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EDITOR'S NOTE

So, you may be wondering, what do they mean by "The New Private Law"? Try as I might over the last year, I have been unable to articulate a simple explanation. Whatever the nature of this Symposium topic, it succeeds in raising curiosity and sparking lively debate—which is, I believe, its purpose.

Following the November 1994 elections, the new politically conservative majority in Congress, led by House speaker Newt Gingrich, called for the elimination of broad government policies in favor of private decisionmaking. The shift towards privatization seemingly appealed to a majority of the public. However, it cast a gray cloud on those who consider themselves "progressives," and who saw it as a step backward.

The Symposium participants posit the theory that a jurisprudential shift corresponds to the political trend. With regard to labor and employment disputes, conservation easements, and cohabitation agreements between same-sex couples, some authors see a progressive potential—the proverbial silver lining—within the move towards the private. Their intriguing insights confirm that, "Once in awhile you get shown the light, in the strangest of places if you look at it right."[1]

Others argue that the shift will, as expected, result in fewer protections for minority interests, and that we need to be careful before we embrace what may be a wolf in sheep's clothing. Lastly, one author defiantly suggests there is nothing at all "new" about the New Private Law. Nevertheless, the thoughtful treatment given the topic by all the participants demonstrates the success of the *Denver University Law Review* Symposium format, intended to facilitate a scholarly discussion of contextual legal phenomena.

I thank the Hughes Research and Development Fund and Dean Dennis Lynch for their continuing commitment to this important intellectual enterprise. I thank all the authors for their hard work and patience throughout the editing process. I thank the University of Denver College of Law faculty who participated in the weekly reading groups, particularly those who took the time to write an article or a comment for the issue, and especially the stellar symposium committee co-chairs Federico Cheever and Martha Ertman.

Thanks to all the editors and staff of the *Denver University Law Review* who helped before and during the symposium conference. Thank you to Tanya Haynes and Lauri Mlinar for helping me coordinate all the conference details. A big thank you to Tarek Younes, who was indispensable in the production of this issue. Finally, I thank my friend and colleague, Sue Chrisman, who helped preserve my sanity and sense of humor, and with whom it has been my greatest pleasure to work.

Tracy S. Craige, Editor

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1. JERRY GARCIA & PHIL HUNTER, *Scarlet Begonias*, *on* GRATEFUL DEAD FROM THE MARS HOTEL (Grateful Dead Records, 1974).

THE NEW PRIVATE LAW: AN INTRODUCTION

JULIE A. NICE*

This introductory essay provides the backdrop against which the New Private Law Symposium developed. It briefly explains our unique symposium model, which informed much of this volume. In addition, it introduces this year's topic, the New Private Law, an idea so fresh as to resist definition. Readers can best understand what we mean by the New Private Law by understanding how we came to coin the phrase.

OUR MODEL: DENVER'S CONTEXTUALIZED SYMPOSIUM

Each year members of the University of Denver law faculty select a symposium topic from among common themes we encounter in our work. In this endeavor, we hold a series of meetings and discuss trends emerging in our teaching, research, and writing. From among common themes, we select as our symposium topic a pattern which both relates to and transcends our diverse contextual interests. We focus our group inquiry on developing the pattern in context, both to investigate its specific contextual impact and as a grounded means to explore whether a cross-contextual pattern emerges. Next, we search for willing travelers to participate in a classic symposium, an intimate roundtable exchange requiring full engagement of all who attend. This format stands in stark contrast to the experience of many of us, who have attended too many conferences involving talking heads, sterile audiences, and far too little meaningful engagement. We conduct the symposium through contextualized discussions which ground our examination of how the identified pattern plays out both in context and across contexts. Our symposium process allows us to do what legal scholars do best, identifying broad patterns in the development of law in society, analyzing them, and when necessary, giving them names.

OUR TOPIC: EXPLORING THE EMERGENCE OF NEW PRIVATE LAW

As we met to develop a topic for this symposium, one theme repeatedly emerged: the growing trend toward preferring private ordering over public governance. The mainstream media had reported about experiments in privatizing traditionally government institutions such as schools and prisons. Several

* Assistant Professor, University of Denver College of Law. B.S., Northwestern University, 1982; J.D., Northwestern University School of Law, 1986. Thanks to my Denver colleagues whose devotion to a meaningful scholarly dialogue made this endeavor worthwhile. Thanks also to our guest participants who contributed their important inquiries and insights. Finally, my special thanks to Sue Chrisman, Editor-in-Chief, and Tracy Craige, Symposium Editor, for their perseverance in committing their extraordinary skills and talents to coordinating and editing this Symposium issue, and to Tarek Younes for his assistance.

faculty members identified this pattern within their legal contexts, including the evolution of private labor dispute resolution systems,[1] the emergence of techniques for private environmental preservation,[2] and the increasing contractualization of family structures.[3]

In my work,[4] I had observed privatization take hold even in welfare, one of the most traditionally "public" arenas. In the recent federal welfare reform legislation, Congress authorized states to provide services through contracts with charitable, religious, or private organizations.[5] Some states and counties had been experimenting with private contracts prior to this new round of welfare reform.[6] Proponents of welfare privatization claim that it costs less because of greater flexibility, and provides better services because workers receive performance-based financial incentives.[7] Opponents, including unions, counter that privatization costs more, reduces the quality of services, eliminates expertise, fosters patronage and corruption, and diminishes public accountability.[8]

Welfare privatization has taken many forms. For example, some states have used competitive request-for-proposal bidding processes, while others have relied on a non-competitive single-bidder method.[9] Some states contract with large corporations, while others rely on smaller, local entities.[10] Some state agencies compete with private bidders for welfare contracts, while others simply select among private bids.[11] Texas has entertained bids for its contract to administer welfare from public-private partnerships consisting of Texas public agencies working in conjunction with major corporations, as well as from wholly private competitors.[12] In whatever manner Texas and other states configure their welfare privatization, many states seem firmly committed to

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1. *See* Roberto L. Corrada, *Claiming Private Law for the Left: Exploring* Gilmer*'s Impact and Legacy*, 73 DENV. U. L. REV. 1051 (1996).

2. *See* Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077 (1996).

3. *See* Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996).

4. *See* JULIE A. NICE & LOUISE G. TRUBEK, POVERTY LAW: THEORY AND PRACTICE (1997).

5. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

6. *Contractors Must Learn Intricate, Varying Procurement Rules to Win Bids*, 5 WELFARE TO WORK (MII) No. 24, at 380-81 (Dec. 16, 1996) [hereinafter *Contractors*] (describing welfare privatization efforts in Texas, Michigan, Connecticut, Maryland, Indiana, and Virginia).

7. *Privatization Useful but Risky Tool in Welfare Reform*, 4 WELFARE TO WORK (MII) No. 14, at 108-09 (July 31, 1995).

8. *See, e.g.*, AFSCME, AFL-CIO, *Government for Sale: An Examination of the Contracting Out of State and Local Government Services* (on file with the author).

9. *Contractors*, *supra* note 6.

10. *Id.*

11. *Id.*

12. Bidders for the Texas contract include the Texas Department of Health and Human Services, Texas Workforce Commission, Anderson Consulting, Electronic Data Systems, IBM, Lockheed Martin, and Unisys. *See* Nina Bernstein, *Companies See Profits in Welfare Law*, DALLAS MORN. NEWS, Sept. 15, 1996, at 10A; John Carlin, *How to Profit from the Poor*, INDEPENDENT (London), Sept. 29, 1996, at 12; *Contractors*, *supra* note 6; Laura Griffin, *Nation's Eyes Turn to Texas*, DALLAS MORN. NEWS, July 22, 1996, at 5B.

the basic notion that private entities can provide welfare services both more efficiently and effectively than government.[13] This Symposium explores what the different forms of, and basic commitment to, privatization mean.

Though our inquiry revealed ubiquitous privatization, we approached privatization as a symposium topic with some trepidation for two reasons: (1) none of us was an immediate fan of the trend; and (2) some of us were skeptical about its importance in legal scholarship. Some of us viewed the trend as a political tool of lawmakers, rather than as an identified movement in legal scholarship. We wondered, nonetheless, whether this trend toward privatization might represent something more than a new technique of the political right. Might it also constitute a legal movement that could be characterized as New Private Law? If so, what are the movement's attributes? How can it best be situated within legal discourse?

To capture the gist of our conversations, we coined the phrase "New Private Law"[14] and began our attempt to identify what it is. The primary characteristics of New Private Law include deregulation, decentralization, privatization, and contractualization. New Private Law reflects a normative regime which both recognizes a distinction between public and private domains and prefers the ordering of the private market to that of public decisionmakers. The preference for the "private" seems, at a minimum, to tolerate inequality and, perhaps, to reify existing power hierarchies.

In a broad-stroke attempt to situate our inquiry within the tradition of legal discourse, we began to compare New Private Law to recognized jurisprudential schools. Initially, we assumed that New Private Law shared the conservative values underlying jurisprudential movements more typically associated with the political right. We speculated that New Private Law could be an outgrowth of Formalism and Law and Economics (see Table 1). Specifically, it seemed to share core values with both Formalism and Law and Economics, especially a commitment to an individualist, pluralist, liberal ideal. Some of us were struck, however, by differences between New Private Law and these existing schools of thought. For example, New Private Law rejects Formalism's devotion to rules and categories. Unlike Law and Economics, it

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13. The confidence in privatization may be premature. In a recent comparison of three states' private and public child support collection performances, for example, one study concluded that "because full-service privatization of child support enforcement is relatively new, the extent to which it offers comparable performance and cost-effectiveness remains an issue for additional evaluation over the long term." UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON THE BUDGET, HOUSE OF REPRESENTATIVES, PUB. NO. GAO/HEHS-97-4, CHILD SUPPORT ENFORCEMENT: EARLY RESULTS ON COMPARABILITY OF PRIVATIZED AND PUBLIC OFFICES 16 (1996). The study included specific findings of mixed performances:

> The relative cost-effectiveness of the privatized versus public offices, however, differed among the comparisons we made. Specifically, Virginia's and Arizona's privatized offices were more cost-effective—60 percent and 18 percent, respectively—than their public counterparts. However, in Tennessee, one public office was 52 percent more cost-effective than the privatized office we reviewed, while the remaining privatized office in Tennessee was about as cost-effective as its public counterpart.

Id. at 2-3.

14. We were particularly inspired by the *Michigan Law Review*'s Symposium on the New Public Law. *See* Symposium, *The New Public Law*, 89 MICH. L. REV. 707 (1991).

seems less concerned with efficiency and more concerned with whether an activity is conducted by the private sphere (see Table 2).

TABLE 1
NEW PRIVATE LAW AS CONSERVATIVE OUTGROWTH

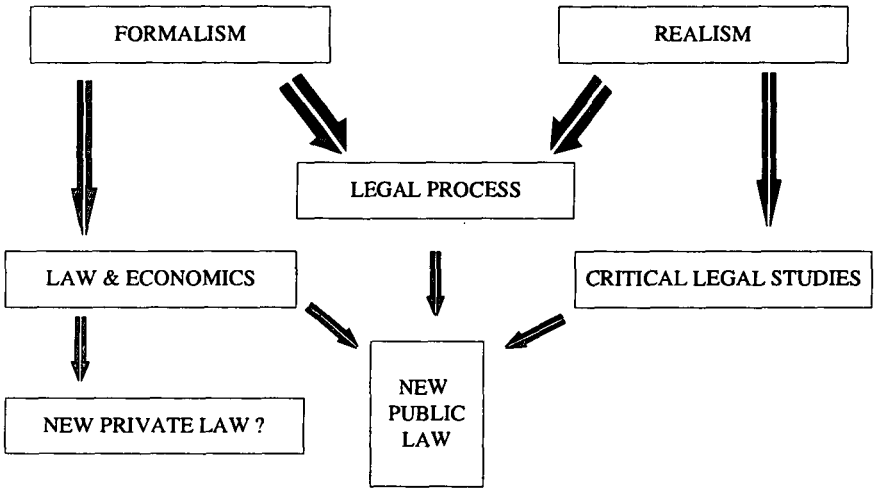


TABLE 2: CHARACTERISTICS OF FORMALISM, LAW AND ECONOMICS, AND NEW PRIVATE LAW

FORMALISM[15]	LAW AND ECONOMICS	NEW PRIVATE LAW
▸ Primacy of Private Domain over Public (Liberalism)	▸ Primacy of Private Domain over Public (Liberalism)	▸ Primacy of Private Domain over Public (Liberalism)
▸ Formalism	▸ Normativism	▸ Normativism
▸ Common Law Baselines	▸ Efficiency Baseline	▸ Privatization Baseline

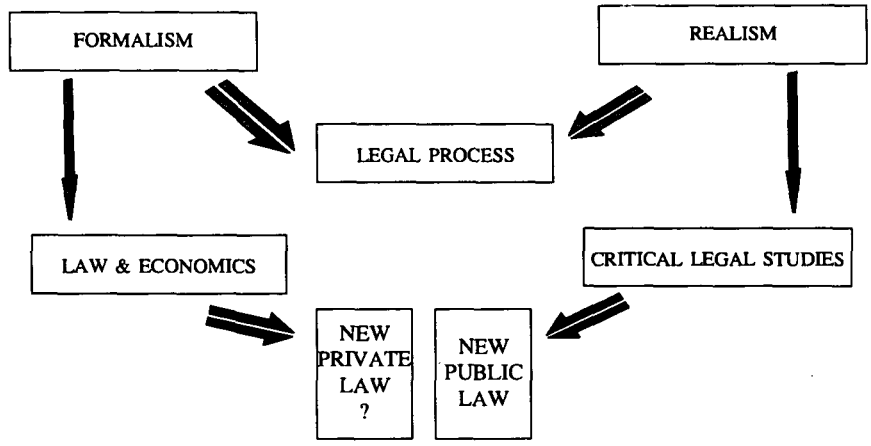
We compared New Private Law with the centrist legal movements which had attempted to synthesize values from both the political left and right. For example, in the simplest terms, mid-twentieth century Legal Process thinkers criticized Formalism as too conservative and Realism as too politicizing.[16] They devoted themselves to process and institutional competence as the solu-

15. William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 717 (1991) (adapted from Table 1: Common Law Formalism, Legal Realism, and Legal Process and Table 2: From Common Law Formalism to the New Public Law).

16. *See, e.g., Id.* at 709-10.

tion to these faults. More recently, New Public Law scholars similarly criticized Law and Economics as too conservative and Critical Legal Studies as too politicizing.[17] The New Public Law scholars responded to these perceived extremes by devoting themselves to normativism and pragmatism as the solution to these faults. Our comparisons between the New Private Law, Legal Process, and New Public Law yielded several additional queries. Is the New Private Law a synthesis between Law and Economics and Critical Legal Studies? If so, could the New Private Law be the conservative-oriented centrist response to the polarization between Law and Economics and Critical Legal Studies, as New Public Law may be the progressive-oriented centrist response (see Table 3)?

TABLE 3
NEW PRIVATE LAW AS CENTRIST SYNTHESIS



How do New Private Law and New Public Law compare? Certainly New Public Law and New Private Law share several characteristics: both seem simultaneously normative and pragmatic (see Table 4). But they seem committed to different fundamental values. New Public Law seems more committed to values of community and equality, while New Private Law seems more committed to values of individualism and market integrity. Other questions seem more difficult to call. For example, to what extent do they comparatively tend to reinforce extant power relations?

17. *Id.* at 725-26.

TABLE 4:
CHARACTERISTICS OF NEW PRIVATE LAW AND NEW PUBLIC LAW

NEW PRIVATE LAW	NEW PUBLIC LAW[18]
▸ Deregulation, Decentralization, Privatization, Contractualization	▸ New Forms of Regulation, or Deregulation
▸ Public/Private Distinction	▸ Denial of Public/Private Distinction
▸ Normativism	▸ Normativism
▸ Individualism	▸ Communitarianism
▸ Market Values	▸ Nonmarket Values
▸ Liberty	▸ Equality

This Symposium issue explores the potential of the New Private Law and related questions through the contextualized analyses which follow. First, Gary Peller[19] and Dan Farber[20] explore privatization with a focus on public school administration. In the context of labor law, Katherine Van Wezel Stone[21] explores the danger to employees when labor and employment disputes are privatized. Roberto Corrada[22] and Dennis Lynch[23] comment on Professor Stone's cautionary tale. In the context of environmental law, Federico Cheever[24] explores the use of land trusts as progressive tools toward conservation, on which Richard Collins[25] comments. In the context of sexual regulation, Martha Ertman[26] provides a model for charting privatization as a way station on the road to progressive protection for those she identifies as sexual marginorities, followed by a comment from Mary Becker.[27] On a broader level, Clayton Gillette[28] explores the potential competition between public and private provision of goods and services, with a response by Elaine Welle.[29]

18. *See id.* at 744 (adapted from Table 2: From Common Law Formalism to the New Public Law).

19. Gary Peller, *Public Imperialism and Private Resistance: Progressive Possibilities of the New Private Law*, 73 DENV. U. L. REV. 1001 (1996).

20. Daniel A. Farber, *Whither Socialism?*, 73 DENV. U. L. REV. 1011 (1996).

21. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

22. Corrada, *supra* note 1.

23. Dennis O. Lynch, *Conceptualizing Forum Selection as a "Public Good": A Response to Professor Stone*, 73 DENV. U. L. REV. 1071 (1996).

24. Cheever, *supra* note 2.

25. Richard B. Collins, *Alienation of Conservation Easements*, 73 DENV. U. L. REV. 1103 (1996).

26. Ertman, *supra* note 3.

27. Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169 (1996).

28. Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185 (1996).

29. Elaine A. Welle, *Opting Out of Public Provision: Constraints and Policy Considerations*, 73 DENV. U. L. REV. 1221 (1996).

Finally, Nancy Ehrenreich[30] explores the potential of privatization and Alan Chen[31] critiques the existence and potential of New Private Law.

This Symposium accomplishes several objectives. It addresses an overarching topic and captures it in context. It considers whether a New Private Law exists, and if so, what characteristics define it. Finally, it examines who benefits from a New Private Law: suggesting that while privatization may generally benefit powerful parties, it may benefit less powerful actors as well. If the legal and social developments that led us to name the New Private Law continue, we hope the provocative ideas in this Symposium will provide a foundation for further exploration of its significance.

30. Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235 (1996).

31. Alan K. Chen, *"Meet the New Boss . . ."*, 73 DENV. U. L. REV. 1253 (1996).

PUBLIC IMPERIALISM AND PRIVATE RESISTANCE: PROGRESSIVE POSSIBILITIES OF THE NEW PRIVATE LAW

GARY PELLER*

In hosting this Symposium on "The New Private Law," the *Denver University Law Review* is to be commended for providing an occasion to reflect on a clearly recognizable but insufficiently conceptualized development in the contemporary legal/political arena. If I understand the topic, the New Private Law is meant to connect various trends in law and social policy as part of a single phenomenon; examples include school voucher programs, privatization of prisons, contracting out traditional municipal functions, the movement from public trial to private mediation and arbitration, curtailment of the state action doctrine and thus limitations on the application of constitutional norms with respect to a range of institutions, and the various ways of delegating lawmaking power to formally private groups. The markers of this transformation are generally: (a) distrust of centralized public administration, (b) commitment to increased choice for individuals, and (c) new faith in the social responsiveness of institutional arrangements based on the profit motive.

Several years ago, my colleague William Eskridge and I described a contemporary jurisprudential phenomenon that we dubbed the New Public Law.[1] Our basic idea was that a cadre of contemporary mainstream legal scholars had coalesced around a "centrist" approach to law in response to the polarizing and ideologically charged character of the legal academy in the 1970s and 1980s. Paralleling in many ways the postwar "legal process"[2] response to the radical possibilities of legal realism, we saw the New Public Law as an implicit attempt to incorporate the intellectual sophistication and general political direction of the Left's critical scholarship (embodied primarily in the work of critical legal studies, radical feminist, and critical race intellectual movements), while nevertheless defending a decidedly centrist, de-radicalized normative vision of an apolitical rule of law. We associated the New Public Law with a pragmatic, republican-oriented, and vaguely reformist attitude toward legal institutions, within which "public" type values of inclusion, participation, and cultural respect were taken as emblematic of a "new normativity."[3]

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* Professor, Georgetown University Law Center. B.A., Emory University, 1977; J.D., Harvard University Law School, 1980.

1. *See* William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 U. MICH. L. REV. 707 (1991).

2. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Gary Peller, *"Neutral Principles" in the 1950's*, 21 MICH. J.L. REFORM 561 (1988).

3. *See* Eskridge & Peller, *supra* note 1, at 708-09.

In Eskridge's evaluation, this development was to be applauded as a progressive articulation of the legal discursive tradition rooted in *Brown v. Board of Education*[4] and Warren Court activism more generally. In my evaluation, New Public Law scholarship—like the legal process school of the 1950s—represented an attempt to domesticate and defang the critical work that it appropriated, primarily by ignoring the overall point that legal discourse worked to constitute and legitimate status quo power relations. While Eskridge celebrated the emergence of a sophisticated view of law as legitimately resolving social conflict in a just way, by paying proper respect to various viewpoints held by the multiple groups making up American society, I saw a bland form of "post-modern moderation" where the very social conflicts that leftists had argued mainstream legal discourse suppressed were now to be "processed" through an inclusive "good-guyism" blind to its own cultural ethnocentrism.

The New *Private* Law might be taken to be the polar opposite of the New *Public* Law—here the emphasis is on "private" values of individual choice and decentralized decisionmaking where the New Public Law emphasized social inclusion and public deliberation. But the image of opposition misses more important similarities in the two tendencies. The New Private Law represents a slightly conservative *correlate* to the New Public Law. Both are located near the center of legal ideology, rather than at the poles (whatever might constitute the poles these days: perhaps Chicago-style law and economics on the one hand and post-modern cultural critique on the other). While there is a general sense that the New Private Law is slightly right of center (the domestication of law and economics), and New Public Law scholarship appears slightly left of center (the domestication of critical legal scholarship), the fact of the matter is that they both have the feel of being, more simply, depoliticized.

This essay reflects upon the transformation implicit in the emergence of the New Private Law on the contemporary legal scene. My main point is to note the end of the tradition, dating back at least to the the mid-nineteenth century, of delineating political ideologies according to the public/private distinction. The association of advocates of the public arena with *progressive* social reform and advocates of the private realm with *conservative* social ideology is clearly over; the distinction between public and private administrative alternatives has been, for the most part, drained of its ideological significance. Given this development, I conclude that there is, in fact, no reason for progressives reflexively to oppose many of the various privatization trends that mark the contemporary policy scene.

In the remainder of this essay, I situate the emergence of the New Private Law phenomenon in terms of limitations in the ways that progressives have usually understood the public/private distinction. The highly general framework I sketch is intended to be suggestive and evocative rather than definitive; I will simplify what are actually much more complex terms of intellectual and ideological development.

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4. 347 U.S. 483 (1954).

I begin by distinguishing the New Private Law from traditional market ideology. I next consider how many of the ways that progressives understood what "public" and "private" politically meant were intellectually and ideologically impoverished. Our association of the public sphere with justice and equity was blind to the ways that the very conception of a universal, nondiscriminatory equal opportunity could serve to produce colonized institutions from which virtually everyone is alienated. Conversely, our association of the movement from public to private with parochialism or oppression ignored the ways that such social change could signify empowerment and a recovery of liberatory democratic values. I will use the example of public school reform to provide a context within which to evaluate these possibilities.

At the outset, it should be emphasized that the New Private Law phenomenon does not represent a resurgent laissez-faire market ideology. While contemporary privatization reforms do often constitute recognizably conservative or right-wing social interventions, it would mistake the New Private Law simply to associate it with capitalist or libertarian ideology. Instead, the recent privatization interventions should be seen as more centrist, ideologically diluted institutional developments. Defenders use a discourse that is pragmatic and situational, not ideal and universal. Champions of the private realm traditionally sought to defend the market as a truly private, unregulated realm of exchange. Their defense was principled: the market represented the realm of individual free choice and accordingly state intervention threatened not only economic distortion but a form of tyranny. But the ideology of recent social reforms such as school voucher programs or contracted prison administration is not premised on the idea that a truly private realm is being protected from the coercive power of the State. Rather, privatization is presented as simply one in an array of possible, and concededly regulative, social interventions, bearing no *a priori* claim to legitimacy but instead depending on historical and contextualized justification: the New Private Law might see centralized administration of schools, for example, as having produced dysfunctional and often corrupt urban institutions, leading to the impetus for alternative institutional arrangements. From this perspective, then, the New Private Law should be distinguished from neo-conservative revivals of the theories of private property and free exchange.[5]

In addition to the transformed idea of what the private realm represents for contemporary privatization advocates, the identification of recent reforms as evidencing a general movement from public and private should not be exaggerated. Since the realist critique, it has been clear that as an analytic matter, the categories of "public" and "private" do not signify something outside of legal and political discourse itself. The so-called free market, the paradigm of the private realm, is, properly understood, inseparable from the social power implicit in the so-called framework rules defining the boundaries of

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5. The most notable champion of the principled justifications for such a regime in legal academé is Richard Epstein. *See* RICHARD EPSTIEN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). For an extended analysis of the distinction between what is characterized here as the New Private Law and traditional market ideology, see Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL'Y REV. 6 (1988).

"private property" and the permissible pressure that could be brought to bear in "free exchange." Since terms like "consent," "private property," and "coercion" are not self-defining, any particular choice of their boundaries manifests a political decision and State "intervention"—with distributive consequences for the "market" that is supposed to stand outside governmental power. Thus, for example, the refusal to recognize sexual harassment as a tort does not leave such behavior to an unregulated "private" realm, but instead bears the mark of State intervention in the form of a privilege granted to men. Were women to use "natural" responses of physical force to defend themselves against the injury that sexual harassment causes, the harassers could call on the State to defend *them*. That is, harassed women are not entitled to self-help in the form of a privilege to engage in self-defense because they are not protecting an interest that is officially recognized by the State, and thus they may not use force to prevent its invasion. The resulting form of regulation is a privilege on the part of men to harass and legal exposure on the part of their victims. And there are distributive consequences from these inevitable "framework" decisions: were such harassment to be officially recognized, harassers would be worse off and their victims better off—there is simply no way for the State to stay out of a "private" market because either way it is affecting the distribution of market wealth and power.

Since the terms of the "private" realm are socially created by the very legal and political judgments that are supposed to follow from the "private" or "public" nature of a social encounter, they are, as the realists taught, simply conclusions attached to judgments reached on other bases. Proponents of the New Public Law as well as the New Private Law understand this at some level, and accordingly both approach the market, as did the legal process school, as simply one administrative alternative to centralized public regulation rather than as principled and normatively dictated. But taking seriously the realist critique suggests that it may be ultimately impossible to delineate administrative options by these labels at all—they are not only relative to a particular baseline, but also arguably analytically incoherent once they have lost their grounding as part of an ideology through which power was translated as choice.

Furthermore, not only is the purportedly private realm arguably public, but the converse may be true as well. The so-called public realm arguably represents simply another form of private power. Think, for example, of the workers' compensation system—perhaps the very paradigm of "publicization" as disputes over workplace injuries were transposed from the former "private" law of torts to a publicly administered, regulated, and rationalized system. The lynchpin of a worker's right to recover under most workers' compensation systems is a disability—ordinarily one that must be identified and documented as such by a medical doctor. Doctors are, in the conventional typography, private actors. The "public" character of workers' compensation schemes depends on taking medical judgment as an objective fact rather than the product of a complex of private power exercised by the medical profession.

Given that the terms "public" and "private" may have no meaning except relative to a pre-conceived baseline, it is nevertheless true that we do

recognize the New Private Law as a phenomenon—and also recognize its slightly more liberal correlate in the New Public Law. I now change focus to consider how the traditional associations that progressives have made—public as liberal and private as conservative—may have suppressed from view the manner in which the public sphere was repressive and alienating, and the move to the relatively private realm arguably a move to a relatively more liberatory form of social relations.

My sense of the contemporary environment is that there is no reason to assume that privatization reforms will necessarily represent conservative rather than progressive social change. The valance provided by the grand debate between capitalism as the ideology of the private sphere and socialism as the ideology of the public sphere now provides only a faint echo in the background of policy debate. Whether a particular form of privatization will be liberatory or repressive depends on the context and the circumstances; it can only be evaluated institution by institution and reform by reform. Consider, for example, the context of public school reform.

Public schools represent a paradigm of publicly administered institutions. Having their genesis in noble aims of egalitarianism, one might expect that they would exist as model institutions of democratic and social progressivism. Moreover, they are administered for the most part by the most local, close-to-the-people of democratic institutions, school boards. And public education is arguably the institutional context in which the republican values of inclusion and social tolerance have had their greatest vitality—the Warren Court activism that New Public Law adherents champion was most visibly directed at reforming public education by ending racial segregation and school prayer.

To my mind, the public education context reveals the deep problems in the traditional liberal ideology regarding the public and the private and associating universalism and objectivity with equity and equal opportunity. Arguments against various privatization reforms of school management and attendance decisions typically center on the risks that private choice will reproduce social stratification. But the "public" character of schools that is defended against the evils of privatization is more or less a total fantasy. Despite the formally decentralized and localized structure of administration by county or municipal governmental units—and thus the expectation of popular sovereignty at its height—American public schools by and large represent the paradigm of alienating, unresponsive, often corrupt, inefficient, and culturally repressive social institutions. Despite their public and democratic character, my guess is that most people who have had occasion to encounter schools boards share my experience of them as arrogant, unresponsive, technocratic entities presenting themselves as educational "experts" concerned with professionalism and disdaining parents and students as constituting the threat of "political pressure" which might interfere with the "educational mission." To the extent that there are exceptions to this image, they are more often than not occasions when cultural right-wingers or religious fundamentalists have managed to take over and inscribe their own value system on their children's education. But progressives have found themselves pitted against such groups, trying to defend public schools against such "parochialism" and "narrowmindedness." What has

been defended is a professional culture that rather blatantly attempts to manage the community they are supposed to serve by channeling community concerns into technocratically understood "inputs"; thus the need for "parental input" is understood as a component of appropriate process and management, but that's it. The ruling ideology is that community intervention represents the threat of local parochialism invading the province of impersonal professionalism.

The elitism of the school board is part and parcel of a wider progressive ideology about public education that, ironically, connects this form of elitism with egalitarianism. The culture of public education today actually represents the victory of progressive forces against repressive ones—the direction of reform over the last three or four decades has been away from the private and local and toward the public and universal, understood to be part of instituting public values of inclusion, equal opportunity and respect, and deliberative procedure. From this perspective, it is no simple litigation accident that school prayer was banned at roughly the same time as racial segregation. Both were understood as part of a single project to transform public schools into truly democratic institutions open to all and free of local parochialism and prejudice. Hence the links between ideas of universalism, centralism, and the public realm in contemporary liberal ideology. As schools come to be managed centrally, in the sense that they institute *national* standards for curriculum and teacher training and methodology, the reigning ideology sees each child being given an equal opportunity to compete in American life and to develop themselves as individuals. The more aloof from local prejudice and influence, the more "federal" and "public" the day-to-day administration of the schools, the more egalitarian they are supposed to be. The overarching symbol of these links between universalism, centralism, and egalitarianism is the number two pencil marking totally impersonal, anonymous, standardized test answers.

The actual governing structure of public schools is, in terms of the day-to-day life of teachers and students, a mockery of democratic self-determination. Schools across the country are in fact amazingly similar: they are all by and large governed by distant ideological and cultural assumptions that stand opposed to the "distortion" of local community control. As teachers across the country mouth scripts they learned in graduate schools and administrators institute uniform national management techniques, it is no wonder that students and parents experience teachers and administrators as "not there," as ruled by distant forces that are never themselves visible but always "out there" somewhere, maybe located wherever the standardized tests are devised. In other words, as public education has been made ever more public, objective, and impersonal, it has become ever more alienating and disempowering—like a form of colonization or podification by the pseudo-scientific standardized test regime with its own bases for sorting students in hierarchies of worth. And, of course, this alienating otherness is not from nowhere—it is located in a specific ideology of what the right-wing calls secular humanism or pointy-headed elitism, a culture emanating vaguely from the northeast, white, protestant, upper-middle class.

From the perspective of alienation, I find it difficult to disdain even right wing cultural interventions—like school prayer movements or advocacy of the teaching of creationism or values education. They strike me as liberatory moments of disalienating energy seemingly struggling to subvert the hold of unseen colonizers over their local schools.

And, as I see it, it's not that the attempt to make schools truly "public" was just done incorrectly. In retrospect, the whole idea that animated liberal public school reform during the past several decades of making schools culturally neutral and thus open to all was seriously misguided, as is the wider attempt to neutralize the public sphere more generally by banning religion, for example. The connection between the "public" and the "universal" as a means for achieving social justice in institutional form is a recipe for the alienation of all of us who live, work, and study in such institutions.

Against this backdrop, various school privatization reforms can be evaluated for their potential to break the hold of the "public" culture of professional, scientific expertise over public schools. And, to the extent they contribute to the recovery of real democratic empowerment, they may reveal that there is no essential connection between privatization and conservative regression.

Various school reform proposals constitute a range of privatization options. The leading reform to date, the hiring of a private corporation to administer schools, hardly seems like a qualitative transformation at all. To the extent the school board retains ultimate control over the schools and sets the terms of the contract with the private corporate entity, there is no particular reason to think that such an administrative form is much different from the school board hiring particular principals, superintendents, and other administrators to run the schools. In fact, such an alternative highlights a dimension in which "full" public control is always to a certain degree management by private entities, since school policies depend for their implementation day-to-day on individuals—the personnel of the school system—who are "private" people, just like everyone else, except for the formal status of their employer. Contracting out management may be good or bad from the viewpoint of a progressive approach to education; it depends on the specific context. A private company may be fairer and more evenhanded in administration, fearing that student or parent discontent will endanger its contract. The result may be, oddly enough, that the arrogance and unresponsiveness of current public school administration in most places would be replaced by a caring, loving, and responsive staff. If "pleasing the consumer" would mean not acting as if parents and students represent impediments to the smooth running of schools, this form of privatization might be a progressive improvement in the day to day school life.

