54. *See id.*

55. *See* Gartrell et al., *supra* note 50, at 272-73.

56. *Id.; see also* Ailsa Steckel, *Psychosocial Development of Children of Lesbian Mothers, in* GAY AND LESBIAN PARENTS 75 (Frederick W. Bozett ed., 1987) (finding that separation-individuation process for children in heterosexual families was more aggressive and that children in heterosexual families were more bossy and domineering).

57. Gartrell et al., *supra* note 50, at 272-73.

58. *See* Green, *supra* note 51, at 695-96 (finding teasing relatively "minor and transitory"); Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law Over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91, 99-100 (1996); *cf.* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families,* 78 GEO. L.J. 459, 568-69 n.588 (1990) (citing a 1986 survey which found that 80% of the daughters and more than 80% of the sons of lesbian mothers reported that they were liked "much more," "somewhat more," or "as much" by their same-sex peers as other children in their class at school, as compared to 75% of the daughters and more than 80% of the sons of heterosexual mothers).

59. *See* Patterson, *Adoption*, *supra* note 49, at 200-01.

60. *See* Beverly Hoeffer, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 AM. J. ORTHOPSYCHIATRY 536, 543 (1981); Sally L. Kweskin & Alicia S. Cook, *Heterosexual and Homosexual Mothers, Self-Described Sex-Role Behavior and Ideal Sex-Role Behavior in Children*, 8 SEX ROLES 967 (1982) (finding that homosexual and heterosexual mothers do not differ in their sex role behaviors and perceptions.); Terrie A. Lyons, *Lesbian Mothers' Custody Fears*, 2 WOMEN & THERAPY 232 (1983) (finding that lesbian and heterosexual single mothers were similar in their likelihood to call upon family and other resources for help in child rearing.); Judith A. Miller et al., *The Child's Home Environment for Lesbian vs Heterosexual Mothers: A Neglected Area of Research*, 7 J. HOMOSEXUALITY 49, 55 (1981).

61. *See* Patterson, *Baby Boom*, *supra* note 52, at 169.

heterosexual mothers were more domineering and more often engaged in power struggles than children of lesbian mothers.[62]

At least one study concludes that children raised by lesbian mothers might be more likely to become lesbian or gay for a number of reasons, including being raised in an environment more permissive of same-sex relationships.[63] Although children raised in lesbian households *might* be more likely to identify as lesbian or gay, this cannot be a problem for girls if, as I argue, lesbian relationships are more moral than heterosexual relationships in our culture today.

4. *Family Stability.* Many conservatives regard bans on same-sex relationships as necessary to stabilize heterosexual marriages.[64] The vast majority of heterosexual divorces today are not due to homosexuality but to the fact that women and men in intimate relationships often have different needs, desires, and expectations.

Given these problems, acceptance of lesbian relationships might actually destabilize heterosexual marriage, especially in the short term. Were women to see lesbian relationships as a viable option, some might prefer more equitable relationships with women to less equitable relationships with men. For women already married to men, acceptance of lesbian relationships might affect divorce rates. But such instability may well be necessary if men are to have the incentive to eliminate inequities in heterosexual relationships in the foreseeable future. The trade-off may be between increased marital instability, particularly in

---

62. *See* Steckel, *supra* note 56, at 81.

63. *See* Ghazala Afzal Javaid, *The Children of Homosexual and Heterosexual Single Mother*, 23 CHILD PSYCHIATRY & HUMAN DEV. 235, 236 (1993). A critical review of three summaries of the literature concludes that there is evidence that "homosexual parents appear to produce a disproportionate percentage of bisexual and homosexual children." Paul Cameron et al., *Errors by the American Psychiatric Association, the American Psychological Association, and the National Education Association in Representing Homosexuality in Amicus Briefs About Amendment 2 to the U.S. Supreme Court*, 79 PSYCHOL. REP. 383, 389 (1996). Nine to twelve percent of children raised by lesbian or gay parents were reported to be lesbian or gay. *Id.*

64. *See* J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 595-96 (1977); GRANT & HORNE, *supra* note 32, at 97-99. Often the need for family stability is stressed in conjunction with the preceding points — the need to restrain promiscuity and the belief that children are best off in a traditional family. *See, e.g.*, The Ramsey Colloquium, *supra* note 35, at 17 ("Marriage and the family — husband, wife, and children, joined by public recognition and legal bond — are the most effective institutions for the rearing of children, the directing of sexual passion, and human flourishing in community.").

the short term, and greater equality between the sexes within and outside of heterosexual marriage.

The focus should not be whether lesbian relationships might destabilize heterosexual marriage. Rather, the pertinent question is whether lesbian relationships should be taboo in order to increase the pressure on women to enter into or to remain in heterosexual relationships in which they do more than their share of emotional, domestic, and reproductive work for less than their share of the benefits. To ask this question however, is to answer it for purposes of this Article. If the traditional moral norm against lesbian relationships is one aspect of the social structure facilitating the subordination and exploitation of women by men, then it is illegitimate.

5. *Men Need the Civilizing Effects of Living in Stable Family Units with Women and Children.* One argument repeatedly made for heterosexual marriage is that men will otherwise behave in violent and irresponsible ways if they are not living in stable family units with women and children. Only stable (heterosexual) marriage will produce moral men, responsible fathers, and civilized relationships between the sexes. Proponents of this argument claim that men in families are more likely to be employed than other men, to work harder, and to be more responsible members of their communities.[65] "[U]nattached males roam the interstices between socially cohesive groups, kill, and are themselves killed and maimed."[66]

There is something particularly odd about the moral argument that bans on same-sex relationships are necessary to civilize men in light of the dangers women face in intimate relationships with men. Women are more likely to be victims of the men they live with than of the strangers "roam[ing] the interstices" of society.[67] This argument requires that women nevertheless live with

65. *See* Karl Zinsmeister, *Marriage as the Male Antidote*, 7 AM. ENTERPRISE 46 (1996) (Family men are less violent and less likely to be killed by other men.).

66. *Id.*

67. Women are two to three times as likely to be sexually assaulted by a husband than by a stranger. *See* DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 205 (1985) (reporting that 10% of a representative sample of women in the Boston area, with children between 6 and 14 in their custody, had been raped by husbands; only 3% reported having been raped by a stranger); DIANA E.H. RUSSELL, RAPE IN MARRIAGE 57-64 (1982) (noting that in a representative sample of women 18 and over in the San Francisco area, 14% of married women report rape by husbands while only half as many reported having been raped by a stranger). Women are also more likely to be murdered after mar-

men, hopefully civilizing them successfully, but, when that does not happen, they become men's victims. Many men are violent and abusive to their female partners because violence allows them to dominate their families.[68] Such control *cannot* be legitimate in moral terms just because men would be even more violent outside such relationships.

A more moral approach would not sacrifice women for men's moral "development." Men would be expected to behave morally on their own, and both lesbian and heterosexual relationships would be accepted and honored when moral. Under this approach, I suspect that heterosexual men would be *less* violent in a society more tolerant of lesbian relationships. The primary long-term effect of respecting lesbian relationships might be to change the terms of heterosexual relationships, pressuring heterosexual men to be more equitable, respectful, and less violent in their relationships with women.[69]

In this Subpart, I have reviewed the consequentialist arguments that lesbian relationships cause promiscuity and sexually transmitted diseases, sexual abuse of children, fewer good homes and role models for children, marital instability, and less civilized men. The first two are unsupported by or inconsistent with the empirical evidence: we have no evidence that lesbians are more promiscuous than heterosexual men, and they have the lowest risk of STD of any sexually active group. With respect to children, the evidence indicates that lesbians are not likely to abuse children and are fit parents, even though there is some evidence that children raised by lesbians might be more likely to identify as lesbian or gay. This difference, however, even if established by reliable data, cannot justify discrimination against lesbians because women are more likely to find moral intimate relationships with other women than with men. The last two justifications — family stability and civilization of men — sacrifice women for stability of often hazardous family structures in which women do

---

riage than before. *See* DEE L.R. GRAHAM, LOVING TO SURVIVE: SEXUAL TERROR, MEN'S VIOLENCE, AND WOMEN'S LIVES 71 (1994). Women are beaten most often by the men they live with. *See* G.D. Rath et al., *Rates of Domestic Violence Against Adult Women by Men Partners*, 2 J. AM. BOARD FAM. PRAC. 227 (1989) (reporting that boyfriends not cohabitating were least abusive, while couples together for four to six years had more domestic violence than other couples).

68. *See* Richard M. Tolman & Larry W. Bennett, *A Review of Quantitative Research on Men Who Batter*, 5 J. INTERPERSONAL VIOLENCE 87 (1990) (reporting characteristics of male batterers).

69. *See infra* Part IV.

more than their share of the work for less than their share of the benefits.

B. *The Inherent Moral Superiority of Heterosexuality*

In this Subpart, I describe two major forms of the argument that committed heterosexual marital relationships are morally superior to all other sexual liaisons. I suggest two problems with this argument and identify one important insight — the harm of disassociation of the physical and conscious selves — which I develop further in discussing the immorality of autonomy-denying sex in Part III.