School voucher programs, in which schools competed for students in a market atmosphere, similarly might result in more democratic and responsive schools. There is little doubt that school diversity would be increased; the risk of particular schools failing to accomplish what everyone might consider a minimum might be real and call for supervision and regulation—but given the current state of schools in many urban settings, it hardly seems that the current system avoids the possibility of failure to educate many at a bare minimum

either. And given the possibility that vouchers might include private schools, the scope of public regulation might actually increase in such a regime.[6]

At the opposite pole of merely contracting out management of schools as currently constituted might be a more radical form of privatization: the auctioning off of public schools to the highest bidder. Thinking through how such radical privatization might be accomplished reveals the "public" nature of any private market, and the manner in which, at some analytic point, the terms public and private seem to lose virtually all their evocative and descriptive power.

To be sure, various measures would have to be taken to ensure against simple looting of physical resources. One can imagine an auction proceeding on the basis of the school commodity being defined in holistic terms—as each school more or less in its current physical state. Moreover, to the extent that a tuition-based school commodity would unfairly allocate educational resources on the simple basis of family wealth, one could imagine the school commodity structured so that it would include the power to raise funds by assessments on the surrounding community—a municipal rather than private sort of power to be sure, but one that could be justified within the discourse of privatization as necessary for the schools to be able to recoup external benefits that a functioning school would provide to the local area.

The point of this thought experiment, as unrealistic as it might seem, is that there is no essential character to how privatization might proceed. In contrast to the image of turning schools over to the greed of the profit motive and a market in which only those able to pay the highest tuition would be truly served (ironically, the result of *public* financing as currently practiced in most places), the auction model might result in neighborhoods coming together and pooling resources in syndicates to buy and then manage their local schools. By decentralizing administration to the school level, a true community control over schools, and a living connection between the school and the community, might arise. Poorer communities might be able to trade less desirable neighborhood living conditions—the location of industrial and business areas within the school zone—for a higher tax base from which to raise money for superior schools. Privatization thus, ironically, could lead to a more authentic form of "local control" than the supposedly local, democratic character of the school board governing structure.[7]

There are all kinds of problems with this kind of approach to school management, and all kinds of complexities that are beyond the scope of this essay. My point is that as one imagines even extreme forms of privatization, it is apparent that the results do not follow any *a priori* logic; such a plan might be a disaster for egalitarian values, or it might finally allow poor people a degree of control over their own destinies that would be successful and empowering. Additionally, as one imagines in this context a way to structure a private market to permit recoupment of external benefits by the private enterprise, it is

6. *See* Starr, *supra* note 5, at 14 n.16.

7. *See* Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148-59 (1977).

striking that we seem to come full circle: private schools serving neighborhoods and assessing costs based on benefits provided are a form of radically decentralized, reconceived municipalities with the sovereign power to tax, just as profit in traditional capitalist markets were seen, by realist and progressive thinkers, as a form of taxation over a social product. A radical democracy, the goal of "public" oriented values—might be achieved by the most radical forms of "privatization."

I believe that this paradoxical result is possible because, in contrast to the traditional ways that progressives have understood the political direction of the "private" and "public" character of social institutions, we have tended, incorrectly, to associate justice with centralization, universalism, and neutrality. To the extent that the movement toward the private represents a move toward decentralization, it is not surprising that it also holds possibilities for radical forms of democratic and popular control. The reason is that the private sphere need not be composed of serial individuals competing in an impersonal market, but instead might consist of organic community units striving to determine their own destinies.

Despite the above thought experiment, the school context nevertheless seems to reveal the intractability of institutional reform in the context of severe wealth disparity—the possibility of school privatization simply increasing the extent to which the wealthy are favored in the distribution of educational resources is just far more plausible than the utopian images I have suggested. It seems piecemeal socialist reform has always faced the flight of capital problem—so long as wealth could move to a more favorable climate. Reform in any particular place has the inevitable potential to backfire and just make things worse. The only conclusion that seems to me to follow is that, whether the reform goes in the public or the private direction, a massive redistribution of wealth is a precondition to truly just institutional arrangements. But you didn't need me to tell you that.

WHITHER SOCIALISM?

DANIEL A. FARBER*

Whither Socialism[1] is the title of a recent book by Joseph Stiglitz, a Stanford economics professor who is a member of the President's Council of Economic Advisors. His book considers the lessons to be learned from the failure of the planned economies and assesses options for the new transition economies. He argues that the issue of public versus private ownership is relatively unimportant to economic success. If markets functioned as perfectly as some economists believe, the government could have used "market socialism" to mimic the free market.[2] On the other hand, most of the problems caused by government ownership are quite capable of occurring in a badly structured or poorly regulated private sector.[3] Socialism failed as an overall system, but this failure does not mean that privatization is always an improvement. Although some of the economic theory does not make for light reading, his conclusion is quite simple: "We cannot, in general, be assured that private production is necessarily 'better' than public production. Privatization involves costs and benefits, which, as always, must be weighted against each other."[4]

Stiglitz's pragmatism finds strong—and perhaps unexpected—support in Gary Peller's thoughtful contribution to this Symposium, *Public Imperialism and Private Resistance: Progressive Possibilities of the New Private Law.*[5] Professor Peller begins by describing, perhaps somewhat ruefully, how leftist insights regarding public law have been appropriated by legal centrists. He views the New Private Law as a similar phenomenon, domesticating conservative views such as law and economics into a more palatable centrist form.[6] Peller concludes, however, "that there is, in fact, no reason for progressives reflexively to oppose many of the various privatization trends that mark the contemporary policy scene."[7]

In Peller's view, the New Private Law "is not premised on the idea that a truly private realm is being protected from the coercive power of the State."[8] Rather, "privatization is presented as simply one in an array of possible, and concededly regulative, social interventions, bearing no *a priori* claim to legiti-

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* Associate Dean for Faculty and Henry J. Fletcher Professor of Law, University of Minnesota. B.A., University of Illinois, 1971; M.A., University of Illinois, 1972; J.D., University of Illinois College of Law, 1975.

1. JOSEPH E. STIGLITZ, WHITHER SOCIALISM? (1994).
2. *Id.* at 66.
3. *Id.* at 172.
4. *Id.* at 194.
5. Gary Peller, *Public Imperialism and Private Resistance: Progressive Possibilities of the New Private Law*, 73 DENV. U. L. REV. 1001 (1996).
6. *Id.* at 1002.
7. *Id.*
8. *Id.* at 1003.

macy but instead depending on historical and contextualized justification."[9] Peller applauds this reconceptualization of the issue and argues that progressives should seriously consider privatization as a technique for advancing their agenda. Thus, like Stiglitz, he views the choice between public and private as purely pragmatic rather than ideological.

I too, endorse this pragmatic approach, perhaps not surprisingly.[10] In this brief comment on Professor Peller's article, I will suggest two extensions of his argument. First, in my view, not merely progressives and centrists, but also conservatives, should take a pragmatic view of privatization. Hence, they should resist any reflexive tendency to favor the private over the public sector. Perhaps this might be considered the "big tent" vision of the New Private Law, since it invites scholars across the political spectrum to enter into a common intellectual enterprise. Second, the most important issue is probably not whether an activity is "public" or "private," but instead how to tailor the best mix of regulations and incentives. As Stiglitz puts it, "[T]he question is not just 'how large a role' the government should undertake, but what specific roles? . . . What forms should government intervention take?"[11] As the New Private Law matures, the focus will increasingly turn to these questions.

I.

In the flush of the global victory of capitalism, conservatives are understandably tempted to rush headlong into privatizing formerly public institutions. But this would be a mistake. Conservatives should not, I would argue, adopt a reflexive attitude—"private good, public bad"—but instead should engage in the context-specific analysis that Professor Peller advocates. Although they may well disagree with Professor Peller about assessing specific situations, they should utilize the same kind of pragmatic analysis. For conservatives of all stripes, whether social conservatives or libertarians, privatization should be seen as a not-unmixed blessing.

There are several reasons why social conservatives should think twice about plunging into privatization. First, privatization can direct public resources toward activities that social conservatives find disturbing. Consider a few examples. A privatized version of the National Endowment for the Arts might enjoy some kind of public funding, if only in the form of favorable tax treatment, and might well devote resources to works which social conservatives find abhorrent. School vouchers might well support Afrocentric or other programs which conservatives dislike. Conservation easements create tax benefits for anti-development land use decisions.

A related issue is that privatization may weaken the central systems of our society for socializing and expressing values. Indeed, this effect seems to be one of the attractions of privatization for Professor Peller. But for social

9. *Id.*

10. *See* Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the 21st Century*, 1995 U. ILL. L. REV. 163.

11. STIGLITZ, *supra* note 1, at 231.

conservatives this effect should be troubling. Privatizing means more diversity and less homogeneity, and thus a less coherent set of social values. Moreover, social conservatives may be concerned about the corrosive effect of markets on the kind of organic social structure they admire. Privatization further increases the strength of the market and thus may frustrate the desire to reinforce organic social relations.

Libertarian conservatives should have a different set of concerns. First, at least for some libertarians such as Richard Epstein, there are limits on the proper scope of privatization. Epstein is a firm believer in the Public Trust Doctrine, which restricts the ability of government to give away certain kinds of public resources like rivers and lakes.[12] He would find the idea of auctioning off the Mississippi River, for example, to be just as bad as the social regulations that he opposes, and for just the same reasons, because it is economically inefficient and an invitation to "rent seeking" by interest groups.

For libertarians, partial privatization may sometimes be worse than leaving an activity fully public. For example, from a libertarian point of view, when the taxing power or the condemnation power is granted to private groups, the result is at least as bad as having those powers exercised by the public, because we still have an entity with the power to invade property rights and even the check of the ballot box is absent. From a libertarian perspective, this is no improvement and may be worse. Also, libertarians whose concerns focus on economic efficiency should closely scrutinize particular privatization schemes, which may well involve subsidies or tax incentives with distortionary effects. So, a half-government/half-market solution may be less efficient than a purely governmental approach.

Similar concerns arise about giving private groups monopoly power. Regulatory schemes have sometimes been privatized. Under the guise of "rate bureaus," railroads used to get together and agree on rates. Similarly, in a sense, unions serve to privatize government wage controls, which is not appealing to libertarians either.

Libertarians should also be concerned that the form of privatization may be strongly influenced by special interest group pressures. Privatization, after all, is another form of regulation. It involves government legislation affecting private interests, and therefore is potentially subject to all of the kinds of distortions that people like Epstein worry about. As with any government action, privatization could be designed to redistribute wealth, perhaps in directions that cannot be defended. The lesson, in short, is that conservatives need to view privatization through the same pragmatic lens used by centrists and progressives.

II.

I would also like to briefly discuss the question of what happens after privatization. When "going private" does turn out to be the appropriate

12. *See* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 70-74, 217-18 (1993).

decision, what should be the legal regime for these newly privatized institutions? As Stiglitz explains, the real question is not whether to privatize but instead is defining the role of the state. There is obviously a continuum of answers, ranging from central planning to the "watchdog" state which merely protects property and personal safety.[13] As we move past the decision to privatize, new issues will arise.

The first set of issues is posed by Professor Peller's imaginative proposal about public schools. Privatization is an experiment. Many seemingly good ideas don't actually work in practice. That is certainly true of policy reform. It's true in life in general. And the more interesting and innovative the idea, the higher the risk. Regarding Peller's proposal, there are any number of ways that things could go sour.[14] On the other hand the Peller scheme might be a wonderful success. What we need to remember is that these are experiments, and we need to plan on that basis.

Consequently, we need to do something that we do poorly even in public law (and that we hardly do at all in private law), which is to monitor the outcomes in some systematic way. It's actually rather shocking how badly we do that in public law. For example, there are huge gaps in what we know about environmental quality that make it very hard to assess programs.[15] This is even more true with monitoring of private law rules. We need to design some mechanisms to monitor what is going on. That may be all the more important with private law because when we privatize things, we make them less visible.

We also need to consider whether we can reverse these privatization experiments if they fail. There may be constitutional problems in reversing some experiments, such as takings and contract clause issues. There may also be political issues. Given the political culture of American society, it may be easier to move from public to private than it is to move back again. If changes are difficult to reverse, we may want to do them anyway, but we probably need to have a stronger case. That is, in the cost-benefit analysis, the benefits had better be substantially greater than the costs for irreversible decisions. In fact, there is some economic theory to that effect.[16] There are some situations—and perhaps inner-city schools may be one—where the situation just couldn't get much worse, so there is little downside risk. But that's not always going to be true. Indeed, it may turn out that as bad as our inner-city schools are today, that they could get worse if we privatize badly. We want to leave ourselves in a position to unravel the situation. Privatization is an experiment, let's watch it closely, and let's be prepared to pull the plug. And where we can't pull the plug, let's be very careful about starting the experiment.

Another issue is what legal regime will govern for privatized ventures. Once we say something has been "privatized," a certain vision of the private

13. STIGLITZ, *supra* note 1, at 231.

14. Localized control seems to have been a resounding failure in the New York City schools. *See* James Dao, *Albany in Accord*, N.Y. TIMES, Dec. 18, 1996, at B10.

15. *See* Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOYOLA L.A. L. REV. 791, 892 (1994).

16. *Id.* at 803-04 (discussing economic theory of hysteresis effects).

sector clicks into place. We tend to assume as a very strong baseline that the new private entity will be treated like IBM or like the owner of Blackacre or whatever, and we therefore may rather unthinkingly apply Old Private Law to new areas. The risk is that we won't end up with a New Private Law but merely with a bigger Old Private Law. That would be a serious mistake. Not only intellectual inertia but broader cultural norms may exert a pressure in that direction, and we need to be very much aware of this temptation to assimilate new institutions into old legal regimes.

One obvious question is the extent to which constitutional norms apply to these privatized ventures. If, for example, we spin off these schools and they have the taxing power, will they be state actors?[17] Even if the Court would hold that they are not state actors, should courts or legislatures impose similar norms on these privatized enterprises? This question requires us to move beyond the technicalities of the state action doctrine. Instead, we need to consider why some norms apply to government institutions but not to traditional firms, and to analyze how these reasons apply to these new forms of privatized enterprise. Until now, most discussion of the state action issue has been very doctrinal, with little thought about whether (for example) there are special reasons for requiring due process hearings in public institutions as opposed to privatized ones.

A related question is what kinds of governance norms should apply to these institutions. For example, how would boundaries be set for schools in Peller's scheme? Who selects the management? Should we worry about the kind of districting issues that have been so important in voting rights law? We have already encountered governance issues in the private sector in corporate law, but we have worried about them to a much greater degree in the public sector. It's not clear that the corporate model of shareholder control is best for these different kinds of ventures.[18]

What about the need for government regulation of the privatized sector? One might ask, for example, how conservation easements will connect with other kinds of environmental regulation and zoning, or what procedures will be mandated in arbitration as we privatize litigation. As we move past the initial decision of *what* to privatize and toward the issue of *how* to privatize, these questions are going to come to the forefront.

The New Private Law raises the same question posed on a much larger scale in transition economies: what is the proper role of public institutions versus private ones? As Stiglitz says, we now know that at least one answer (traditional socialism) is plainly wrong. In that sense, socialism is as dead as any movement can be. But socialism, he explains, also had a broader message:

> The answer that socialism provided to the age-old question of the proper balance between the public and the private can now, from our

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17. *See* Rendell v. Kohn, 457 U.S. 830 (1982) (holding that a private school was not a state actor, even though almost all of its students were referred by public institutions, it was heavily regulated by public authorities, and virtually all of its budget came from public funds).

18. For a discussion of some of these issues of control and accountability, see A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543.

> current historical perspective, be seen to have been wrong. But if it was based on wrong, or at least incomplete economic theories, theories that are quickly passing into history, it was also based on ideals and values many of which are eternal. It represented a quest for a more humane and a more egalitarian society.[19]

Indeed, these egalitarian and humanist ideals are not limited to "progressives," though others may conceptualize them differently.

The lesson of the New Private Law is that these idealistic goals can be pursued in many guises, not just through the traditional public sector. In that sense, as Professor Peller's essay reminds us, the spirit of socialism is very much alive.

19. STIGLITZ, *supra* note 1, at 279. Perhaps he would have done better to say that "at its best" socialism reflected these ideals; at its worst, it had quite another face.

MANDATORY ARBITRATION OF INDIVIDUAL EMPLOYMENT RIGHTS: THE YELLOW DOG CONTRACT OF THE 1990S

KATHERINE VAN WEZEL STONE*

I. INTRODUCTION

Imagine that you are a salesperson who lost her job six months ago. You apply for an opening at a large retail chain store. While waiting for an interview, you are given a booklet labeled "Employee Handbook." Too distracted to read, you fill out an application form, provide references, and take a simple test. After a pro forma interview, you are offered the job. You accept, still without opening the Handbook. Later at home, you read the Handbook. It sets out various company rules and policies regarding tardiness, absenteeism, parking spaces, holidays, overtime, dress code, obscene behavior, and so forth. On page nine, at the end of the booklet, it says, "All disputes which arise during the course of your employment shall be submitted to arbitration pursuant to arbitration rules maintained by the employer at its corporate headquarters."

Imagine further that after working eight months, you suffer an on-the-job accident and have a back injury. You are out for two weeks. Before returning, you ask for a transfer to a light work assignment. The company refuses your request and then informs you that your old position has been eliminated and that you are therefore dismissed.

You believe you have suffered discrimination on the basis of your handicap, and so you bring a lawsuit alleging a violation of the Americans with Disabilities Act (ADA). The employer moves to dismiss your claim on the ground that you failed to arbitrate your ADA claim as required by the Handbook. You have not seen the arbitration procedures until now, but you get them upon request. They say that all disputes between employees and the employer shall be decided at arbitration before an arbitrator selected from a panel of retired industry executives. You do not believe that the industry panel, made up of individuals who are beholden to the industry and too old to have much sympathy with the ADA, will render a fair decision in your case.

 Professor of Law, Cornell Law School and Cornell School of Industrial and Labor Relations. B.A., Harvard University, 1970; J.D., Harvard University Law School, 1979. The author would like to thank participants at the Symposium on The New Private Law at the University of Denver Law School, the Law and Economics Roundtable at the University of Pennsylvania Law School, and the Cornell-NLRB Conference on the Sixtieth Anniversary of the NLRA in Washington, D.C., for their helpful comments and suggestions. She would also like to thank Philip Hostak and Alex Colvin for their exceptional research assistance.

And you learn from your lawyer that whatever the arbitrator decides, you have effectively no right to appeal to a court. A court will only set aside an arbitral award for "manifest disregard of the law."

Do you have to submit your case to the panel? That is, does your employer succeed in getting your case dismissed? The answer is almost certainly yes. The court will treat the Employee Handbook as a waiver of your rights to sue in court under most federal and state employment laws. Thus the employer, by giving you the booklet and unilaterally establishing an arbitration procedure, has relieved herself of numerous burdensome employment regulations. This hypothetical describes the state of labor and employment "law" today. Note that what we think of as "law" has become "nonlaw" at least insofar as your legal rights have been rendered unenforceable in a judicial tribunal. Your rights are only enforceable in a system of private justice, in a forum crafted by your employer and foisted upon you without any real bargaining or choice. The question is, how did we get there, and does this change from "law" to "nonlaw" make any difference? These questions will be addressed below.

In 1935, Congress passed the National Labor Relations Act (NLRA or Wagner Act),[1] the most extensive worker rights statute ever enacted in this country. Prior to its passage, American workers enjoyed very few statutory rights of any type. In the late nineteenth and early twentieth centuries, the Supreme Court struck down most state and federal laws that had been passed for the protection of workers as violative of substantive due process.[2] Even in the 1930s, many judges, legal scholars, and congressmen continued to express serious doubts about the constitutional power of the federal government to enact legislation about private-sector labor relations.[3] Of course, prior to the 1930s, some workers had contractual rights that were contained in the collective agreements negotiated by their unions, but even those rights were of dubious value given the ambiguous legal status of collective bargaining agreements in the state courts.[4] Thus in 1935, when the Wagner Act was passed,

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1. National Labor Relations Act (NLRA or Wagner Act), §§ 1-16, 29 U.S.C. §§ 151-169 (1994).

2. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923) (holding unconstitutional law establishing board to set minimum wage); Coppage v. Kansas, 236 U.S. 1 (1915) (holding unconstitutional state law that made yellow dog contracts unlawful); Lochner v. New York, 198 U.S. 45 (1905) (holding unconstitutional law limiting hours of work in bakeries). *But see* Muller v. Oregon, 208 U.S. 412 (1908) (upholding maximum-hour law for women workers on ground that women need special protection); Holden v. Hardy, 169 U.S. 366 (1898) (upholding maximum-hour law for coal miners on ground that the hazardous nature of the work merited special protection for such workers).

3. *See, e.g.*, PETER IRONS, THE NEW DEAL LABOR LAWYERS 3-4 (1982); *see also* West Coast Hotel v. Parrish, 300 U.S. 379, 400 (1930) (Van Deventer, J., dissenting, joined by McReynolds & Butler, JJ.). There was an exception for labor relations in the railroad industry, where Congress had exercised regulatory power since the 1880s. *See generally* Leifur Magnusson & Marguerite A. Gadsby, *Federal Intervention in Railroad Disputes*, 11 MONTHLY LAB. REV. 26 (1920) (discussing history of federal railroad labor legislation).

4. In most states in the early decades of this century, employees could only enforce a right they had under a collective agreement if they could show that they either incorporated the term into their individual contract of hire or that the union had acted expressly as their agent in negotiating the term. *See* William G. Rice, Jr., *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572, 581-93 (1931). Thus, collective bargaining agreements were enforced, if at all, as part of individual employment contracts; unions were not permitted to enforce them at all. In the

American workers obtained for the first time the right to organize, the right to engage in collective action, and the right to bargain collectively.[5] These were contained in section 7 of the statute.[6]

The state of workers' rights today is entirely different. There are a myriad of federal and state laws that give employees substantive rights and protections—protections for whistle-blowers, protection against racial and gender discrimination, rights to be free of lie-detector tests, rights to be free of sexual harassment, rights to a safe and healthy workplace, and protection against unjust dismissal through various modifications of the at-will rule, and so forth.[7] In addition, the rights guaranteed by section 7 of the NLRA have been given meaning over the course of sixty years as the National Labor Relations Board has interpreted and applied the sparse, broad words of the NLRA. So one might conclude that today's workers reap the benefits of labor's struggles in the nineteenth and early twentieth century—they have government protection for unions, a statutory framework to ensure them rights to bargain collectively and to strike, and legislative guarantees of job security, safe working conditions, pension protection, and dignity on the job.

In recent years, however, a new trend has emerged that threatens to turn back the clock on workers' rights. This trend is found in legal doctrines and judicial opinions that require workers to assert their statutory rights in the forum of private arbitration. These developments prevent workers from vindicating their statutory rights in a public tribunal. At the same time, employers are using arbitration clauses as a new-found weapon to escape burdensome employment regulations.

The trend toward mandatory arbitration of statutory rights is evident in two areas of law, affecting unionized and nonunion employees respectively. First, by means of an expansive interpretation of section 301 preemption, courts generally dismiss suits brought by unionized workers under state employment laws on the grounds that they must take such claims to arbitration. Second, in the wake of the 1991 Supreme Court decision *Gilmer v.*

1920s, this began to change. In Schlesinger v. Quinto, 194 N.Y.S. 401 (Sup. Ct. 1922), the New York Appellate Division held that a union was entitled to an injunction against an employers' association to prevent a breach of its collective agreement. Over the next ten years, some states followed the New York rule. *See, e.g.*, Weber v. Nasser, 292 P. 637 (Cal. 1930); Mississippi Theaters Corp. v. Hattiesburg Local Union, 164 So. 887 (Miss. 1936); Harper v. Local Union No. 520, 48 S.W.2d 1033 (Tex. Civ. App. 1932); Katherine Van Wezel Stone, *The Postwar Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1518-21 (1981).

5. Three years earlier, Congress enacted the Norris-LaGuardia Act, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-115 (1995)), which declared it to be the public policy of the United States to support collective bargaining. However, the Norris-LaGuardia Act only gave rhetorical support to worker organizing and collective action; it did not create a general right to organize. The Act's substantive provisions prevented courts from issuing injunctions in labor disputes and rendered yellow dog contracts unenforceable.

6. 29 U.S.C. § 157 (1995), as initially enacted in 1935, states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining and other mutual aid or protection."

7. *See generally* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 591-93 (1992) (citing examples).

Interstate/Johnson Lane Corp.,[8] courts are requiring nonunion workers to submit claims based on federal and state employment laws to private arbitration rather than to a court. Further, some courts are beginning to merge these two doctrinal areas, thereby requiring unionized and nonunion workers to arbitrate state and federal statutory rights under the FAA.

In this article, I describe and analyze the trend toward mandatory arbitration of statutory employment rights. I demonstrate that the trend threatens to deprive workers of their statutory rights altogether. Further, in the nonunion setting, I show that mandatory arbitration is often imposed as a condition of employment, without any consent or bargaining. Thus, mandatory arbitration agreements operate as the new yellow dog contracts of the 1990s. I argue that courts should not permit workers to waive their rights under state or federal employment statutes. That is, courts should not force parties to arbitrate statutory claims, should not presume that promises to arbitrate include promises to arbitrate statutory claims, and should not give arbitral rulings on statutory issues preclusive effect. To do otherwise threatens to nullify the past sixty years' development of workers' rights and will make it difficult to legislate effective worker protection in the future.

II. A SHORT HISTORY OF THE ROLE OF ARBITRATION UNDER THE COLLECTIVE BARGAINING SYSTEM

Today, arbitration and collective bargaining are usually assumed to be coterminous, if not synonymous, institutions. It is usually assumed that all collective agreements contain arbitration procedures and that all disputes arising under the agreements are amenable to arbitration. However, arbitration has not always been such a prominent feature of our collective bargaining system. From the 1900s until the 1930s, enforcement of collective bargaining agreements was generally left to the vicissitudes of moral suasion and economic power.[9] Beginning in the 1920s, a few state courts permitted workers or unions to enforce collective bargaining agreements as ordinary contracts.[10] At that time, it was not common for collective agreements to contain provisions for arbitration. Where such arbitration provisions existed, parties could easily avoid them, given the historical disinclination of common law courts to enforce executory agreements to arbitrate.[11]

During World War II, the attitude of courts and unions toward arbitration began to change. The War Labor Board (WLB) regarded arbitration as a substitute for industrial warfare and thus they found it to be a helpful system for securing wartime no-strike pledges. To this end, the WLB made arbitration the preferred method for resolving workplace disputes. It encouraged parties to

8. 500 U.S. 20 (1991).

9. *See* Katherine Van Wezel Stone, Rethinking Labor Voluntarism: Legal Personality, the Enforcement of Trade Agreements, and the AFL's Attitude Toward the State in the Progressive Era 26-29 (Oct. 1996) (unpublished manuscript, on file with author).

10. *See* Stone, *supra* note 4, at 1519-21.

11. *See* Kulukundis Shipping v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942); Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926).

engage in collective bargaining and to include arbitration clauses in their agreements, and it accorded arbitration promises substantial deference.[12]

After the War, Congress enacted section 301 of the Labor Management Relations Act (LMRA), which said that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."[13] On its face, this provision appeared to give federal courts jurisdiction to hear and decide labor disputes. In the next ten years, some scholars and practitioners in the labor field urged the courts to interpret section 301 in a manner that respected the special role of arbitration in resolving contractual disputes.[14] Justice Douglas adopted this position in 1957 in *Textile Workers Union v. Lincoln Mills*,[15] where he called upon federal courts to develop a "federal common law of collective bargaining," the centerpiece of which was support for and deference to private arbitration.

Since *Lincoln Mills*, private arbitration has become the central feature of our collective bargaining system. In 1960, in three cases known as the *Steelworkers' Trilogy*, the Supreme Court adopted a set of legal doctrines that have defined a privileged role for arbitration within our collective bargaining system. First, the Supreme Court held that courts should grant specific enforcement of promises to arbitrate without regard to the merits of the underlying dispute. Thus it held that parties who agree to arbitration provisions can be required to arbitrate meritless, or even frivolous, claims.[16] It further held that agreements to arbitrate were not only judicially enforceable but were enforceable on the basis of a presumption of arbitrability.[17] And finally, the Court held that arbitral awards are enforceable with a minimum amount of judicial review.[18]

In 1964, the Court further defined the privileged status of arbitration by holding that in cases involving rights arising both under the National Labor Relations Act and from a collective bargaining agreement, it was appropriate for the Labor Board to give deference to arbitration over judicial or administrative mechanisms for resolving the disputes.[19] And in 1970, the Supreme Court approved the use of labor injunctions against strikes over issues that are subject to arbitration agreements,[20] thereby making a wide exception

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12. *See* James Atleson, Labor and the Wartime State: The Continuing Impact of Labor Relations During World War II 97-103 (Oct. 1995) (unpublished manuscript on file with author).

13. 29 U.S.C. § 185(a) (1995).

14. *See, e.g.*, Archibald Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MTN. L. REV. 247 (1958) [hereinafter Cox, *Problems*]; Archibald Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958) [hereinafter Cox, *Legal Nature*]; Archibald Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959) [hereinafter Cox, *Reflections*]; Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 72 HARV. L. REV. 999 (1955).

15. 353 U.S. 448 (1957).

16. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

17. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

18. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

19. Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964).

20. Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970).

to the venerable Norris-LaGuardia Act.[21] The cases that proclaimed these labor law rules are well-known fixtures of our collective bargaining system. Together they make private arbitration the central and distinctive feature of our collective bargaining system.

In the past two decades, in two different but parallel developments, courts have expanded the use of labor arbitration even further. While the previous Supreme Court cases supported broad deference to arbitration to resolve unionized workers' contractual disputes—i.e., disputes concerning the interpretation and enforcement of collective agreements—courts are now insisting that arbitration be used to resolve statutory disputes—alleged violations of workers' statutory rights. These developments are found in the section 301 preemption doctrine for unionized workers, and in the post-*Gilmer* deferral doctrine for nonunionized workers.[22] Both developments threaten to nullify present and future legislative efforts to protect workers.

III. MANDATORY ARBITRATION OF UNIONIZED WORKERS' STATUTORY CLAIMS

In the past fifteen years, courts have given section 301 of the Labor Management Relations Act a broad application and an expansive, preemptive scope. The section 301 preemption doctrine says that a unionized worker must utilize her grievance procedure to resolve all disputes that involve enforcement of her collective bargaining agreement.[23] Even if the case is brought solely as a state law action, it is converted into a section 301 case if it is found to be a de facto effort to enforce a collective bargaining agreement. Today, section 301 preemption has become so extensive that most unionized workers' lawsuits to enforce state law employment rights are automatically dismissed.

The exceptional breadth of section 301 preemption has its origins in a 1968 case, *Avco Corp. v. Aero Lodge No. 735*.[24] There the Supreme Court held that a lawsuit which a plaintiff brought solely on the basis of a state-created entitlement was a section 301 action because the defendant raised a contractual issue in its defense.[25] *Avco* established an exception to the well-pleaded complaint rule which "makes the plaintiff the master of the claim" by allowing the plaintiff to avoid federal jurisdiction by relying exclusively on state law.[26] The *Avco* Court refused to apply the general rule to labor cases and instead created the "complete preemption corollary to the well-pleaded

21. 29 U.S.C. §§ 101-115 (1995).

22. In addition, the scope of arbitration has been expanded under the Board's own deferral rules. In Hammontree v. NLRB, 894 F.2d 438 (D.C. Cir. 1990), the Board applied its pre-arbitral deferral doctrine to an 8(a)(3) case even though the plaintiff only alleged violations of the NLRA, not contractual violations. *Id.* A D.C. Circuit panel ruled that deferral was inappropriate, but on rehearing, the Circuit sided with the Board, holding that the Board's expansion of deferral was a reasonable construction of the NLRA. Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991) (en banc).

23. Stone, *supra* note 7, at 594-96.

24. 390 U.S. 557 (1968).

25. *Avco Corp.*, 390 U.S. at 557.

26. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

complaint rule."[27] This corollary means that an action that asserts a state law right but which arguably involves enforcement of a collective bargaining agreement, is converted into a section 301 claim and may therefore be removed to a federal court where federal law will apply.[28] The jurisdictional transformation attaches even if the plaintiff deliberately fails to rely on any rights she might have under her collective bargaining agreement.[29] As the Court explained: "[T]he preemptive force of section 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal laws . . . ."[30] Further, even where a plaintiff's case-in-chief rests on adequate state law grounds and does not rely on a collective bargaining agreement, the court will permit removal to a federal court, apply federal law under section 301, and hold that the claim is preempted if the defendant-employer raises an issue involving the collective bargaining agreement in defense.[31]

In 1985, the Supreme Court began to define when it will find a suit brought under state law to be "federalized," and thus preempted. In *Allis-Chalmers v. Leuck*,[32] the Court held that a state law employment claim whose disposition is "substantially dependent upon" or "inextricably intertwined with" a collective bargaining agreement is preempted.[33] Further, the Court held that section 301 preemption applies to suits in tort as well as those alleging contractual violations.[34] By extension, complete preemption under section 301 is also applied in suits arising under state statutory law.[35] Thus, as the Supreme Court recently recognized, section 301 has been "accorded unusual preemptive power."[36]

When a suit is preempted under section 301, there are two practical consequences. First, once a state employment law claim is converted into a section 301 claim, it must be resolved through private arbitration. This follows from the logic of the *Steelworkers' Trilogy* cases discussed above, in which the Supreme Court adopted the position that all claims for breach of a collective bargaining agreement should be decided in private arbitration rather than by a court.[37] And in arbitration, there is virtually no right of judicial re-

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27. *Id.* at 393.
28. *Avco Corp.*, 390 U.S. at 559-60.
29. *Caterpillar*, 482 U.S. at 394-95.
30. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 23 (1983).
31. *See* Stone, *supra* note 7, at 596-604.
32. 471 U.S. 202 (1985).
33. *Allis-Chalmers*, 471 U.S. at 212, 220.
34. *Id.* at 210.
35. *See, e.g.*, Atchley v. Heritage Cable Vision Assocs., 904 F. Supp. 870 (N.D. Ind. 1995) (claims under state wage payment statute preempted by § 301); *see also* Burgos v. Executive Air Inc., 914 F. Supp. 792 (D.P.R. 1996) (claims under Puerto Rico's wage and hour law preempted by the RLA).
36. Livadas v. Bradshaw, 512 U.S. 107, 122 n.16 (1994).
37. Del Costello v. International Bhd. of Teamsters, 462 U.S. 151, 163 (1983); Clayton v. UAW, 451 U.S. 679, 681 (1981); Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965) ("As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contractual grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress.").

view.[38] Thus, once a claim is preempted under section 301, the worker's only and final recourse is to private arbitration.[39] As a result, unionized workers find that by virtue of the section 301 preemption rules, they do not have access to any court to assert their state law claims.

Second, and perhaps more significantly, when a claim is preempted under section 301, the worker's state law rights are extinguished. In arbitration, the arbitrator must apply the law of the collective bargaining agreement, not the external state law which was the basis of the original lawsuit. Thus the unionized worker whose state law claim is preempted receives neither the benefit of a judicial forum nor the benefit of the substantive provisions of the state law.

Section 301 preemption has become a central feature of employment litigation in recent years. Since the mid-1970s, when state courts and legislatures began to create extensive rights for individual employees, there have been thousands of cases in which unionized workers tried to take advantage of the new employment rights. Their fate in the state courts depends on the federal courts' approach to section 301 preemption.

Under the *Allis-Chalmers* standard, a state law claim is preempted when it is "substantially dependent" upon an interpretation of a collective agreement.[40] Lower courts have differed as to when they will find a state law claim to be "substantially dependent" on a collective agreement.[41] In 1988, in *Lingle v. Norge Division of Magic Chef, Inc.*,[42] the Supreme Court reiterated, and slightly revised, the *Allis-Chalmers* contract-dependency standard. It said that a suit is preempted "if the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement."[43] The *Lingle* Court held that an employee's state law action alleging that she had been fired in retaliation for filing a workers' compensation claim was not preempted, even though the employee could have brought a grievance under the "just cause" clause in her collective agreement.[44] In so doing, the Court rejected the argument that a

38. The grounds for vacating an arbitral award under § 301 are extremely narrow. An award may only be vacated when it fails to "draw[] its essence" from the collective agreement. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). And because there is no obligation for an arbitrator to give a written opinion, a reviewing court attempting to determine from whence an award "draws its essence" must enforce an award if it could have drawn its essence from the collective agreement. "Mere ambiguity" is not grounds to refuse enforcement. *Id.* at 598.

39. The only exception is if the union fails to bring a case to arbitration, or handles a case ineptly at arbitration, as a result of a breach of its duty of fair representation. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564 (1976); Vaca v. Sipes, 386 U.S. 171, 187-88 (1967). This is a narrow exception because a union only breaches its duty if its action or inaction is "arbitrary, discriminatory, or in bad faith." *Id.* at 190. Mere negligence by a union does not constitute a breach of its duty of fair representation. United Steelworkers v. Rawson, 495 U.S. 362, 372-73 (1990).

40. *Allis-Chalmers*, 471 U.S. at 220.

41. *See generally* Laura W. Stein, *Preserving Unionized Employees' Individual Employment Rights: An Argument Against Section 301 Preemption*, 17 BERKELEY J. EMPLOYMENT & LAB. L. 1, 11-17 (1996) (discussing several tests lower courts have used to define the scope of § 301 preemption under *Allis-Chalmers*).

42. 486 U.S. 399 (1988).

43. *Lingle*, 486 U.S. at 405-06.

44. *Id.* at 407.

suit is preempted if the state law claim involves the same operative facts as a claim arising under the collective agreement.[45]

After *Lingle*, many federal courts developed a free-wheeling approach to section 301 preemption. In 1991, the Ninth Circuit described the state of section 301 preemption law as a "thicket . . . [a] tangled and confusing interplay between federal and state law,"[46] and "one of the most confused areas of federal court litigation."[47] As of 1992, the result of this "thicket" was that lower courts were finding preemption in the vast majority of employment cases brought by unionized workers.

In 1992, this author surveyed hundreds of section 301 preemption cases and found an astonishingly simple pattern: when unionized workers attempted to exercise state employment rights, they were not able to do so.[48] Rather, by virtue of the preemption rules, the courthouse door was closed. For example, courts routinely dismissed, on preemption grounds, suits for wrongful dismissal or breach of a promise of job security.[49] In addition, courts routinely dismissed claims of unlawful drug testing, claims of defamation by an employer's derogatory remarks, claims that an employer conducted an unlawful search of a person or automobile, claims concerning the mishandling of health insurance, medical leave, or other medical obligations, and claims that an employer breached a promise to an employee who was in a bargaining unit.[50] Indeed, very few cases brought by unionized workers survived dismissal for preemption, and those that did fell into a small number of narrowly-honed exceptions.[51]

An example of a typical section 301 preemption case is *Jackson v. Liquid Carbonic Corp.*[52] The plaintiff, a union member, was dismissed for failure to pass an employer-administered drug test. He sued on the basis of a state statutory and constitutional right to privacy.[53] The employer removed the case to federal court and won a dismissal on preemption grounds.[54] Affirming this ruling, the First Circuit reasoned that in order to decide if the employee's privacy had been violated, it had to determine whether the employer's drug testing program was "reasonable."[55] Further, it said, reasonableness had to be assessed in light of the right management had, under the collective agreement, to post reasonable rules and regulations.[56] Thus the court concluded that the suit involved interpretation of the collective agreement, and was therefore preempted.[57]

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45. *See* Stone, *supra* note 7, at 603.
46. Galvez v. Kuhn, 933 F.2d 773, 774 (9th Cir. 1991).
47. *Id.* at 776.
48. These results, with supporting authority, are discussed more fully in *The Legacy of Industrial Pluralism*, Stone, *supra* note 7, at 605-20.
49. *Id.* at 607.
50. *Id.* at 607-08.
51. *Id.* at 608-10.
52. 863 F.2d 111 (1st Cir. 1988).
53. *Jackson*, 863 F.2d at 113.
54. *Id.*
55. *Id.* at 118.
56. *Id.* at 119.
57. *Id.* at 113.

In a similar fashion, the great majority of union members' cases alleging violations of state law brought in the 1980s and early 1990s were found to be preempted by section 301. In that period, federal courts applied section 301 preemption with extraordinary reach, finding all kinds of lawsuits to be de facto efforts to enforce collective bargaining agreements. Indeed, some courts in the 1980s and early 1990s developed a de facto presumption to preempt all cases in which a unionized worker attempted to assert a state employment right. For example, in a 1991 decision, the Ninth Circuit stated that in a unionized workplace, claims about any working conditions that were within the scope of collective bargaining would be preempted.[58] Similarly, the Sixth Circuit found an employee's claim preempted because, while not entailing interpretation of a collective agreement, it "address[ed] relationships that have been created through the collective bargaining process."[59]

In 1994, in two cases decided one week apart, the Supreme Court revisited the issue of the scope of section 301 preemption. In doing so, it reined in some of the more expansive approaches that the courts of appeals had been taking. The first case was *Livadas v. Bradshaw*,[60] which concerned a California law that requires employers to pay all wages due a discharged employee immediately upon discharge.[61] The California Commissioner of Labor had a policy of pursuing late wage payment claims of nonunion workers while refusing to pursue such claims of unionized workers. Livadas, a discharged worker who was not promptly paid her wage claim, challenged the Commissioner's policy under 42 U.S.C. § 1983 as a violation of her federal right to engage in collective bargaining. She alleged that the policy "placed a penalty on the exercise of her statutory right to bargain collectively with her employer."[62] The Commissioner defended the policy on the grounds that it was compelled by section 301 preemption because disposition of the plaintiff's wage penalty claim would require determining the amount she was owed, and this in turn would involve interpreting her collective bargaining agreement.[63] The district court agreed with the plaintiff and enjoined the Commissioner's policy of refusing to enforce wage-and-hour regulations for unionized workers.[64] A divided Court of Appeals for the Ninth Circuit reversed, stating that whether or not the plaintiff's claims were actually preempted, state officials should err on the side of avoiding interference with contractual grievance and arbitration procedures.[65]

The Supreme Court reversed the Ninth Circuit, rejected the Commissioner's defense, and found him in violation of the plaintiff's federal rights. In doing so, it stated that there was not even a "colorable argument"

58. Schlacter-Jones v. General Tel., 936 F.2d 435, 441 (9th Cir. 1991).
59. Jones v. General Motors Corp., 939 F.2d 380, 382 (6th Cir. 1991).
60. 512 U.S. 107 (1994).
61. *Livadas*, 512 U.S. at 110. The law imposes financial penalties, enforceable by the Commissioner, on employers who fail to comply. *Id.*
62. *Id.* at 113-14.
63. *Id.* at 118-20.
64. *Id.* at 114-15.
65. Livadas v. Aubry, 987 F.2d 552, 570 (9th Cir. 1991), *rev'd sub nom.* Livadas v. Bradshaw, 512 U.S. 107 (1994).

that Livadas's claim for late wages was preempted under section 301. The Court reasoned:

> [T]he primary text for deciding whether Livadas was entitled to a [late payment] penalty was not the Food Store contract, but a calendar. The only issue raised by Livadas's claim, whether Safeway "willfully failed to pay" her wages promptly upon severance . . . was a question of state law, entirely independent of any understanding embodied in the collective-bargaining agreement between the union and the employer.[66]

While the *Livadas* Court found the plaintiff's claim not preempted, it declined the opportunity to articulate a test for defining the scope of section 301 preemption. Instead, in a footnote, the Court noted that there was a conflict between the circuit courts as to the proper breadth of section 301 preemption. But, the Court said, because the non-preempted status of the plaintiff's claim was "clear beyond peradventure," this case was "not a fit occasion for us to resolve disagreements that have arisen over the proper scope of our earlier [section 301 preemption] decisions."[67]

Exactly a week later, the Supreme Court did revisit its preemption decisions, but in the context of the Railway Labor Act (RLA) rather than section 301 of the Labor Management Relations Act. In *Hawaiian Airlines, Inc. v. Norris*,[68] an airline mechanic was fired for refusing to certify a repair as satisfactorily completed on an airplane maintenance record.[69] The employee brought suit in the Hawaii state court on state common law and statutory wrongful discharge theories.[70] The airline claimed that the suit was in reality a grievance under the "just cause" provision of the collective agreement, and it was therefore preempted by the RLA's arbitral machinery for resolving grievances.[71]

The Court rejected the airlines' preemption argument. It stated that the standard for preemption under the RLA was "virtually identical" to the standard under section 301.[72] It then noted that the facts of the case were "remarkably similar" to those in *Lingle*, where the plaintiff alleged she was fired in retaliation for filing a workers' compensation claim.[73] Here the employee alleged he was fired for refusing to sign off on the maintenance record that violated airline safety and health regulations. The Court said that in both cases, the state law retaliatory discharge claim turned on a "purely factual question: whether the employee was discharged . . . , and, if so, whether the employer's motive in discharging him was to deter or interfere with his exercise of [state law] rights."[74] The Court said that this question could be re-

66. *Livadas*, 512 U.S. at 124-25.
67. *Id.* at 124 & n.18.
68. 512 U.S. 246 (1994).
69. *Hawaiian Airlines*, 512 U.S. at 247.
70. *Id.* at 248.
71. *Id.* at 265.
72. *Id.* at 260.
73. *Id.*
74. *Id.* at 262.

solved without reference to the collective agreement.[75] Reiterating the *Lingle* standard, the *Hawaiian Airlines* Court held that preemption was required when the employee's state-law claim "is dependent on the interpretation of a CBA [collective-bargaining agreement]" and that here the plaintiff's claims were not preempted.[76]

The 1994 Supreme Court decisions restricted some of the more free-wheeling approaches to preemption taken by the courts of appeals. No longer do courts preempt simply on the grounds that an employee is covered by a collective bargaining agreement.[77] However, since *Livadas* and *Hawaiian Airines*, the lower federal courts continue to preempt most unionized workers' claims of unjust dismissal,[78] promissory estoppel,[79] and breach of contract concerning employment issues.[80] But certain claims are less likely to be pre-empted since the 1994 decisions. In particular, claims of defamation,[81] intentional infliction of emotional distress,[82] fraud,[83] and battery[84] are no longer routinely preempted. And, as before the 1994 cases, employees' claims of discrimination or workers' compensation retaliation are generally not preempted.[85]

Despite some constriction of the lower courts' use of preemption since the *Livadas* and *Hawaiian Airlines* decisions, courts nonetheless stretch to find unionized workers' state law claims preempted. This is especially true for cases in which a worker challenges her dismissal. For example, in *Thomas v. LTV Corp.*,[86] a case decided after *Livadas* and *Hawaiian Airlines*, a unionized employee negotiated an individual attendance agreement with his employer.[87] When he was fired for absenteeism that resulted from an on-the-job injury, he sued for breach of contract, intentional infliction of emotional distress, wrong-

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75. *Id.*

76. *Id.*

77. *Cf.* Jones v. General Motors Corp., 939 F.2d 380, 382 (6th Cir. 1991); Schlacter-Jones v. General Tel., 936 F.2d 435, 441 (9th Cir. 1991).

78. *See, e.g.*, Thomas v. LTV Corp., 39 F.3d 611, 621 (5th Cir. 1994); Cullen v. E.H. Friedrich Co., 910 F. Supp. 815, 823 (D. Mass. 1995); Sirois v. Business Express, Inc., 906 F. Supp. 722, 728-29 (D.N.H. 1995) (RLA preemption).

79. *See, e.g.*, *Thomas*, 39 F.3d at 619; *Cullen*, 910 F. Supp. at 824.

80. *See, e.g.*, *Thomas*, 39 F.3d at 619; *Sirois*, 906 F. Supp. at 729; Atchley v. Heritage Cable Vision Assocs., 904 F. Supp. 870, 876 (N.D. Ind. 1995); Knox v. Wheeling-Pittsburgh Steel, 899 F. Supp. 1529, 1534 (N.D. W. Va. 1995); Gregory v. Southern New England Tel. Co., 896 F. Supp. 78, 83 (D. Conn. 1994).

81. *See, e.g.*, Luecke v. Schnucks Mkts. Inc., 85 F.3d 356 (8th Cir. 1996) (holding defamation claims not preempted under § 301); Gay v. Carlson, 60 F.3d 83, 88 (2d Cir. 1995) (holding libel, slander, and prima facie tort claims not preempted under RLA).

82. *See, e.g.*, Trans-Penn Wax v. McCandless, 50 F.3d 217, 232 (3d Cir. 1995); *Gregory*, 896 F. Supp. at 84.

83. *See Trans-Penn Wax*, 50 F.3d at 232.

84. *See, e.g.*, *Gregory*, 896 F. Supp. at 83; Mack v. Metro-North Commuter R.R., 878 F. Supp. 673, 677 (S.D.N.Y. 1995).

85. *See, e.g.*, Martin Marietta Corp. v. Maryland Comm'n on Human Relations, 38 F.3d 1392, 1402 (4th Cir. 1994) (state handicap discrimination claims not preempted under § 301); Westbrook v. Sky Chefs, Inc., 35 F.3d 316, 318 (7th Cir. 1994) (workers' compensation retaliation claim not preempted under RLA).

86. 39 F.3d 611 (5th Cir. 1994).

87. *Thomas*, 39 F.3d at 614.

ful dismissal, and retaliation for filing a workers' compensation claim.[88] The Fifth Circuit said that even assuming the individual agreement was independent of the collective bargaining agreement, all the claims were nonetheless preempted. It noted that the employee's individual agreement sought to limit or condition his terms of employment, terms which were also addressed by the collective agreement. On this basis, it found that the individual agreement was subject to preemption.[89]

So long as courts continue to find most unionized workers' state unlawful dismissal claims preempted, organized workers will have, in some respects, less employment rights than their unionized counterparts. One might ask, however, what's wrong with a broad section 301 preemption doctrine that leaves unionized workers with their right to private arbitration? The answer is that when a case is preempted under section 301, the law converts the unionized worker's statutory claim into a claim arising under her collective bargaining agreement. The arbitrator's task is to apply the collective agreement, *not* the relevant statute. Thus, in section 301 arbitration, unionized workers lose their statutory rights. This would not be a problem if unions were able to secure strong contractual protections for their members. However, after years of concession bargaining, judicial restrictions on the scope of mandatory bargaining, and employer use of striker replacements, unions have seen their bargaining strength erode.[90] As a result, their collective bargaining agreements have become weaker and weaker. In fact, it is precisely because employment law statutes seem to provide workers with stronger protections and better remedies than those contained in their collective bargaining agreements that unionized workers frequently bring legal actions on the basis of their statutory rights rather than rely on grievances to assert their contractual rights. Yet the law of section 301 preemption says that in such cases, the unionized worker is out of luck.[91]

In addition to using an expansive section 301 preemption doctrine to deprive unionized workers of their state law employment rights, some courts have developed another approach that similarly prevents workers from challenging dismissals on state law grounds. The First Circuit has concluded that state common law modifications of the at-will rule do not apply to unionized workers. As it was explained by Federal District Court Judge Ponsor of Massachusetts:

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88. *Id.* at 615.

89. *Id.* at 618. In dicta, the court stated that it believed that the individual agreement "technically qualifies as a CBA" because the union played a role in helping the employee negotiate it and because it resulted from disciplinary action. *Id.*

90. Katherine Van Wezel Stone, *Labor and the Corporate Structure*, 55 U. CHI. L. REV. 73, 74-76, 86-96 (1988).

91. Judge Alex Kosinski, in his dissent in the Ninth Circuit's opinion in the *Livadas* case, decried the court's expansive interpretation of § 301 preemption, calling it the "novel doctrine of quasi-preemption." *Livadas*, 987 F.2d at 561 (Kosinski, J., dissenting). He pointed out that the doctrine has the effect of depriving unionized workers of the benefits of state law employment rights and placing them at a disadvantage vis-à-vis nonunion workers. *Id.* at 563. He even hypothesized that the courts' expansion of § 301 preemption and the consequent application of labor arbitration to unionized workers' statutory claims has contributed to union decline. *Id.* at 563 n.2; *see also* Stone, *supra* note 7, at 578-84.

> The Massachusetts cause of action for wrongful discharge in violation of public policy is a judicially created exception to the "employment at will doctrine." This doctrine holds that an employee, who works without the benefit of an employment contract, may be discharged for almost any reason with or without cause. The cause of action, however, is only available to "at-will" employees. Allowing employees governed by a CBA [collective bargaining agreement] to assert an independent, common law claim of wrongful discharge would not be "a commendable practice. It would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances."[92]

Several courts in Rhode Island and New Hampshire have utilized this same reasoning.[93] By limiting application of judicially created exceptions to the at-will rule to nonunion workers, these courts preclude claims of unjust dismissal brought by unionized workers, notwithstanding which the standard of section 301 preemption would otherwise be applied. Thus courts are developing a variety of techniques to keep unjust dismissal claims out of court and restrict unionized workers to their contractual grievance procedures.

IV. THE GROWTH OF MANDATORY ARBITRATION IN THE NONUNION SECTOR

A. *The* Gilmer *Decision*

The second legal development that has expanded arbitration into the realm of statutory employment rights addresses the use of arbitration by nonunion employers. In 1991, the Supreme Court decided the case of *Gilmer v. Interstate/Johnson Lane Corp.*,[94] which held that an employee of a stock brokerage firm, who alleged he was fired in violation of the Age Discrimination in Employment Act (ADEA), had to arbitrate his claim. At the time of hire, the employee had signed an arbitration clause in a standard stock exchange registration form, which he was required to file in order to begin work.[95] The *Gilmer* Court held that the arbitration agreement was enforceable under the Federal Arbitration Act (FAA),[96] an Act which makes arbitration promises in contracts involving commerce "valid, irrevocable, and enforceable."[97]

The *Gilmer* Court's reasoning was based on a series of recent Supreme Court cases about commercial arbitration under the FAA. For example, it quoted its decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[98] in which it had stated that the FAA evidences a "'liberal

92. *Cullen*, 910 F. Supp. at 821 (citations omitted).

93. *See Sirois*, 906 F. Supp. at 728; *see also* Bertrand v. Quincy Mkt. Cold Storage & Warehouse Co., 728 F.2d 568, 571 (1st Cir. 1984) (holding that under Massachusetts law, implied covenant of good faith and fair dealing does not apply to unionized employees).

94. 500 U.S. 20 (1991).

95. *Gilmer*, 500 U.S. at 23.

96. 9 U.S.C. § 2 (1994).

97. *Gilmer*, 500 U.S. at 26.

98. 460 U.S. 1 (1983).

federal policy favoring arbitration.'"[99] In addition, the *Gilmer* Court referred to its holdings in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[100] and *Shearson/American Express, Inc. v. McMahon*,[101] noting that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."[102] It rejected the plaintiff's arguments that requiring plaintiffs to arbitrate ADEA claims was inconsistent with the statutory framework. In response to the plaintiff's argument that the ADEA embodies important social policies which should not be determined in private tribunals, the Court recounted recent cases where it had found that claims arising under the antitrust act, the securities act, and the Racketeer Influenced and Corrupt Organizations Act (RICO) are amenable to arbitration under the FAA.[103] The Court then quoted *Mitsubishi* to the effect that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[104]

The *Gilmer* Court also rejected, without much discussion, the plaintiff's arguments that arbitration procedures were inherently inadequate to protect statutory rights.[105] Rather, it discussed with approval the particular arbitration rules of the New York Stock Exchange (NYSE). For example, the Court noted that the NYSE Rules required arbitration panel members to disclose their employment histories and permitted parties to make further inquiries into the backgrounds of potential arbitrators to discern bias. The NYSE Rules also give parties one peremptory challenge and unlimited challenges for cause.[106] The Court also noted that the NYSE Rules permit limited discovery, including document production and depositions.[107] And the Rules require that arbitral awards be in writing, specifying the names of the parties, a summary of the issues, and a description of the award.[108] These features of the NYSE arbitration led the Court to conclude that the arbitration procedures adequately safeguarded Gilmer's substantive rights.

Justice Stevens, in dissent, raised what is perhaps the most troublesome aspect of the *Gilmer* opinion. Section 1 of the FAA has an exclusion for contracts of employment.[109] The FAA states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce.*"[110] Stevens argued that the brokerage agreement the plaintiff signed in *Gilmer* was part of

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99. *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24).
100. 473 U.S. 614 (1985).
101. 482 U.S. 220 (1987).
102. *Gilmer*, 500 U.S. at 26.
103. *Id.* at 27-28.
104. *Id.* at 28 (quoting *Mitsubishi Motors*, 473 U.S. at 637).
105. *Id.* at 30-32.
106. *Id.* at 30.
107. *Id.*
108. *Id.* at 31-32.
109. *Id.* at 36 (Stevens, J., dissenting).
110. 9 U.S.C. § 1 (emphasis added).

a contract of employment.[111] Because the employer in *Gilmer* sought to compel arbitration under the FAA, Stevens maintained that the exclusion for contracts of employment governed and the Act could not be applied.[112]

The majority gave short-shrift to Stevens's argument about the contract-of-employment exclusion. It stated that because the arbitration clause originated in a contract between the plaintiff and the stock exchange and not in a contract between the plaintiff and his immediate employer, it was not a "contract of employment" for purposes of the FAA exclusion.[113] In addition, the Court said that because the issue of the section 1 exclusion had not been raised by the litigants below, nor developed in the record, it was not obliged to address it in detail. Instead, the Court said, it would leave that issue "for another day."[114]

The *Gilmer* dissent also took issue with the majority's interpretation of the FAA exclusion for employment contracts. Stevens argued that Congress had excluded employment contracts from the FAA out of its concern that arbitration promises contained in employment contracts were not truly voluntary but might arise out of excessive inequality of bargaining power.[115] These concerns, he argued, should be implemented by giving an expansive interpretation to the "contract of employment" exclusion and by refusing to apply the FAA to arbitration of ADEA or other employment-related statutory claims.[116]

Stevens also argued that the Court's decision in *Alexander v. Gardner-Denver*[117] precluded arbitration of employment discrimination claims. In *Gardner-Denver*, the Supreme Court held that an employee who had arbitrated his discrimination claim under his collective bargaining agreement may, nonetheless, obtain a *de novo* judicial determination of his Title VII claim. The *Gardner-Denver* Court reasoned that a union's collective bargaining agreement may not waive an employee's individual rights:

> Title VII . . . concerns not majoritarian processes, but an individual's right to equal employment opportunities . . . . Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.[118]

Stevens, in his *Gilmer* dissent, maintained that *Alexander v. Gardner-Denver Co.* established the principle that compulsory arbitration conflicts with the congressional purpose behind anti-discrimination legislation. He quoted Chief Justice Burger on the issue:

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111. *Gilmer*, 500 U.S. at 40 (Stevens, J., dissenting).
112. *Id.*
113. *Id.* at 51-52 & n.2.
114. *Id.*
115. *Id.* at 39.
116. *Id.* at 39-43.
117. 415 U.S. 36 (1974).
118. *Gardner-Denver*, 415 U.S. at 59-60.

> Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.[119]

The *Gilmer* majority distinguished *Gardner-Denver* on the ground that the latter involved a unionized worker's claim and an arbitration promise contained in a collective bargaining agreement, thus posing issues about the relationship between a collective representative and an individual employee's rights which were not present in *Gilmer*.

B. *Application of* Gilmer *to Non-Union Workers*

Since 1991, most lower federal courts have interpreted *Gilmer* expansively. Several federal courts have applied *Gilmer* to find employees' discrimination claims arbitrable in cases in which an arbitration promise arose directly from an employment contract between an employer and an employee, rather than the third-party arbitration promise involved in *Gilmer*.[120] These cases read the "contracts of employment" exclusion in section 1 of the FAA narrowly to apply only to employees involved in the physical movement of goods across state lines.[121] Some go even further and maintain that the exclusion only applies to transportation workers.[122] They justify these narrow readings of the statutory language by saying that the contract-of-employment exclusion refers explicitly to contracts of employment involving "seamen and railroad employees," and hence these enumerated categories should limit the type of employees included in the phrase "any other class of workers."[123]

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119. *Gilmer*, 500 U.S. at 42 (Stevens, J., dissenting) (quoting Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting)).

120. *See, e.g.*, Metz v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994) (applying *Gilmer* in employee's Title VII suit alleging pregnancy discrimination); Albert v. NCR, 874 F. Supp. 1328 (S.D. Fla. 1994) (applying *Gilmer* in an employee's Title VII suit alleging religious and national origin discrimination); Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76 (D. Mass. 1993) (applying *Gilmer* to an employee's suit for sex discrimination under Title VII); DiCrisci v. Lyndon Guaranty Bank, 807 F. Supp. 947 (W.D.N.Y. 1992) (applying *Gilmer* to an employee's Title VII suit alleging sexual harassment); *see also* Crawford v. West Jersey Health Sys., 64 Fair Empl. Prac. Cas. (BNA) 853 (D.N.J. 1994) (applying *Gilmer* to suit by medical director against employer for violations of ADEA, Title VII, antidiscrimination statutes, and trade libel); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995) (applying *Gilmer* to deny injunction against arbitration of contract dispute between employee and employer).

121. The leading case which interpreted the "contracts of employment" exclusion narrowly to apply only to movement of goods across state lines was Tenney Engineering, Inc. v. United Elec. Radio & Machine Workers, 207 F.2d 450 (3d Cir. 1953). While *Tenney* pre-dated *Gilmer*, it remains good law in many circuits. *See, e.g.*, Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76 (D. Mass. 1993); Dancu v. Coopers & Lybrand, 778 F. Supp. 832 (E.D. Pa. 1991) (following *Tenney*).

122. *See, e.g.*, Miller Brewing Co. v. Brewery Workers Local 9, 739 F.2d 1159 (7th Cir. 1984); Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430 (N.D. Ill. 1993); DiCrisci v. Lyndon Guarantee Bank, 807 F. Supp. 947 (W.D.N.Y. 1992).

123. *Tenney*, 207 F.2d at 453. The *Tenney* court relied on the principle of "*ejusdem generis*"

A few courts, however, have held that the contract-of-employment exclusion applies to all workers engaged in interstate commerce.[124] These courts argue that the mention of seamen and railroad employees only illustrates the limited reach of the Commerce Clause in 1925, when the FAA was enacted. By including the language "any other class of workers engaged in foreign or interstate commerce," they reason, Congress indicated its intent to except all workers that were within the reach of the commerce power.[125] While the lower courts are currently split on this issue, most federal circuit courts are adopting the former, narrow reading of the contracts-of-employment exclusion.

In addition to applying *Gilmer* to conventional employment contracts, many courts have utilized *Gilmer*'s reasoning to mandate arbitration of non-union employees' claims involving employment-related statutes other than the ADEA statute that was involved in *Gilmer* itself. Thus, courts have required arbitration of claims based on laws prohibiting discrimination on the basis of race,[126] sex,[127] religion,[128] and national origin,[129] as well as claims arising under ERISA[130] and the federal Employee Polygraph Protection Act.[131]

C. *Application of the FAA to Unionized Workers After* Gilmer

Since *Gilmer*, some courts have questioned whether the holding in *Gardner-Denver*—that unionized workers had a right to judicial determination of discrimination claims despite arbitration provisions in their collective agreements—is still good law.[132] Indeed, some lower courts' decisions effectively overrule *Gardner-Denver*. For example, in *Austin v. Owens-Brockway Glass Container, Inc.*,[133] the Fourth Circuit dismissed a gender and handicap discrimination claim brought by a worker who was covered by a collective bargaining agreement, holding that the employee was required to arbitrate, rather

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to conclude that the "any other class" language was limited to the narrow categories that preceded it. *Compare* Note, *The Federal Arbitration Act and Individual Employment Contracts: A Better Means to an Equally Just End*, 93 MICH. L. REV. 2171 (1995) (advocating narrow interpretation of the exclusion) *with* Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 292-93 (recounting history and reasoning of *Tenney* interpretation of "contracts of employment" exclusion and refuting the "*ejusdem generis*" argument).

124. *See* Arce v. Cotton Club of Greenville, Inc., 883 F. Supp. 117 (N.D. Miss. 1995); Mittendorf v. Stone Lumber Co., 874 F. Supp. 292 (D. Or. 1994).

125. *See also* Matthew Finkin, *'Workers Contracts' Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMPLOYMENT & LAB. L. 282 (1996).

126. Maye v. Smith, Barney, Inc., 897 F. Supp. 100 (S.D.N.Y. 1995).

127. Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76 (D. Mass. 1993) (pregnancy discrimination).

128. Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430 (N.D. Ill. 1993) (race, sex, and religious discrimination).

129. Albert v. NCR Co., 874 F. Supp. 1328 (S.D. Fla. 1994) (sex, race, and national origin discrimination).

130. Pritzker v. Merril Lynch, Pierce, Fenner and Smith, Inc., 7 F.3d 1110 (3d Cir. 1993).

131. Saari v. Smith, Barney, Inc., 789 F. Supp. 155 (D.N.J. 1992).

132. *See, e.g.*, Ngheim v. NEC Elec., 25 F.3d 1437, 1441 (9th Cir. 1994); Willis v. Dean-Witter Reynolds, Inc., 948 F.2d 305, 308 (6th Cir. 1991).

133. 78 F.3d 875 (4th Cir. 1996).

than litigate, her claims.[134] It based its reasoning on *Gilmer*, concluding that the arbitration clause in the collective bargaining agreement barred judicial determination of the employee's individual discrimination claims. The court stated that it assumed that unionized workers were not subject to the FAA, but it nonetheless held that *Gilmer* mandated its conclusion.[135] The court also stated that *Gilmer* had effectively overruled *Gardner-Denver*.[136]

Despite Fourth Circuit's dicta in *Austin* to the effect that the FAA does not apply to unionized workers, its holding that the unionized employee must arbitrate her federal statutory claims necessarily rests *sub silentio* on application of the FAA. That is because the FAA would provide the only possible basis for compelling arbitration of a unionized worker's *federal* statutory claims. Section 301 preemption is only available to require arbitration of unionized workers' *state law* claims.

The circuit courts have been long split on the question whether the FAA applies to unionized workers.[137] Some hold that the FAA does not apply because collective bargaining agreements are "contracts of employment" subject to the section 1 exclusion. As more and more courts reject that view in favor of the narrow interpretation of the section 1 employment exclusion, they will also be inclined to apply *Gilmer* to the unionized sector as the court in *Austin* did. Thus the line between FAA arbitration and section 301 preemption is likely to become blurred.

A recent New Jersey decision similarly blurs the distinction between FAA-compelled arbitration for nonunion workers and section 301 preemption-compelled arbitration for union workers. In *In re Prudential Insurance Co. of America Sales Practices Litigation*,[138] New Jersey District Judge Wolin considered the application of the FAA to a group of employees of an insurance company who were fired allegedly for refusing to engage in illegal insurance practices.[139] The employees had been required by their employer to sign the securities industry standard arbitration clause ("U-4 agreement"). The court analyzed the case under *Gilmer* despite the fact that the employees were represented by a union and covered by a collective bargaining agreement. The court ultimately decided that the agents were subject to the U-4 arbitration clause, but rejected the company's motion to compel arbitration on the ground that the U-4 agreement had an exclusion for disputes involving the insurance busi-

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134. *Austin*, 78 F.3d at 880.

135. *Id.* at 880-81.

136. *Id.* at 882.

137. The First, Fourth, Tenth, and Eleventh Circuits have held that the FAA does not apply to collective bargaining agreements. *See, e.g.*, Posadas de Puerto Rico Assocs. v. Asociacion de Empleados de Casino, 873 F.2d 479 (1st Cir. 1989); Domino Sugar v. Sugar Workers Local 392, 10 F.3d 1064 (4th Cir. 1993); United Food and Commercial Workers v. Safeway, 889 F.2d 940 (10th Cir. 1989); American Postal Workers Union v. USPS, 823 F.2d 466 (11th Cir. 1987). The Second, Third, and Seventh, on the other hand, have held that it does. *See, e.g.*, I.A.M. v. General Electric, 406 F.2d 1046 (2d Cir. 1969); Newark Stereotypers Union v. Newark Morning News, 397 F.2d 594 (3d Cir. 1968); Pietro Sclazitti Co. v. International Union of Operating Eng'rs, 351 F.2d 576 (7th Cir. 1965).

138. 924 F. Supp. 627 (D.N.J. 1996).

139. *In re Prudential*, 924 F. Supp. at 633.

ness.[140] But by entertaining the company's FAA arguments, the court decided *sub silentio* that the FAA applies to employees covered by collective bargaining agreements, at least if the employees are subject to an independent promise to arbitrate disputes other than one contained in their collective agreement.