1. *Committed Heterosexual Marital Relationships are More Selfless and Transcendental.* Some argue that committed noncontracepted heterosexual marital intercourse is morally superior in that only such sex is self-giving and the kind of sex act that can be reproductive. According to scholar John Finnis, only such intercourse can be the actualization of the union of the two people both biologically and personally:

> Sexual acts cannot in reality be self-giving unless they are acts by which a man and a woman actualize and experience sexually the real giving of themselves to each other in biological, affective, and volitional union in mutual commitment, both open-ended and exclusive — which . . . we call marriage.
>
> In short, sexual acts are not unitive in their significance unless they are marital (actualizing the all-level unity of marriage) and (since the common good of marriage has two aspects) they are not marital unless they have not only the generosity of acts of friendship but also the procreative significance, not necessarily of being intended to generate or capable in the circumstances of generating but at least of being, as human conduct, acts of the reproductive kind — actualizations, so far as the spouses then and there can, of the reproductive function in which they are biologically and thus personally one.[70]

2. *Heterosexual Intercourse in a Committed Marital Relationship is an Inherent Good Whereas Other Forms of Sexual Conduct are Not.* Some contend that committed heterosexual marital relationships are morally superior because heterosexual intercourse is an inherent — not just instrumental — good whereas other forms of sexual conduct threaten personal integ-

70. John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1067 (1994).

rity by alienating one's bodily self from one's consciously experiencing self. Scholars Robert George and Gerard Bradley make this point:

> [T]he intrinsic point of sex in any marriage, fertile or not, is, in our view, the basic good of marriage itself . . . consummated and actualized by acts of the reproductive type. Such acts alone among sexual acts can be truly unitive, and thus marital; and marital acts, thus understood, have their intelligibility and value intrinsically, and not merely by virtue of their capacity to facilitate the realization of other goods.[71]

It is key that neither marriage nor marital intercourse is instrumental, i.e., a means to other extrinsic ends such as pleasure, procreation, or emotional intimacy. George and Bradley regard pleasure and procreation as valuable *effects* of marital intercourse. But if pleasure or procreation *motivate* intercourse, sex damages personal integrity by transforming the body into a means to other ends, alienating one's bodily self from one's conscious self.[72] These writers therefore view all sex for any end

---

71. Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 305 (1995). John Finnis also makes this point about the inherent goodness of heterosexual marital intercourse: "Homosexual orientation in this sense is, in fact, a standing denial of the intrinsic aptness of sexual intercourse to actualize and in that sense give expression to the exclusiveness and open-ended commitment of marriage as something good in itself." John M. Finnis, *Law Morality, and "Sexual Orientation,"* 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 32 (1995).

72. George and Bradley explain the harm of alienation:

> The body, as part of the personal reality of the human being, may not be treated as a mere instrument without damaging the integrity of the acting person as a dynamic unity of body, mind, and spirit. To treat one's own body, or the body of another, as a pleasure-inducing machine, for example, or as a mere instrument of procreation, is to alienate one part of the self, namely, one's consciously experiencing (and desiring) self, from another, namely, one's bodily self. But these parts are, in truth, metaphysically inseparable parts of the person as a whole. Their *existential* separation in acts that instrumentalize the body for the sake of extrinsic goals, such as producing experiences desired purely for the satisfaction of the conscious self, disintegrates the acting person as such.
>
> So, in our view, while sexual intercourse is valuable and morally good when it actualizes (and, thus, allows spouses to experience) the one-flesh communion of their marriage, sex that is wholly instrumentalized is intrinsically morally bad, even when the ultimate goals to which orgasmic activity is chosen as a means (for example, sharing a pleasurable experience, getting a good night's sleep, expressing tender feelings, generating feelings of closeness) are in themselves innocent and even desirable.

George & Bradley, *supra* note 71, at 314.

such as pleasure or reproduction as damaging to personal integrity. George and Bradley concede that "[i]ntrinsic value cannot, strictly speaking, be demonstrated. *Qua* basic, the value of intrinsic goods cannot be derived through a middle terms."[73]

It is not that pleasure is bad, but that "it is contrary to reason — bad and immoral — to sacrifice one's psychosomatic integrity, or to instrumentalize a part of oneself, for the sake of some desired experience, whether it is getting drunk, enjoying a psychedelic drug trip, or having an orgasm."[74] George and Brad-

---

73. *Id.* at 307.

> In the end, we think, one either understands that spousal genital intercourse has a special significance as instantiating a basic, noninstrumental value, or something blocks that understanding and one does not perceive correctly. For the most part, our liberal friends . . . do not see any special point or value in such intercourse. For them, spouses have no reason, apart from purely subjective preference, ever to choose genital intercourse over oral or anal intercourse. And because oral and anal intercourse are available to same-sex couples, such couples have as much interest in marriage and as much right to marry as couples of opposite sexes.

Id.

> By contrast, many other people perceive quite easily the special value and significance of the genital intercourse of spouses, and see that this value and significance obtains even for spouses who are incapable of having children, or any more children. They are therefore confident that sodomitical acts cannot be marital (though they divide over the question whether contracepted intercourse retains its marital quality). Thus, as a matter of common sense, they deny that marriage, as a moral reality, is possible for couples of the same sex.

Id.

> The central issue can be brought into focus by considering the case of an elderly married couple who simply no longer experience pleasure in their acts of genital intercourse. They are, however, still physiologically capable of performing such acts and can do so without emotional repugnance. Is there any point in their continuing to perform them? Can it be reasonable for them to do so, at least occasionally, as a way of actualizing and experiencing their marriage as a one-flesh union? We say yes. We suspect that . . . liberals would say no. Our answer is valid if marriage, and the genital acts that actualize it, are intrinsically good, and, thus, have an intelligible point even apart from their capacity to produce pleasure.

Id. at 309-10.

74. *Id.* at 316. What of chewing sugarless gum or eating only for pleasure? Are such activities immoral because the body is used instrumentally in these activities? George and Bradley explain:

> Chewing gum, rocking in a chair, and taking a walk are examples of "innocent pleasures." The pleasure they provide is effortlessly integrated with larger projects (such as concentrated thinking), and for most people these activities present no hazard to any aspect of the person's well-being . . . . The important point is that in the activity of chewing gum, no existential separation of the bodily self and the con-

ley believe their moral view is the only one available to distinguish between the morality of some sex and the immorality of other sex, such as bestiality, adultery, or prostitution.[75]

The conviction that heterosexuality is inherently morally superior to homosexuality is difficult to respond to because one either sees the moral superiority of noncontracepted heterosexual intercourse in marriage or one does not.[76] I do not, therefore, try to disprove these points. I do, however, discuss two problems with the arguments outlined above. First, there are several problems with the line these authors draw between noncontracepted heterosexual intercourse in marriage and all other sexual acts. Second, they present an idealized and very male view of what constitutes moral sex. Women are likely to find sex alienating and harmful to personal integrity under circumstances quite different from those regarded as problematic by Finnis, George, and Bradley.

I begin with the line drawn between noncontracepted heterosexual intercourse in marriage and all other sexual activity, including contracepted sex in marriage and oral or anal sex. This distinction cannot justify the denial of marriage rights to lesbian and gay couples given that the Constitution already protects the sale of contraceptives to married and unmarried heterosexual couples.[77] The line drawn by Finnis, George, and Bradley therefore cannot support the current constitutional regime, which pro-

---

> sciously experiencing self is typically effected. In that activity, the body is not typically commandeered into the service of a project that is fully and accurately described (and, thus morally specified) as producing pleasure, whether as an end in itself or as means to other ends.

Id. at 317.

75. *See id.* at 318. George and Bradley contend:

> Our view about the disintegrative quality of nonmarital sex tends to strike liberals as exceedingly odd. Something like our view, however, must be affirmed by anyone who supposes . . . that there can be something morally wrong, and not merely imprudent, about some forms of consensual sex. "Sexual liberationists" can afford casually to dismiss the idea that sex can damage integrity. They have no interest in developing a principled moral critique of consensual adultery, promiscuity, prostitution ("sex work"), bestiality, and the like. Liberals who reject liberationism, however, had better take care before dismissing our view.

Id.

76. *See supra* note 73 and accompanying text.

77. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (finding it unconstitutional to ban the sale of contraceptives to unmarried couples); Griswald v. Connecticut, 381 U.S. 479 (1965) (finding it unconstitutional to ban the sale of contraceptives to married couples).

tects much immoral heterosexual sex but does not protect lesbian or gay sex.

Moreover, this view has roots in mysogenistic strands of Christianity. It reflects the recurring Christian distrust of the body and its pleasures, particularly sex — a distrust particularly strong in Roman Catholicism.[78] As Karen Armstrong and other feminist theologians have argued, the Catholic Church's unwillingness to allow married couples to use birth control comes from the Catholic denial that sexual pleasure is good in itself.[79] Because Catholics have not seen sex as a good in itself, the theoretical potential of procreation is necessary as "justification" to avoid sin.[80] Obsession with sexual sin, which has existed in many forms of Christianity,[81] is linked with the perception of woman as evil because she is sexual (tempting man to sin)[82] or as pure angel because she is virginal and asexual.[83] Both views of woman — the whore and the virgin — deny women agency, particularly sexual agency, respect, and human status.

A second problem with the argument that noncontracepted marital heterosexual intercourse is inherently morally superior to all other sex is that it describes an idealized *male*[84] experience.[85]

---

78. *See* Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J. L. ETHICS & PUB. POL'Y 41, 66 (1995) (noting that the position Finnis defends is the "official" position of the Roman Catholic Church, but not the position of all Christians or even all Catholic Christians). *See also* Carlos Ball, *Moral Foundations For A Discourse On Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1918 (1997) (pointing out the conclusory nature of Finnis's assertions about the moral superiority of heterosexuality and noting that he is in the end, doing "nothing more than giv[ing] a secular gloss to the traditional positions of the Catholic Church in matters of sexual ethics . . . .").

79. *See generally* KAREN ARMSTRONG, THE GOSPEL ACCORDING TO WOMAN: CHRISTIANITY'S CREATION OF THE SEX WAR IN THE WEST (1986). Armstrong discusses Christianity's problem dealing with sex and the connection between the denigration of sex and the demonization of woman, the temptress.

80. *See* Ball, *supra* note 78, at 1910-12.

81. *See* ARMSTRONG, *supra* note 79, at 1-51 (documenting the rejection of marriage and the family by the West and Christianity because sexual activity was seen at best as inconsistent with holiness and often as inherently sinful).

82. *See id.* at 58-87 (documenting Christian view of woman as Eve, the temptress, and evil because sexual).

83. *See id.* at 73-75 ("[B]y making women perfect, men were making them freaks of impossible virtue" and "depriving them of sexuality, . . . an important and essential part of their nature.") *Id.* at 73. Armstrong discusses Christian preference for virginity, *see id.* at 117-69, and discusses the Victorian ideal of woman as the angel in the house, *see id.* at 289-92.

84. There are reports from women describing noncontracepted marital intercourse as transcendent in language somewhat reminiscent of Finnis, George, and Bradley. Women who are pro-life activists often regard "sex [heterosexual inter-

The only sexual act considered potentially moral — because *noninstrumental* — routinely results in male emission and orgasm but rarely (if that is all that occurs) in female orgasm.[86] Ironically, the only sexual act these theorists consider *noninstrumental* is also the *only* sexual act that routinely results not just in male orgasm and emission but also, if the partners are fertile, in someone else becoming pregnant and bearing *his* child. Such sex seems about as instrumental as sex can be from a man's perspective.

Given the routine instrumentality of noncontracepted heterosexual intercourse for men but not necessarily for women, the experience these men describe as a selfless, transcendent union with the other may actually be a selfish and self-centered event. The man may experience noncontracepted heterosexual intercourse as truly *unitive*, making one flesh out of two persons, while the woman experiences boredom, discomfort, disassociation, or worse. To the extent this disjuncture does occur, heterosexual intercourse is *less* moral than other sexual interactions. Such sex is not only immoral in itself but also is likely to adversely affect the morality of men in general, making them more selfish because they perceive others needs and pleasures as identical to their own.

Similarly, Finnis, George, and Bradley seem to miss the mark — at least for women — in their identification of what makes sex alienating. They maintain that sex used to achieve pleasure or some other (instrumental) end, can be harmful:

> To treat one's own body, or the body of another, as a pleasure-inducing machine, for example, or as a mere instrument of procreation, is to alienate one part of the self, namely, one's consciously experiencing (and desiring) self, from another, namely, one's bodily self. But these parts are, in truth, metaphysically, inseparable parts of the person as a whole. Their *existential* separation in acts that instrumentalize the body for

---

course] as literally sacred" and transcendent because of its capacity "to bring into existence another human life." KRISTEN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 165 (1984). These women often see natural planning as valuable to a relationship because it supports and reinforces the ability of the wife to say "no" to unwanted sex when she is sick and ensures that for at least part of every month, the couple will express affection in nongenital ways such as holding hands. *Id.* at 166-67.

85. For a discussion of the inconsistency of Finnis's claims and the experiences of committed lesbian and gay couples, see Perry, *supra* note 78, at 41.

86. *See* Alix Shulman, *Organs and Orgasms, in* WOMAN IN SEXIST SOCIETY: STUDIES IN POWER AND POWERLESSNESS 292, 293-96 (Vivian Gornick and Barbara K. Moran eds., 1971) *reprinted in* MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 178 (1994).

> the sake of extrinsic goals, such as producing experiences desired purely for the satisfaction of the conscious self, disintegrates the acting person as such.[87]

Women frequently describe disassociation of their conscious and physical selves during such sex. Think of Queen Victoria's advice to her daughter: "Lie there and think of the Empire." Women's accounts of alienating sex (causing disassociation of conscious and physical selves) tend not to be about seeking and achieving their own pleasure in sexual encounters. Women describe *unwanted* sex as harmful to their sense of personal integrity.[88] Such reports are routinely made by women who have been victims of incest, sexual abuse, and unwanted sex.[89] In the next Part, I suggest that we assess the morality of sex acts in terms of women's experiences of disassociation.

III. SEXUALITY AND OBJECTIFICATION

In this Part, I propose an alternative moral standard for judging sexual conduct that identifies sexual encounters in which women experience disassociation of their conscious selves and bodily selves as autonomy-denying objectification. I then apply this standard to heterosexuality and lesbian sexuality in our culture today and conclude that male heterosexuality is more often immoral.

A. *Autonomy-Denying Objectification*

In discussions of sexuality, "objectification" is a term commonly used but rarely defined. The literal meaning is to treat a person as an object, in contrast to a sexual interaction which is an expression of mutual love and respect that affirms the full personhood of each partner. Andrea Dworkin and Catharine MacKinnon see much sexuality in our culture as male objectification of women; what is erotic for many men and women is male

---

87. George & Bradley, *supra* note 71, at 314.

88. *See generally* DOROTHY ALLISON, BASTARD OUT OF CAROLINA (1993); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

89. On survivors' experience of disassociation, see KAREN S. CALHOUN & BEVERLY M. ATKINSON, TREATMENT OF RAPE VICTIMS: FACILITATING PSYCHO SOCIAL ADJUSTMENT 1-3, 16 (1991); ELIZABETH A. WAITES, TRAUMA AND SURVIVAL: POST-TRAUMATIC AND DISSOCIATIVE DISORDERS IN WOMEN 9-12, 26-31, 115-17, 136-38, 225-27 (1993); ELAINE WESTERLUND, WOMEN'S SEXUALITY AFTER CHILDHOOD INCEST 80-82, 84-85 (1992).

dominance over and objectification of women.[90] For these feminists, what is troubling is the dehumanization of one's partner — the use of the partner's body for the subject's purposes in a way that denies the partner's personhood. In such interactions, the subject is indifferent to the other *as a person* and only interested in figuratively consuming the desired parts of the other's body, irrespective of the other's autonomy and subjectivity. Such objectification is autonomy-denying because the subject's actual wishes, needs, and feelings are irrelevant. When men objectify women in this way, they see women as *their* property. As own-

---

90. *See, e.g.*, ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1979); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 50, 91, 173 (1987); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 113, 115, 120, 122-24, 130-31, 137-38, 177, 178 (1989).

For a somewhat different and very rigorous discussion of many possible meanings, see Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFFAIRS 249 (1995). Nussbaum defines objectification as generally comprised of at least seven notions:

1. *Instrumentality:* The objectifier treats the object as a tool of his or her purposes.
2. *Denial of autonomy:* The objectifier treats the object as lacking in autonomy and self determination.
3. *Inertness:* The objectifier treats the object as lacking in agency and perhaps also in activity.
4. *Fungibility:* The objectifier treats the object as interchangeable (a) with other objects of the same type, and/or (b) with objects of other types.
5. *Violability:* The objectifier treats the object as lacking in boundary-integrity, as something that is permissible to break up, smash, break into.
6. *Ownership:* The objectifier treats the object as something that is owned by another, can be bought or sold, etc.
7. *Denial of subjectivity:* The objectifier treats the object as something whose experience and feelings (if any) need not be taken into account.

Id. at 257. Instrumentality and fungibility, under Nussbaum's typology, *could* be autonomy-respecting objectification using my terminology. The other forms of objectification identified by Nussbaum — denial of autonomy, inertness, violability, ownership, and denial of subjectivity — *could* also be autonomy-denying objectification. But Nussbaum does not use these terms in ways precisely parallel to my categories.

Nussbaum discusses how complicated the notion of objectification is, and how it has been used by Kant, MacKinnon, and Dworkin, and concludes that:

> Kant, MacKinnon, and Dworkin are correct in one central insight: that the instrumental treatment of human beings, the treatment of human beings as tools of the purposes of another, is always morally problematic; if it does not take place in a larger context of regard for humanity, it is a central form of the morally objectionable. It is also a common feature of sexual life, especially, though not only, in connection with male treatment of women.

Id. at 289-90.

ers, men have the right to do what they wish with women, ignoring their physical integrity and hurting, smashing, or using them for their own pleasure. In such encounters, men ignore women's feelings; women are only objects, not subjects.

The key problem here is the lack of mutuality. A woman's needs and desires are irrelevant even to her. Our culture systematically teaches women and men to regard women as men's sexual objects and that women find erotic men's sexual subordination of them. This view is reinforced and supported by women's lesser economic power, the socialization of women and men, traditional roles in heterosexual marriage, and the countless rules and social practices disadvantaging women and limiting their ability to say no or act autonomously in intimate relationships with men.

Autonomy-denying objectification occurs when a person agrees to have sex that she does not desire and expects no pleasure from, though she may say yes and even pretend to have an orgasm.[91] Such sex is autonomy-denying because she would rather avoid it than experience it were there no unwanted consequences.[92] In any relationship there will be times when one partner wants sex and the other is not equally interested but is quite willing to participate and enjoys the experience. This is not what I am referring to. In addition, the degree of harm is likely to vary with frequency. Occasional autonomy-denying sex may cause only trivial or fleeting harm, whereas repeated and routine autonomy-denying sex is likely to cause more severe harm.

Avoiding undesired sex, even if consensual, is important because repeated unwanted sex can cause serious harm to women's sense of self and integrity. In a recent essay, Robin West identified four injuries to women's sense of selfhood when they allow

91. For a further description of women's experience of unwanted sex in heterosexual relationships, see, for example, Liz Kelly, *The Continuum of Sexual Violence, in* WOMEN, VIOLENCE AND SOCIAL CONTROL 46, 56 (Jalna Hanmer & Mary Maynard eds., 1987) (finding that most women "felt pressured to have sex in many, if not all, of their sexual relationships with men").

92. I use "autonomy" in an unusual way. I am not describing consensual acts as necessarily autonomous, nor suggesting that autonomy is synonymous with choice. "Autonomy," as used here, does not have its ordinary liberal meaning. Indeed, it is inconsistent with standard usage to the extent that I exclude consensual unwanted sex from the realm of autonomous sexual experiences. I considered changing the term to "authentic" but ultimately rejected the term as too weak to carry strong normative claims. I hope to change the meaning of autonomy in the end by describing it realistically as a matter of degree and dependent on the justice of alternatives rather than as some inherent aspect of human personality.

their bodies to be used in autonomy-denying but consensual sex: (1) injury to their capacity for self-assertion and to their ability to translate their feelings and experiences into actions to increase their pleasure or decrease their pain; (2) injury to their sense of themselves as sexual subjects by serving others' needs and wants rather than seeing themselves as beings with their own legitimate needs and wants; (3) injury to their sense of autonomy; and (4) injury to their sense of integrity when they lie and say that they desired and enjoyed the experience.[93] Women's sense of integrity is violated when women disassociate their conscious selves from their physical selves to distance themselves from a sexual experience they do not desire. Thus, unwanted sex injures women's autonomy, integrity, and sense of being agents and sexual subjects.

It is true that we typically lack perfect autonomy. We often do things that we would not do were there no negative consequences, such as work for wages for an obnoxious boss we must pretend to like. There are, however, likely to be differences between allowing one's body to be used sexually in undesired and unwanted ways and other instances of less than perfect autonomy, particularly for women in a culture that regards men's sexual use of women as demeaning and degrading to women but not

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

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

Id.

to men. The damage unwanted sex causes to women — to their autonomy, integrity, and sense of being agents and sexual subjects — is not just another set of alienating experiences like working on an assembly line. One cannot simply decide when to disassociate one's bodily experience from one's conscious self and when to integrate them. Unwanted sex and the related phenomenon of disassociation undermine and ultimately destroy women's potential to develop their sexuality as something of their own rather than something fashioned to please men. In a culture in which men's use of women's bodies is regarded as demeaning and evidence of women's essential inferiority, unwanted sex also teaches women that they exist to serve others.