As more and more courts apply the FAA to unionized workers' federal statutory claims, unionized workers will be required to arbitrate not only their *state law* employment rights, as they are presently under section 301 preemption, but also their *federal* employment claims through such expansive interpretation of *Gilmer*. Such a move would overrule *Alexander v. Gardner-Denver*, a position that some management-side labor lawyers have been advocating for years.[141] It would also make unionized workers' legal claims similar to those of nonunion workers who, as discussed above, are required to arbitrate both state *and* federal employment-related statutory claims. Together these developments would transform the Supreme Court's commitment to labor arbitration beyond recognition.

The original justification for judicial deference to arbitration was that labor arbitrators have a special expertise in applying the "law of the shop," which they can bring to bear in the resolution of disputes.[142] It was never posited that arbitrators have special expertise in interpreting the law of the land. As Justice Brennan, an avid supporter of labor arbitration for deciding contractual disputes, warned in 1980, "[B]ecause the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land, . . . many arbitrators may not be conversant with the public law considerations underlying [statutory claims]."[143]

V. THE YELLOW DOG CONTRACTS OF THE 1990S

A. *Due Process Deficiencies*

While mandatory arbitration of statutory rights is troublesome in any context, in the nonunion setting it is particularly problematic. Many pre-hire arbitral agreements are blatant contracts of adhesion. In 1994, the *New York Times* reported that more and more employers are requiring their nonunion employees to agree to boilerplate arbitration agreements as a condition of employment.[144] At the moment of hire, employees lack bargaining power and are needful of employment, so they frequently agree to such terms without giving them much thought. In these agreements, employees are typically re-

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140. *Id.* at 641-42.

141. *See, e.g.*, Brief Amicus Curiae of Center for Public Resources, Inc., in support of Respondent in *Gilmer v. Interstate/Johnson Lane Corp.*, in the Supreme Court of the United States, filed Dec. 19, 1990, at 14-16 (arguing that *Gardner-Denver* is based on out-moded views of arbitration, and urging the Court to overrule it). The Center for Public Resources is a non-profit corporation made up of 200 major corporations and 100 law firms engaged in employer-side labor and employment law. *Id.* at 1.

142. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

143. Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 743 (1981).

144. Steven A. Holmes, *Some Workers Lost Right to File Suit for Bias at Work*, N.Y. TIMES, Mar. 18, 1994, at A1, B-6.

quired to pay their own legal fees and one-half of the arbitrator's fees, a sum that could easily exceed $1,000.[145] Thus, these *Gilmer* pre-hire arbitration agreements discourage workers from asserting statutory rights. They operate like the early nineteenth century "yellow dog contracts"—contracts in which employees had to promise not to join a union in order to get a job.[146] Today's "yellow dog contracts" require employees to waive their statutory rights in order to obtain employment.[147]

Like the yellow dog contracts of the past, the new mandatory arbitration provisions are often imposed on workers without even the illusion of bargaining or consent. They are designed by employers unilaterally, and given to employees at the time of hire or inserted in employee handbooks, without mention of their existence and without discussion as to their terms. A typical case is *Lang v. Burlington Northern Railroad Co.*,[148] in which an employer unilaterally adopted an arbitration policy in 1991, and notified incumbent employees of its existence by mail. When the plaintiff attempted to bring a legal action for wrongful termination, the employer moved to dismiss on the grounds that the dispute must be arbitrated under the company's arbitration policy. The Court agreed with the employer, holding that by sending employees the arbitration policy in the mail, the employer had created a binding unilateral contract. It said, "[The plaintiff's] continued employment, with knowledge of the changed condition, constituted acceptance of the offer and provided the necessary consideration to bind the parties."[149]

The *Lang* case is not atypical.[150] As the U.S. Government's Commission on the Future of Worker-Management Relations, reported in its May, 1994 *Fact-Finding Report*:

> [T]he type of pre-dispute arbitration arrangement seen in *Gilmer* is devised by employers or their associates and presented to newly-hired employees on a "take it or leave it" basis. While the labor market does permit some negotiation and variation in salaries and benefits, it is hardly likely to let employees insist on litigating, rather than arbitrating, future legal disputes with their prospective employers.[151]

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145. Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMPLOYMENT & LAB. L. 131, 136-37 & n.26 (1995).

146. "Yellow dog contracts" are employment contracts in which workers promise not to join a union in order to obtain employment. They were prevalent in the early decades of the twentieth century and were approved by the Supreme Court in the *Hitchman Coal* and *Coppage* cases. *See* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 299 (1917); Coppage v. Kansas, 236 U.S. 1 (1915). After decades of agitation by organized labor, in 1932 Congress declared yellow dog contracts unenforceable in § 3 of the Norris-LaGuardia Act, codified at 29 U.S.C. § 103 (1988).

147. *See* Margaret Jacobs, *Woman Claims Arbiters of Bias Are Biased*, WALL ST. J., Sept. 19, 1994, at B1 (reporting that more than 100 major companies have made it a condition of being hired that an applicant agree to a mandatory arbitration provision of his/her statutory employment rights).

148. 835 F. Supp. 1104 (D. Minn. 1993).

149. *Lang*, 835 F. Supp. at 1106.

150. *See also* Kinnebrew v. Gulf Ins. Co., 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. 1994) (upholding arbitration policy unilaterally adopted by employer and mailed to incumbent employees).

151. U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, COMMISSION ON THE FUTURE OF THE WORKER-EMPLOYER RELATIONSHIP, FACT-FINDING REPORT 118 (May 1994).

The problem of lack of consent by nonunion employees to employer-initiated arbitration systems has been much noted by commentators but little heeded by courts. In one unusual case, the Ninth Circuit refused to enforce an arbitration agreement in the securities industry because the agents were not given an opportunity to read it and it was not explained to them.[152] However, that decision has been repudiated by most other courts.[153] Indeed, one district court recently acknowledged that the lack of consent is typical of arbitration agreements in the securities industry and it found that fact no bar to its enforcement. It said:

> Even if Smith Barney had explained the scope of the arbitration clause to the plaintiff, the end result would have been the same; the execution of a Form U-4 is not unique to Smith Barney employees and it is not optional. It is an SEC industry-wide requirement, a prerequisite to registration with any securities firm.[154]

The Center for Public Resources (CPR), an organization devoted to promoting alternative dispute resolution in employment relations, acknowledges that some courts might find that some arbitration clauses do not give employees adequate notice of the fact that by signing them, they are waiving some or all of their statutory employment rights. To cure this potential problem of lack of knowing waiver and consent, the CPR has proposed language for employers to use in the introductory paragraph to their written ADR procedures. They propose the following:

> *Statement of Consideration and Joint Agreement*
>
> IN CONSIDERATION AND AS A MATERIAL CONDITION OF THE EMPLOYMENT AND CONTINUATION OF EMPLOYMENT OF THE EMPLOYEE AS OF THE DATE OF THIS EMPLOYMENT DISPUTE ARBITRATION PROCEDURE ("*Employment Dispute Arbitration Procedure*") BECOMES EFFECTIVE, THE EMPLOYEE AND THE EMPLOYER (as this term is defined below) (collectively, the "Parties") AGREE TO SUBMIT FOR RESOLUTION PURSUANT TO THIS *Employment Dispute Arbitration Procedure* ANY EMPLOYMENT DISPUTE (as this term is defined below), AND FURTHER AGREE THAT ARBITRATION PURSUANT TO THIS *Employment Dispute Arbitration Procedure* IS THE EXCLUSIVE MEANS FOR RESOLUTION OF SUCH DISPUTE AND THAT BOTH THE EMPLOYER AND EMPLOYEE HEREBY WAIVE THEIR RESPECTIVE RIGHTS, IF ANY, TO RESOLVE ANY DISPUTE THROUGH ANY OTHER MEANS, INCLUDING A JURY TRIAL OR A COURT TRIAL IN A LAWSUIT, EXCEPT AS EXPRESSLY PROVIDED IN THIS *Employment Dispute Arbitration Procedure.*[155]

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152. Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994).

153. *See e.g., In re Prudential*, 924 F. Supp. 627, 642 (D.N.J. 1996).

154. *Id.* at 642 (quoting Bender v. Smith Barney Upham & Co., Inc., 789 F. Supp. 155, 159 (D.N.J. 1992)).

155. *See* Jay W. Waks & John Roberti, *Challenges to Employment ADR: Processes, Rather*

The virtue of this language, observes the CPR, is that it explains "in a single sentence that 'All Disputes are subject to this *Employment Dispute Arbitration.*'"[156] The CPR goes on to propose additional language, which:

> [D]efines this term broadly with certain limited and clearly stated exceptions: the term "Dispute," whether in the singular or plural, means (a) all claims, disputes or issues of which the Employee (including former Employee) is or should be aware during the employment relationship or after termination thereof, and which relate to or arise out of the employment of the Employee by the Employer (including without limitation any claim of constructive termination, any benefits-related claim or any related claim against an individual employee), *and* (b) all Employer counterclaims against that Employee. The term "Dispute" *includes*, without limitation, contractual, statutory and common law claims and *excludes* statutory claims for workers' compensation or unemployment insurance, other claims that are *expressly excluded* by statute and claims that are expressly required to be arbitrated under a different procedure pursuant to the terms of an employee benefit plan. In addition, the term "Dispute" *expressly excludes* any claim which relates to or arises out of confidentiality or noncompetition conditions of employment, trade secrets, intellectual property or unfair competition.[157]

The CPR recommendation concludes by saying, "An explication of this nature should ordinarily provide sufficient protection."[158]

The CPR language is about as "sufficient" as the back of a parking lot ticket stub for conveying knowledge of a waiver of liability. After trying to imagine a worker without legal training and extraordinary patience reading this language, one is left to wonder who is getting the protection out of this?

In addition to resting on dubious consent, many nonunion arbitration agreements require employees to waive their rights to punitive damages, consequential damages, attorneys' fees, injunctive relief, reinstatement, or other remedies that might be available in court. These are almost always upheld.[159] For example, in *Pony Express Courier Corp. v. Morris*,[160] an applicant for employment was given an arbitration agreement to sign, which provided that all claims relating to her employment shall be arbitrated without discovery and that any award shall be limited to actual lost wages or six months wages,

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Than Principles, Are at Issue, N.Y. ST. B. ASS'N, June 1996.

156. *Id.*

157. *Id.*

158. *Id.*

159. *See, e.g.*, DeGaetano v. Smith Barney, No. 94-CIV-1613, 1996 WL 44226 (S.D.N.Y. 1996) (compelling arbitration of Title VII even though arbitration agreement did not permit awards of injunctive relief, attorneys' fees, or punitive damages); Kinnebrew v. Gulf Ins., 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. 1994) (enforcing arbitration agreement that limited damages to compensation for "direct injury," excluding punitive damages, attorneys' fees, and equitable relief, and placing severe restrictions on possibility of reinstatement).

160. 921 S.W.2d 817 (Tex. Ct. App. 1996).

whichever is less. The agreement also said that "you will not be offered employment until it [the arbitration agreement] is signed without modification."[161] The Texas appeals court upheld this agreement against a challenge that it was unconscionable.

Perhaps the most troublesome aspect of nonunion arbitration agreements stems not from the fact that they are contracts of adhesion or that they limit employees' remedies, but that they often have a systematic pro-employer effect on the outcomes of disputes. While there is no comprehensive survey data on the subject (and indeed there cannot be due to the privatized nature of the tribunals), there is some anecdotal data that suggests that nonunion arbitration schemes tend to generate pro-employer outcomes.[162] For example, a congressional study found that the overwhelming majority of securities industry arbitrators who hear sexual harassment complaints as well as other employment matters are white males in their sixties who do not have significant experience or training in labor and employment law. In this setting, women plaintiffs are not likely to win.[163]

In the wake of *Gilmer*, several organizations have developed model arbitration procedures for nonunion workplaces. One, the "Model Employment Termination Dispute Resolution Procedure" which was promulgated by the Center for Public Resources, demonstrates how particular ADR procedures can have a systematic effect on the outcome of disputes.[164] In the CPR model ADR procedure, an employee promises to arbitrate all disputes related to or arising out of the termination of her employment, and it expressly precludes bringing any such claims in a court. The employee has a short time period, 180 days, to initiate the procedure.[165] All disputes are heard by an Adjudicator. If the parties cannot agree on who the Adjudicator shall be, it is to be chosen from the commercial arbitration panel of the American Arbitration Association (AAA), not the labor arbitration panel. The CPR's Official Commentary does not explain why they call for selecting an arbitrator from the AAA's commercial arbitration panel rather than from the AAA's labor arbitration panel, yet commercial arbitrators tend not to be lawyers and, unlike the labor arbitrators, have no familiarity with employee rights or concerns.

The CPR procedure states that for an employee to prevail, she must "demonstrate that the termination was not based on any legitimate business rea-

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161. *Pony Express*, 921 S.W.2d at 819.

162. One survey concludes that employers are more likely to win discrimination cases before an arbitrator than before a jury, and that those employees who do win, generally receive smaller awards in arbitration than in jury trials. Stuart Bompey & Michael Pappas, *Compulsory Arbitration in Employment Discrimination Claims: The Impact of* Gilmer v. Interstate/Johnson Lane Corp., 1993 A.B.A. SEC. ON EMPLOYMENT & LAB. LAW EEO COMM. PAPERS.

163. Steven A. Holmes, *Arbitrators of Bias in Securities Industry Have Slight Experience in Labor Law*, N.Y. TIMES, Apr. 15, 1994, at B4.

164. CENTER FOR PUBLIC RESOURCES, MODEL EMPLOYMENT TERMINATION DISPUTE RESOLUTION PROCEDURE, *in* Jay W. Waks & Linda M. Gadsby, *Arbitration and ADR in the Employment Area*, C879 ALI-ABA MEDIATION AND OTHER ADR METHODS 439 app. at 461 (Nov. 18, 1993) [hereinafter CPR PROCEDURES].

165. *Id.* at 470. In contrast, under Title VII of the 1964 Civil Rights Act, in some circumstances employees have 300 days to file suit. 42 U.S.C. § 706 (e)(1).

son."[166] As the CPR's Official Commentary acknowledges, this phrase is an express waiver of other burdens of proof which might otherwise apply.[167] Specifically, this burden of proof makes it more difficult for employees to prevail in CPR arbitrations than they would under the usual burden in labor arbitrations, in which the employer typically has the burden of demonstrating "just cause" for a dismissal. The CPR's burden of proof is also a more onerous burden than the burden of proof under some employment statutes, in which an employee can win in a mixed motive situation.[168] In the CPR procedures, by contrast, if there is any scintilla of legitimate business reason involved in a dismissed decision, the employer will prevail.

Under the CPR procedures, should an employee win her case, she will find she has a very limited range of remedies. The rules provide that the Adjudicator may grant the remedy of lost wages, less interim income from unemployment benefits, other earnings etc., the expenses of bringing the case to arbitration, and reinstatement. If reinstatement is not practical "under the circumstances," the Adjudicator may grant up to two years "front pay" in its stead. Also, the Adjudicator may grant up to one year's wages in lieu of punitive or other special damages that the employee may be entitled to in a judicial proceeding.[169] No recovery for items such as pain and suffering, consequential damages, or punitive damages are permitted. Thus, a worker who might otherwise have received a generous award of damages for unjust dismissal, intentional infliction of emotional distress, invasion of privacy, assault, defamation, or some other tort in a state court, is limited in CPR to reinstatement, interim lost earnings, and one or two year's wages.[170]

B. *Agreements to Capitulate*

Some federal agencies and courts are beginning to recognize that by enforcing mandatory arbitration of statutory rights, they are effectively depriving employees of their rights altogether. For example, in *EEOC v. River Oaks Imaging & Diagnostic*,[171] an employer insisted its employees agree to arbitration clauses under which they promised to arbitrate all disputes with the employer and to pay one-half of the cost of any ADR proceedings.[172] Two female employees who refused to sign the employer's arbitration agreement were fired. The EEOC sought a preliminary injunction against the company's enforcement of its ADR policy, arguing that the agreement was a violation of the Civil Rights Act because it required employees, as a condition of employ-

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166. CPR PROCEDURES, *supra* note 164, at 473.

167. *Id.* at 483.

168. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (on method for determining mixed motive questions in Title VII disparate treatment case).

169. CPR PROCEDURES, *supra* note 164, at 475-76.

170. These arbitral monetary remedies are not nearly as generous as some jury awards in unjust dismissal litigation in state courts, which often reach six figures. *See* Stone, *supra* note 7, at 630 & n.225.

171. No. CIV.A.H-95-755, 1995 WL 264003 (S.D. Tex. 1995).

172. For a detailed discussion of the facts of *River Oaks Imaging*, see Hoffman, *supra* note 145, at 136-40.

ment, to promise to refrain from exercising their rights to bring employment discrimination charges to the EEOC. On April 19, 1995, a district court issued a preliminary injunction against River Oaks prohibiting the employer from requiring its employees to submit to "any ADR policy which would cause an employee to pay the costs of ADR proceedings preclud[ing] or interfer[ing] with any employee's right to file complaints with the EEOC or to promptly file suit in a court of law when the employee has complied with the requirements of Title VII."[173] The case was ultimately settled with a consent order which voided the River Oaks ADR policy.[174]

Another recent case which demonstrates the potential for pre-hire arbitration agreements to operate as mandatory waivers of statutory rights is *Bentley's Luggage Corp.*[175] There, employees were asked to sign a form stating that by remaining a Bentley's Luggage employee, they agreed to submit all employment-related disputes to arbitration before bringing any legal action. One employee who refused to sign the agreement was fired. The NLRB General Counsel's office issued an unfair labor practice complaint on the theory that it is an unfair labor practice for an employer to fire a worker for refusing to waive his right to bring an unfair labor practice charge to the Board.[176]

Bentley's Luggage was eventually settled, with the employer reinstating the employee-complainant and posting a notice that it would not require employees to arbitrate issues that involved rights protected by the NLRA.[177] However, a similar case is still pending at the NLRB. In *Great Western Financial Corp.*, an employee who signed a pre-hire arbitration agreement was fired when she filed an unfair labor practice charge with the NLRB.[178] In these cases, the Labor Board, like the EEOC in *River Oaks Imaging*, has begun to recognize that reliance upon, and deferral to, arbitration has gone too far.

We can expect cases like these to proliferate. Indeed, *Gilmer* suggests a modern revival of the old yellow dog contract. In many states, employers can get the benefit of *Gilmer* merely by inserting arbitration clauses into their employment manuals or by sending incumbent employees a postcard. Thus even without signing anything, workers can be forced to waive their statutory rights—rights to be free of employment discrimination, rights to a safe workplace, rights to form a union—just to get a job.

C. *Curtailing Legislative Capacity and Reinventing Substantive Due Process*

The increased judicial deference to arbitration to resolve the statutory claims of nonunion workers and to preclude the statutory claims of unionized workers makes it exceedingly difficult for legislatures to enact meaningful

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173. *River Oaks Imaging*, 1995 WL 264003, at *1.
174. Hoffman, *supra* note 145, at 140 & n.48.
175. NLRB Case No. 12-CA-16658, 1995 DAILY LAB. REP. 95 d4 (BNA) (Sept. 25, 1995).
176. *Arbitration: Accord Reached on Unfair Labor Practice Case Involving Mandatory Arbitration Pledge*, 1996 DAILY LAB. REP. 96 d15 (BNA) (May 17, 1996).
177. *Id.*
178. NLRB Case No. 12-CA-166886, DAILY LAB. REP. 105 d4 (BNA) (Sept. 25, 1995).

statutes that give employees protection. Imagine, for example, that courts were to hold that workers' complaints under the Occupational Safety and Health Act of 1970 (OSHA) are subject to mandatory arbitration provisions. Such a result, which is possible under an expansive interpretation of *Gilmer*, would vitiate Congress's intent in enacting OSHA in the first place. Congress enacted OSHA in order to provide *uniform* standards for employee health and safety. To subject its provisions to mandatory arbitration would subject unionized as well as nonunion workers to the variable, unpredictable, and invisible outcomes of private arbitration.[179] Further, such a requirement would make it difficult, if not impossible, for Congress to monitor the effectiveness of its legislative efforts, or to revise legislation to better address pressing social problems. In a similar fashion, compelled arbitration of statutory claims threatens to nullify all employee protection legislation. It also makes it impossible for Congress to enact effective legislation for worker protection because whatever is stipulated by statute can be compromised away by employer-designated arbitrators. In addition, by removing labor cases to private arbitral tribunals, courts are taking employment concerns out of the public arena, away from public scrutiny and political accountability. Because the arbitral tribunal is invisible, no one knows to what extent arbitration enforces these publicly conferred employment rights, if at all.

A related problem with mandatory arbitration of statutory rights is that statutory disputes are being decided in private tribunals which generate no publicly available norms to guide actors or decisionmakers in the future. Over the next five years, we can expect a gradual diminution of litigation in the discrimination area as employers channel more and more employees' discrimination complaints into arbitration. This will mean that arbitrators who want to interpret the statutes correctly will have no authoritative statutory interpretations to look to for guidance.[180] It also means that the law cannot play an educational role of shaping parties' norms and sense of right and wrong, and therefore it cannot shape behavior in its shadow.

Furthermore, statutory employment rights are enacted when a legislature believes that workers cannot adequately protect themselves simply by bargaining with their employers. That is, they reflect a legislature's view of market failure in the contracting process. Legislatures act to ensure healthy and safe workplaces, protect privacy on the job, or to provide other protections when they believe that there is a public policy concern so compelling that it warrants intervening in the wage bargain. To then relegate enforcement or interpretation of these employment rights to a privatized tribunal—a tribunal whose composition and internal rules reflect and instantiate the very power imbalances that gave rise to the need for legislation in the first place—permits, indeed invites, de facto nullification.

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179. *See also* Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 ST. LOUIS U. L.J. 77, 100 (1996) (employment statutes represent Congress's desire to enact uniform labor statutes).

180. Arbitrators frequently have no training in the legal issues they are called upon to decide. *See, e.g.*, Holmes, *supra* note 163, at B4.

VI. DUE PROCESS OR COWBOY ARBITRATIONS?

A. *Efforts to Reconstruct Due Process in the Private Realm*

One could read the *Gilmer* decision as imposing minimal due process norms on employment arbitration and thus precluding the spread of lawless, one-sided "cowboy" arbitration procedures of the sort described above. The majority opinion in the *Gilmer* Court noted with approval the due process protections in effect in the New York Stock Exchange arbitration rules that were involved in Gilmer's case. The NYSE rules include procedures for employees to detect and challenge bias in arbitration panels, provisions for limited discovery by employees, requirements that arbitrators issue written opinions, and approval for a broad range of remedies, including equitable relief.[181] One commentator has argued that *Gilmer* thus establishes a minimal set of due process standards by which employment arbitration must be measured.[182] Professor Robert Gorman reads *Gilmer* to say that "Arbitral systems without the procedural safeguards found in the New York Stock Exchange would apparently so undermine the enforcement of statutory claims as to be, in the Court's view, intolerable."[183]

Unfortunately, none of the lower courts since *Gilmer* have read the Supreme Court opinion in this way. To date, no post-*Gilmer* lower court has treated the procedural aspects of the NYSE arbitration rules as a precondition to enforcing an employment law arbitration. Rather, courts almost universally uphold mandatory pre-dispute arbitration for statutory claims without any discussion about the procedures to be utilized in the arbitration itself.

Since *Gilmer*, some members of the labor-management bar have attempted to draft their own minimal due process norms for nonunion employment arbitration proceedings. Most notably, a task force composed of representatives of the Labor & Employment Section of the American Bar Association, the American Arbitration Association, the National Academy of Arbitrators, the National Employment Lawyers Association, the American Civil Liberties Union, and the Society of Professionals in Dispute Resolution met over a period of months to develop a set of fair arbitration procedures. Out of this effort came a document called "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship." The Protocol, which was signed in May, 1995, addresses issues such as arbitral bias, representation of parties, costs of arbitration, discovery, and the form of arbitral awards.[184] The organizations that endorsed the Protocol have taken the position that they will not participate in any employment arbitrations that do not satisfy its terms.

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181. *Gilmer*, 500 U.S. at 30-32.

182. Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 644-45.

183. *Id.* at 645.

184. Arnold M. Zack, *The Evolution of the Employment Protocol*, 50 J. DISP. RESOL. 36, 37-38 (Oct.-Dec. 1995).

The Due Process Protocol thus appears to represent a consensus within the labor-management community about fair procedures for employment arbitrations. However, its protections are extremely limited. The task force did not achieve consensus on the most important issues concerning nonunion arbitration: whether to permit pre-dispute arbitration at all, and whether to permit employers to make agreement to arbitration a condition of employment.[185] Some task force members believed that employees should never be permitted to waive their right to judicial relief of statutory claims, some believed that employees should be permitted to waive their right to a judicial forum once a dispute arises but not *ex ante*, and some believed that employers should be able to insist on a pre-dispute agreement to utilize an arbitration procedure.[186] Thus the most controversial aspect of *Gilmer* arbitrations is not addressed by the Protocol.[187]

To the extent that the Protocol sought to develop "standards of exemplary due process" for such arbitrations as do occur, it presents at best a bare minimum. It contains few, if any, significant process rights for employees. One due process protection it does contain is to state that employees should have the right to be represented by a spokesperson of their own choosing. Another is that it calls for "limited pretrial discovery" to give employees access to "all information reasonably relevant to . . . arbitration of their claims."[188] However, beyond these two specific safeguards, the Protocol gives employees little. For example, the Protocol calls for the selection of "impartial arbitrators" and insists arbitrators must be "independent of bias."[189] These are worthy goals—goals that no one would dispute. But the Protocol may just as well say, "arbitration procedures should be fair." That too would be beyond reproach but equally devoid of any guidance about how fairness could be achieved or what fairness comprises. Without more detail, exhortations for impartiality and freedom from bias are empty aspirations rather than meaningful protections. The Protocol says nothing about how to ensure impartiality and lack of bias.[190] The FAA itself states that "evident partiality" is grounds for a court to vacate an arbitral award,[191] so the Protocol's language endorsing the idea of impartiality for arbitrators gives employees no better protection than they already had.

The Protocol's main achievement is to delegate the most important issues that arise in arbitration to the arbitrator. For example, it says that the arbitrator should have the authority to determine the scope of discovery, to rule on evi-

185. *Id.* at 37.

186. *Id.*

187. In contrast, the Dunlop Commission took a position on this issue in its Final Report, and concluded that courts or Congress should "Forbid Making Agreement to Arbitrate Public law Claims a Condition of Employment at This Time." U.S. DEP'T OF LABOR, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 33 (Dec. 1994) [hereinafter DUNLOP COMMISSION FINAL REPORT].

188. Zack, *supra* note 184, at 38.

189. *Id.* at 38-39.

190. The Protocol does call for the disclosure of conflicts of interest by an arbitrator, but that too has been a feature of the federal arbitration act for a long time. *See* Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968).

191. 9 U.S.C. § 10(b) (Supp. 1996).

dentiary matters, to determine whether post-hearing submissions should be considered, and decide arbitrability questions.[192] On the issue of expense, the Protocol is ambiguous. It recommends that employers reimburse employees for a portion of the employee's attorneys' fees if the employee is low paid, yet it also calls for employer and employee to share in the costs of the arbitrator, if at all possible. It leaves the actual allocation of fees, including attorneys' fee reimbursement, to the arbitrator.[193]

The Protocol also devotes considerable attention to the issue of ensuring arbitrators are knowledgeable about employment statutes. While the existence of knowledgeable arbitrators would ultimately enure to the benefit of employees, the Protocol's proposal is extremely weak. The Protocol does not take the position that only lawyers should conduct arbitrations about statutory claims—it merely recommends that arbitrators receive training in "substantive, procedural, and remedial issues to be confronted."[194]

Overall, the Protocol proposals will not cure most of the due process defects in the nonunion arbitrations. Even with the right to representation and minimum discovery that the Protocol calls for, nonunion employment arbitrations are still designed by employers, heard by whichever arbitrator the employer selects, and conducted under whatever procedural rules, burdens of proof, presumptions, limitations periods, and the like that the employer writes into the procedure.

B. *Critical Voices from the Bar, the Labor Movement and the Supreme Court*

There is a significant and growing sentiment in the legal community that arbitration is an inadequate enforcement mechanism for employees' statutory rights. Some focus on the procedural deficiencies in the arbitral process, stressing that arbitration is a privately created, do-it-yourself tribunal, which rarely provides rights to discovery, compulsory process, cross examination, or other due process protections common to civil trials.[195] Thus, some claim, arbitration relegates workers to second-class justice.

Other critics focus on the privatization of disputes in arbitration. These critics argue that arbitral decisions are invisible documents—they do not receive media attention or public scrutiny and therefore engender no public debate. Arbitrators are not public officials, not accountable to a larger public, nor required to apply public law.[196] And there is no legislative arena in

192. Zack, *supra* note 184, at 39.
193. *Id.* at 38-39.
194. *Id.*
195. Stone, *supra* note 9; *see* Republic Steel Corp. v. Maddox, 379 U.S. 650, 659 (1965) (Black, J., dissenting).
196. While arbitrators are not accountable to the public, they may be accountable to the repeat players in the arbitral world—those who pick arbitrators on a regular basis. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 1974 LAW & SOC'Y REV. 95 (on the advantages of repeat players). In the nonunion context, the repeat players are inevitably the employers.

which unpopular decisional trends can be challenged. Arbitration is a privatized forum, designed by the parties, and out of the public eye.[197]

Some of the voices critical of arbitration of statutory rights come from the labor movement and the labor relations bar.[198] For example, in a joint statement to the Commission on the Future of Worker-Management Relations, several organizations representing working women, including 9 to 5, the National Association of Working Women, the American Nurses Association, and the Coalition of Labor Union Women, decried the "alarming trend toward using mandatory arbitration to reduce employment-related litigation."[199] These groups feared in particular that Alternative Dispute Resolution (ADR) was being used "as a means of eroding the hard-fought legal protections women have against inequitable treatment in the workplace . . . [especially] in the area of sexual harassment."[200] They argued that "employers should not be able to coerce individual workers, particularly women workers who are not protected by a union, at the onset of an employment relationship or at any time thereafter, to choose between their statutory rights to be free of discrimination and their jobs."[201]

Marsha Berzon, an attorney who represents the AFL-CIO, pointed out to the Commission that mandatory ADR to resolve statutory disputes would circumvent the deterrent effects of litigation—large verdicts and unfavorable publicity—which are so important in enforcing employment legislation.[202] Berzon also argued that ADR systems are inherently biased without a union. Even if ADR systems are designed to provide neutral decisionmakers and a level playing field, they still give the employer an advantage because the employer is a repeat player in the world of ADR professionals.[203] Berzon also opines that by relegating important employment issues to private tribunals, employment law will remain unelaborated, misunderstood, and diminished in its effectiveness.[204]

On many occasions, members of the Supreme Court have also recognized the shortcomings of arbitration of statutory rights. The Court has repeatedly

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197. Stone, *supra* note 4. In addition to its due process failings, arbitration also does not provide remedies as effective or as generous as those in a judicial forum. For example, most arbitrators believe that they do not have the power to award damages for intangible harms, or to award punitive or consequential damages. In addition, arbitrators almost never grant interest on back pay awards, even when it is issued months or years after an unjust dismissal. It is common practice for an arbitrator to award reinstatement but no back pay at all to a worker fired without just cause. In contrast, prevailing parties in unjust dismissal litigation receive jury awards in the mid-to-high six figures. Furthermore, most arbitrators do not believe that they have the power to order provisional relief. Thus many contract violations, such as improper job assignments or safety matters, can neither be prevented nor remedied after the fact. Stone, *supra* note 7.

198. *See* Committee on Labor and Employment Law, *Final Report on Model Rules for the Arbitration of Employment Disputes*, 50 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 629, 629-30 (1995).

199. *Fact Finding Report, 1994: Hearing Before the Commission on the Future of Worker-Management Relations*, 102d Cong. 24-26 (1994) (statement of 9 to 5).

200. *Id.*

201. *Id.*

202. *Id.* at 5 (statement of Marsha Berzon).

203. *Id.* at 6-7.

204. *Id.* at 9-10.

warned that the second-class procedures of arbitration can lead to second-class outcomes. For example, the Court stated in 1956, in *Bernhardt v. Polygraph Co. of America*:[205]

> The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury. . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial.[206]

Bernhardt was a nonlabor case arising under the FAA. Justice Douglas, who wrote these words, spearheaded the Supreme Court's adoption of broad support for arbitration in labor cases. Douglas wrote the *Bernhardt* opinion in 1956, one year before he wrote the path-breaking *Lincoln Mills* opinion calling upon courts to expand the role of labor arbitration.

Justice Douglas repeated these sentiments in 1974 in another nonlabor case, *Scherk v. Alberto-Culver Co.*,[207] where he criticized judicial deference to arbitration of statutory claims. He wrote in dissent:

> An arbitral award can be made without explication of reasons and without development of a record, so that the arbitrator's conception of our statutory requirement may be absolutely incorrect yet functionally unreviewable. . . . The loss of the proper judicial forum carries with it the loss of substantial rights.[208]

Similar arguments about the lack of due process in arbitration and the consequences for the outcomes of disputes have been raised by many Supreme Court Justices over the past four decades. Justice Black, in his dissent in *Republic Steel Corp. v. Maddox*,[209] observed:

> For the individual, whether his case is settled by a professional arbitrator or tried by a jury can make a crucial difference. Arbitration . . . carries no right to a jury trial . . . ; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited.[210]

Justice Reed in his majority opinion in *Wilko v. Swan*,[211] stated that, for securities cases, it is unlikely that arbitrators will be sufficiently versed in the law, or have an adequate understanding of statutory requirements such as "'burden of proof,' 'reasonable care' or 'material fact.'"[212] Similarly, Justice

205. 350 U.S. 198 (1956).
206. *Bernhardt*, 350 U.S. at 203.
207. 417 U.S. 506 (1974) (Douglas, J., dissenting).
208. *Scherk*, 417 U.S. at 532.
209. 379 U.S. 650 (1965).
210. *Maddox*, 379 U.S. at 669 (Black, J., dissenting).
211. 346 U.S. 427 (1953).
212. *Wilko*, 346 U.S. at 436 (quoting 15 U.S.C. § 771(2) (1995)). Justice Reed also criticized

Brennan wrote for the majority in *McDonald v. City of West Branch*[213] that "an arbitrator's expertise 'pertains primarily to the law of the shop, not the law of the land.'"[214] Justice Powell, writing for the Court in *Alexander v. Gardner-Denver Co.*,[215] said:

> [W]e have long recognized that "the choice of forums inevitably affects the scope of the substantive right to be vindicated. . . ." Respondent's deferral rule is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues. We deem this supposition unlikely.[216]

Similar sentiments have been expressed by Justice Blackmun dissenting in *Shearson/American Express Inc. v. McMahon*,[217] by Justice Stevens dissenting in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[218] and by Justice Harlan concurring in *U.S. Bulk Carriers, Inc. v. Arguelles*.[219] Indeed, even Justice Marshall, writing for the majority in *Dean Witter Reynolds, Inc. v. Byrd*[220]—a decision in which the Court approved an expansive interpretation of the FAA—acknowledged that "arbitration cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that section 1983 is designed to safeguard."[221]

Thus for over four decades, many Supreme Court Justices have recognized the procedural shortcomings of arbitration and have questioned the wisdom and justice of permitting private arbitration to substitute for judicial or administrative tribunals for resolving statutory disputes. I hope that we could return to this wisdom now, and reverse the trend toward compulsory arbitration of statutory employment rights.

VII. CONCLUSION

The state of labor and employment law today stands as a distorted reflection of that which existed one hundred years ago. In the past, workers had few workplace rights other than those they could secure and enforce through collective muscle and labor market power. Today, workers have many *de jure* rights, but often these rights cannot be enforced due to mandatory pre-dispute arbitration systems. Further, in many respects, workers have less ability to use direct action to enforce rights than they once did. Today, labor's use of

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the FAA for not providing for "judicial determination of legal issues such as is found in the English law." *Id.* at 437.

213. 466 U.S. 284 (1984).

214. *McDonald*, 466 U.S. at 288-93 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974)).

215. 415 U.S. 36 (1974).

216. *Gardner-Denver*, 415 U.S. at 56 (quoting United States Bulk Carriers v. Arguelles, 400 U.S. 351, 359-60 (1971) (Harlan, J., concurring)).

217. 482 U.S. 220, 257-60 (1987) (Blackmun, J., concurring and dissenting) (arguing that procedural defects in arbitration render it inadequate to protect investor's rights).

218. 473 U.S. 614, 647 (1985) (Stevens, J., dissenting).

219. 400 U.S. 351, 365 (1971) (Harlan, J., concurring).

220. 470 U.S. 213 (1985).

221. *Byrd*, 470 U.S. at 222 (discussing *McDonald*, 466 U.S. at 284).

economic weapons is governed by a Byzantine labyrinth of complex and contradictory legal rules, rules which channel disputes into a legalistic maze of public and private tribunals, at the end of which the worker, exhausted, demoralized, and dispirited, finds she has lost whatever rights she once believed were worth seeking. The result is a bitter irony for the worker—she has more rights and less protection than ever.

To avoid this descent into labor-management absurdity, we need to consider legislative proposals that would reverse the trend toward privatizing employment rights. Congress could take action to reverse this trend of excessive use of labor arbitration to resolve disputes over workers' statutory rights. Specifically, Congress could enact legislation that would:

(1) state clearly that section 301 is not intended to preempt state *or* federal employment law statutes; and

(2) reaffirm a broad interpretation of the FAA's employment exclusion and/or expressly repudiate the result of the *Gilmer* case.

Further, courts need to reevaluate their knee-jerk pro-arbitration approach to cases involving statutory employment rights. They should narrow their approach to section 301 preemption, interpret worker protection statutes to be non-waivable, and adopt a broad interpretation of the contract-of-employment exclusion in the FAA, so that employment contracts of *all* workers engaged in interstate commerce are excluded from the Act. In addition, the courts and Congress should adopt two recommendations of the Dunlop Commission: they should ensure that binding arbitration agreements are not made a condition of employment, and they should provide for judicial review of statutory issues decided on arbitration.[222]

None of these changes will occur until employees, the labor movement, Congress, and the general public recognize that while labor arbitration may play a valuable role in resolving disputes concerning interpretation of collective bargaining agreements, extending arbitration to disputes over statutory rights—especially for nonunion workers—is inappropriate. Expanding arbitration in this way may seem expedient in terms of reducing court congestion, but it is a trend that will, in the long run, prove very costly. By subjecting employment rights to a regime of private justice and cowboy arbitrations, we are eliminating most employment rights for most American workers.

222. DUNLOP COMMISSION FINAL REPORT, *supra* note 187, at 32.

CLAIMING PRIVATE LAW FOR THE LEFT: EXPLORING *GILMER*'S IMPACT AND LEGACY

ROBERTO L. CORRADA*

I agree with most of the comments and arguments posited by Katherine Stone in her essay in this Symposium issue.[1] I agree, for example, that the trend in labor law to foreclose union members' common law suits under an expansive view of section 301 preemption has the effect of forcing their claims to be judged in a private, not public, hearing. The trend in employment law to shift civil rights claims from public courts to private arbitrations is certainly a similar phenomenon. I also agree that these trends are somewhat insidious in that they mean there is, by virtue of fewer procedural safeguards, a lesser chance on the whole that workers will prevail in their claims. As a result, I also conclude that the trend toward privatization in labor and employment law tends to greatly benefit management, and hence, not surprisingly, is a trend embraced by the conservative right in this country.

Perhaps if there is any strong point of disagreement between Katherine Stone and me it relates to the approach each of us recommends given the current state of affairs. Katherine Stone urges the enactment of a law that would both nullify the current expansive view of section 301 preemption and reaffirm or broaden the Federal Arbitration Act's exclusion of employment contracts.[2] Her decidedly public/legislative approach would purportedly allow all workers to vindicate their civil rights and common law claims in a court of law.

Stone's proposed reform would possibly allow more court access to some unionized and white collar workers than would be the case in the present system, but is it true that most workers will be better off as a result? I do not believe so, and thus advocate a different approach that embraces the privatization of worker rights and legal claims. The fact that I advocate privatization does not place me in the conservative camp, however. I believe that the left can lay

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* Associate Professor, University of Denver College of Law. B.A., George Washington University, 1982; J.D., Catholic University School of Law, 1985. I would like to thank all of the participants in the New Private Law Symposium. In particular, I would like to thank Katherine Stone for her continuing outstanding contributions to a better understanding of dispute resolution in the labor and employment arena, and Dennis Lynch for the depth of his insights regarding the impact of process on the quality of justice. In addition, I would like to thank Alan Chen, Ed Dauer, Nancy Ehrenreich, and Martha Ertman for taking the extra time to read drafts of this particular essay. Thanks also to the Hughes Research Fund for its continuing support of these symposia and to Sue Chrisman, Tracy Craige, and Tarek Younes, without whose tireless efforts on behalf of the *Law Review* this Symposium would not have been possible.

1. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

2. *Id.* at 1049-50.

claim to the private sphere with a progressive agenda and transform that sphere for the betterment of workers. To demonstrate my point, let us reconsider Katherine Stone's hypothetical case. The hypothetical highlights the unsavory prospect of private arbitration for a retail store salesperson who is injured on the job and is compelled to take her Americans with Disabilities Act (ADA) claim to a presumably biased panel composed of retired industry executives. Stone concludes that if the employee proceeds to court, her claim will be dismissed.[3]

An unstated but implied assumption made by Professor Stone is that the retail salesperson could proceed to court on her ADA claim. This may not, in fact, be the case. Whether the salesperson will actually be able to bring a lawsuit will depend on a variety of other facts not mentioned in the hypothetical. The salesperson may have difficulty finding a lawyer to represent her unless she lives in an area with an active plaintiff's employment bar. Law has become increasingly specialized, and in many areas of the country there is still a decided lack of skilled plaintiff's side employment law practitioners. Next, a lawyer may not take her case unless the remedy she stands to receive is at least somewhat substantial. This would be true even if the attorney would be entitled to attorneys' fees, because the opportunity cost of foregoing another case with larger backpay potential may simply be too great. Since the hypothetical plaintiff is a retail salesperson who has been out of her job for only a short time, it is probably true that her backpay damages are not significant. Representation would thus probably rest on her ability to claim compensatory and punitive damages. There are not enough facts in the hypothetical case to determine whether there are any compensatory damages (emotional distress, physical injury, etc.). Punitive damages are rarely assessed, and, of course, they are capped. Moreover, given the vagaries of the jury trial system, plaintiff's attorneys rarely decide to take cases based solely on the potential availability of punitive damages.

Even if the salesperson succeeds in finding legal representation, she will probably be asked to come up with a retainer of some $5,000.00 or upwards to be used against costs incurred in litigation, for which she is ultimately responsible. If her case is exceptional, she may be able to convince her attorney to advance the costs of litigation, but she will bear the risk with respect to a loss of those monies in case she does not prevail. Even then, the attorney may not advance the costs unless she enters into a much less attractive contingent fee arrangement. All of this, of course, assumes that the salesperson acts relatively quickly in speaking with an attorney within 300 days of the adverse action by her employer. If she waits too long, her case will be barred by the relevant statute of limitations. The truth is that the mere availability of a legal

3. *Id.* at 1018. It should be noted here that although federal courts seem to be reading *Gilmer* expansively, it is not at all clear that the Supreme Court would apply the case's holding to Professor Stone's hypothetical salesperson since it has been suggested that what the Court was willing to hold with respect to a relatively sophisticated worker, like the broker before the Court in *Gilmer*, it may not be willing to extend to someone like a retail store salesperson. *See generally* Robert L. Duston, Gilmer v. Interstate/Johnson Lane Corp.: *A Major Step Forward for Alternative Dispute Resolution, or a Meaningless Decision?*, 7 LAB. L.J. 823 (1991).

cause of action does not necessarily result in an ultimate vindication of the claim in court.

The hypothetical salesperson may ultimately be better off in a private system that provides specific notice to her about any possible claim and time limitations along with affording her the choice of bringing her case with or without an attorney as a representative. Moreover, many of the due process problems highlighted by Stone and characterized by current employer arbitral processes are not inherent features of those systems. And even though I also admit that the employer has considerable leverage over employees with respect to employment contracts, making them contracts of adhesion, I believe there are other institutional actors (such as the American Bar Association) who can affect that relationship and temper employer inclinations toward one-sided accords. This essay will argue, then, that more justice might be achieved for more people if the left decides to work with privatization in a progressive way rather than fight it in favor of public processes that may be less efficient vehicles for the delivery of legal services.

The Supreme Court's Decision in Gilmer v. Interstate/Johnson Lane Corp.[4]

The *Gilmer* case holding and its facts have been rehashed countless times, so let me recount here only the essentials. In *Gilmer,* a stockbroker was required by his employer to register as a securities representative with the New York Stock Exchange.[5] His registration application included an agreement to arbitrate any dispute arising out of his employment or termination of employment.[6] When Gilmer's employment was terminated, he sued under the Age Discrimination in Employment Act (ADEA).[7] The district court denied the employer's motion to compel arbitration, but was reversed by the court of appeals whose decision was affirmed by the United States Supreme Court.

Fundamentally at odds in the *Gilmer* case were an earlier Supreme Court decision securing the right of plaintiffs in statutory civil rights suits to go to court regardless of a contractual agreement to arbitrate[8] and a string of other Supreme Court decisions upholding contractual agreements to arbitrate under the mantle of public policy surrounding the Federal Arbitration Act.[9] Both parties had good arguments, and it seems that *Gilmer* is one of those cases that could have been decided either way. Gilmer himself should have felt secure in his argument that the Supreme Court's earlier decision in *Gardner-Denver* was well on point. In that case, the Supreme Court had held that an employee could proceed to court on a statutory civil rights claim (Title VII) despite an agreement between an employer and his union requiring arbitration

4. 500 U.S. 20 (1991).
5. *Gilmer,* 500 U.S. at 23.
6. *Id.*
7. *Id.*
8. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
9. *See, e.g.,* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

of such claims. If anything, Gilmer's case was more compelling since the employee in *Gardner-Denver* had his rights waived by his union, an institutional actor not easily cowed by an employer. Moreover, the Federal Arbitration Act contains an express statutory exemption for contracts of employment.[10]

On the other side, the employer, Interstate/Johnson Lane Corp., may well have found the Supreme Court's trend in favor of arbitration quite compelling. After all, the Supreme Court had favored arbitration in cases involving statutory rights under laws as imbued with public policy concerns as the Sherman Act, the Securities Acts, and even the Racketeer Influenced and Corrupt Organizations Act (RICO).[11] The employer may also have felt that its case, involving the securities industry and a relatively sophisticated employee, presented the ideal facts for Supreme Court extension of its arbitration precedents into the employment law arena.

The Supreme Court agreed that arbitration should have been compelled in Gilmer's case, and it did so on the basis of the Federal Arbitration Act's liberal policy in favor of arbitration. In doing so, the Court distinguished the *Gardner-Denver* case primarily by maintaining that it had not presented the issue regarding arbitration of statutory rights. Rather, the Court held that *Gardner-Denver* involved whether the consideration of contract rights paralleling statutory rights (since the plaintiff's claim of discrimination was primarily based on anti-discrimination language in the collective bargaining agreement) can serve as a basis for precluding judicial vindication of statutory rights.[12] With respect to the Federal Arbitration Act's exclusion for employment contracts, the Supreme Court expressly avoided the issue by refusing to find that Gilmer's agreement with the New York Stock Exchange was an employment agreement, leaving the issue "for another day."[13]

The *Gilmer* decision poses two interesting questions regarding what we might call the New Private Law. First, can we say that the decision represents some sort of shift to private law that stands as a bellwether for the private law movement? Second, if it does, is this shift a conservative one that stands to have a strong impact on public law and the political left generally? With respect to the first question, I believe it does signal a substantial shift to the private sphere which may be indicative of a new movement. With respect to the second question, I do not believe that the shift necessarily means that the right has scored a victory. The New Private Law, in my mind, does not inherently

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10. Section 1 of the Federal Arbitration Act provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994). For a discussion of the legislative history of the employment contract exemption, see Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Classification*, 17 BERKELEY J. EMPLOYMENT & LAB. L. 282 (1996).

11. *See, e.g.*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

12. *Gilmer*, 500 U.S. at 33-35. The Court also distinguished *Gardner-Denver* on the grounds that it involved a collective bargaining agreement, raising the tension between individual and collective rights, and that the case had not been decided under the Federal Arbitration Act (suggesting *Gardner-Denver* might be decided differently today). *Id.* at 35.

13. *Id.* at 25 n.2.

carry with it some sort of political valence—either right or left. I will suggest, in fact, that the time is ripe for this shift to be captured and occupied by the progressive left.

Gilmer's *Impact: Signalling a Shift to Private Law in the Employment Arena*

It is my contention that there is evidence of a New Private Law shift in the employment and labor law arena. I believe that the Supreme Court's decision in *Gilmer* and its later opinion in *Lechmere* signal such a shift, not merely by their substantive pronouncements in favor of that which is private, but also by the analytical mode within which the substantive decisionmaking unfolds. A useful framework for determining whether in fact there is something that could be characterized as New Private Law is suggested by the comments made some years ago by Peter Shane in a Symposium on the New Public Law.[14] Shane posited an approach that requires a parsing of the phrase "New Private Law." We should ask first whether we can say that it is, in fact, "new," then whether it is "private," and finally whether it is "law."

To decide whether New Private Law is "new," "we must identify some past moment in time as an appropriate baseline for comparison, and somehow construct a portrait of [private] law as it then existed."[15] Our "private" law, however, would only be new if its features reveal a "theory of the state different from the theory of the state most plausibly attributed to the [private] law of our baseline time."[16] "Theory of the state" is taken to mean "a widespread understanding of the relationship of the state to its citizens, of official institutions to one another, or of the core purposes of government activity."[17] Finally, newness must be understood on a relatively broad level, incorporating different perspectives. If what is purportedly new is only new through a very particularized or contextualized perspective, then it should not necessarily be proclaimed as new on a grander scale.[18]

Let me dispense with the final requirement quickly. I do not, in this essay, purport to be saying that there is an entire legal shift to a private regime (although some of my arguments do indeed support this). Rather, I am merely making the claim in the context of employment and labor law. With respect to a baseline, to the extent that it is generally agreed that the rise of the regulatory state has ushered in a regime of public law,[19] then such a regime could be the baseline that we would use in noting any shift to private law. If indeed there is a shift to private law, which would contain features substantially different from what we know as public law, then we can conclude that this is

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14. *See generally* Symposium, *The New Public Law*, 89 MICH. L. REV. 707 (1991); *see also* Peter M. Shane, *Structure, Relationship, Ideology, or, How Would We Know a "New Public Law" If We Saw It?*, 89 MICH. L. REV. 837, 838-42 (1991).

15. *See* Shane, *supra* note 14, at 838.

16. *Id.* at 840.

17. *Id.*

18. *Id.* at 840-41.

19. *See generally* Symposium, *The New Public Law*, *supra* note 14; *see also* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 596-604 (1990).

"new." Hence, because I am arguing that what is new is "private" and the current regime is public, I have less work to do than the authors in the "New Public Law" who were attempting to show (at least according to Shane's characterization) that there was something new about "public" law, the then-existing regime. If all this is correct then I will have revealed a "new" private law if I only show that there is a private shift from public law.

Some might maintain, however, that if a regime of "private" law was ever prevalent in some past era, I have not shown newness unless I distinguish this current private law from that which existed before. To these, I would say that even a mere return to private law is necessarily new because it must be understood in the context of its public law predecessor. However, I believe that the New Private Law has a facet that makes it different from the old private law, and will therefore argue newness on the merits.

If there was an "old" private law regime in the United States, it would be the one safeguarded by common law formalists who regarded the private sphere as primary and who distinctly favored private property rights.[20] This regime was characterized by a suspicion toward government regulation, but at the same time relied upon a decidedly public institution—the court of law—to ensure the protection of property rights and the enforcement of "private" agreements.[21] It is with respect to this characteristic that the "new" private law differs. The New Private Law, as evidenced by the decision in *Gilmer*, expressly mistrusts public fora and seeks to enforce private law in private venues. Although it retains an inherent characteristic of the old private law—a fondness for private property rights and for enforcement of private consensual arrangements—it also seeks to have those rights and contracts enforced by private means. Indeed, vis à vis this new movement, the old private law might be considered only a milder form of public law.[22] This same analysis reveals

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20. *See* William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 711-12 (1991).

21. *Id.* at 712.

22. *Cf.* Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 884-88 (1991). Of course, one could find a baseline for "private" law that might argue against the newness of the latest private law shift. For example, there was a time, before English common law courts became interested in enforcing private contracts, when contracts were created and enforced by parties other than the state. *See, e.g.*, E. ALLAN FARNSWORTH, CONTRACTS 12-20 (2d ed. 1990) (describing the rise of contract through the ecclesiastical and merchant courts and the ultimate wresting away of contract law jurisdiction by the King's common law courts). As one writer has noted, in language eerily similar to some of the language contained in *Gilmer*, "It is not the custom of the court of the lord king to protect private agreements, nor does it even concern itself with such contracts as can be considered to be like private agreements." *Id.* at 13 (citing R. de Glanville, *Treatise on the Laws and Customs of the Realm of England*, bk. 10, ch. 18 (G. Hall ed., 1965)).

The current shift to private law, however, would be new vis à vis this baseline as well. The law being applied in private fora today is decidedly public law enacted by the legislature. *Gilmer* expressly allows private decisionmakers to decide issues involving public rights, but only if the private parties have consensually agreed to such an arrangement in advance. By contrast, private law enforced in ecclesiastical or commercial courts was developed in those courts by church officials and merchants. In addition, there is certainly something new in the state's giving up jurisdiction (as is the case in a *Gilmer* regime) versus its acquisition of jurisdiction (as was the case when the King's common law courts encroached on the jurisdiction of the ecclesiastical and commercial courts).

a "theory of the state" that is different from prior baseline theories of the state. Certainly any emphasis on private rights, and especially on private dispute resolution mechanisms, necessarily suggests a less republican view of the state versus the individual. Whereas a regime of public law emphasizes public discourse (whether it be in the courts or in the legislature) and public policy, private law seeks to leave matters to be decided by private parties and within private institutions, preferably with no public discussion and devoid of public influence. This new private theory of the state differs also from common law formalism ("the old private law") in that it sees no role for the state in enforcing private agreements: it is not that these are matters for common law courts rather than legislatures, it is simply that the state shall not be involved in these matters at all. Therefore, the shift indeed seems to be "new."

Next, consider whether this shift can be called "private." Many have written about the public/private distinction in law.[23] Most of these have found the problem of what is public and what is private to be quite intractable. Consider, for example, in labor law literature, Karl Klare's article, *The Public/Private Distinction in Labor Law*.[24] Klare demonstrates the incoherence of the public/private distinction in labor law by showing the inconsistency of the use of public and private designations to describe similar phenomena, how policymakers use public and private labels to arrive at sharply contrasting or even contradictory legal conclusions, and how the borderline between public and private is constantly being altered and redefined despite the absence of significant changes in the underlying phenomena or social forces that are described by public and private labels.[25] As a result, Klare concludes that the public/private distinction poses as an analytical tool, but "functions more as a form of political rhetoric used to justify particular results."[26] In this Symposium, Alan Chen also strongly maintains that there is virtually no real distinction between the public and the private given that the private realm's jurisdiction depends exclusively on the whim of the public sphere.[27] Moreover, according to Chen, even a descriptive shift that we might label "private" has no jurisprudential significance since it is likely to be subsumed, defined, and explained by jurisprudential movements that already exist and carry their own truly independent weight.[28]

Indeed, much of what has been written regarding the incoherence of the public/private distinction has questioned the notion that "private law" is truly private. For example, Karl Klare questions the labeling of an employment contract as a private agreement given the growing number of states forbidding

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23. Legal Realists, Critical Legal Scholars, and Neo-Republicans have successfully attacked the prior line of distinction between private law and public law. *See* Farber & Frickey, *supra* note 22, at 886 (collecting authority).

24. Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982).

25. *Id.* at 1360.

26. *Id.* at 1361.

27. *See* Alan K. Chen, *"Meet the New Boss . . ."*, 73 DENV. U. L. REV. 1253, 1257-65 (1996).

28. *Id.* at 1253-55, 1259-67.

the discharge of an employee for a reason that contravenes public policy.[29] He points out that "[p]ublic law norms are implied into the relationship as restrictions upon the employer's power to discharge."[30] The same might be said of the "private" collective bargaining agreement. The original Wagner Act embodied the notion that labor law problems would be resolved by a private process of negotiation.[31] Although this private process was created and maintained by the enactment of public law, "the mission of public law was narrowly limited to the task of establishing and maintaining an effective private bargaining system."[32] Despite this, however, postwar interpretation of labor law provisions governing collective bargaining agreements has been characterized by a "pronounced drift toward public expansionism."[33] This public drift is seen in increased legal regulation of collective bargaining negotiations, the expanded judicial role in administering the labor contract, and increased statutory regulation of the employment relationship.[34] The collective bargaining agreement today is indeed controlled as much (if not more) by the state as it is by the private parties who breathe life into it in the first instance. It is fair to conclude that the so-called "private" labor contract is part of an integral web of state control over the bargaining relationship.

The longstanding critique of the public/private distinction has been successful because what has occurred with respect to the distinction in labor and employment law development has been replicated in the development of other areas of law. And that critique has shown that to date, the "private law" label has been misapplied to common law. As a result, the "public law" sphere is dominant and in fact encompasses all governmental institutions—the legislature, the courts, and the executive. Those scholars writing about the "New Public Law" in 1991 by and large sought to describe the trend away from the exclusive study of courts and court decisions in law to the study also of the legislature and the executive and their role in making law through the enactment and enforcement of statutes.[35] Even Peller and Eskridge in their article about New Public Law concede that the New Public Law occupies much broader ground than initially suggested by the Legal Realists or even Legal Process Theorists. In describing the New Public Law as: (1) normative, (2) formative, destructive, and transformative, and (3) dialogical practical reasoning,[36] Peller and Eskridge define a dynamic system of interaction that we might call "law" today. Describing "law" so broadly allows Peller and Eskridge to sweep all legal movements in this century into their "New Public Law" schema, but at the expense, perhaps, of defining any "private" sphere entirely out of existence.

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29. Klare, *supra* note 24, at 1362.
30. *Id.* at 1363.
31. *Id.* at 1390; *see* Archibald Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 322 (1951).
32. Klare, *supra* note 24, at 1391.
33. *Id.* at 1395.
34. *Id.*
35. *See, e.g.*, Farber & Frickey, *supra* note 22, at 888-905.
36. *See* Eskridge & Peller, *supra* note 20, at 746.

However, an analysis of the "New Public Law" scholarship does reveal that despite the apparent breadth of public law today, there may exist a fundamental limiting principle that gives credence to the view that the *Gilmer* decision represents a true "private" law shift. It would appear that public law, and even the "New Public Law," is somehow situated within what we would call the public sphere. "Public sphere," however, should be viewed very broadly today based on the critique of the public/private distinction: it includes not just the judiciary, but also the legislature and the executive. Beyond the formal branches of government, the public sphere might also include institutions that have an impact on these branches—i.e., lobbyists, the media, and even private institutions somehow involved with the public trust. Today, the Internet, because of its easy public accessibility, might be a mechanism that we would include in an expanded and fluid definition of the public sphere.

The argument can be made that the New Private Law seeks to exist outside of the public sphere. If so, the *Gilmer* decision, extended in all the horrible ways suggested by Katherine Stone, could establish an entirely different paradigm of employment law: a paradigm we would be hard-pressed to call "public." This may be true even if New Private Law fails to exist entirely outside the public sphere. If, in fact, private companies take it upon themselves to enter into contracts with employees requiring private arbitration of public law claims and with no hope for judicial review, then the *Gilmer* decision will have welcomed an extraction from the public sphere. Especially if one feature of these private arbitrations is the lack of written opinions, law will be created and re-created without, in any tangible way, affecting the public discourse. Although the public sphere may act upon the private decisionmaking process, there will be no popular mechanism to ensure that the private process acts endogenously upon the public.

It seems to me that a vision of law which seeks to divest itself from the state in particular and the public sphere in general is something new and also something uniquely "private." Moreover, the fact that the state could recapture this jurisdiction at any time does not necessarily mean that the law created in individual private institutions for individual consumption and influence is a creature of the state. Thus, what *Gilmer* portends—an infinite number and kind of individual justice mechanisms within private institutions—cannot be said to fall within the generalized rubric of the "New Public Law" because it does not intend to be a player in public discourse. Individual systems of private justice, whatever they may be, are not systems that generally contribute to political dialogue or public deliberation.[37] They do not, by virtue of their decisions or results, have "a major impact on the implementation of public policy or collective interests."[38] Nor do they, on a day-to-day basis, require

37. *Id.* at 732-37, 744-45, 750, 752-55, 758-61. Peller and Eskridge implicitly support this idea as well in that, in seeking to define "New Public Law," they necessarily choose two judicial decisions in order to contextualize their discussion. In this sense, they have chosen the quintessential vehicle of public law (the published judicial decision) to make their point—the very vehicle that is circumvented in the *Gilmer*-led private law regime.

38. *See* Shane, *supra* note 14, at 842 (defining "public" law).

an understanding of political institutions or the framing of issues relating to the proper role of government.[39]

Perhaps a more interesting question than whether New Private Law is new or private is whether it is law at all. If New Private Law lives in hiding, seeks no public identity, and has no public essence, then, quite possibly, it may not be law. Peter Shane has defined law broadly as "webs of institutions and practices through which a society represents to itself its shared understandings of right or wrong . . . . "[40] In the New Private Law of employment, each individual justice system will ultimately develop its own code of right and wrong through a series of self-contained, institutional arbitral decisions. One might argue that these ultimately will not constitute a "shared understanding" of right and wrong. However, there are certain inherent features of the New Private Law in the employment arena that raise it to the level of "shared understanding" without converting it into "public" law. First, these individual systems of justice will be interpreting public law texts. The *Gilmer* case will, if viewed expansively, allow private arbitral tribunals to decide statutory rights. Although these rights will necessarily be transformed into different sets of understandings by isolated fora, they nevertheless must begin with the same textual language, and, to some extent, will be guided by public law decisions relating to such texts. Moreover, appeals to "public" courts of fringe arbitral decisions reaching absurd results should ensure that some general "shared" boundary will be maintained regarding private interpretation of public law. Next, at least in terms of impact, some private arbitral systems will serve communities much larger than many small towns served currently by public courts. For example, a private justice system implemented by General Motors or Exxon will typically yield a "shared understanding" of employment law that is more widely held than that yielded by a local trial court decision from Basalt, Colorado. We can conclude that New Private Law is indeed law, though it may stretch the definition.

To lend further support to the emergence of New Private Law, *Gilmer*'s style of analysis strongly suggests such a trend. Although the *Gilmer* decision opens substantive and procedural doors to the New Private Law, it is not merely these opened doors that make the decision noteworthy. The decision may also close a door. The analytical mode of the opinion (the way in which the Supreme Court actually goes about announcing and rendering its substantive decision on the merits) suggests a possible Supreme Court inclination toward ignoring—maybe even erasing—what was so comforting for the left about past civil rights decisions involving discrimination laws. If this is true,

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39. *See* Farber & Frickey, *supra* note 22, at 887. Farber and Frickey do, however, consider that the New Public Law might be implicated when "the interpretation of a governmental act is at stake." *Id.* To the extent that private arbitration systems within companies will be seeking to apply public law, the argument may be made that these systems fall within public law and certainly the public sphere. But that is true in only the most formalistic sense of public law. Without judicial review (or some other mechanism of public discourse), the public text of a statute can easily lose its "public" character. By interpretation, the text is easily rendered a creature of the private process. Thus, "interpretation of a governmental act" is to the private arbitration process what "sound" is to the tree that falls in the woods with nobody around to hear it.

40. *See* Shane, *supra* note 14, at 841.

then those like Professor Stone who would argue for a legislative reversal of *Gilmer* should be more careful about what they ask.

As I will show below, the analytical mode of the *Gilmer* opinion strikingly deviates from prior Court analysis of civil rights decisions that invoke public law principles. In general, the decision favors a formalistic, superficial analysis that typifies the manner in which a court might interpret a contract between two parties rather than the more in-depth, less formal analysis the Court has employed when invoking public law concerns surrounding civil rights laws.[41] Although this may at first seem appropriate given that a contract, after all, was at the heart of *Gilmer*, the Court has in the past rejected the easy contract-type analysis when a matter of public law was also involved. The best example of this contrast is seen in a comparison of *Gilmer* and the Court's 1974 decision in *Alexander v. Gardner-Denver Co.*[42] The fundamental issue in *Gardner-Denver*, as in *Gilmer*, was whether a "private" contract providing for arbitration of a civil rights dispute could be used to prevent a plaintiff from having the dispute heard by a court.[43]

Relying heavily upon legislative history, the *Gardner-Denver* decision begins by focusing on the procedures of Title VII and the public policy behind the statutory enactment. The Court cites to Congress's statement that the policy against discrimination is the "highest priority" in discussing the importance of alternative fora for bringing discrimination claims[44] and emphasizes legislative history manifesting an intent to allow individuals to independently pursue claims under Title VII and other applicable federal and state laws.[45] Finally, in justifying its decision that individuals may go to court despite arbitration over the same issue, the Court relies on the difference between arbitration and the judicial forum, critically highlighting public policy and meaningful differences between the two processes. For example, the Court states, "The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal."[46]

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41. Martha Ertman argues that courts' general and superficial approach to contracts (as opposed to statutory cases) has benefitted marginalized minorities in our society, and thus she views any trend toward contract-type analysis as positive. *See generally* Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996). I would simply note that whether the trend is normatively good or bad depends upon whether one is in a statutorily protected class. Those whose civil rights are protected by public law would probably prefer continuation of that protection in the public arena. Ertman shockingly points out that a trend toward contract and away from legislative protection may lead ultimately to outright prohibition—and perhaps the affirmative action debate is an early indicator that anti-discrimination protections are indeed headed in a direction toward prohibition and away from legislative protection.

42. 415 U.S. 36 (1974).

43. Certainly there are notable differences between the two cases: *Gardner-Denver* involved a labor contract which did not require the arbitrator to apply public law (the contract had language mirroring Title VII), while *Gilmer* involved a commercial agreement requiring an arbitrator to actually interpret ADEA statutory language. These differences, however, do not negate the similarity of the fundamental issue in both disputes—to what extent can private arbitration of a civil rights dispute substitute for a judicial hearing and determination of the same issue?

44. *Gardner-Denver*, 415 U.S. at 47.

45. *Id.* at 48 & n.9.

46. *Id.* at 56.