I do not propose any direct prohibition on consent to autonomy-denying sex for *any* woman, whether wife, girlfriend, or sex worker. My argument is that we need to increase the odds of women being able to develop as sexual subjects should they so choose.

Thus far, I have discussed autonomy-denying objectification, the kind described by MacKinnon and Dworkin, though I have defined it in a way they have not. As I use the term, autonomy-denying objectification includes all sex or sexual experiences one would rather avoid than endure could one do so without negative consequences. This category includes sexual torture, rape, and sexual harassment at work,[94] school, or on the street.[95]

Now imagine objectification that is consistent with the autonomy of the subject — I call this autonomy-respecting objectification. This objectification occurs when a person treats another as an object in a manner consistent with the object's own wishes and desires. Such objectification can take a number of forms. For example, autonomy-respecting objectification occurs when the subject sees the other as body parts for the subject's use because the object's desires are consistent with the subject's own, as in a brief sexual encounter between strangers. As a collection of useful body parts, the other might be fungible with similar objects, though the two meet with a common goal. Similarly, controlled, consensual sadomasochism ("S/M") can be objectifying because the script requires certain roles and forms of interaction

94. *See* Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

95. *See* Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993) (discussing effects of street harassment).

based on those roles. Such interaction is objectifying in that one actor treats the other not as the actual human being she is but as a mental abstraction, a fantasy, a role. Such sex may, of course, be mutually desired, consistent with and respectful of the autonomy of each.

In contrast to both forms of objectifying sex — autonomy-denying and autonomy-respecting — nonobjectifying sex is both mutually desired and entirely consistent with the personhood of the partner, affirming the partner as a person rather than only as a thing. At the same time, however, nonobjectifying sex is not a platonic love of pure spirits, but love between two *embodied* beings. One can appreciate another's body without reducing that person to their body and denying their personhood. Indeed, one's love for another person is likely to heighten one's appreciation for the real physical beauty of the beloved's body.

Examples of sexual interactions in each of these three categories include the following: (1) autonomy-denying sex includes nonconsensual sex (rape and sexual torture), consensual unwanted sex (sex one would rather forego than endure were there no negative consequences), sexual harassment on the job and at school, and virtually all commercial sex;[96] (2) autonomy-respecting, objectifying sex includes mutually desired sex between strangers or between individuals who regard their sexual partner as fungible with other possible partners and hence an "object" in some sense, and sex dictated by scripts, such as S/M. Nonobjectifying sex is mutually desired sex between two individuals who interact as unique individuals and affirm each other's personhood.

The lines between these categories are blurred at best. Rape and sexual torture are at one end of a continuum and nonobjectifying mutually desired sex at the other. Even the participants may not always know which category applies in a given situation. Women often constitute themselves as "giving selves," agreeing to give what might otherwise be taken from them and hence hiding, often from themselves and more often from their partners, whether sex is something they want.[97] Women routinely submit to sex they *know* they do not want and also pretend they desire the experience. The point here is not to assign blame. Indeed, one partner may experience unwanted sex even though the other

96. Virtually all prostitution, phone sex, nude dancing, etc., appears to be is unwanted sexual activity by this definition, since these workers require payment.

97. *See* West, *supra* note 88.

partner has been blameless. For example, despite her lover's best intentions, autonomy-denying sex can occur if a woman shuts down sexually because of past experiences of violence and abuse. In that situation, autonomy-denying sex is likely to occur unless she lets her partner know about her difficulty so that the partner can stop until she again desires sexual interaction.

B. *Autonomy-Denying Objectification of Women in Heterosexual and Lesbian Relationships*

Although autonomy-denying objectification is harmful to women, it does not follow that direct regulation should criminalize such expressions of sexuality. Women consent to much autonomy-denying sex because, often rightly, they see enduring it as a better option than the alternatives. We can, however, attempt to minimize the social, cultural, and economic forces pressuring women into autonomy-denying sex.

In this Subpart, I consider the degree of autonomy-denying objectifying sex in relationships of sexual intimacy available to women — heterosexual and lesbian relationships. Men, whether gay or straight, seem more likely to objectify than women: men consume far more photographic pornography,[98] are more interested in promiscuous sex,[99] and more concerned with looks.[100] In a study of cohabiting heterosexual couples, gay couples, and lesbian couples, researchers found that "[f]or all kinds of couples, except lesbians, people who find their partners attractive say they have a better sex life" and are "happier in their overall relationship."[101]

---

98. *See* EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 135 (1994) (in a National Opinion Research Center ("NORC") survey of a nationally representative sample of men and women, 23% of men and 11% of women report viewing X-rated movies or videos; 16% of men and 4% of women report using sexually explicit books or magazines).

99. *See id.* at 198 (NORC's survey found that 49.7% of men report having 5 or more sexual partners while only 12.1% of women report the same number of sexual partners).

100. *See* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX 247 (1983).

101. *Id.* These findings are especially interesting in light of the fact that lesbians placed about the same value on looks as married women: 41% of lesbians stressed looks, with 6% regarding "movie star" looks as important and 35% regarding sexy looking as important. Similarly, 40% of wives placed equal stress on looks, with 9% regarding "movie star" looks as important and 31% regarding sexy looking as important. But 73% of husbands considered it important that their partner be either

Autonomy-denying sex is overwhelmingly asserted by men in the United States today. Rape is the clearest evidence, and it is overwhelmingly men who rape women. In a recent National Opinion Research Center ("NORC") sex survey, the authors report that whereas 21.6% of women report having been forced to do something sexual by a man, 0.3% report having been forced by a woman; in contrast 1.3% of men report being forced by a woman.[102] Taboos on sex between women may result in more underreporting of sex forced by another woman than by a man, but 13% of women respondents in this survey did report some lesbian sexual behavior after age 18.[103] Yet only 0.3% report having been forced to do something sexual by a woman. This data indicates that although coercive sex between women does occur, the rates are quite low relative to man-on-woman rape.

The more common form of autonomy-denying objectification — unwanted sex — is also more prevalent among women in heterosexual relationships. Girls continue to be socialized to be sexual objects rather than agents seeking their own sexual pleasure. In a study on teenage girls' sexuality based on hundreds of interviews, the author reports that girls have heterosexual intercourse for all sorts of reasons: to get him to love her; for a hug or some physical closeness; to be popular; to prove her worth; or to have the experience of sex before going to college.[104] This study reports that most girls do not, however, have heterosexual inter-

---

"movie star" good looking (16% of husbands) or at least sexy looking (57% of husbands).

102. *See* LAUMANN ET AL., *supra* note 98, at 336.

103. *Id.* at 299. The NORC survey reported on responses of a random sample. Studies of domestic violence within lesbian and gay relationships are just beginning to appear and seem to suggest that within lesbian and gay relationships violence levels may be as high as within heterosexual relationships. *See* THE NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, 1997 REPORT ON LESBIAN, GAY, BISEXUAL, TRANSGENDER DOMESTIC VIOLENCE (1997) (on file with author); Gregory S. Merril, Battered Gay Men: An Exploration of Abuse, Help-Seeking, and Why They Stay (1996) (unpublished M.S.W. thesis, San Francisco State University) (on file with author). These results seem at odds with those of the NORC survey, however, and are not based on randomized nationally representative sampling techniques. Also, as of yet, there are no studies comparing clearly-defined, specific kinds of abuse — psychological, rape, sexual torture — across groups. It may be that abuse rates in general in intimate relationships are similar among those involved in heterosexual, lesbian, and gay relationships, but that there are variations in patterns of specific kinds of abuse. In any event, my argument does not focus on domestic violence but on other domestic inequities.

104. *See* SHARON THOMPSON, GOING ALL THE WAY: TEENAGE GIRLS' TALES OF SEX, ROMANCE, AND PREGNANCY 97-98 (1995).

course for their own sexual pleasure.[105] Few mentioned having orgasms as a result of heterosexual intercourse. Only girls involved in relationships with other girls mentioned orgasms or their own sexual pleasure as relevant to their decision to "have sex."[106] It is, of course, likely that at least *some* teenage girls in heterosexual relationships have orgasms and are motivated by their own desire for pleasure, but this study indicates that *many* have other motivations and that few feel free to describe themselves as sexual subjects.[107]

Many women in heterosexual relationships speak of having unwanted sex because they feel it is their obligation or duty, they wish to avoid a partner's anger or resentment, they feel saying no is awkward or difficult, or they want to cuddle or hug and engage in genital sex to get affection. The phenomenon of unwanted sex does not seem as widespread among lesbians,[108] though there is bound to be some, particularly when economic and other power differentials are present. But there are a number of reasons to think that unwanted sex is likely to occur less often in lesbian than heterosexual relationships.

First, both partners in a lesbian relationship are likely to value nongenital touching and cuddling as an ends in themselves and are less likely than men to assume that any physical contact is an attempt to initiate genital sex.[109] Second, neither partner comes to a lesbian relationship with the understanding that because she, and only she has a penis, sex is defined by and centered on her orgasms; neither partner has been raised with a male sense of entitlement to sex from "his" woman.[110] Because

105. *Id.* at 104.

106. *Id.* at 184.

107. *Id.* at 104.

108. In my research, no sexual survey asks people about their experience of unwanted sex. There are, however, many anecdotal reports of unwanted sex by heterosexual women. *See, e.g.*, LILLIAN B. RUBIN, WORLDS OF PAIN: LIFE IN THE WORKING-CLASS FAMILY 148-53 (1976). Although one can easily find lesbians talking about sex and sexual problems, they do not report unwanted sex. *See, e.g.*, Margaret Nichols, *Lesbian Relationships: Implications for the Study of Sexuality and Gender, in* HOMOSEXUALITY/HETEROSEXUALITY 350 (David P. McWhirter et al. eds., 1990) [hereinafter Nichols, *Lesbian Relationships*]; Margaret Nichols, *Lesbian Sexuality: Issues and Developing Theory, in* LESBIAN PSYCHOLOGIES 103 (Boston Lesbian Psychologies Collective eds., 1987) [hereinafter Nichols, *Lesbian Sexuality*] (reporting that lesbians are less likely to pressure a reluctant partner to have sex).