The Court expressly recognizes the marked differences between private and public processes. According to the Court, the role of the arbitrator, to effectuate the intent of the parties, may be inconsistent with the goals of the statute. Moreover, while arbitrators are expected to know the particular parties and make decisions with that in mind, "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, *whose broad language frequently can be given meaning only by reference to public law concepts.*"[47] The Court goes on to explain other incongruities, including differences in the way proceedings are recorded, the rules of evidence, and differences in procedural rights like discovery, compulsory process, cross examination, and testimony under oath.[48] The Court states that "it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts."[49]

The Court finally suggests that courts may nonetheless give weight to arbitral decisions in deciding Title VII claims, and the Court acknowledges that the weight accorded might even be substantial if the arbitral process reflects procedures used in court.[50] The Court concludes, however, that "courts should be ever mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of the courts to assure the full availability of this forum."[51]

By contrast, the *Gilmer* Court not only reaches a different result, but does so by perfunctorily comparing and dismissing any differences between arbitral and judicial fora.[52] In *Gilmer,* the Court begins with an exposition lasting several pages on case law involving the Federal Arbitration Act.[53] After introducing the Age Discrimination in Employment Act (ADEA) in only one general paragraph, the Court, with no analysis, concludes that broader social policies can be pursued through both arbitral and judicial resolution mechanisms.[54] The Court sloughs off a concern that encouraging arbitration will undermine the Equal Employment Opportunity Commission's (EEOC) role in enforcing the ADEA by maintaining merely that nothing in the ADEA precludes arbitration.[55] Rather than compare arbitral and judicial structures vis à vis the ADEA, the Court states simply that because the EEOC may receive

47. *Id.* at 57 (emphasis added).
48. *Id.* at 57-58.
49. *Id.* at 58.
50. *Id.* at 60 n.21.
51. *Id.*
52. I am not the first to point out the superficial nature of the Court's comparisons in *Gilmer. See* Christine G. Cooper, *Where Are We Going with* Gilmer?*—Some Ruminations on the Arbitration of Discrimination Claims,* 11 ST. LOUIS U. PUB. L. REV. 203 (1992); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 ST. LOUIS U. L.J. 77 (1996).
53. *Gilmer,* 500 U.S. at 24-27.
54. *Id.* at 27-28.
55. *Id.* at 28-29.

information from "any source" and because the agency is itself directed to pursue "informal methods of conciliation," arbitration is consistent with the ADEA's statutory scheme.[56]

Regarding the adequacy of arbitral procedures compared to judicial safeguards, the Court states that general attacks on arbitration are "far out of step with our current strong endorsement" of arbitration.[57] As a result, the Court, almost apologetically, reveals that it intends to "address these arguments only briefly."[58] And, indeed, the Court's dismissal of the procedural arguments is brief. Noting the possibility of biased arbitration panels, the Court quickly states that the New York Stock Exchange (NYSE) rules allow the parties to receive information on the arbitrators and that courts may overturn decisions in which there was "evident partiality or corruption."[59] While the Court concedes that there are more ample discovery rules in a judicial forum, it states that limited discovery in arbitration is the tradeoff for the "simplicity, informality, and expedition of arbitration."[60] The Court makes this point as if ADEA plaintiffs would somehow desire these as much as the employers who institute the procedures. More disturbing, however, is the Court's cite to a decision involving an arbitration agreement between two commercial entities. The Court implicitly suggests that it sees no difference between individuals filing civil rights suits and commercial entities pursuing contract or antitrust claims. With respect to the fact that arbitrators need not file written opinions, the Court refuses to recognize a distinction between judicial opinions and arbitrators' pronouncements by stating that the NYSE rules require an arbitral writing that includes the name of the parties, a summary of issues, and a description of the award.[61]

Finally, with respect to the most important argument in *Gilmer*, that there is often unequal bargaining power between employers and employees, the Court stated that mere inequality is not sufficient to hold that arbitration agreements are per se unenforceable in the employment context. Here, the Court suggests a limiting rule for its decision that harkens back to the days of the *Gardner-Denver* case, but it then undermines this by comparing the employee/employer relationship to that of securities dealer/investor. The Court reveals its unwillingness to entertain inequality arguments when it concludes that there was no indication in the case that Gilmer was "coerced or defrauded" into agreeing to arbitration.[62]

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56. *Id.*

57. *Id.* at 30.

58. *Id.* It is interesting to note how the Court dismisses as general attacks on arbitration, the very same attacks that it not only entertained, but substantially endorsed, in the *Gardner-Denver* decision.

59. *Id.* The Court concludes, as if recognizing that its arguments are specious, that "[t]here has been no showing in this case that [the NYSE] provisions are inadequate to guard against potential bias." *Id.* at 31.

60. *Id.*

61. *Id.* at 32. Again, the Court seems to sheepishly recognize the lack of force behind its argument by adding that despite its decision, ADEA claims will continue to be filed in courts of law. *Id.*

62. *Id.* at 33.

The *Gilmer* Court's unwillingness to entertain arguments about the deficiencies of arbitration compared to judicial resolution of civil rights claims cannot bode well for those who would seek merely to reverse *Gilmer* in the hopes that the Court (and federal courts in general) will decide civil rights cases as it did in the past, in a manner imbued with the public trust and encrusted with concerns about public policy. The starkest evidence that the Court is unlikely to decide civil rights cases the same way, however, is revealed by two more important indicators: first, the Court's radically different view of the public forum in *Gilmer* as compared to its view in *Gardner-Denver*; and second, and most importantly, the Court's abject refusal to view employees as a class as somehow different from investors or car dealers when it comes to negotiation of contracts. The Court's myopia with respect to a distinction that cuts to the very *raison d'etre* of civil rights statutes is a strong indicator that the times they are a changin'.

A slightly weaker trend toward a New Private Law can also be seen in labor relations law (the law of union and management relations). This trend is manifested in two ways, one procedural and one substantive: first, the expansion of the doctrine of preemption in the 1980s and 1990s (procedural), and, second, the Supreme Court's decision in *Lechmere, Inc. v. NLRB*,[63] involving union access rights to employer private property (substantive). Katherine Stone does an excellent job of explaining the expansion of section 301 preemption and its implications for unionized workers' common law employment claims.[64] This expansion, which forces unionized workers to take common law claims to labor arbitrators and by and large prevents judicial resolution of those claims, reflects a Supreme Court preference for private arbitration systems over public fora. It is a weaker private law trend than the one represented by *Gilmer*, however, because the labor contract has become a creature of the state, and there has been a drift toward importing public ideals and controls into the labor arbitration process. Still, the labor arbitration process is much less public than judicial resolution of claims in court. Thus, the Supreme Court's increasing preference for private ordering in the unionized context (measured by the expansion of section 301 preemption) reflects a trend toward private law that is at least equal to the private ordering preferences of old common law formalism with some features of the New Private Law (requiring resolution of "public law" claims in private fora).

The other indicator of a trend toward private law in the labor arena is the Supreme Court's 1992 decision in *Lechmere*, which, incidentally was issued only some eight months after *Gilmer*. In *Lechmere*, the Court was asked to determine whether it was an unfair labor practice for a private employer to bar nonemployee union organizers from its property. In holding that it was not an unfair labor practice, the Court tilted substantially in favor of private property rights over public law guarantees of employee access to information about organizing.[65] In deciding *Lechmere*, the Court expressly rejected the highly

63. 502 U.S. 527 (1992).
64. *See* Stone, *supra* note 1, at 1022-30.
65. *See, e.g.*, Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of*

nuanced, decidedly New Public Law approach that the NLRB had taken to the issue of nonemployee union access to private property.[66] The Board's approach had been developed over a course of decades with guidance from the Supreme Court in three union access cases.[67] The approach relied on the weighing of a multiplicity of variables that would help the NLRB to determine a "locus of accommodation" between employers' private property rights and employees' NLRA section 7 rights. The Board's own description of the analysis used reflected its "New Public Law" grounding. According to the Board, "As with other legal questions involving multiple factors, the 'nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer.'"[68] In rejecting the Board's complicated approach that attempted to equate private law and public law rights, the Court stated:

> To say that our cases require accommodation between employees' and employers' rights is a true but incomplete statement, for the cases also go far in establishing the locus of that accommodation where nonemployee organizing is at issue. So long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place. It is only where such access is *infeasible* that it becomes necessary and proper to take the accommodation inquiry to a second level.[69]

The Court's application of its understanding that private property rights should be ascendant to employee section 7 rights was revealed in its discussion of the actual case. The Court explained that despite insurmountable access problems encountered by the union in *Lechmere*, "[a]ccess to employees, not success in winning them over, is the critical issue," and "the union in this case failed to establish the existence of any 'unique obstacles' . . . that frustrated access to Lechmere's employees."[70]

The Court's decision in *Lechmere* certainly seems to be a throwback to old common law formalism due to its enhanced view of private property interests. To the extent that the decision also rejects the NLRB's "New Public Law" approach to the question of nonemployee access to private property, it also represents a closing door similar to the one in *Gilmer*.

Gilmer*'s Legacy: The Seeds of Co-Optation by the Left*

Whether or not *Gilmer* signals some sort of New Private Law movement, its legacy—shifting public law civil rights cases into private dispute mechanisms—will have a profound impact on employment law. Certainly what

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Lechmere, Inc. v. NLRB, 9 HOFSTRA LAB. L.J. 1 (1991).

66. *Lechmere*, 502 U.S. at 538; *see also* Jean Country, 291 N.L.R.B. 11 (1988).

67. Hudgens v. NLRB, 424 U.S. 507 (1976); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

68. *Jean Country*, 291 N.L.R.B. at 14 (quoting Electrical Workers v. NLRB, 366 U.S. 667 (1961)).

69. *Lechmere*, 502 U.S. at 538 (emphasis added).

70. *Id.* at 540-41.

Gilmer may allow should be of large concern to the left in general and to the civil rights community in particular. In the past, there has been a marked difference in the quality of justice meted out in public courts and private arbitrations. Katherine Stone does a good job of quantifying these differences.[71] As a result of these differences, Stone maintains that legislators should act to ensure that all public statutory rights claims be decided in courts.[72]

I maintain, however, that, despite these historical differences between private and public processes, civil rights advocates should not opt for the old public law route so quickly. The analysis of *Lechmere* and *Gilmer* in the prior section reveals the Court's growing inclination against interpreting civil rights laws broadly in the public interest as it once did. And this should come as no real surprise given the absence from the Court of noted civil rights champions such as Thurgood Marshall and William Brennan. But this shift in Court analysis and approach is not as important an argument for proceeding with caution as is the fact that *Gilmer,* despite its shortcomings, has served as an impetus of sorts for the transformation of private processes by various private actors to erase some of the meaningful differences that have separated public from private fora for so long. If this transformation continues, the prospects for equal justice in private arbitration processes is improved with a corresponding increase in the possibility of justice.

Before discussing transformative efforts, a brief recap of the traditional problems with private arbitration in the employment setting is in order. Katherine Stone rightfully points out the primary hazard of allowing employment agreements in the nonunion setting.[73] These agreements are often blatant "contracts of adhesion" which have been required of new employees on a "take it or leave it" basis without affording employees proper notice regarding waiver of a public venue for their claims.[74] Moreover, these arbitration processes have been characterized by systematic deficiencies that tend to favor employers, not the least of which is a biased decisionmaker who generally tends to be a retired industry executive.[75]

Since the *Gilmer* decision, however, a number of private organizations have attempted to draft and implement procedures that address a number of concerns regarding arbitration of employment disputes. Moreover, these groups have by and large attempted to incorporate due process requirements from public dispute resolution mechanisms in an attempt to make private arbitrations fairer. For example, the Center for Public Resources (CPR) has drafted a process that requires an arbitrator selected from an arbitration panel of the American Arbitration Association.[76] In addition, the CPR process provides for

71. *See* Stone, *supra* note 1, at 1036-43; *see also Gardner-Denver*, 415 U.S. at 57-60.
72. Stone, *supra* note 1, at 1046-50.
73. *See generally id.* at 1036-41, 1046-49.
74. *See id.*
75. *See id.*
76. *Id.* at 1040-41; *see also* CENTER FOR PUBLIC RESOURCES, MODEL EMPLOYMENT TERMINATION DISPUTE RESOLUTION PROCEDURE, *in* Jay W. Waks & Linda M. Gadsby, *Arbitration and ADR in the Employment Area*, C879 ALI-ABA, MEDIATION AND OTHER ADR METHODS, 439 app. at 461 (Nov. 18, 1993) [hereinafter CPR PROCEDURES].

backpay, attorneys' fees and costs, and reinstatement.[77] If reinstatement is not practicable, then an employee may be awarded "front pay."[78] Although punitive and special damages are not allowed, an arbitrator may award up to one year of wages in lieu of such an award.[79]

The American Arbitration Association (AAA) has also released its National Rules for the Resolution of Employment Disputes.[80] The AAA's rules follow the Due Process Protocol developed by a task force comprised of management, union, and arbitration representatives formed in response to an American Bar Association (ABA) resolution to address employment arbitration involving nonunion workers.[81] Along with its rules, the AAA also announced that it has assembled a roster of experienced employment arbitrators and mediators to decide disputes and has instituted a national training program focusing on substantive and procedural issues.[82] The AAA rules provide that arbitrators have the authority to order whatever discovery is necessary for "a full and fair exploration of the disputed issues" and that they may grant any relief that would be available in court, including attorneys' fees.[83] Important systematic safeguards are also required by the rules, including: the right to representation, the same burdens of proof as in court, and various requirements regarding arbitrators to ensure neutrality.[84] The rules took effect on June 1, 1996 and will be applied to "any arbitration agreement that provides for arbitration by AAA or proceedings under its rules."[85] In addition, JAMS/Endispute, another provider of ADR services, adopted similar fairness rules in January of 1995.[86]

Katherine Stone levels a substantial criticism at these processes that despite their attempts to provide disclaimers to employees informing them of their decision to elect a private forum for any disputes, employers' continuing inclination to minimize any disclaimers by hiding them or placing them in fine print will hopelessly serve to undermine the process.[87] Stone emphasizes post-*Gilmer* case law that supports her point.[88] However, Stone also discusses cases in which courts of law or the parties themselves have refused to be bound by mandatory arbitration agreements because of procedural irregularities surrounding the formation of the contract.[89] Moreover, courts have shown a

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77. *See* Stone, *supra* note 1, at 1041; *see also* CPR PROCEDURES, *supra* note 76, at 475-76.

78. *Id.*

79. *Id.*

80. *See Arbitration: Revised AAA Arbitration Procedures Reflect Due Process Task Force Scheme*, 1996 DAILY LAB. REP. 102 d6 (BNA) (May 28, 1996).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* Arbitrators must be mutually acceptable to both parties and drawn from a diverse and nondiscriminatorily composed pool. Moreover, arbitrators must be experienced in employment law, have no conflicts of interest, and must disclose all information affecting neutrality. *Id.*

85. *Id.*

86. *Id.*

87. *See* Stone, *supra* note 1, at 1037-39.

88. *Id.*; *see, e.g.*, De Gaetano v. Smith Barney Inc., No. 95 Civ. 1613 (DLC), 1996 WL 44226 (S.D.N.Y. Feb. 5, 1996); Kinnebrew v. Gulf Ins. Co., 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. 1994); Lang v. Burlington Northern R.R., 835 F. Supp. 1104 (D. Minn. 1993); Pony Express Courier Corp. v. Morris, 921 S.W.2d 817 (Tex. Ct. App. 1996).

89. Stone, *supra* note 1, at 1041-42; *see* EEOC v. River Oaks Imaging & Diagnostic, 67 Fair

willingness to void arbitration agreements that drastically depart from the substantive requirements of civil rights laws or the procedural rights afforded in courts of law.[90] In fact, the courts' overall willingness to review the fairness of private arbitral systems in the context of statutory civil rights claims has led private ADR service companies to change their procedures. For example, after the *River Oaks Imaging* case discussed by Stone,[91] CPR upgraded its disclaimer to provide better and more meaningful information to employees in a "model memorandum to employees."[92] Moreover, the new policy ensures that arbitration agreements do "not truncate statutes of limitation available under statutory or common law."[93]

Despite continuing concerns about private resolution of statutory civil rights claims, it appears that a unique combination of the courts and the private marketplace is working to ensure fairer procedures and more just results. The adoption by AAA and JAMS/Endispute of policies that follow the Due Process Protocol endorsed by the ABA indicates that private institutions can work within themselves to ensure fair application of civil rights statutes in private processes. Also, the willingness of CPR to respond to the market for ADR services by making its procedures more fair means that employers will not be able to institute arbitral processes with the help of expert ADR providers without incorporating notions of procedural and substantive fairness into their systems. While these developments may seem precarious in the sense that these private groups might change their approach, the fact that some of these developments occurred roughly simultaneously with a threatened boycott of ADR processes by the National Employment Law Association (plaintiffs' employment lawyers) strongly suggests the developments may well be enduring ones.[94] Ultimately, too, as employers and ADR providers become more knowledgeable about what courts will generally allow with respect to private arbitration in this area, the courts will become much less relevant. If the trend continues, it will become more efficient and direct for those who would seek to change these processes to approach private institutions like the ABA and

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Empl. Prac. Cas. (BNA) 1243 (S.D. Tex. 1995); Bentley's Luggage Corp., NLRB Case No. 12-CA-16658 (Sept. 25, 1995); *see also* Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994).

90. *See, e.g.*, Graham Oil Co. v. ARCO Prod. Co., 43 F.3d 1244 (9th Cir. 1994) (holding unenforceable an arbitration agreement limiting the authority of the arbitrator to award exemplary damages or attorneys' fees as allowed by statute); Graham v. Scissor-Tail, Inc., 623 P.2d 165 (Cal. 1981); Ditto v. RE/MAX Preferred Properties, Inc., 861 P.2d 1004 (Okla. Ct. App. 1993) (voiding an arbitration agreement allowing the employer alone to appoint the arbitration panel). *Cf.* Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995) (upholding a punitive damages award in arbitration, although partly because of the parties' contractual agreement to provide for them). For a more complete discussion of these cases, see George W. Bohlander et al., *Alternative Dispute Resolution Policies: Current Procedural and Administrative Issues*, 1996 LAB. L.J. 619.

91. *See* Stone, *supra* note 1, at 1041; *see also supra* note 89.

92. *See Alternative Dispute Resolution: Center for Public Resources to Issue Model ADR Policy for Employment Disputes*, 1995 DAILY LAB. REP. 114 d11 (BNA) (June 14, 1995).

93. *Id.* ("Although the change [regarding statutes of limitation] takes into account such recent case law as *EEOC v. River Oaks Imaging and Diagnostic* . . . , the committee's concern over the model policy's varying substantive rules of law predated that decision . . . . ").

94. EDWARD A. DAUER, 2 MANUAL OF DISPUTE RESOLUTION § 26.04, at 2S-58 (Supp. 1996); Thom Weidlich, *Storm Brews over ADR*, NAT'L L.J., Nov. 6, 1995, at A6.

private ADR companies like AAA and JAMS/Endispute. In the future, then, the state may well be effectively divorced from this new private system of law.

One might react to the above argument by asking whether it would simply be better to seek to have statutory civil rights disputes remain in the courts since the courts are more adept at instituting and enforcing the due process notions that are so important in this area of law. In other words, if private arbitration systems can at best hope to be pale imitations of the court system, why not simply try to retain judicial handling of civil rights complaints? Of course, the answer must be that transforming private arbitral systems has some additional bonus for the progressive left that the court system cannot provide. I can think of two substantial benefits to working for change in private arbitral systems. The first harkens back to Katherine Stone's hypothetical involving the retail salesperson plaintiff and my reaction to that hypothetical at the beginning of this essay. Under the public law system, a potential plaintiff must find a lawyer to represent him or her, typically for a fee. Plaintiffs who appear to be poor witnesses, who have very little backpay damages because of low paying jobs or mitigation efforts, or who simply cannot afford to pay consultation fees and retainers are effectively denied justice for lack of legal representation. Most private arbitral processes allow the option of proceeding without representation. For those who cannot find representation, this facet of private arbitration offers some hope, especially if these processes are ultimately engineered to be fair to the employee.

The second benefit of taking the private route relates to a point that Katherine Stone makes with respect to section 301 preemption in the labor law setting. She maintains that one of the problems with requiring unionized employees to take their common law wrongful discharge and tort claims to a labor arbitrator is that arbitrators do not typically award the same kind of relief that can be procured in a court of law.[95] It seems to me that all the changes taking place in arbitration processes for nonunion employees must ultimately inure to the benefit of unionized workers. One reason is that the charge to change arbitration to ensure its integrity on the nonunion front is being led by labor arbitrators, among others.[96] In addition, many of the arbitrators who currently preside over disputes regarding union employees and labor contracts will be the very ones who are called to deal with public statutory questions in private nonunion processes. It should be only a matter of time, if the culture indeed changes, before these same arbitrators are comfortable and knowledgeable about awarding punitive and compensatory damages for common law claims of unionized workers brought in labor arbitration.

Finally, one should not underestimate the ability of the progressive left to react to change that at first may seem contrary to its goals or agenda. This has been true, for example, in the case of the *Gilmer* decision where the left has acted, with others, to transform private arbitral processes. It is also true in the case of the *Lechmere* decision, where the progressive left (in this case, labor

95. *See* Stone, *supra* note 1, at 1029.
96. *See supra* text accompanying note 81.

unions) also reacted in a uniquely private way. Rather than attempt to reverse *Lechmere*, unions responded to a general ban on access to employer property for organizing purposes by having union organizers apply for jobs in the workplaces they sought to unionize (a process known as "salting" the workplace).[97] The genius of this approach is that it is difficult for employers to react to it by protesting the means by which such unionization is achieved without conceding that the government should be more involved in regulating the hiring process. And although employers did attempt to argue, within the labor laws, that they should be able to reject job applicants who would have divided loyalties, the Supreme Court, relying upon master/servant principles ironically forged during the era of common law formalism, rejected the employers' pleas.[98] As a result, unions have increasingly come to use employee organizers, a more effective tool for organizing workers than mere access.[99]

I have maintained in this essay that the left should not be so quick to condemn private arbitration of statutory rights for two primary reasons. First, although these processes have historically been seized by employers as an efficient, less costly alternative to litigation devoid of due process safeguards, there is nothing inherent in private arbitration to prevent making the process fairer for employees. Second, there is a substantial payoff that justifies the work required by those on the left to transform these processes for the betterment of employees. That payoff is greater access to justice. Private arbitration holds the potential to eliminate institutional barriers that block access to public courts by some employees. In conclusion, although there is much work to be done, the seeds of co-optation of the private realm by the progressive left in labor and employment law already seem to have been planted.

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97. *See generally* Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 HARV. L. REV. 1341 (1995) (arguing that the *Lechmere* decision creates a powerful incentive for increased use of "salting," compelling union organizers to become statutory employees).

98. *See* NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450 (1995). *Town & Country*, which reflects a Supreme Court tilt in favor of old common law formalist protection of the private master/servant relationship, provides more evidence of the New Private Law in the labor and employment arena.

99. *Cf. generally* Jeffrey A. Mello, *The Enemy Within: When Paid Union Organizers Become Employees*, 1996 LAB. L.J. 677.

CONCEPTUALIZING FORUM SELECTION AS A "PUBLIC GOOD": A RESPONSE TO PROFESSOR STONE

DENNIS O. LYNCH*

First, I want to remind everyone about the powerful conceptual imagery that informs the underlying structure of legal norms governing the unionized work setting. Scholarly work and case law have glorified the imagery of a "democratic" work place where unions and employers jointly shape the rules that determine the rights of labor and management through the administration of a grievance and arbitration procedure to resolve their disputes.[1] The collective agreement or "private law of the workplace" is also enhanced by the consensual "contractarian imagery" that supports the presumption of workers bargaining away their statutory right to strike in exchange for final and binding arbitration with very limited judicial review.[2]

In her earlier scholarship, Professor Stone has demonstrated the problematic character of this "imagery" of American labor law.[3] In her article in this Symposium issue,[4] she extended the logic of her argument to an expanding preemption doctrine under section 301.[5] I have made similar arguments in an

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* Dean and Professor of Law, University of Denver College of Law. B.A., Oregon, 1965; J.D., Harvard University Law School, 1969; L.L.M., Harvard University Law School 1973; J.S.D., Yale Law School, 1979.

1. Archibald Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959); Archibald Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951); *see also* Note, *Arbitration After* Communications Workers: *A Diminished Role?*, 100 HARV. L. REV. 1307, 1309 (1987).

The Court placed arbitration at the heart of collective agreements in the *Steelworkers Trilogy* of 1960. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (holding that an arbitration award should be enforced when it draws its essence from the collective bargaining agreement); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) ("[T]he grievance machinery under a collective bargaining agreement is at the very heart of a system of industrial self-government."); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (holding that when a dispute falls within an arbitration clause, its merits are irrelevant to enforcement).

2. *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-83 (when the scope of an agreement to arbitrate is ambiguous, courts should resolve doubts in favor of coverage and order the parties to arbitrate); *see* Dennis O. Lynch, *Defense, Waiver, and Arbitration Under the NRLA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237, 241 & n.18 (1989).

3. *See, e.g.*, Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992); Katherine Van Wezel Stone, *The Postwar Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

4. *See* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1049-50 (1996).

5. *Id.*

earlier article regarding the deferral to arbitration of the resolution of employees' statutory rights under the National Labor Relations Act.[6]

I will devote my brief comments to a distinct set of questions as a way of forcing us to think about our assumptions regarding the differences between public and private ordering. Are there characteristics that are necessarily inherent in the differences between public and private fora that cause us to oppose trends toward increased reliance on the New Private Law in the labor field or are we primarily reacting to our empirical observations of labor arbitration as a forum for resolving statutory rights? Would we be as concerned if employees had the option of taking their statutory claims to a public or private forum?

Focusing on these questions forces us to consider the importance of the process for resolving claims and the doctrine governing that process as a "public good." The legal doctrine governing a statutory right benefits all parties similarly situated by making the resolution of their respective rights more predictable and easier to resolve without litigation. The value of legal doctrine as a "public good" may, in some circumstances, be in tension with an employee's access to a cost effective and fair procedure for resolving a statutory claim. What we may regard as an appropriate balance between these two interests may turn on how we think about the following: (1) the methods available for the selection of arbitrators and their knowledge of legal doctrines governing statutory rights; (2) the procedures available through arbitration for obtaining information prior to a hearing; (3) employees' perceptions of the opportunities to have a voice and to be heard in a non-intimidating setting; (4) the effectiveness of the remedies available to the parties in arbitration; (5) arbitrators' views of the relative importance in resolving conflicts of the culture and specific context of a particular work setting as balanced against the public policies underlying the statutory right at issue; and (6) the potential to realize a "public good" from the private forum of arbitration. I will touch briefly on each of these considerations and then end with the question of what really bothers us about the New Private Law of statutory rights in the workplace.

The process for selecting arbitrators has a major impact on the perceived legitimacy of the arbitration forum.[7] One can argue that the type of "industry panel" that would hear Gilmer's age discrimination claim would be more sensitive to the culture and needs of stock brokerage firms than to the public policy underlying the Age Discrimination in Employment Act.[8] In addition Gilmer would not be a "repeat player" in arbitration with a long run interest in

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6. Lynch, *supra* note 2.

7. *See* G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?* 69 TEX. L. REV. 509, 534-40 (1990); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 ("[A]rbitration clauses are crucial in that they not only bar judicial review but also may allow companies to select the arbitrators . . . .").

8. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30-31 (1991) (finding that plaintiffs had failed to show that existing protections against bias in NYSE arbitration panel selection were insufficient).

making sure there was no inherent bias in the selection of industrial panels to hear disputes arising through a brokers' work and governed by the arbitration clause in the standard stock exchange registration form.[9] In the case of arbitration under collective agreements, the union is a "repeat player" just as is the employer. Both parties to the arbitration agreement are in a position to maintain information on the backgrounds, opinions, open-mindedness, and basic fairness of the arbitrators they jointly select. The union and the employer will have information on the way the arbitrators they select handle discovery requests, conduct hearings, and reason to a final decision. They can also research the way the arbitrator deals with statutory issues when they come up in the context of resolving the rights of parties under the collective agreement. The real problem with the arbitration of a statutory right under the arbitration clause of a collective agreement may be whether the union and the individual employee actually have a shared interest in the way the arbitrator resolves the statutory claim. As has been clear in some Title VII disputes in unionized work settings, the union may have a stronger interest in maintaining a good working relationship in the workplace than protecting individual statutory rights.[10]

In the non-union setting, the individual employee will not have to worry about a partial conflict of interest with the union over the precedent an arbitrator may establish under a collective agreement, but the employee will not be in as strong a position to invest in maintaining information on the biases and approaches of different arbitrators. As a "one-time player" in arbitration, the employee will not have access to the same quality of information. The employee will be forced to rely on the incentives for a specialized bar handling individual employee claims in arbitration to maintain the information they need to protect the interests of their clients in the selection of arbitrators. In addition, the arbitrator will know the individual employee is not likely to be involved in the selection of an arbitrator in the future so there is less incentive for the arbitrator to worry about the employee's reaction to the arbitrator's opinion. Again the employee must rely on the arbitrator's concern over the reaction of the employee's attorney to the arbitrator's opinion. It is clear that a specialized bar that regularly represents employees in the protection of statutory rights is critical to the fairness of a New Private Law in the labor field.

The second major criticism of arbitration involves its procedural characteristics in terms of the lack of discovery, less formal rules of evidence, and no judicial review of the arbitrator's interpretation and application of legal

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9. *Id.* at 23 (noting that Gilmer was a 62-year-old individual ADEA plaintiff).

10. *See, e.g.*, Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1974) ("Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority."); Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 n.19 (1974) (noting that "a further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented"); Vaca v. Sipes, 386 U.S. 171, 182 (1966) (characterizing subordination of individual interests under collective bargaining system as a necessity); Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965) ("If a grievance procedure cannot be made exclusive, it loses much of its desirability as a settlement.").

doctrine.[11] At the same time arbitration is what we could call a very "plastic" forum. It can become what the parties want it to be. They can shape its characteristics by contract and by mutual instructions to the arbitrator they select. The range can be anywhere from replicating the characteristics of a public court to a very relaxed and informal process. A union and employer can bargain over the procedural characteristics they prefer in arbitration with the possible exception of the degree of judicial review they prefer.[12] The individual employee signing an arbitration clause with an employer is not in the same position to bargain over the procedural issues. Once a dispute arises, the employee's attorney may not be able to negotiate over the characteristics of the arbitration forum unless the law gives the employee an election of forum option that the attorney can use as leverage in negotiation with the employer. The election of forum would give the employer an incentive to craft a cost effective and fair forum that would be attractive to the specialized plaintiff's bar as an alternative to adjudication.

An additional procedural concern is the lack of discovery in arbitration.[13] We all know that the burdens and costs of discovery can make it a negative as well as positive procedural device. A threat to drive up the costs of litigation by excessive discovery can make it impractical to litigate many employee claims for lesser amounts. We can not provide a definite answer as to whether a public or private forum will offer an employee better access to a fair disputing process at reasonable cost without knowing a good deal more about the specifics of the employee's statutory claim.

There is also the question of how the employee will relate to the structural characteristics of a court as compared to arbitration. Employees want a legitimate opportunity to tell their story, to voice the problems they have encountered as well as obtain a remedy. From an anthropological perspective, courts are a very formal and intimidating atmosphere with the judge in a robe, the raised dais, jury venire, and evidentiary constraints on the presentation of evidence. A skilled arbitrator can make the setting for the employee's testimony more relaxed and less formal with everyone at a table together and fewer objections interrupting the presentation of testimony. An arbitrator's skill and knowledge of the law will depend on training and experience, but the point is we can not assume an arbitrator selected by the parties after a review of the arbitrator's background will be less skilled and knowledgeable than a judge. As university professors, we may be more effective by focusing on how to

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11. *See, e.g.*, Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591 (1995).

12. I have never seen a collective bargaining agreement that defines the scope of judicial review more broadly than the *Steelworkers Trilogy*. Federal courts, however, have developed a limited public policy exception to judicial deference to arbitration. *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987) (limiting a court's ability to refuse to enforce an arbitrator's interpretation of a collective agreement "to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well-defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests'") (quoting W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983)).

13. *See* Bales, *supra* note 11.

educate better arbitrators regarding the issues surrounding employees' statutory rights than to assume that judges selected through a political process are preferable.

The remedies available in arbitration are an enormous problem.[14] As Professor Stone noted, arbitrators feel very constrained regarding remedies.[15] They lack the contempt power of the courts making provisional remedies and certain other forms of equitable relief difficult to administer. Indeed the confused body of law surrounding the jurisdiction of federal courts to issue an order to maintain the status quo pending arbitration of a dispute aptly illustrates this problem.[16] The real question is whether there is a creative way to address the problem of remedies while maintaining the integrity of arbitration. For example, expedited arbitration with court enforcement of the arbitrator's award if needed could be used in some circumstances.

The mindset of arbitrators can also present an issue. An arbitrator who works regularly in a specific type of industry will become schooled in the culture of the workplace in that industry. That can be a plus or a minus depending on the nature of the dispute. Of course, the alternative may be the adjudication of an employee's rights before a judge who has no knowledge of the workplace in question. I mentioned earlier, the possible negative aspects of the mindset of an arbitrator who was selected by the parties and who knows that the parties may not select her again if they are not satisfied with the handling of the case and the arbitrator's opinion. An arbitrator does look at a case through different lenses than a judge who is selected through a process totally independent of the case in question and who may or may not stand for retention through a political process. My point is that the judicial mindset may not always be the preferred one. We ought to at least ask questions about differences in the mindset of the adjudicators in the two fora in a thoughtful manner, informed by more empirical observation.

I started with the value of judicial opinions as a "public good." The visibility of judicial opinions and the public debate surrounding legislative correc-

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14. *See id.*; *see also* Stone, *supra* note 4, at 1039-41.

15. *Stone, supra* note 4, at 1047 n.197.

16. *See, e.g.*, Niagra Hooker Employees Union v. Occidental Chem. Corp., 935 F.2d 1370 (2d Cir. 1991); IBEW Local 733 v. Ingalls Shipbuilding Div., 906 F.2d 149 (5th Cir. 1990) (both holding that an employer's prior agreement to maintain status quo pending arbitration as sufficient but not necessary for a grant of injunctive relief); United Steelworkers v. Fort Pitt Steel Mfg., 598 F.2d 1273, 1278-79 (3d Cir. 1979) (endorsing three elements to consider in determining NLA preclusion of injunction: (1) whether the dispute is subject to arbitration, (2) whether the party is interfering or frustrating arbitral process, and (3) the propriety of an injunction over "ordinary principles of equity"); Lever Bros. Co. v. Chemical Wkrs. Local 217, 554 F.2d 115 (4th Cir. 1976) (stating that the purpose of the anti-injunction exception was to ensure that arbitration would not be merely a "hollow formality"); *see also* International Union, United Automobile, Aerospace and Agricultural Implement Workers of American, UAW v. Textron Lycoming Reciprocating Engine Div., 919 F. Supp. 783 (D. Pa. 1996) (applying "irreparable harm" test). *But cf.* Consolidated Rail Corp. v. Brotherhood of Maintenance of Way Employees, 847 F. Supp. 1294 (E.D. Pa. 1994); Complete Auto Transit, Inc. v. Chauffeurs, Teamsters, and Helpers Local Union No. 414, 839 F. Supp 1339 (N.D. Ind. 1993); Teamsters Assoc. v. Japanese Edu. Inst., 724 F. Supp. 188 (S.D.N.Y. 1989); *see also* Chicago Typographical Union No. 16 v. Chicago Newspaper Publishers Ass'n, 620 F.2d 602 (7th Cir. 1980) (defining Seventh Circuit test as whether arbitral remedies would be "wholly inadequate" to redress a contractual violation).

tions to unpopular judicial opinions is an important element of our democratic process. Whether similar debate can be generated by the repetitive arbitration of similar disputes is an open issue. Since the concept of precedent is deeply embedded in our jurisprudence, we can expect private services to develop and to reduce the cost of obtaining arbitrators' opinions. New technologies should make this even easier. Parties specializing in employment law will read and evaluate the opinions and will pursue ways to change an evolving doctrine in arbitration that they do not like. In collective bargaining, unions and employers regularly bargain around the opinions of arbitrators. They also use public policy arguments to increase the scope of judicial review of arbitrators' opinions.[17] The relationship between arbitrators and courts need not be viewed as fixed in stone. It can be adjusted to make both work together to better serve the ends of justice.

In reality I am much more skeptical of the use of arbitration to resolve statutory claims than these comments suggest. I do believe, however, that we would benefit from a much more serious comparative examination of institutional fora for settling disputes. Each will have their own particular characteristics that yield benefits and detriments. Their positive and negative qualities may vary depending on the nature of the claim underlying the dispute. One way to learn more is to encourage doctrines that leave parties with a choice of fora and to study the conflicts they encounter over the choice of forum.

We are worried because we see employers beginning to force a choice on employees through mandatory arbitration clauses. Before these mandatory clauses, employees could have voluntarily agreed to arbitrate in lieu of going to court, but there was not much incentive for the parties to invest in the development of specialized arbitration panels for statutory disputes. Can we develop an improved arbitration option while maintaining the right of employees to elect their preferred forum? We would certainly learn more about the comparative qualities of different fora for resolving similar conflicts.

17. *Misco*, 484 U.S. at 43.

PUBLIC GOOD AND PRIVATE MAGIC IN THE LAW OF LAND TRUSTS AND CONSERVATION EASEMENTS: A HAPPY PRESENT AND A TROUBLED FUTURE

FEDERICO CHEEVER*

I. INTRODUCTION

In October 1995, I joined about a thousand other people—predominately young and professional, in shorts and pile jackets—in an ornate auditorium on the California coast.[1] We listened politely as politicians—aging, in suits and ties, identifying themselves with "the radical middle"—praised the achievements of the "land trust movement." The numbers, enthusiasm, and experience of my companions provided much better evidence of the achievements of that movement than the politicians could. It is, currently, the most active and forward-looking element in the national effort for environmental preservation. The laws that provide the framework for the national environmental regulatory structure remain in a perilous and apparently perpetual reauthorization holding pattern in Congress.[2] State legislatures appear unwilling to undertake environmental protection where the federal government no longer will. But someone establishes a new "private" land trust, committed to scenic, historic, or ecological preservation on an average of once a week.[3]

The land trust movement furthers the public good[4] in ways that other

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* Assistant Professor of Law, University of Denver College of Law. B.A., M.A., Stanford University, 1981; J.D., University of California at Los Angeles School of Law, 1986. I would like to thank the organizers and participants in the *Denver University Law Review* Symposium on the New Private Law, particularly Sue Chrisman and Tracy Craige, without whom this essay would have been impossible, my three able research assistants Timothy Gordon, Dirk Holt, and Greg Johnson, William Silberstein and his colleagues at Isaacson, Rosenbaum & Levy, P.C. (Colorado's preeminent land trust lawyers), Jake Barnes, Alan Chen, Roberto Corrada, Nancy Ehrenreich, Martha Ertman, Cecilia Espenoza, Julie Nice, Rob Smith, Celia Taylor, Richard Collins, Daniel Farber, Clayton Gillette, Gary Peller, Katherine Van Wezel Stone, Annette Stroud, the participants in my environmental law seminar in the fall of 1995, many, many others, and of course, Mary McNeil Cheever and Elizabeth Oakley Cheever.

1. Land Trust Alliance National Rally '95, Asilomar Conference Center, Pacific Grove California, Oct. 15-18, 1995.

2. 25 ENVTL. L. REP. (Envtl. L. Inst.) 10104 (discussing Congress's attempt to reauthorize the Endangered Species Act); 25 ENVTL. L. REP. (Envtl. L. Inst.) 10089 (discussing Congress's failure to reauthorize the Resource Conservation and Recovery Act); 24 ENVTL. L. REP. (Envtl. L. Inst.) 10262 (discussing Congress's attempt to reauthorize CERCLA); 24 ENVTL. L. REP. (Envtl. L. Inst.) 10489 (discussing Congress's failure to reauthorize the Clean Water Act).

3. LAND TRUST ALLIANCE, 1995 NATIONAL DIRECTORY OF LAND TRUSTS at vi (1995) [hereinafter DIRECTORY] (Land Trust Alliance 1994 Land Trust Survey results).

4. For purposes of this essay, I assume that piecemeal preservation of open space by private transaction is in the public interest. Some reviewers of this essay questioned the public value of land trusts because the land trust preservation model does not require comprehensive planning. In

more "public" aspects of the environmental protection movement cannot because it possesses a "private magic." I use the word "magic" for its two meanings: "the art of producing illusions . . . by the use of sleight of hand" and "the art of producing a desired effect or result through . . . techniques that presumably assure human control over supernatural agencies."[5] I leave to the reader whether the "private magic" of land trusts and conservation easements is simply legal sleight of hand or the "operation of some occult controlling principle of nature."[6]

The magic of the land trust movement has something to do with its apparent contradictions. The movement is "radical" because it regularly endeavors to do what traditional environmental protection rarely dares to do—"lock-up" private land. Through donation and purchase, land trusts transform the property rights associated with the land they protect, prohibiting or severely limiting, in perpetuity, the possibility of environmentally damaging development. Many of my companions in California had experience in more traditional and "public" elements of the environmental movement. In land trusts and conservation easements, they have found powerful tools to pursue goals they have pursued before in other ways. At the same time, the movement achieves its goals primarily through private, voluntary land transactions, among the most ancient and settled of all means of legal interaction and among the least "public" or controversial. This draws to its ranks activists distrustful of government,[7] and politicians fond of words like "middle."

At present, the land trust movement seems a successful combination of public and private. Its apparent success provides a useful model for achieving legislated goals in a privatized world. However, some dark omens cloud the future of the movement and, absent some changes in the legal structures that support it, time may erode the happy congruity between public and private at the cost of the environment and the public good. The legal community associated with the land trust movement should address these potential problems. However, in doing so, we must be careful to avoid destroying the private magic that gives the movement its special power.

Land trusts do many things: they purchase land outright; they purchase land for sale to government agencies; they participate in the development and application of every conceivable manner of land use restriction, public or private. I will focus my attention on one specific type of transaction which, I believe, embodies more than any other the movement's happy present and potentially troubled future: acquisition and maintenance of conservation easements by private land trusts. First, I will describe some general legal aspects

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fact, land trust land purchases can compliment comprehensive land use planning. The Internal Revenue Code governing the income tax deductibility of donations to land trusts require that "the preservation of open space be pursuant to a clearly delineated Federal, state or local governmental conservation policy." I.R.C. § 170(h)(4)(A)(iii) (1994). The regulations interpreting that provision explicitly govern designations of scenic areas. Treas. Reg. § 1.170A-14(d) (1994).

5. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1155 (2d ed. 1983).

6. 6 OXFORD ENGLISH DICTIONARY 24 (1933).

7. Telephone Interview with Reeves Brown, Colorado Cattleman's Land Trust (May 24, 1996).

of both conservation easements and the land trusts which employ them.[8] I will then use a single hypothetical conservation easement transaction to demonstrate the complex and productive interrelationship between public goals and private.[9] I will use the same hypothetical transaction to identify some of the dangers the future may hold.[10] Finally, I will ponder briefly possible responses to these dangers and how they might affect the private magic of the land trust movement.[11]

I should say, at the outset, that I do not believe that the legal problems the future holds for land trusts are insurmountable. My companions in California are not wasting their time. However, the positive politics of the movement serve to obscure problems, which, if left unaddressed, may lead to dire results. Those who have ruminated about the legal ramifications of the land trust movement in the past have been concerned about the movement's place in the law of property,[12] the tax benefits it can provide,[13] and its potential positive effects on American farmers.[14] I am an environmental lawyer concerned about biological diversity. I *want* land trusts and conservation easements to function and to preserve environmental values for "biologically significant"[15] periods of time. Perversely, this may make my characterizations of the problems they face more alarming than others have been.

II. THE LAND TRUST/CONSERVATION EASEMENT BOOM

A. *What Is a Conservation Easement?*

The land trusts represented at the California conference sometimes preserve land by buying it or receiving it as a donation, transforming property relations only by transferring the "bundle of rights" we understand as land ownership[16] into the hands of an organization committed to biological or aesthetic preservation.[17] However, their favored tool is not acquisition of the fee, but instead, the "conservation easement."

By granting a conservation easement, the owner of land splits that bundle of rights, reserving the rights to engage in certain activities (for example:

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8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Part IV.
11. *See infra* Part V.
12. *See, e.g.*, Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2 (1989); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984).
13. *See, e.g.*, Mathew J. Keifer, *Creating Additional Tax Benefits from Qualified Conservation Easements*, 15 REAL EST. L.J. 136 (1986).
14. *See, e.g.*, Vivian Quinn, *Preserving Farmland with Conservation Easements: Public Benefit or Burden?*, 1992/1993 ANN. SURV. AM. L. 235 (1994).
15. *See generally* KAI N. LEE, COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT (1993).
16. For an excellent and recent treatment of this concept, see J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996); Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994).
17. *See infra* notes 47-61 and accompanying text.

hunting, farming, building a cabin) to the grantor—holder of the underlying possessory interest—and ceding the right to prevent the grantor or anyone else from engaging in another range of activities (for example: building casinos, housing developments, clearcutting timber, or filling swamps) to another party, the grantee. A conservation easement may prohibit all ground disturbing activity on a piece of wild land or prohibit only activities that will interfere with particular things (e.g., elk calving). Conservation easements may preserve land as farmland or preserve a "working forest" by allowing only certain types and a certain frequency of logging. The terms of the restrictions are usually set out in detail in the conservation easement itself.[18]

1. Not an Easement at All

Conservation easements are statutory creations. They do not fit easily into any common law category for real property interests. They are creatures of legislation and recent legislation at that. The Colorado Conservation Easement Statute was adopted in 1976,[19] five years before the National Conference of Commissioners on Uniform State Laws approved the current Uniform Conservation Easement Act. Although almost all states now have some form of conservation easement or restriction legislation, the oldest identifiable "conservation easement" statutes were adopted in Massachusetts in 1956[20] and California in 1959.[21] Significantly, both statutes originally only authorized *government* entities to hold the created interests.[22] Modern conservation easement statutes allow private land trusts and other organizations to hold the easements.[23]

A conservation easement is not an "easement" in the traditional sense.[24] Before the statutory coming of conservation easements, the common law system of servitudes tolerated both negative easements and easements in gross, but under limited circumstances.[25] These circumstances did not include what

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18. The Land Trust Alliance Model Conservation Easement uses a tripartite structure identifying overarching "conservation values" the easement should protect, specific reserved rights identifying what activities the holder of the underlying fee interest may engage in, and specific "prohibited uses" identifying activities that the fee holder may not engage in. JANET DIEHL & THOMAS BARRETT, THE CONSERVATION EASEMENT HANDBOOK 147-65 (1988). Iowa requires that the conservation easement "clearly state its extent and purpose." IOWA CODE § 457A.4 (1993).

19. Act approved May 13, 1976, 1976 Colo. Sess. Laws 750-752 (codified as amended at COLO. REV. STAT. §§ 38-30.5-101 to -111 (1994)); *see* Comment, *Open Space Procurement Under Colorado's Scenic Easement Law*, 60 U. COLO. L. REV. 383 (1989).

20. 1956 Mass. Acts, ch. 631; *see* Comment, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638, 642 (1960) [hereinafter *Preservation*].

21. The Scenic Easement Deed Act of 1959, CAL. GOV'T CODE §§ 6950-6954 (1959). Some argue that California passed the first open space easement legislation in the United States. THOMAS S. BARRETT & PUTNAM LIVERMORE, THE CONSERVATION EASEMENT IN CALIFORNIA 34 (1983).

22. *See Preservation*, *supra* note 20, at 638.

23. *See infra* notes 47-61 and accompanying text.

24. Korngold, *supra* note 12, at 477-78.

25. The common law preferred neither easements in gross nor negative easements. *See* Weil v. Hill, 69 So. 438, 440 (Ala. 1915) ("[T]he court will not presume that [the easement] was intended to be in gross, or personal to the grantor, if it can fairly be construed as appurtenant to his land . . . ."); Wing v. Forest Lawn Cemetery Ass'n, 101 P.2d 1099, 1103 (Cal. 1940) ("[A]ny provisions of an instrument creating or claimed to create [a negative easement] will be strictly con-

we now call conservation easements. Traditionally, negative easements in the United States were limited to easements for light, air, support, or the flow of artificial streams.[26] A negative easement protected the interests of one property owner by restricting the owner of nearby property from exercising an otherwise valid property right.[27] On the other hand, by definition, an easement in gross creates a personal right in an individual, a right unassociated with ownership of land.[28] Easements in gross were generally restricted to commercial affirmative functions like the right to erect billboards or to maintain sewer lines and railway corridors.[29] Negative easements were by their nature appurtenant.[30] Easements in gross were by their nature affirmative. Negative easements in gross were beyond the contemplation of the traditional easement categories.[31]

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strued, any doubt being resolved in favor of the free use of the land."); Atlantic Mills v. New York Cent. R. Co., 223 N.Y.S. 206, 211 (App. Div. 1927) ("It is a well-established principle of law that an easement in gross will not be presumed, where it can fairly be construed to be appurtenant to land."); McWhorter v. City of Jacksonville, 694 S.W.2d 182, 184 (Tex. Ct. App. 1985) ("It is the rule that an easement in gross is not favored, and an easement is never presumed to be in gross, or a personal right, when it can be fairly construed to be appurtenant or attached to some other estate."); Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co., 173 P. 508, 511 (Wash. 1918) ("It is well settled in law that easements in gross are not favored; and a very strong presumption exists in favor of construing easements as appurtenant.").

26. JESSE DUKEMINIER & JAMES KRIER, PROPERTY 851 (3d ed. 1993).

27. Clements v. Taylor, 184 S.W.2d 485, 487-88 (Tex. Ct. App. 1944). *Accord* Uihlein v. Matthews, 64 N.E. 792, 793 (N.Y. 1902).

28. *See* Ratino v. Hart, 424 S.E.2d 753, 756 (W.Va. 1992) ("An easement in gross is not appurtenant to any estate in land or does not belong to any person by virtue of ownership of estate in other land but is mere personal interest in or right to use land of another; it is purely personal . . . ."); *see also* Stiefel v. Lindermann, 638 A.2d 642, 647 n.4 (Conn. App. Ct. 1994) ("An easement in gross belongs to the owner of it apart from his ownership or possession of any specific land and, in contrast to an easement appurtenant, its ownership is personal to its owners.").

29. Alan D. Hegi, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109 (1986); Korngold, *supra* note 12.

30. *See* Miller v. Babb, 263 S.W. 253, 254 (Tex. Ct. App. 1924).

31. The comments accompanying the Uniform Conservation Easement Act contain a justification for the use of the term "conservation easement":

> The interests protected by the Act are termed "easements." The terminology reflects a rejection of two alternatives suggested in existing state acts dealing with non-possessory conservation and preservation interests. The first removes the common law disabilities associated with covenants, real and equitable servitudes in addition to those associated with easements. . . . The second approach seeks to create a novel additional interest which, although unknown to the common law, is, in some ill-defined sense, a statutorily modified amalgam of the three traditional common law interests.
>
> The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine.

UNIF. CONSERV. EASEMENT ACT § 1 cmt. (1981). While defensible in practical terms, this justification does not make much doctrinal sense. In an era in which the majority of newly constructed housing is subject to restrictive covenants, it is hard to assert that "an easement is the basic [one size fits all] less-than-fee interest." A conservation easement is in fact the "novel additional interest" which the drafters of the Uniform law fear will create "severe confusion." *See* Korngold, *supra* note 12, at 439.

2. Use Restrictions on a Land Use Restriction

State conservation easement statutes generally limit the purposes for which such novel interests may be created. The Uniform Conservation Easement Act, approved in 1981 and adopted in sixteen states[32] and the District of Columbia,[33] provides an example in its definition of "conservation easement":

> A nonpossessory interest of a holder in real property imposing limitations or affirmative obligations *the purposes of which include* retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.[34]

The "purposes of which include" phrasing in the Uniform Act is a relatively modest restriction on the intent of the parties at the time of the transaction. California law provides that a "'conservation easement' means any limitation in a deed, will or other instrument in the form of an easement . . . binding upon successive owners . . . *the purpose of which is* to retain land predominantly in its natural, scenic, historic, agricultural, forested, or open space condition."[35] The laws of Delaware, Hawaii, and New York contain similar unqualified "purpose" requirements.[36] On the other hand, the laws of Colorado, Massachusetts, and New Jersey require only that the restriction be "appropriate" for maintaining a legislative purpose.[37]

In addition to purpose restrictions, some states list specific acts that the grantor may prohibit.[38] Delaware not only enumerates what may be prohibited, it specifically provides what may not be prohibited: the easement cannot prohibit the fee holder from allowing hunting, fishing, or other recreational activities on the land.[39] The Kentucky statute includes language forbidding certain restrictions affecting mining operations.[40]

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32. ALASKA STAT. §§ 34.17.010-.060 (1989); ARIZ. REV. STAT. ANN. §§ 33-271 to -276 (1985); GA. CODE ANN. §§ 44-10-1 to -8 (Michie 1992); IDAHO CODE §§ 55-2101 to -2109 (1988); IND. CODE ANN. §§ 32-5-2.6-1 to -7 (West 1984); KAN. STAT. ANN. §§ 58-3810 to -3817 (1992); KY. REV. STAT. ANN. §§ 382.800-.860 (Baldwin 1988); ME. REV. STAT. ANN. tit. 33, §§ 476 to 479-B (West 1985); MINN. STAT. ANN. §§ 84C.01-.05 (West 1985); MISS. CODE ANN. §§ 89-19-1 to -15 (1986); NEV. REV. STAT. §§ 111.390-.400 (1983); N.M. STAT. ANN. §§ 47-12-1 to -6 (Michie 1991); S.C. CODE ANN. §§ 27-8-10 to -80 (Law. Co-op. 1991); TEX. NAT. RES. CODE ANN. §§ 183.001-.005 (West 1983); VA. CODE ANN. 1950, §§ 10.1-1009 to -1016 (Michie 1988); WIS. STAT. ANN. § 700.40 (West 1981).

33. D.C. CODE ANN. §§ 45-2601 to -2605 (1986).

34. UNIF. CONSERV. EASEMENT ACT § 1(1) (1981) (emphasis added).

35. CAL. CIV. CODE § 815.1 (1988) (emphasis added).

36. DEL. CODE ANN. tit. 7, § 6901(a) (1991); HAW. REV. STAT. § 198-1 (1989); N.Y. ENVTL. CONSERV. LAW § 49-0303(1) (McKinney 1989).

37. COLO. REV. STAT. § 38-30.5-102 (West 1990); MASS. GEN. L. ch. 184, § 31 (1995); N.J. REV. STAT. ANN. § 13:8B-2(b) (West 1991).

38. DEL. CODE ANN. tit. 7, § 6901(a) (1991) (providing a non-exclusive list). *Accord* FLA. STAT. ch. 704.06 (1988) (providing an exclusive list); MONT. CODE ANN. § 76-6-203 (1995) (providing an exclusive list).

39. DEL. CODE ANN. tit. 7, § 6901(c).

40. Specifically, the Kentucky statute prohibits the transfer of a conservation easement on property in which there are outstanding subsurface rights, unless written consent is acquired from

To take advantage of federal legislation allowing a charitable income tax deduction for "qualified conservation contributions,"[41] discussed below,[42] most conservation easements are created "in perpetuity." Some states require perpetual conservation easements.[43] Most state conservation easement statutes provide that conservation easements are to be unlimited in duration unless otherwise stated in the instrument itself.[44] Kansas, on the other hand, requires that a conservation easement be limited to the lifetime of the grantor unless otherwise stated in the conservation easement.[45] Many statutes specifically provide that conservation easements can be released or modified like any other easement.[46]

B. *What Is a Land Trust?*

A land trust is either a governmental entity or a private non-profit corporation, association, or trust committed to biological, historical, or aesthetic preservation. Not all private land trusts hold conservation easements, but most

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the owners of the subsurface rights first. KY. REV. STAT. ANN. § 382.850(1) (Baldwin 1988). Furthermore, the easement cannot interfere with coal mining operations on adjacent or surrounding properties. KY. REV. STAT. ANN. § 382.850(2).

41. 26 U.S.C. § 170(h) (1994).

42. *See infra* notes 68-86 and accompanying text.

43. California and Hawaii both require that conservation easements be perpetual. CAL. CIV. CODE § 815.2(b) (West 1992); HAW. REV. STAT. § 198-2(b).

44. *See, e.g.*, ALASKA STAT. § 34.17.010(c); ARIZ. REV. STAT. ANN. § 33-272(C); ARK. CODE ANN. § 15-20-406 (Michie 1994); COLO. REV. STAT. § 38-30.5-103(3); IDAHO CODE § 55-2102(3); TEX. NAT. RES. CODE ANN. § 183.002(c).

45. KAN. STAT. ANN. § 58-3811(d). Apparently, the only way Kansans could get a conservation easement bill passed was to include this concession supported by various interests groups. However, Kansas Land Trust, the lone listed land trust operating in Kansas, will only accept conservation easements if they are perpetual. Telephone Interview with Joyce A. Wolf, Executive Director, Kansas Land Trust (Apr. 19, 1996).

46. *See, e.g.*, ARK. CODE ANN. § 15-20-404; GA. CODE ANN. § 44-10-3(a); IDAHO CODE § 55-2102(1); IND. CODE ANN. § 32-5-5.6-2(a); KAN. STAT. ANN. § 58-3811(b); ME. REV. STAT. ANN. tit. 33, § 477(1); MINN. STAT. § 84C.02(a); NEV. REV. STAT. § 111.420(1); N.M. STAT. ANN. § 47-12-3; S.C. CODE ANN. § 27-8-30; S.D. CODIFIED LAWS ANN. § 1-19B-57; TEX. NAT. RES. CODE ANN. § 183.002(a); VA. CODE ANN. § 10.1-1014; W. VA. CODE § 20-12-4(a) (1995); WIS. STAT. ANN. § 700.40(2). In addition to release, Colorado allows a conservation easement to be terminated, extinguished, or abandoned by merger with the fee interest. COLO. REV. STAT. § 38-30.5-107. In Iowa, a conservation easement may be released by the holder or changed circumstances can render an easement no longer beneficial to the public. IOWA CODE § 457A.2(1) (1996). In Kansas, the grantor is permitted to have the easement revoked at her request. KAN. STAT. ANN. § 58-3811(d). In Maine, a change in circumstances may justify a termination of the conservation easement. ME. REV. STAT. ANN. tit. 33, § 477(3)(B). Montana allows open-space land to be converted under certain circumstances, but requires that it be replaced with other property. MONT. CODE ANN. § 76-6-107 (1995). Nebraska allows release of a conservation easement with the approval of the governing body that originally approved the conservation easement. NEB. REV. STAT. § 76-2,113 (1990). In New Jersey, the holder may release a conservation easement, if allowed by the terms of the easement, only after a public hearing. N.J. REV. STAT. § 13:8B-5. New York allows conservation easements to be released if allowed by the instrument creating the easement and extinguished if a court finds it to be of no actual benefit to the person seeking enforcement. N.Y. ENVTL. CONSERV. LAW § 49-0307 (McKinney 1989); N.Y. REAL PROP. ACTS. LAW § 1951. In Rhode Island, a holder may release a conservation easement subject to the terms of the easement itself. R.I. GEN. LAWS § 34-39-5 (1995). Utah also allows for termination by release, abandonment, merger, nonrenewal, specific conditions set out in the easement, or any other lawful manner. UTAH CODE ANN. § 57-18-5 (1994). Mississippi, on the other hand, specifies that merger does not occur if the fee holder is also the easement holder. MISS. CODE ANN. § 89-19-5.

do.[47] Accordingly, most private land trusts must conform to the requirements for easement holders imposed by the conservation easement statutes in the states in which they operate. Two sets of legal rules, one state and one federal, define the characteristics to which private land trusts conform.

First, state conservation easement statutes, discussed above, generally allow only two types of entities to hold development rights for someone else's land for purposes of preservation. Again, the Uniform Conservation Easement Act provides an example:

> (2) "Holder" [of a Conservation Easement] means:
>
> (i) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or
>
> (ii) *a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property . . . .*[48]

The states that have adopted versions of this uniform law all contain some similar limitation on potential private "holders" of conservation easements. Alaska and Virginia explicitly require that private "holders" be non-profit entities for purposes of federal taxation.[49]

California, although not a Uniform Act state, places similar limitations on potential easement holders.[50] Colorado, also not a Uniform Act state, requires "a charitable organization" exempt under section 501(c)(3) of the "Internal Revenue Code of 1954."[51] Massachusetts is more restrictive still, requiring the purposes of the "charitable corporation or trust" to conform with the specific purposes of the type of restriction: conservation, agricultural preservation, watershed preservation, or affordable housing.[52]

Federal regulations provide the remaining characteristics of private land trusts. Because much of the grantors' impetus for land trust preservation comes from the charitable federal income tax deductions allowed for "qualified conservation contributions" to "qualified organizations,"[53] private land trusts must generally be "qualified organizations." Internal Revenue Service Code § 170(h)(3) defines qualified organizations to include most § 501(c)(3) charitable organizations that receive substantial public support and almost any governmental entity.[54] Private land trusts must satisfy the requirements for private "qualified" organizations. Establishing necessary tax-exempt status requires some specific structure, filing, and reporting.[55] To maintain tax-exempt

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47. DIRECTORY, *supra* note 3, at vii (1995) (Land Trust Alliance 1994 survey indicated that 54% of land trusts use donated conservation easements and 13% purchase easements).

48. UNIF. CONSERV. EASEMENT ACT § 1(2) (1981) (emphasis added).

49. ARK. CODE ANN. § 34.17.060(2)(3); VA. CODE ANN. § 10.1-1009.

50. CAL. CIV. CODE § 815.3(a),

51. COLO. REV. STAT. § 38-30.5-104(2).

52. MASS. GEN. L. ch. 184 § 31-32.

53. I.R.C. § 170(h) (1995).

54. I.R.C. § 170(h)(3) (1995). The regulations interpreting this provision also require that a "qualified organization" have "a commitment to protect the conservation purposes of the donation and have the resources to enforce the restriction." Treas. Reg. § 1.170A-14(c)(1) (1994).

55. LAND TRUST ALLIANCE, THE STANDARDS AND PRACTICES GUIDEBOOK, AN OPERATING MANUAL FOR LAND TRUSTS, Standard 4.

status, private land trusts must avoid any action which inures to the benefit of any private shareholder or individual, avoid political campaign activity, not engage in "substantial" lobbying, and meet the "public support test" (which requires that a substantial part of the organization's support comes from the general public).[56]

While significant, these two sets of rules do not dictate the specific character of individual private land trusts. Land trusts range in size from the relatively vast Nature Conservancy[57] and Trust for Public Lands,[58] to extremely small organizations with minimal budgets and no paid staff. Land trusts may operate on a national scale or be entirely local. They may endeavor to protect a range of land types and uses, or they may be interest-specific, like the Colorado Cattlemen's Agricultural Land Trust.

Private land trusts are older than conservation easements, but not much older. Founded in 1891, Massachusetts' Trustees of Reservations is probably the oldest private land trust in the United States.[59] Before 1950 there were less than forty land trusts in the United States.[60] There are now 1,095 private land trusts in the country.[61]

C. *The Boom*

1. Advantages of Land Trust/Conservation Easement Preservation

The enthusiasm for the land trust movement extends beyond the politicians at the California conference. With the exception of a few dissenting voices,[62] it is almost universal. Environmental preservation by land trust offers significant advantages over environmental protection through direct public regulation.

First, environmental preservation by land trusts encourages the creation of a more site-specific environmental protection regime. While regulation lends itself to categorical protection of all wetlands (however defined) from all

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56. *Id.* at 4-8, 4-9.

57. The Nature Conservancy has offices in every state and some foreign countries. For a map of locations, see http://www:tnc.org/infield/map.html.

58. Twenty-two offices at last count; *see* http://www.igc.apc.org/tpl.

59. Randee G. Fenner, *Land Trusts: An Alternative Method of Preserving Open Space*, 33 VAND. L. REV. 1039, 1042 (1980).

60. Dana & Ramsey, *supra* note 12, at 5.

61. DIRECTORY, *supra* note 3, at vi.

62. Some critics charge that larger land trusts, such as The Nature Conservancy, "exist to remove land or land rights from the ordinary marketplace." Tom Holt, *Q: Are Nonprofit Land Trusts Taking Advantage of the Public's Trust?*, WASH. TIMES, Feb. 5, 1996, at 22. Taking land from the marketplace "removes the land from local tax roles and limits job growth." Malcolm Howard, *U.S.-Environment: Land Trusts Protect, Threaten Country Lifestyles*, Inter Press Service, Feb. 8, 1996, *available in* LEXIS, News library, Current file. Groups such as The Nature Conservancy are also able to stop larger housing and industrial development by acquiring development rights in strategic areas. Holt, *supra*, at 22. Property rights advocates also criticize The Nature Conservancy for buying land or land rights and immediately selling them to government agencies for a profit. Aside from being labeled as "profit-motivated," The Nature Conservancy is also chastised for avoiding accountability. *Id.* The stated purpose for this practice is that the government cannot operate as freely as a land trust can, so the government uses the land trust as a "middleman." *Id.*

significant disturbance (however defined), conservation easements and land trust acquisition lend themselves to protection of particular wetlands with particular boundaries in particular places. Because every wetland—like every other piece of land—is different, a more site-specific regulatory regime can, in theory, do a better job of protection.

Second, and more intriguing, for a law professor at least, is the capacity of conservation easements to alter the nature of land tenure itself. During the 1970s and 1980s, protection of the environment affected the nature of land tenure through public regulation. The rights associated with uses of land remained conceptually unchanged, but were increasingly subject to "burdens" imposed by local, state, and federal regulation for environmental protection. A land owner remained sole owner of her land, but could not fill wetlands upon the land, destroy endangered species' nesting habitat, emit large quantities of noxious air pollutants, or build more than a certain number of houses per acre. The various elements of this process of land regulation have been discussed at length elsewhere.

The conceptual structure of burdensome regulation upon property rights has contributed to the current backlash against environmental protection because it fosters a sense of injury among landowners. Accustomed to our conceptual structure of legal rights, they perceive that they have "rights" that they cannot exercise.

Conservation easements avoid this by creating property rights in conservation. The holders of conservation easements possess, to a greater or lesser degree, the right to prevent development on the land subject to the easement. They may prevent, just as a regulator might, such environmentally harmful activities as: the filling of wetlands, destruction of species' nesting habitat, construction of factories that might emit noxious air pollutants, and construction of additional structures. Legally, however, we do not perceive this protection as an imposition but rather an exercise of rights. The fee holder does not have rights she cannot exercise; those rights have been granted away with the conservation easement.

> Property . . . includes a normative "deep structure" that may be of use in an environmental ethic. The norms that lurk in property go beyond the wonderous power of exclusion that so awed Blackstone in the case of individual property. They include as well the qualities of restraint and responsibility that characterize common or shared property.[63]

The express mutual interests in the same land created by severing the rights associated with a conservation easement from the rights associated with the underlying possessory interest crystalize these often hidden norms of responsibility and restraint in our property system.

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63. Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1, 28 (1994).

2. Growth in Land Trust/Conservation Easement Preservation

According to a 1994 survey conducted by the Land Trust Alliance (LTA), there are now more than 1,095 private land trusts in the United States, an increase of 23% over four years.[64] These trusts have protected roughly 4,029,000 acres of land. Of that acreage, 990,000 acres were acquired and then transferred to a third party (generally a government agency), 535,000 acres are owned outright by land trusts, and 740,000 acres are protected by conservation easements held by land trusts. The rest of the four million acres are protected in ways unidentified by the LTA survey.[65]

These numbers may seem small compared to, say, the 187 million acres of the National Forest System,[66] until one realizes that this is all land someone felt was worth protecting from development and made the effort to protect. Therefore, unlike the National Forests, National Parks, and National Wildlife Refuges, it includes little or no land above 9,000 feet, north of the 60th parallel, under glaciers or rock slides, or with slopes that cannot be negotiated without ropes. Private land trusts also tend to be concentrated in the more populous parts of the country: New England (36%), the Mid-Atlantic region (18%), and the West Coast (16%).[67] Most significantly, the rapid growth of land trusts suggests that the acreage of protected land will multiply in years to come.

III. A "PRIVATE" TRANSACTION

The mixture of public and private in a land trust conservation easement transaction stands out more clearly when presented in a factual context. While I could make the points below using a variety of specific transactions which have taken place in Colorado in recent years, it is simpler to use a hypothetical transaction that draws together the elements of many transactions in a simplified form.

A. *The First Generation*

Laura Deadlock wakes up one morning and realizes that she is not as young as she used to be. Seventy years of raising cattle on the Deadlock ranch and fighting with the federal government about public land grazing have taken their toll. She loves her family and hopes they will stay in the ranching business. She loves her Colorado mountain ranch and the idea of seeing it carpeted with condominiums fills her with dismay. She owns a thousand acres, worth $1 million[68] in a real estate market inflated by developers and perhaps half

64. DIRECTORY, *supra* note 3, at vi.

65. *Id.*

66. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, LAND AREAS OF THE NATIONAL FOREST SYSTEM 1 (1996).

67. *Id.*

68. This figure is probably unrealistically *low*. Telephone Interview with William Silberstein, Isaacson, Rosenbaum & Levy, P.C. (June 27, 1996).

that much ($500,000) as a going concern. On a clear night, and there are many, she can see the lights of the nearby ski area.

Laura has an honest son, Martin, who works at a university a few hours drive away. She would be happy to leave him the ranch and he would be happy to have it. However, Laura is aware of the federal estate tax and knows that if she leaves Martin the ranch in her will there may be more estate tax to pay than he can afford on his university salary. Federal estate tax applies to estates valued at $600,000 or more.[69] Effective rates start at 37% and escalate quickly.[70] Assuming Laura had no other property, her estate would incur roughly $153,000 in tax payable within nine months of her death.[71] Martin's only option would be to sell at least a part of the ranch in a market dominated by ski condominium developers.[72]

In a recent issue of *High Country News*,[73] Laura read an article about ranchers in another part of the state "preserving" their ranch land by granting conservation easements to public interest land trusts.[74] She understood from the article that granting such an "easement" might technically reduce the value of the land, thereby limiting or eliminating the estate tax burden. Laura calls someone she knows in town who puts her in touch with the president of the Local Area Land Trust. A few days later the land trust president drives out and gives Laura the good news.