109. *See* BLUMSTEIN & SCHWARTZ, *supra* note 100, at 197.

110. In one study, describing a lesbian couple in which one partner desired more genital sex than the other, Sally, the person who wanted more sex, describes how she initiates sex. She states "now I'm more discreet. I edit how much I ask in order not

both are women, one does not have the disadvantage vis-a-vis the other of thinking that her sexuality is primarily for the pleasure of her (male) partner rather than herself, a lesson drummed continuously into women by our culture. Nor is the partner who sees sex as an entitlement as likely as a man to have the advantages of being older and earning a male wage, while the other partner has the disadvantages of being younger and of being expected to care for the home, her partner, and the children in addition to working for wages.

Dominance can be based on any number of other factors less likely to systematically favor men, such as physical endowments, beauty, or willingness to leave the relationship if one does not get one's way. However, in heterosexual relationships, there are more power differentials systematically favoring one partner than there are in lesbian relationships. And many more lesbians than heterosexual men are feminists fiercely committed to equality in sex.[111]

I am not suggesting that lesbian couples never have unwanted sex, that rape and coercion never occur between lesbians, or that all heterosexual sex is immoral. I am only stating that the available data indicates that rape, sexual coercion, and unwanted sex are *relatively* more widespread among heterosexual couples than lesbian couples. The differences between lesbian and heterosexual couples are of degree and linked to many cultural factors. These differences are not essential or eternal. Indeed, the extent of objectification and role playing[112] in lesbian relationships has varied over time and in various communities. During the eighties and nineties, there has been a significant increase in objectification in relationships between women in some settings: increased stress on looks and weight; increased role playing with "butch" and "femme" defined in ways that seem heterosexual; women encouraging women to enjoy promiscuity, dominance

---

to get rejected as much. Also, she sometimes says no, but more often than not she says yes. But then I don't ask all the time." *Id.* at 214. The authors conclude: "if Sally were a traditional heterosexual man, she would not hesitate to ask, because it would be both her right and her duty to do so. Nor would she be so hurt when refused." *Id.* at 214-15. The problem more likely to be raised by lesbians is not unwanted sex but "bed death," i.e., too little sex once the relationship is no longer novel. *See* Nichols, *Lesbian Sexuality, supra* note 108, at 103.

111. *See* BLUMSTEIN & SCHWARTZ, *supra* note 100, at 55, 237-38, 239-40, 303.

112. By role playing I mean behavior patterned after male-female relationships.

and submission in sex, including S/M;[113] and women encouraging lesbians to have sex with men because such sex "transgresses" current understandings.[114]

The increase in objectification in lesbian relationships is itself a cultural phenomenon associated with the virtual elimination of lesbian feminism from the gay and lesbian scene during the eighties and nineties and its replacement with a supposedly more radical queer politics.[115] Lesbian feminism of the seventies was critical of heterosexuality because of its routine sexual objectification and subordination of women in heterosexual relationships. With the emergence of queer politics in the eighties, that critique disappeared.[116] In the queer movement, the radical lesbian feminist critique of heterosexuality has been replaced by a liberal claim that all sexual minorities are entitled to equal treatment in existing social and legal institutions and structures.[117]

I cited increased butch-femme role playing among lesbians as evidence of increased objectification.[118] Butch and femme are not, however, equivalent to heterosexual roles, particularly in bed. Butch-femme roles were most clearly delineated in the fifties in many lesbian communities.[119] The butch role in sex consisted of being the active partner giving sexual pleasure to the femme. Indeed, many butches could not bear to be touched or to

---

113. *See* PAT CALIFIA, SENSUOUS MAGIC: A GUIDE FOR ADVENTUROUS LOVERS (1998); PAT CALIFIA, SEX CHANGES: THE POLITICS OF TRANSGENDERISM (1997).

114. *See, e.g.*, Sue Wilkenson, *Bisexuality as Backlash, in* ALL THE RAGE: REASSERTING RADICAL LESBIAN FEMINISM 75, 86-87 (Lynne Harne & Elaine Miller eds., 1996) [hereinafter ALL THE RAGE] (describing this phenomena).

115. *See, e.g., id.* (concluding that "[w]hether presenting sex with men as 'transgressive' for lesbians or sex with women as 'chic' for heterosexual women, the marketing of bisexuality as fashion functions primarily to depoliticise sex").

116. *See generally* Shiela Jeffreys, *The Essential Lesbian, in* ALL THE RAGE, *supra* note 114, at 90; Wilkenson, *supra* note 114, at 75.

117. *See, e.g.*, Katie Cotter, *Dating a Man: A Lesbian Leader Reveals She's Been Doing the One Thing Her Followers Won't Stand For*, ADVOCATE, Feb. 18, 1997, at 41 (describing JoAnn Loulan's new heterosexual romance). "Longtime lesbian activist" and "innovative political thinker" Robin Tyler is quoted as stating: "'The gay community has to stop saying we are talking about sexual politics. We're not. We're not a movement from the waist down. What we're fighting for is the right to love,' . . . lesbians should therefore defend Loulan's right to love a man." *Id.* at 42.

118. *See supra* note 113 and accompanying text.

119. Often, there was misogyny in the distinction between femme and butch: the butch was braver because more visible as a lesbian (more "out") and more masculine in a society that prized masculinity over femininity. In many places, a femme could not dance with another woman without her butch's permission; the butch held open the door and lit cigarettes. *See generally* ELIZABETH KENNEDY & MADELINE DAVIS, BOOTS OF LEATHER, SLIPPERS OF GOLD (1993).

be the direct recipient of sexual pleasure.[120] This is hardly parallel to male-female roles in heterosexual encounters, where the core of sex is male pleasure and orgasm, typically by means (fellatio or heterosexual intercourse) that are unlikely to result in female orgasm.

In heterosexual relationships, women and men continue to perform tasks according to gender roles. Women tend to be primarily responsible for child care, shopping, cooking, cleaning, and other household tasks, while husbands tend to be older, responsible for garbage, garage, car maintenance, and yard work.[121] Husbands are also likely to be regarded as primarily responsible for earning money. While there is more variation today than there would have been in the past, gender roles among men and women in heterosexual relationships remain prominent.

Within lesbian couples roles are less clearly defined. One partner may appear to be more butch (shorter hair, less jewelry, less feminine style) and the other more femme, but they are unlikely to divide tasks and responsibilities predictably. The butch partner may, for example, earn less money, cook most meals, and be younger. There are no patterns.[122]

In sum, I have assessed the morality of sexual relationships in terms of their tendency to objectify the "other" in autonomy-denying ways. Using this standard, heterosexual relationships are more problematic for women than lesbian relationships. The problem is not that heterosexuals objectify each other; rather it is that women as well as men in heterosexual relationships tend to view women as men's sexual objects instead of as sexual subjects in their own right. Autonomy-denying objectification contributes to women's subordinate status, perpetuating an additional moral wrong. As I discuss in the next Part, the compulsory nature of heterosexuality means that most women are unaware that they might find moral and equitable intimacy in lesbian relationships.

---

120. *See* LESLIE FEINBERG, STONE BUTCH BLUES (1993) (describing such a person as "stone butch").

121. *See, e.g.*, ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 6-10 (1989).

122. In the American Couples study of married, cohabiting heterosexual, gay, and lesbian couples, researchers found no correlation for same-sex couples between masculinity or femininity and which partner did more housework. *See* BLUMSTEIN & SCHWARTZ, *supra* note 100, at 148. In a recent nonrepresentative survey of lesbians by the Advocate, the only behavior the survey found correlated to butch-femme self-identification was who drives the car. *See* Janet Lever, *Lesbian Sex Survey*, ADVOCATE, Aug. 22, 1995, at 23, 28.

IV. TABOOS ON LESBIAN RELATIONSHIPS AND IMMORALITY IN HETEROSEXUAL RELATIONSHIPS

Taboos on lesbian relationships facilitate immoral heterosexual relationships, just as nineteenth-century "moral" norms facilitated the immorality of slavery and women's subordination to men. Most heterosexual relationships continue to be relationships of injustice and inequality, and I begin this Part by briefly describing some of the continuing problems outside the sexual realm.[123] These continuing inequities should, like unwanted sex, be recognized as moral problems. As Susan Moller Okin pointed out in *Justice, Gender, and the Family*, our understandings of morality begin at home, and we cannot expect to raise moral citizens in families in which the benefits and burdens of family life are inequitably divided between wife and husband.[124]

Eliminating taboos on lesbian relationships could have a considerable effect on women's immoral subordination (sexual and otherwise) in heterosexual relationships even if most women are born with a fixed sexual orientation towards men. As Adrienne Rich noted, men worry not about being smothered by women but "that women could be indifferent to them altogether, that men could be allowed sexual and emotional — therefore economic — access to women *only* on women's terms, otherwise being left on the periphery of the matrix."[125] To the extent more equitable lesbian relationships are socially acceptable, men might strike fairer bargains with women in heterosexual relationships.[126] This effect will be even more dramatic if, as I suggest in the discussion below, many women are born with a fluid sexuality so that significant numbers of women would be interested in lesbian relationships were such relationships seen as normal and socially acceptable.

A. *Inequalities in Heterosexual Relationships*

In this Subpart, I describe only briefly a few areas of persistent inequality in heterosexual relationships. Were injustice and immorality in heterosexual relationships limited to the sexual

123. *See supra* notes 98-111 and accompanying text.

124. *See* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 17-24 (1989).

125. Rich, *supra* note 23, at 643.

126. On inequality with respect to sex in lesbian or heterosexual relationships, see *supra* notes 98-122 and accompanying text. For a discussion of inequalities in other areas, see *infra* notes 127-46 and accompanying text.

arena, I would simply rely on the discussion above of autonomy-denying sex in heterosexual relationships. But there are many areas of persistent inequality.

Married women are more likely to be depressed than married men or unmarried women.[127] Although women are the caretakers and nurturers of many people in their lives — children, coworkers, husbands, bosses, and elderly relatives — many women receive little nurturing or emotional support themselves from their emotionally distant spouses.[128] Women in heterosexual relationships continue to be primarily responsible for child care, child care arrangements, and domestic caretaking in addition to working for wages. Although many women *want* to be the primary caretaker of their children,[129] being a caretaker does not mandate inequality in terms of leisure time, power in a relationship, economic security, or sexual fulfillment. And most women are not satisfied with the current division of labor.[130]

Inequities arise from many factors, including socialization into traditional sex roles and legal rules governing division of assets and responsibility at divorce. Inequities also stem from women's greater commitment to marriage and children. In most marriages, the wife's greater commitment to the children weakens her in a number of ways. Once she is the primary caretaker of the children, her attachment to the wage labor market is likely to be more attenuated than his.[131] She is now likely to earn much less money than he does or to be entirely dependent on his support. If she pushes too much, then he may insist on a divorce.[132] In a divorce, she may fear losing custody of the chil-

127. *See* Hope Landrine, *Depression and Stereotypes of Women: Preliminary Empirical Analyses of the Gender-Role Hypothesis,* 19 SEX ROLES 527, 528 (1988) *cited in* BECKER ET AL., *supra* note 86, at 498-99.

128. For a discussion of the norm that men are "emotionally inexpressive" except for the expression of "emotions that enhance men's control and status," see ALLAN G. JOHNSON, THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY, 64-65 (1997).

129. *See* LOUIS GENEVIE & EVA MARGOLIES, THE MOTHERHOOD REPORT: HOW WOMEN FEEL ABOUT BEING MOTHERS 358-59 (1987) (reporting that "only about one in four [mothers, whether working for wages or full-time homemakers] thought fathers should play a fifty-fifty role in raising the children.").

130. Women report that "the uneven division of labor was becoming a source of conflict between men and women." ROBERTA S. SIGEL, AMBITION & ACCOMMODATION: HOW WOMEN VIEW GENDER RELATIONS 143, 167 (1996).

131. *See* VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 60-61 (1988) (arguing that women's greater commitment to children is central to their persistent economic inequality).

132. *See* HOCHSCHILD & MACHUNG, *supra* note 121, at 253.

dren despite having been the primary caretaker (and may worry that she will have fewer assets to use in fighting for their custody because she has been the primary caretaker).[133] After a divorce, if she does retain custody, then she and the children are likely to be poorer than they were prior to the divorce.[134] Most custodial wives and their children do not regain their predivorce standard of living unless the mother is able to marry another man.[135] Remarriage becomes more difficult, however, as a woman ages and is less likely for women with custody of children.

In contrast, men do not suffer the same drop in economic well-being after a divorce.[136] In fact, the income available for their personal needs and desires increases.[137] Furthermore, it is easier for men to remarry because they are less likely to have custody of the children, they earn more money than women, and women are more willing to marry older men than men are willing to marry older women.

Many readers will feel that this analysis is harsh and unfair to many wonderful men and that I am "essentializing" the differences between women and men. True, there have been changes for the better. But studies reveal that husbands of working wives have only marginally increased the amount of effort they expend on child care and domestic tasks.[138]

Moreover, even though some men voice commitment to equality between the sexes, the vast majority of men in heterosexual relationships resist equality in their own intimate relationships (and do not insist on it at work either). A study of men and women reveals that men are generally aware of women's distress over continuing gender inequities but "consider it a fact of life which does not engage their interest, let alone their commitment."[139] In the all-male or all-female focus groups in this study,

133. *See* Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992).

134. *See* Karen C. Holden & Pamela J. Smock, *The Economic Costs of Marital Dissolution: Why Do Women Bear a Disproportionate Cost?*, 17 ANN. REV. SOC. 52 (1991).

135. *See id.*

136. *See id.*

137. *See id.*

138. *See* HOCHSCHILD & MACHUNG, *supra* note 121, at 2-10.

139. SIGEL, *supra* note 130, at 143 (studying women and men in New Jersey). *See also* HOCHSCHILD & MACHUNG, *supra* note 121, at 9. In a study of couples in the San Francisco Bay area with two working parents and a child or children under six, Hochschild and Machung found little ideological commitment to equality between the sexes in working-class families but more real equality than in the more upscale

the moderator began by discussing some neutral topic. In the all-female groups, the moderator never had to raise the topic of gender relations; "it arose spontaneously."[140] In the male groups, "the moderator was always the one to bring it up; nor did men show much inclination to linger over this topic."[141] One of the women's major complaints was the "inequitable division of labor in the household."[142] For most men in the focus groups, "the second shift [was] a nonproblem."[143] Although the female focus groups noted that "the uneven division-of-labor [at home] was becoming a source of conflict between men and women," the male focus groups failed "to discuss the topic at even moderate length."[144]

Women are more committed to domestic equality in intimate relationships than are men. In a study of heterosexual married, heterosexual cohabiting, gay, and lesbian couples in the eighties, only in lesbian couples was there no correlation between income and power in the relationship.[145] Lesbian couples are also more likely to share domestic tasks equitably than are heterosexual couples.[146]

---

families. In the middle and upper class families, there was an overt commitment to equality in domestic responsibilities, but often that was interpreted as *his* being responsible for (for example) the garage and the dog while *she* was responsible for everything else. Men routinely came home and rested or engaged in hobbies while their wives worked the second shift. Hochschild and Machung found that, on average, the women in the families she studied worked an extra month a year. *Id.* at 5.

140. SIGEL, *supra* note 130, at 38.

141. *Id.*

142. *Id.* at 167.

143. *Id.*

144. *Id.* Male telephone respondents were asked more specific questions. Although over two-thirds of the men surveyed believed that domestic labor should be evenly divided when both parents worked, only fourteen percent of the men thought that equal sharing actually takes place. *Id.* at 168.

145. *See* BLUMSTEIN & SCHWARTZ, *supra* note 100, at 53-77 ("[w]e find that the amount of money a person earns — in comparison with a partner's income — establishes relative power" among all couples but lesbians.) *Id.* at 53.

146. *See id.* at 149 ("Lesbians are especially careful to devise equitable organization of household duties."). *Cf.* "When husbands do a lot of housework, married couples have greater conflict." *Id.* at 147. Although cohabiting women "do less housework than working wives," their male partners are "no more involved with household duties than husbands." *Id.* ("Both heterosexual and homosexual men feel that a successful partner should not have to do housework."). *Id.* at 151. *See also* Patterson, *Families, supra* note 52, at 119-20 (finding that lesbian couples generally share household tasks and family decision making equally, but biological mothers tend to have greater involvement in the care of their child while her lesbian partner spends more time in paid employment. However, these differences are much less pronounced than those between husbands and wives in heterosexual families.).

My point is not that individual men are jerks, insensitive to the needs and desires of their partners and consciously exploiting their partners' sexual, emotional, reproductive, and domestic labor. Rather, the point is that individual men can be kind and loving to their wives *and still* enjoy more than their share of the benefits of family life. I am not suggesting that it is impossible for a woman to have an equitable relationship with a man, but it is difficult and not the norm.

B. *The Fluidity of (Some) Women's Sexuality*

In the introduction to this Part, I suggested that even if most women are born with a fixed heterosexual orientation, eliminating taboos on lesbian relationships will nevertheless create pressure on men to make heterosexual relationships fairer and more equal.[147] On the other hand, if many women are born with a more fluid sexuality so that many might be interested in lesbian relationships but for current taboos, then eliminating these taboos will place even greater pressure on heterosexual men to behave fairly. One fascinating study reports that women's (and men's) perceptions of equality within a heterosexual relationship varied with the perceived likelihood of finding another partner who was as good or better than the present partner. Thus, a woman's perception of equality in her relationship with her husband or boyfriend often indicates the lack of better alternatives for intimacy.[148]

We learn from our culture that the key determinant of sexual orientation is whether the subject and object have the same or different physical sex. I learned that: (1) everyone has a sexual orientation, i.e., a desire for sexual objects who are physically male or female; (2) if one finds any pleasure in making love to a person of the opposite sex then one is "normal" and heterosexual unless one also has an overwhelming taste for a lover whose physical sex is like one's own, in which case one is a bisexual; and (3) normal people would find making love to a person of the same sex physically revolting.[149] Women who feel "normal" are

147. *See supra* notes 123-25 and accompanying text.

148. *See generally* Elizabeth Grauerholtz, *Balancing the Power in Dating Relationships*, 17 SEX ROLES 563 (1987).

149. *See, e.g.*, John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation, in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 1 (John C. Gonsiorek & James D. Weinrich eds., 1991). Gonsiorek and Weinrich distinguish between biological sex, gender identity, social sex role, and sex-

likely to assume that they are heterosexuals who desire objects whose bodies are physically male, and are likely to be confirmed in this understanding if they find their initial heterosexual experiences at all arousing.

These assumptions make no sense to me and, I suspect, to at least some other women.[150] Whether one desires intimacy with women, men, or both, has little or nothing to do with desire for sex with individuals whose bodies have a certain physical sex.[151] Many women report finding more of what they want or need in relationships with women:

> [T]here's nothing I am not getting in [my] relationship with a woman that I think I could get with a man. Whereas when I think of being with a man, I think there's so much I couldn't get. I can't imagine where a man would come from who would be someone I could have this kind of relationship with.[152]

As this suggests, for some women, the physical sex of a partner's body is not critically important, though sex may be. Far more

---

ual orientation. "[S]exual orientation is erotic and/or affectional disposition to the same and/or opposite sex." *Id.*

150. *See, e.g.,* LINDSY VAN GELDER & PAMELA ROBIN BRANDT, THE GIRLS NEXT DOOR: INTO THE HEART OF LESBIAN AMERICA 105 (1996).

> The circuitous route to a lesbian identity is complicated by female sexual fluidity; girls and women who are attracted to both genders may genuinely not feel like "lesbians." But we've met hardly *any* gay woman who had an easy time putting a label on the constellation of sexual, emotional, and political feelings that add up to a lesbian identity. Gay males appear to be more resourceful at recognizing same-sex attraction at a young age — probably because an erection is a pretty unmistakable clue that what's going on is sexual. Female sexual response is more subtle, more diffuse, and more open to interpretation. Girls are also more programmed than boys to think of their worth in terms of the opposite gender and to imagine their futures in terms of marriage and children. When they begin to grapple with lesbian feelings, there's an extra layer of previously formed identity to strip off.

Id.

151. In a recent essay, Eridami writes that "women, compared to men, tend not to have sexual orientations." ERIDAMI, IS SEXUAL ORIENTATION A SECONDARY SEX CHARACTERISTIC, CLOSER TO HOME: BISEXUALITY & FEMINISM 173 (1992). This is close to my point, though Eridami does not explain what precisely she means. *See* MARJORIE GARBER, VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE 249-50, 278 (1995). Garber makes similar points in her newest book as she argues that the current categories of homosexuality, bisexuality, and heterosexuality are artificial and often wildly inapplicable to the lives of real or fictional individuals. But Garber's point seems to be that everyone would recognize their bisexuality were it not for social pressures and norms, i.e., were social norms and taboos different, everyone would realize their own desire for lovers with male bodies and lovers with female bodies.

152. VAN GELDER & BRANDT, *supra* note 150, at 121.

important are qualities we associate with gender, such as the partner's ability to be emotionally supportive and intimate.[153]

My point is *not* that sexual orientation is socially constructed rather than innate or biologically based. My point is that sexual orientation as normally understood — referring to whether the objects of one's desires have the physical sex of men or women — is simply not pointing at anything relevant for many women.[154] For many women, whether a partner has the same or different physical sex is irrelevant to sexual pleasure, desire, and preferences. A partner's physical sex is simply not important independent of the relationship of care and connection in which it is encountered, in part because our sexuality is not organized around physical objects but around the quality of and emotional intimacy in a personal relationship.[155]

I feel that I have *no* sexual orientation as that term is ordinarily used. I have identified as and acted like a heterosexual. I do not think that I was *really* a repressed lesbian or bisexual. I was an ordinary heterosexual. Given what I was taught about sexual orientation — the three factors described at the beginning of this Subpart — it never occurred to me that I could be anything else until I was in my forties. Today, I identify as and act like a lesbian. All of these categories seem wildly artificial, inappropriate, and irrelevant. A lover's physical maleness or femaleness has never been of central importance to me, let alone of critical importance — *that* has stayed the same.

It might seem that the category of bisexual includes people with no sexual orientation. But people without a sexual orienta-

153. *See, e.g., id.* (reporting that "[a]ccording to *Good Housekeeping,* most married couples spend a total of four minutes a day in meaningful conversation.").

154. In suggesting that a partner's physical sex is not of critical importance for some women, I do not mean to imply that physical sexual intimacy is less important for such people, nor less orgasmic. I simply mean that whether one's partner's body is physically male or female is less important for some women than current discussions of sexual orientation suggest. Women of different classes, races, cultures, sexual identities, ages, and generations are likely to differ on the points I discuss. And not all communities share the dominant understanding of sexual orientation, i.e., that sexual orientation is determined by the relative physical sexes of two sexual partners. Nor am I asserting that *no woman* has a sexual orientation.

155. For criticisms of sexual orientation categories on other bases, see, for example, ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 623-25 (1948) [hereinafter KINSEY, HUMAN MALE]; ALFRED C. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 452-57 (1953) [hereinafter KINSEY, HUMAN FEMALE]; LAUMANN ET AL., *supra* note 98, at 287-90; Case, *supra* note 19, at 1; Gayle Rubin, *Thinking Sex, in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 308 (Carole S. Vance ed., 1984).

tion are not included in the bisexual category in ordinary usage because bisexuals have the characteristics of both homosexuals and heterosexuals in terms of desiring partners with certain physical sexes. In most discussions, "bisexual" refers not to someone who is indifferent to the physical sex of their lover(s) — someone without a sexual orientation — but to someone who craves lovers with male bodies and lovers with female bodies.[156] Women with a fluid sexuality may not have "cravings" for people with particular kinds of genitals.

The assumption that a lover's physical sexual shape is of key importance is troubling not only because it does not reflect the reality of some women, but also because it camouflages sexual possibilities. This is especially troubling for women given the tendency of male heterosexuality to objectify women in harmful ways. In our culture, a woman without a sexual orientation is likely to assume that she is a heterosexual and to be confirmed in that understanding through her initial heterosexual experiences.[157] If these experiences are sexually arousing, she must be heterosexual. According to our understanding of sexual orientation, there is an enormous difference between making love to a person with the same or different physical sex. The message our culture delivers is that unless one is bisexual, one should be disgusted by making love to people with one body shape and excited by making love to people with another.

There is empirical evidence that some people, particularly women, may not have a sexual orientation in the sense of a preference for people whose bodies are male or female (or for both). Surveys of lesbians and gay men reveal that women are four times as likely as gay men to regard sexual orientation as a matter of choice.[158] Women who classify themselves as lesbians, and not as bisexuals, are also more likely to report heterosexual attractions, fantasies, or dreams than men who identify as gay.[159]

---

156. This is why bisexuals are perceived to be constitutionally incapable of monogamy. *See, e.g.*, John Leland, *Bisexuality Emerges as a New Sexual Identity*, NEWSWEEK, July 17, 1995, at 44, 47 ("In a culture organized, however precariously, around monogamy, bisexuality lurks as a rupture in the social structure, conjuring fears of promiscuity, secret lives and instability.").

157. *See supra* text accompanying note 149.

158. *See* Lever, *supra* note 122, at 23, 29 (reporting that 16% of women but only 4% of gay men in a 1994 survey regard their sexual orientation as chosen in some sense).

159. *See id.* "Only one quarter of women who identified themselves as lesbians and not bisexuals said they are exclusively homosexual in their sexual attractions,

In addition, there is evidence that women's sexuality is malleable. A study of women in "swinging" marriages[160] indicates that although few of these women had fantasies about women or felt sexually attracted to women prior to their "swinging" experiences, *most* of these women reported having such fantasies and attractions afterwards.[161]

My point is not that the categories "lesbian" and "gay man" make no sense. On the contrary, they may make sense for many people as conventionally defined. Many people do feel desire for sexual intimacy with people of a certain physical sex. Even people without a sexual orientation can identify or live as lesbians, gay men, or bisexuals. My point is simply that not everyone has a desire for sexual intimacy either with men (because they have men's bodies) or women (because they have women's bodies) or both.

While many people without a sexual orientation may even have a clear preference for intimacy with men or women (or both), that preference is often based on factors other than an object's physical sex. It might, for example, be based on a preference for intimacy with people who have the gender male or the gender female, i.e., people who have certain capacities for relationships we enjoy. For some women, a relationship with a woman may be much easier to find as well as more fulfilling than a relationship with a man.

When we ignore the fluidity of women's sexuality, we adopt a heterosexist and androcentric view of reality. We agree that sexual relationships between women and between a woman and a man are so inherently different on a physical level that most women who find one arousing will find the other disgusting. Thus, the possibility of being without sexual orientation — the possibility of sexual fluidity — is hidden from many women. The ordinary view of sexual orientation conceals that a woman might

---

fantasies, and dreams; for comparison, close to two thirds of [gay] male respondents in the 1994 survey claimed total exclusivity in sexual orientation." *Id.*

160. Marriages in which couples engage in unconventional forms of sex, such as sex with another person or couple.

161. *See* Joan K. Dixon, *Sexuality and Relationship Changes in Married Females Following the Commencement of Bisexual Activity*, 11 J. HOMOSEXUALITY 115, 122-23 (1985). *See also* KINSEY, HUMAN FEMALE, *supra* note 155, at 472. Kinsey reports that 14-19% of unmarried women in his sample did not have any overt allocentric sexual experiences or fantasies. This suggests that many women may be asexual (or so sexually repressed) as to lack a sexual orientation in some essence. My focus in the text is on women who are sexually active and lack a sexual orientation.

find a number of advantages in a relationship with another woman. If in fact some women might prefer more equitable relationships with other women to relationships with men were they aware of the possibility, then taboos on lesbian relationships facilitate men's immoral subordination and exploitation of women in heterosexual relationships.

V. REALITY AND CONSTITUTIONAL LAW: THE MARRIAGE DEBATE

In this Part, I argue that bans on lesbian marriage discriminate formally and substantively on the basis of sex. Such bans discriminate on the basis of sex on a *formal* level because they treat women and men differently; only men can marry women. Such bans discriminate on a *substantive* level because they pressure women to enter into intimate relationships in which they are subordinated and exploited. I begin by describing the formal argument because courts generally have used a formal standard for sex equality and because this argument is the only one that has succeeded in winning same-sex marriage rights. I then go on to make a substantive equality argument, using the analysis suggested by discussions in earlier sections of this Article.

In *Baehr v. Lewin,*[162] the Supreme Court of Hawaii used formal equality to hold that Hawaii's law discriminated on the basis of sex in violation of the state's equal rights amendment unless on remand[163] Hawaii could prove that its ban was narrowly drawn to serve compelling governmental purposes.[164] Under the formal equality standard, rules requiring women to

162. 852 P.2d 44 (Haw. 1993).

163. The trial court found that the state of Hawaii failed to sustain its burden. *See* Baehr v. Miike, No. CIV. 91-1394, 1996 WL 694235, at *16 (Haw. Cir. Ct. Dec. 3, 1996).

164. Under the Hawaiian Constitution, strict scrutiny is applied to classifications based on sex, whereas only intermediate level scrutiny has generally been applied to sex cases under the United States Constitution. *See* Craig v. Boren, 429 U.S. 190 (1976). Justice Ginsburg seems to want to move the court closer to strict scrutiny cases. *See* United States v. Virginia, 116 S.Ct. 2264 (1996). I believe that even under intermediate scrutiny, bans on same-sex marriages should fall. I therefore use the intermediate standard in my analysis. *See infra* notes 165-79 and accompanying text.

No federal court has, as yet, ruled on the constitutionality of state bans on same-sex marriage. Prior to *Baehr v. Lewin*, a number of state courts rejected various challenges to such bans. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed,* 409 U.S. 810 (1972) (arguing denial of marriage to same sex couple violates (1) their statutory right since the state marriage statute does not require a man and a woman for a "marriage"; (2) their fundamental rights under the Due Process and Equal Protection clauses.

marry men and vice versa discriminate on the basis of sex; individual women and men are treated differently. Women can only marry men and men can only marry women.

As some commentators and Supreme Court members have noted, maintaining the difference between women and men is a key part of the system of sex discrimination in the United States today.[165] The limitations and rigidity imposed on individuals by gender roles ground the Supreme Court's commitment to formal equality;[166] the government discriminates on the basis of sex when similarly situated individuals are treated differently by the government because of their physical sex. Such discrimination reinforces traditional roles and stereotypes, and the law demands that it must cease unless the government can show that the classification serves "important governmental objectives" and "must be substantially related to the achievement of those objectives."[167]

It might be objected that bans on same-sex marriage treat women and men similarly because neither can marry someone of the same sex.[168] This is not, however, the meaning of sex discrimination under the Equal Protection Clause. A state could not, for example, defend a requirement that females attend one set of schools and males attend another by arguing that there was no sex discrimination because members of both sexes were required to attend same-sex public schools. Same-sex schools clearly discriminate on the basis of sex.[169] The *only* question would be whether such sex discrimination could be justified by evidence of its relation to a strong and valid government objective.

---

165. *See supra* note 19.

166. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971) (preferring male family members over female family members for executor of an estate is "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment").

167. *Craig*, 429 U.S. at 197. This standard may have been changed by *United States v. Virginia*, 116 S.Ct. 2264 (1996). *See supra* note 164.

168. *See* Loving v. Virginia, 388 U.S. 1, 8-10 (1967). This argument was rejected by the Court in this decision.

169. For cases in which the Supreme Court found same-sex schools to be sex discrimination and not supported by compelling governmental interests, see *Virginia*, 116 S.Ct. at 2276 (Virginia failed to show compelling governmental interest in keeping military school all male); *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (Mississippi failed to show compelling governmental interest in keeping nursing school all female).

Bans on lesbian marriage discriminate against women on a substantive as well as a formal level by pressuring women to enter intimate relationships in which they are subordinated and exploited. Subordination begins at home where women and men still play quite different roles, roles that tend to give men more sexual pleasure, less unwanted sex, more leisure time, and greater financial security than enjoyed by their wives. Requiring women to marry men facilitates the ability of men to exploit women's sexuality as well as their emotional, domestic, and reproductive labor without adequate compensation.

Perhaps the ban on lesbian marriage can be justified as serving an important government purpose despite the fact that it discriminates on the basis of sex. The most likely justifications here are the consequentialist arguments against lesbian relationships discussed in Part II: (1) lesbian relationships cause higher levels of *promiscuity* and sexually transmitted *disease* than do heterosexual relationships; (2) lesbian relationships lead to *sexual abuse of children* by adults; (3) acceptance of lesbian relationships will result in *fewer good homes and confusing role models for children*; (4) acceptance of lesbian relationships threatens the *stability of marriage*; and (5) heterosexuality is necessary in order to *civilize men*.

The first three, as discussed earlier, are inconsistent with all but one piece of available evidence. That evidence is the possibility that lesbian parents may be more likely than heterosexuals to raise children who later identify as gay or lesbian.[170] This justification is, however, circular. Unless being in a lesbian or gay relationship is a problem, it is irrelevant that lesbians might be more likely to raise children who become lesbian or gay. In fact, from the perspective of girls and women, it is an advantage to grow up seeing lesbian existence as a possibility in light of the widespread immorality in heterosexual relationships. It would, therefore, be difficult to conclude that the ban on lesbian marriages is significantly related to a compelling governmental purpose for any of these reasons.

Indeed, at the trial in *Baehr v. Miike*,[171] the Attorney General of Hawaii attempted to justify the ban on same-sex marriage by arguing that children are best off with two biological parents. All but one of the four experts for the state testified, however,

170. *See supra* note 63 and accompanying text.

171. No. CIV. 91-1394, 1996 WL 694235.

that people other than biological fathers and mothers can be wonderful parents.[172] Two of these experts specifically testified that lesbians and gay men could be wonderful parents.[173] The trial judge himself was a stepfather. He found the state's argument for banning same-sex marriage — to protect children from living with one or more parents to whom they are not biologically related — less than compelling.[174]

The remaining two justifications for banning lesbian marriage are family stability and the civilization of men. However, it is difficult to imagine how a court could consider either of these justifications a legitimate reason for sex discrimination. Traditional forms of sex discrimination, particularly limitations on women's employment opportunities, would more directly contribute to the stability of heterosexual marriages in the short term than the ban on lesbian marriages.[175] Yet, as discussed earlier,[176] the Supreme Court has prohibited such discrimination.

Although the ban on lesbian marriage is an easy case of sex discrimination under the Supreme Court's formal standard as well as on a more substantive level, it is unlikely that the Court will recognize the ban as sex discrimination in the near future. Today's Court is careful not to go too far in front of the majority of the public on controversial issues, particularly controversial *moral* issues.[177] The Supreme Court did protect lesbians and gay men in *Romer v. Evans*[178] by striking the Colorado constitutional amendment prohibiting any governmental protection of lesbians

---

172. *See id.* at *8-21.

173. *See id.* at *8-17. One expert testified that although nonbiological parents could be good parents, he knew little about lesbian and gay parenting (though he had once been an expert in a case involving a lesbian mother's custody and, in that case, had regarded the mother's sexual orientation as irrelevant). *See id.* at *18-21. The other expert for the state did not believe in either social science or evolution so was given little credibility by the judge. *See id.* at *17-18.

174. *See id.* at *18.

175. For example, the ban on women's bar admission upheld in *Bradwell v. Illinois*, 83 U.S. 130 (1872). That decision is, however, viewed as overruled by the modern Supreme Court cases striking sex-based classifications. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455 (1981) (striking down community property law giving husband unilateral control of jointly owned marital property).

176. *See supra* note 12 and accompanying text.

177. About 60% of Americans remain opposed to recognition of same-sex marriage though most support bans on discrimination in employment on the basis of sexual orientation. *See* Ball, *supra* note 78, at 1877 n.22 (reporting that 62% of those polled by Newsweek opposed legal recognition of same-sex marriage though 81% favored protection of lesbians and gay men from housing discrimination and 74% from employment discrimination).

178. 116 S.Ct. 1620, 1628 (1996).

and gay men from discrimination. But the scope of that decision is fairly narrow. Gay men and lesbians were not recognized as a protected class themselves, a result that would have been easy to reach doctrinally and would have afforded broad protection. Nor was discrimination against lesbians and gay men recognized as sex discrimination, though that result seems doctrinally mandated by the Court's formal approach to sex equality and also would have afforded broad protection.[179] Instead, the Court decided the case on very narrow grounds, holding only that an identifiable group could not be burdened in a unique way in political processes.

With regard to same-sex marriage, the Court's temerity will be inconsistent with both its substantive standard of formal equality for sex discrimination and with the reason it has repeatedly given for requiring that women and men to be treated similarly by the state — to allow individuals to choose their own paths and roles rather than being constrained by traditional stereotypes.[180] The Court's determination to eliminate rigid sex roles will end when confronting a controversial change that has real potential to break down sex-role stereotypes — allowing women to marry women.

The Court may use traditional morality to justify its denial of marriage rights to lesbian couples. I have suggested that the Court should not accept this justification because this traditional moral norm facilitates the subordination of women to men in intimate relationships. But, as noted at the beginning of this Article, the Court has never developed a jurisprudence explaining when moral norms can legitimate otherwise unconstitutional state action. The Court may simply say, as it has in other cases,[181] that in the case of bans on same-sex marriage, traditional morality trumps sex discrimination.

---

179. *See* sources cited *supra* note 19.

180. *See, e.g.*, United States v. Virginia, 116 S.Ct 2264 (1996). In her opinion for the Court, Justice Ginsburg rejects the establishment of a separate leadership institution for women based on traditional notions of "'the way women are,'" *id.* at 2268, noting that "generalizations" about women can "no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.*

181. See *supra* notes 9-11 and accompanying text.

VI. CONCLUSION

In the nineteenth century, norms based on the "moral" inferiority of African-Americans and women, including their supposedly weaker sexual morality, enabled whites and men to use African-Americans and women in immoral and subordinating ways. In this Article, I have argued that current "moral" norms concerning the inferiority of homosexuality to heterosexuality function in similar ways.

None of the traditional moral arguments against lesbian relationships can justify the overt sex discrimination in bans on lesbian marriages. Autonomy-denying objectification is a better gauge of sexual immorality than whether the couple is heterosexual or homosexual. Autonomy-denying sex is most common among heterosexual men and typically consists of their immoral sexual exploitation of women in heterosexual relationships. In light of these moral problems with heterosexuality, taboos on lesbian relationships are at the core of sex discrimination. Current understandings of sexual orientation obscure from some women the possibility that they might prefer intimate relationships with other women, not because of the shape of women's bodies, but because women are more emotionally supportive, less sexually exploitive, and more committed to domestic equality.

Acceptance of lesbian relationships is important to the well being of women who would still prefer heterosexual relationships as well as to those who would prefer lesbian relationships. Greater acceptance of lesbian relationships will mean that women can choose between heterosexual and same-sex relationships. Until there is acceptance of lesbian relationships, men will remain uncommitted to moral heterosexual relationships. As Adrienne Rich has noted, compulsory heterosexuality ensures that men can interact with women on men's terms.

To a large extent, the current debate within the lesbian-gay community on the advisability of pushing for marriage rights at this time ignores the way in which marriage rights for lesbians are linked to compulsory heterosexuality. This debate misses how compulsory heterosexuality facilitates men's ability to dominate women in intimate relationships and to exploit women's sexuality as well as their domestic, emotional, and reproductive labor.

The Supreme Court should recognize state bans on lesbian marriages as sex discrimination and a violation of the Equal Protection provision in the Fourteenth Amendment. Not only do

such bans discriminate between men and women on a formal level, but they also discriminate substantively by facilitating the ability of men to exploit women's sexuality as well as their emotional, domestic, and reproductive labor. That such taboos are supported by traditional moral norms should not justify them. Traditional moral norms have often served immoral purposes and should be rejected when, as here, they facilitate immorality.