First, if she grants the land trust an easement the land will be preserved as in the easement document. Any restrictions created in the easement document will "run with the land"—bind future owners. Although not a traditional easement, the conservation easement does share the single most important characteristic of all common law servitudes—it burdens future holders of the "servient estate." If Laura wishes, the easement can be "perpetual," protecting the land forever.

Second, by donating the easement to the land trust Laura loses nothing she values (just development rights) and gains a potentially large charitable tax deduction. Section 170(h), mentioned above, permits an income tax deduction for a "qualified conservation contribution" to a "qualified organization." The qualified contribution can include a "qualified real property interest" if the contribution is made for "conservation purposes."[75] A qualified real property

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69. I.R.C. §§ 2001(c), 2010 (1994).

70. I.R.C. § 2001(e) (1994).

71. *Id.* Although there is Colorado estate tax due also, *see* COLO. REV. STAT. § 39-23.5102 (1990), it would not increase the total estate tax burden because the Colorado payment would be credited against the federal estate tax. I.R.C. § 2011 (1995).

72. I.R.C. § 2032 may permit "a special use valuation" of land like Laura's at its current use value under some circumstances. The maximum permitted reduction is $750,000. It might arguably apply in this case, but would not significantly affect other similar cases involving higher, but still realistic, values.

73. *Saving the Ranch*, HIGH COUNTRY NEWS, Nov. 27, 1995.

74. Hal Clifford, *Can Private Conservation Stave Off Ski-Town Sprawl*, HIGH COUNTRY NEWS, Nov. 27, 1995, at 1, 10.

75. Conservation purposes include: (1) "the preservation of land areas for outdoor recreation by, or the education of, the general public"; (2) "the protection of a relatively natural habitat of fish, wildlife or plants, or similar ecosystem"; (3) "the preservation of certain open space (including farmland and forest land)"; and (4) "the preservation of an historically important land area or

interest can contain "a restriction (granted in perpetuity) on the use which may be made of the real property."[76] Such restrictions include conservation easements. The value of the charitable deduction will be the "value" of the restriction. The value of the restriction is generally the difference between the value of the land unburdened by the restriction and its value subject to the restriction.[77]

In Laura's case, her land is worth $500,000 as a cattle ranch and $1 million for development. If she grants away all development rights not associated with maintaining her ranching operation, she can assert that she has reduced the value of her land by one-half ($500,000). Under the federal tax code, she may deduct the lesser of the value of the easement or 30% of her adjusted gross income each year for a total of six years until the value of the gift is depleted.[78] Unless Laura has lots of income from other sources, she is unlikely to be able to deduct the entire value of the donated easement, even over six years. Nonetheless, if she meets all the requirements, the deduction is likely to save her a great deal of money.

If Laura needs cash, the land trust may be able to find some and enter into a "bargain sale" whereby Laura sells the easement to the trust at a price below its "fair market value." She gets a charitable income tax deduction for the difference between fair market value and the sale price, and some money. The availability of money to purchase Laura's easement may not be a function of the wealth of the land trust's backers but rather a function of the fact that a government agency (federal, state, or local) may be a potential future purchaser. Many land trusts engage in what they call "preacquisition" —purchasing development rights from private parties and then turning them over to the government for money.[79] This enhances their financial prospects and decreases the amount of time and money they must expend monitoring and enforcing easements.

Laura's feelings about government may prevent her from entering into any transaction through which a government entity will eventually get an interest in her land.[80] Even so, she may still be the beneficiary of another form of government market participation. State funding organizations—the State Board of the Great Outdoors Colorado Trust Fund in Colorado—may directly provide the Local Area Land Trust with funds to purchase an easement on the Dead-

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a certified historic structure." Treas. Reg. § 1.170A-14(d) (as amended in 1994). Each of these four purposes is discussed at greater length in § 1.170A-14(d).

76. The Internal Revenue Service regulations define "perpetual conservation restriction" as "a restriction granted *in perpetuity* on the use which may be made of real property—including, an easement or other interest in real property . . . ." Treas. Reg. § 1.170A-14(b)(2) (emphasis added).

77. Keifer, *supra* note 13, at 136.

78. I.R.C. § 170(b)(1)(B), (D) (1995) and I.R.C. § 58 (1994) (if Laura dies before the end of the six years, the deduction dies with her, but most of us are optimists about such things).

79. EVE ENDICOTT, LAND CONSERVATION THROUGH PUBLIC/PRIVATE PARTNERSHIPS 17-27 (1993).

80. *Id.* at 39-40 ("It should be said, however, that some landowners will never accept government ownership of their land.").

lock Ranch. As of 1993, at least thirteen states had such direct funding mechanisms in place.[81]

Third, by donating the easement, Laura effectively reduces the value of her land, thereby sheltering her estate from federal estate tax and, perhaps, local property tax. Colorado's conservation easement statute specifically provides:

> Conservation easements in gross shall be subject to assessment, taxation, or exemption from taxation in accordance with general laws applicable to the assessment and taxation of interests in real property. . . . Conservation easements in gross shall be assessed, however, with due regard to the restricted uses to which the property may be devoted.[82]

Fourth, the arrangement will be a private transaction between Laura and the Local Area Land Trust: no "red tape" or government approval required.[83] While the absence of the potential delay and expense often associated with government participation is relatively obvious and objective, there are other more subtle and subjective benefits associated with a private transaction. Laura, as a rancher, familiar and unhappy with federal range control, may place a premium on the absence of government from her preservation deal. Having lived most of her life in the area, she may also place an additional premium on the local nature of the transaction. Chances are good that the Local Area Land Trust is a small organization concerned only with a small area of the state and that its president is a volunteer. The 1994 Land Trust Alliance survey reveals that approximately one-half of the 1,000 odd land trusts in the United States have a budget of $10,000 a year or less, that 54% of the nation's land trusts have no paid staff, and that 21% have a part-time staff only.[84]

There is other news too. But it is probably not going to be bad news to Laura. As discussed above, the easement must be created for specific purposes

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81. *Id.* at 258-313.

82. COLO. REV. STAT. § 38-30.5-109 (1990). In Village of Ridgewood v. The Bolger Found., 517 A.2d 135 (N.J. 1986), the New Jersey Supreme Court recognized the principle that a taxpayer may reduce the value of her land and her property tax assessment by granting a conservation easement to a conservation organization.

83. A few states do require approval of conservation easements by local governments or government officials. Both Massachusetts and Nebraska require prior approval for any conservation easement. MASS. GEN. L. ch. 184, § 32 (1996); NEB. REV. STAT. § 76-2,112(3) (1995). The Nebraska approval requirement ensures the sanction of local planning commissions. The Lower Platte South Natural Resources District (NRD), which has undergone the Nebraska approval process on three occasions, has not encountered any problems with the approval process. Telephone Conversation with Dan Schulz, Lower Platte South Natural Resources Director (Apr. 24, 1996). This may be due to the fact that the properties on which the NRD holds conservation easements are not near any developed land. In Montana, the intended holder must present the proposed conveyance to the local planning authority for review, but their comments are not binding, merely advisory. MONT. CODE ANN. § 76-6-206 (1995). For land to be placed in the Save Illinois Topsoil Program, the land must have a management plan approved by the soil and water conservation district of the county in which the land is located. ILL. REV. STAT. ch. 505, para. 35/1-3(f), 35/2-1 (1996). Oregon requires any *public* entity considering obtaining a conservation easement to hold a public hearing. OR. REV. STAT. § 271.735 (1987).

84. DIRECTORY, *supra* note 3, at vii.

or uses.[85] Technically, Laura cannot create the easement just to preserve the ranch for her son, Martin, or save herself taxes. However, because the side effects of preserving the ranch for natural or agricultural purposes will be to preserve the ranch for her son and save both income and estate taxes, she is unlikely to complain. If Laura wants her charitable income tax deduction, she must donate to either a government entity or qualified conservation organization as discussed above. She assumes the Local Area Land Trust qualifies. If she wants her deduction, she *must* grant the easement "in perpetuity."

Despite the constraints on the potential transaction, Laura has choices. She may drop the idea, give up the ranch, find some other way of paying estate tax, or find another tax shelter mechanism. She may give up the idea of the charitable deduction and grant a less-than-perpetual easement. She may grant a perpetual easement and get all the benefits. If she takes this third option, she presides over the happy marriage of public goals, as expressed in the legislation, and her private desires.

B. *What Governments Did*

If Laura grants an easement to the Local Area Land Trust, she will do so at her kitchen table or in the modest land trust office with no government representative present. The transaction will have the trappings, and "magic," of a private deal. Yet, governments have acted at three levels to make that deal both possible and attractive.

First, the state legislature fashioned the novel, negative, in gross, conservation easement—a real property right which Laura may grant—and authorized the land trust to hold it. In doing so, it delegated a traditional sovereign regulatory function to a private entity. The "negative easement in gross" created by the Deadlock transaction means no more or less than a right for the holder of the easement, private or public, to regulate activities on the servient estate. The holder of the conservation easement operates as a regulatory authority charged with enforcing the mandate set forth in the conservation easement document, just as a public agency operates as an authority charged with enforcing the mandate generated by the municipal zoning code or state wildlife law.

Second, the federal tax code provides Laura with both positive and negative incentives. Potential estate tax liability on the unburdened ranch creates a financial incentive to do something to shelter its value before she dies. The charitable income tax deduction provides motivation to convey

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85. Laura lives in Colorado where the law only requires a "Conservation easement in gross" to be:

> appropriate to the retaining or maintaining . . . land, water, or airspace, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural, horticultural, recreational, forest, or other use or condition consistent with the protection of open land having wholesome environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value.

See supra notes 32-46 and accompanying text; *see infra* notes 97-106 and accompanying text.

development rights in the form of a conservation easement. Potential local property tax and state income tax savings sweeten the pot.

Third, governments—federal, state, and local—have acted as market participants in the "open space" market. Their interest in open space significantly increases Laura's chances of getting cash compensation for her easement both by creating a secondary market in which the Local Area Land Trust may resell her easement and by providing direct funding to private entities to buy easements like Laura's. Government market participation also influences the cash value of Laura's easement by supporting the novel notion that the right to regulate someone else's land, nowhere near your own, has a significant value and the not-much-older idea that open space has value.

All this government influence does not taint the private transaction with the negatives associated with government. It does not destroy the private magic. Why not? From Laura's point of view the answer is relatively simple. While governments shape her motivations and offer her tools with which to achieve her goals—with a few exceptions—they neither make decisions for her nor do they review the decision she makes. The easement will be executed and recorded as a normal "private" land transaction, unquestioned unless challenged in court. Laura (or her accountant) will calculate the tax benefits she receives. While she may run a significant risk of an audit, the issues in the audit will probably be limited to quantitative matters, like the value of the easement conveyed.[86]

IV. THE LONG RUN

Unfortunately, after Laura dies and the ranch passes down to the next generation or the one after, perceptions of the nature of the transaction may change. Although government influence will diminish, the nature of the arrangement will seem more and more like the most despised aspect of government: regulation. The fact that the original transaction vested regulatory power in the Local Area Land Trust was unimportant to Laura because her wishes and the requirements of the regulatory regime were identical. However, as the ranch passes into other hands that regulatory power may take on much greater significance. The congruity of public good and private desire may disappear.

A. *The Third Generation*

Laura grants the easement to the Local Area Land Trust and leaves the burdened possessory estate—the Deadlock Ranch—to her son, Martin. During his tenure he respects her wishes as to the ranch's maintenance and, as a result, gets along well with the people from the Local Area Land Trust. Three decades pass. Martin dies and his daughter, Nora, receives the ranch through his will. By now, the potential economics of the ranch have changed. As a

86. *See, e.g.*, McLennan v. United States, 994 F.2d 839 (Fed. Cir. 1993); Schwab v. Commissioner, No. 5297-90, 1994 WL 223175 (U.S. Tax Ct. May 25, 1994).

result of continued declines in the price of beef, the ranch is still worth $500,000 for the uses allowed by the easement. Ranching is now less common in the area and a buyer who intends to ranch might be hard to find. However, if the easement did not exist, the ranch would be worth *$15 million* for development.

Nora is a moral person, but, like most of us, grew up in town. She has no interest in ranching and barely remembers her grandmother Deadlock. She cannot imagine any reasonable grandmother would have wanted to deprive her of a life of cultural enrichment and leisure just to preserve a thousand acres of scrubby ranchland. She goes to a lawyer and tells the lawyer that something has gone terribly wrong. The lawyer tells her the bad news. The easement that her grandmother granted to the Local Area Land Trust "runs with the land" and binds all future owners, regardless of their feelings on the subject. The restrictions are perpetual, and, therefore, neither Nora nor her heirs have any hope of outlasting them. While Laura had choices, Nora apparently has none.

In Nora's eyes the easement is privatized regulation. The voluntariness of the transaction, so important to her grandmother, is insignificant to Nora. The private nature of the transaction is cold comfort. The people who run the Local Area Land Trust, strangers to Nora, value "her" ranch as open space and wildlife habitat and can summon the government's assistance in the form of court action to ensure that Nora preserves the ranch for those purposes. More than anything else, it is the "public" law, in the form of legislation and courts, which separates Nora from her millions. The only quirk in the otherwise common regulatory situation is that the job of regulating the Deadlock Ranch has been delegated to a private entity.

B. *What Nora May Argue*

At this point, Nora may decide, however unwillingly, to abide by her grandmother's wishes. Or, she may decide to cast the dice, venturing a significant sum in litigation fees in an attempt to "break" the easement in the hope of recouping a much greater sum by selling or developing the unburdened ranch. Assume the die is cast, Nora returns to her lawyer and, suddenly, many of the elements which made the original transaction such a happy marriage of public and private now may aid in the frustration of the public goal.

1. Attacking the Holder

State conservation easement statutes require that a land trust be a "charitable" organization committed to the preservation of land. Nora may assert that the Local Area Land Trust is or was not. The Colorado statute and others like it explicitly define "charitable" status in terms of the federal tax code. As discussed above, the tax code requires that an organization pass a series of tests to qualify as a "charitable organization."[87] Thirty years have passed. The Local Area Land Trust has never had an adequate staff. Papers attesting to the

87. *Supra* notes 47-61 and accompanying text.

minimum requirements for charitable, non-profit organization status may be hard to come by.

The fact that the Internal Revenue Service accepted the land trust as a "qualified organization" at the time of the transaction creates a presumption as to its status "as long as there are no substantial changes in its character, purposes or methods of operation."[88] However, in referencing the federal tax code in its conservation easement statute, Colorado and states like it, have placed no time limits on the requirement. Further, reference to the federal tax law in the Colorado statute gives Nora an opportunity to make her challenge to this federally formulated status in a state court.

A tax-exempt charitable organization must be organized exclusively for exempt purposes.[89] The presence of a single [nonexempt] . . . purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] . . . purposes."[90] By asserting that the land trust engages in significant non-charitable activities, Nora can attack the land trust's charitable status and the capacity of the land trust to qualify as a holder of conservation easements under state law.

A particularly troubling line of cases for land trusts hold that otherwise charitable organizations, whose activities benefit for-profit organizations with which they maintain a business relationship, are ineligible for tax-exempt status.[91] Land trust operations often involve arrangements with local for-profit organizations and land trust preservation acquisitions can enrich private holders of nearby land by guaranteeing their scenic vistas or open space access.[92] In *McLennan v. United States*,[93] the Internal Revenue Service challenged the tax-exempt status of the Western Pennsylvania Conservancy, asserting that the land trust had forfeited that status by engaging in "private inurement."[94]

Imagine, for example, that Nora files a subdivision plan with the appropriate local authorities. The Local Area Land Trust gets wind of the plan and, after getting no satisfaction from Nora, files an action in the Colorado

88. BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS § 36.1 (6th ed. 1992).

89. The income tax regulations provide that "[a]n organization will be regarded as 'operated exclusively' for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3)." Treas. Reg. § 1.501(c)(3)-(1)(c) (as amended in 1990).

90. Better Business Bureau v. United States, 326 U.S. 279, 283 (1945), *quoted in* Tax. Ct. Mem. Dec.

91. Housing Pioneers v. Commissioner, 65 T.C.M. (C.C.H.) 2191 (1993) (holding ineligible for 501(c)(3) status a charitable low income housing organization whose activities benefitted associated commercial entities).

92. A number of parties challenging tax-exempt status in federal court have found their claims barred on standing grounds. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Fulani v. Brady, 935 F.2d 1324 (D.C. Cir. 1991). Standing might be less of a problem for parties challenging the tax-exempt status of a specific land trust holding a specific easement that directly affected the plaintiff's financial status. This is particularly true when the removal of tax-exempt status might directly prevent the organization under attack from enforcing that easement as a result of conditions imposed by state conservation easement law.

93. 23 Cl. Ct. 99, 103 (1991).

94. The United States Claims Court dismissed the claim on the ground that it was not redressable by that court. *McLennan*, 23 Cl. Ct. at 103.

District Court for the county in which the Deadlock Ranch is located, seeking an injunction to prohibit the sale of any subdivision lot, arguing that the conservation easement Laura signed prohibits subdivision. Nora's lawyer answers the Land Trust's complaint by admitting the existence of the prohibition against subdivision, but asserting that the Land Trust is not entitled to enforce it because the Land Trust cannot be a conservation easement holder under Colorado law. Nora's lawyer's papers paint a picture of the Local Area Land Trust as a clique of local landowners who have manipulated the state conservation easement statute and federal tax law for their own personal ends and financial gain—private land use control to achieve private ends. As a result, Nora's lawyer argues, the Land Trust is not a "charitable" organization. In the face of this argument, the local district judge must decide whether or not to enforce the terms of the easement as written thirty years before, terms that reduce the value of the land Nora owns to a small part of its potential.

Many conservation easements provide the easement holder with the power to transfer the easement to another charitable organization, a "back-up grantee."[95] If Nora can establish, however, that the Local Area Land Trust is not a valid easement holder, she can argue that it lacks the power to transfer the easement to another.[96]

2. Attacking the Circumstances

The state statutes authorizing conservation easements require that they be created in ways that further preservation. Nora may assert that the easement under which she suffers was not. While *we* know that Laura Deadlock granted the easement for a "conservation purpose," the incentive structure imposed by federal tax law almost assures that she had other reasons to grant the easement. If Nora asserts that the transaction was no more than a tax shelter masquerading as preservation, she may question the validity of the property right created by state law.[97]

In states like California, which have specific purpose requirements for the existence of conservation easements,[98] Nora may make arguments based on motives now thirty years in the past. Laura's correspondence with Martin is likely to contain more about the tax benefits of the easement than the beauty and preservation-worthiness of the ranch they both knew well.

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95. JANET DEIHL & THOMAS S. BARRETT, THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 111-16 (1988).

96. If the terms of the easement give the back-up grantee a perpetual option to take the easement from the Local Area Land Trust or an executory interest transferring the easement to the back-up grantee upon the failure of the Local Area Land Trust, the interest may violate the Rule Against Perpetuities, common law or statutory. Although under the Uniform Statutory Rule, adopted in Colorado, COLO. REV. STAT. §§ 15-11-1101 to -1107 (1990), the option could last only for 90 years.

97. *Compare* McLennan v. United States, 23 Cl. Ct. 99, 103 (1991) (rejecting an IRS attack on a conservation easement transaction).

98. *See supra* notes 32-46 and accompanying text.

In states like Colorado, in which the restrictions need be "appropriate" for the enumerated statutory purposes,[99] Nora's arguments will be different but equally dangerous. Thirty years will have brought unexpected changes. Nora will argue that the easement is no longer "appropriate" for a conservation purpose. Traditionally, the equitable doctrine of changed conditions allows a court to alter or terminate a real covenant or equitable servitude when changed conditions in or around the burdened land frustrate the original purpose of the restriction.[100] The doctrine of changed conditions is probably applicable to conservation easements.[101] The combination of the doctrine of changed conditions and the preservation-appropriate requirements in conservation easement statutes may provide fertile ground for arguments to invalidate easements when plaintiffs like Nora can convince a court that the easement no longer serves a purpose the legislature contemplated.

Imagine, for example, that during Martin's ownership of the Deadlock Ranch, the Hypothetical Power Authority condemned a right-of-way for a high-tension power line across the ranch.[102] Assume the power line, hanging eighty feet in the air from large steel poles, affects the scenic nature of the ranch but does not prevent its operation as a ranch. Nora files her subdivision plan. The Land Trust sues. Nora's lawyer can argue that the existence of the power line frustrates Laura's original intent and renders the easement "inappropriate" for protection of the purposes set forth in the Colorado statute, and thereby challenge the enforceability of the easement.

Statute-based arguments like those discussed above, if successful, would likely result in the invalidation of the conservation easement. The limited, novel, and statutory nature of conservation easements suggests that any purported conservation restriction that fails to meet the requirements of the state statute that authorizes it is invalid, supported by neither legislative action nor common law tradition. The prefatory note accompanying the 1995 pocket part to the Uniform Conservation Easement Act states:

> The Act *enables* durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources.
>
> The Act *thus makes it possible* for Owner to transfer a restriction upon the use of Blackacre to Conservation, Inc., which will be enforceable by Conservation and its successors . . . .[103]

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99. *See supra* notes 37-45 and accompanying text.

100. AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES §§ 4.10, 9.39 (A. James Casner ed., 1952).

101. Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187 (1989); Korngold, *supra* note 12, at 484-86.

102. Condemnation is a serious issue in the long-term preservation of conservation easements. *See* Town of Libertyville v. Bank of Waukegan, 504 N.E.2d 1305 (Ill. App. Ct. 1987) (under Illinois' Township Open Space Act, town lacked authority to condemn conservation easement on qualified agricultural land); BRENDA LIND, THE CONSERVATION EASEMENT STEWARDSHIP GUIDE 78-80 (1991).

103. UNIF. CONSERV. EASEMENT ACT, comment to 1995 pocket part (emphasis added). The lists of explicit immunizations from common law property doctrines common in authorization statutes further highlight the statute-dependent nature of conservation easements. The Uniform law provides seven:

> A conservation easement is valid even though:

In 1985, in *Parkinson v. Board of Assessors*,[104] the Supreme Judicial Court of Massachusetts struck down a conservation restriction covering three tracts of land totaling 82.17 acres because, in the court's opinion, the restriction was ambiguous about the extent of the grantors' reserved right to maintain a single family residence "with usual appurtenant outbuildings and structures."[105] In the following year, in response to a motion for rehearing, the court reversed itself, holding that the restriction met all the requirements of the state's conservation restriction law.[106] Although a victory for the validity of conservation easements and restrictions, the *Parkinson* case highlights the statutory dependence of these novel conservation property rights.

3. The Statute of Limitations

Rather than force a court challenge of the Local Area Land Trust's right to enforce the terms of the easement, Nora may simply violate its provisions and hope the Local Area Land Trust takes no action until the statute of limitations has run. Many states have extremely short statutes of limitations for property or contractual claims. Arguably, the statute of limitations, for conservation easement enforcement claims in Colorado is one year.[107]

Assume the Local Area Land Trust has received two easements a year for each year since Laura transferred her original easement. The land trust has at least sixty easements to monitor. The overburdened land trust staff try to adequately monitor each easement once a year as the Land Trust Alliance's Land Trust Standards suggest,[108] but to do so they must monitor more than one easement a week. If the Land Trust limits easement monitoring to the season during which its inspector has a good chance of seeing the Deadlock Ranch under less than six inches of snow, the available part of the year will shrink to six months and the number of easements to be monitored per week multiply to

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(1) it is not appurtenant to an interest in real property;
(2) it can be or has been assigned to another holder;
(3) it is not of a character that has been recognized traditionally at common law;
(4) it imposes a negative burden;
(5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;
(6) the benefit does not touch or concern real property; or
(7) there is no privity of estate or of contract.

UNIF. CONSERV. EASEMENT ACT § 4. A servitude that fails to satisfy the statutory definition of "conservation easement" cannot benefit from these and similar statutory protections.

104. 481 N.E.2d 491 (Mass. 1985).

105. *Parkinson*, 481 N.E.2d at 492-93.

106. Parkinson v. Board of Assessors, 495 N.E.2d 294, 296 (Mass. 1986).

107. Conservation easements typically contain building restrictions concerning real property. Two Colorado cases have determined that set-back requirements are building restrictions concerning real property. McDowell v. United States, 870 P.2d 656, 658 (Colo. Ct. App. 1994); Styers v. Mara, 631 P.2d 1138, 1139-40 (Colo. Ct. App. 1981). In Colorado, the statute of limitations for actions involving "any building restriction concerning real property" is one year. COLO. REV. STAT. § 38-41-119 (1990).

108. LIND, *supra* note 102, at 28.

three or more. A single monitoring omission might foreclose any meaningful remedy for a major violation of the easement restrictions.

Imagine, for example, in April of year 30 the Local Area Land Trust does its annual inspection of the Deadlock Ranch. Nothing is amiss. In May of year 30, Nora starts construction of the Deadlock Spa and Resort. By the end of the summer, the foundations of the garish buildings have been put in place, the ranch roads have been paved, and miles of new plumbing installed. In April of year 31 the land trust returns to do its inspection. To avoid trouble, Nora has taken the opportunity to vacation elsewhere. Four inches of late snow hide the ground level improvements. The Land Trust representative walks the property boundaries and visually surveys the entire thousand-acre property in the fading evening light, but fails to notice the new foundations and roads. In April of year 32 the land trust returns again to find the completed resort. The land trust calls its lawyers to take immediate action. Nora argues that the land trust should have discovered the construction when it began almost two years before and the statute of limitations bars any enforcement action.[109]

4. The Problem of Perpetuity

The perpetual nature of conservation easements makes them precarious. The real property system favors alienability, relying on market transfer to provide the highest and best use for land.[110] Under some circumstances, courts have invalidated interests which effectively restrain alienability.[111] Generally, courts' willingness to accept restrictions that limit alienability has been inversely proportional to the duration of the restriction.[112] Accordingly, perpetual restrictions should be subject to a high level of scrutiny.[113]

When a property interest is held for preservation we are inclined to accept preservation as the highest and best use of that property. When a property interest is held for other purposes, however, and somehow restricted for pres-

109. This analysis does not change the "discovery rule" tolling statutes of limitations until the plaintiff knew or should have known about the condition giving rise to her claim. Tolling applies to violations of COLO. REV. STAT. § 38-41-119. The statute makes no reference to discovery and its applicability may be an open question. *See McDowell*, 870 P.2d at 658. Whether or not the discovery rule applies, the statute should run from the initial groundbreaking.

110. For an excellent discussion of this aspect of the conservation easement issue, see Dana & Ramsey, *supra* note 12, at 2, 21-31.

111. Cast v. National Bank of Commerce, 183 N.W.2d 485 (Neb. 1971) (invalidating the condition on a defeasible fee as a de facto restraint on alienability).

112. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 3.4 (Tent. Draft No. 2, 1991) [hereinafter PROPERTY (SERVITUDES)](addressing direct restraints on alienation) ("In determining the injurious consequences likely to flow from enforcement of a restraint on alienation, the nature, extent, and duration of the restraint are important considerations. . . . Another important factor is the nature of the property interest and the type of land or development involved. Generally, greater restraints are justified on estates of lesser duration than on estates of longer duration . . . .").

113. Dana and Ramsey point out that the common law is more inclined to accept long-term restraints on alienation when those restraints are created on behalf of a charitable organization, like a land trust, because we assume that a property right created in favor of a charitable organization does the public some good and should not be struck down. Dana & Ramsey, *supra* note 12, at 28-29. However, the inflexibility of a conservation easement once granted and the length of time for which it may last, make a variety of attacks on this presumption of public good very easy as, I hope, the rest of this section illustrates.

ervation, the analysis becomes more complicated. The conservation easement—with its restrictions tailor-made to achieve the wishes of the original landowner, the land trusts, and the government—has the potential to severely restrict the alienability of the underlying possessory interest—Nora's interest in the ranch. If, under the terms of the easement, the ranch can only be used to raise cattle, then only cattle ranchers will buy it. If people stop raising cattle in the mountains of Colorado, then no one will buy it. The specificity and durability of the restrictions the easement imposes are among its greatest virtues, but, from Nora's point of view, they may also provide a persuasive argument for invalidating it.

The Tentative Draft of the *Restatement (Third) of Property (Servitudes)* draws a distinction between "direct" and "indirect" restraints on alienation—subjecting the former sort to invalidation if they are "unreasonable"[114] and the latter sort to invalidation only if they are without "rational justification."[115] Conservation restrictions are "indirect" restraints on alienation and are therefore subject to the rational justification standard.[116] This indirect/direct distinction, however, is new in the *Restatement Third*[117] and the reported cases still suggest that any restraint may be struck down if "unreasonable."[118]

In his article, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, Professor Gerald Korngold, no great fan of perpetual conservation servitudes, provides a variety of doctrine- and policy-based arguments to challenge perpetual conservation easements.[119] Korngold asserts that courts might imply a "reasonable duration" to terminate conservation easements. This approach allows a court to impose "reasonable" limitations on land use restrictions when no express point of termination exists.[120] Korngold also asserts that the relative hardship doctrine provides a basis for terminating conservation easements. The doctrine gives a court authority to deny injunctive relief for violation of a covenant or servitude if issuing the injunction would do more harm than it would prevent.[121] While application of this doctrine would not prevent land trusts from collecting damages for violations of easements they held, damages would not preserve the land and would be extremely difficult to prove.

Korngold fears that these doctrines will be inadequate to make land subject to conservation servitudes as alienable as he would like. Proponents of preservation should scrutinize these doctrines, however, because they give

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114. PROPERTY (SERVITUDES), *supra* note 112, § 3.4.

115. *Id.* § 3.5.

116. *Id.* § 3.5 cmt.

117. *Id.* § 3.5 reporter's note.

118. Turner v. Clutts, 565 So. 2d 92 (Ala. 1990) (suggesting that restrictions that amount to a prohibition of all use of the servient estate are void); Automatic Sprinkler Corp. v. Kerr, No. 11-017, 1986 WL 7307 (Ohio Ct. App. June 30, 1986) (modifying restriction limiting use of site to corporate headquarters on ground that it was unduly restrictive).

119. Korngold, *supra* note 12, at 480-95 (these include reasonable duration doctrine, changed conditions doctrine, and relative hardship doctrine).

120. *Id.* at 479-80.

121. *Id.* at 486-89.

courts the power to weigh the values protected by a conservation easement against the value of the alienability of the land in which those values are embodied. For example, in our hypothetical case, the district court judge might be inclined to balance the $14.5 million the easement costs Nora against the values (say, 980 acres of open space, 150 acres of elk winter range, five beaver ponds and lodges, one golden eagle nest, etc.) protected by the Deadlock conservation easement.

5. The Problem of Resources

The responsibility of enforcing the private regulation embodied in a conservation easement falls on the land trust rather than on the state. The land trust may have a small fraction of the financial resources Nora is willing to spend in litigation and much less incentive to protect a thirty-year-old transaction than Nora has to achieve her personal enrichment. The treasury regulations governing the tax deductibility of easement gifts provide little incentive for funding enforcement of easements.[122] How can a land trust with an annual budget of $10,000 a year and no paid staff members hope to defend its rights created by a conservation easement from an attack by a landowner who may have tens of millions of dollars to gain by developing the servient land? The scales tilt even more when the land trust may find itself challenged by more than one such landowner.

In contemplating these arguments, one must start by accepting that some conservation easements certainly *should* be struck down. Humans' capacity to predict the future is spotty at best and limitations on land use created in perpetuity will inevitably generate problems. If, in fifty years, the Deadlock Ranch is an urban waste surrounded by a mountain city of five million people—absurd for ranching, unavailable as a park under the terms of the easement, a dump and breeding ground for all manner of urban ills, and loved only by the open-space crazed principals of the anachronistic land trust—then the easement should go. Once we accept this, the issue becomes how do we tell the easements that really no longer serve a significant public purpose from those for which someone is merely motivated to argue a lack of public purpose for personal financial reasons. This sometimes difficult and often factual sifting will be left to the courts. In many cases, the complex and financially exhausting task of defense will fall on private land trusts.

In sum, the limitations that governments placed on Laura's original transaction—to shape it to further a public purpose—provide ammunition for her granddaughter in her attempt to frustrate that public purpose. The private, local nature of the transaction, so congenial to the first generation, now provides the third generation with a relatively smaller and weaker adversary in her attempt to overturn her grandmother's wishes.

122. David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations*, 19 HARV. ENVTL. L. REV. 303, 349 (1995).

V. CONCLUSION: FACING OUR PROBLEMS

As I noted earlier, these problems are not insurmountable. Solutions abound, some traditionally private, others traditionally public. Indeed, the few reported court cases involving the enforcement of conservation easements suggest the willingness of courts to enforce conservation restrictions and respect the policy behind them.[123] It is the contemplation of the potential side-effects of these solutions that is, perhaps, most intriguing, and draws us back to the New Private Law. What can be done to protect the public good associated with transactions like Laura's from Nora's private desires without destroying the "private magic" which allows the conservation easement transaction to do more for the public good than traditional public regulation?

"Private" solutions seem the obvious place to start because they are least likely to dissipate the private magic. Careful easement drafting, the inclusion of attorneys' fee-shifting provisions (allowing prevailing easement holders to recover their fees) in easement documents, and the careful creation and maintenance of extrinsic evidence of the intent of parties to the transaction will help. Careful maintenance of land trust records and scrupulous observance of the requirements of non-profit organization status are also important. For the conciliatory, arbitration clauses concerning changed conditions will seem a wise inclusion.[124] For the more bloody-minded, "poison-pill" arrangements whereby the underlying possessory interest in the ranch is rendered defeasible upon the frustration of the conservation purpose (to Laura Deadlock so long as used as a ranch . . .) may seem attractive. But will these be sufficient? They may deprive Nora of many of her arguments, but they will not remove her financial incentive, nor will they remove the insecurity of any perpetual land use limitation.

The obvious "public" solution to the remaining problems is creation of a government right, and duty, to third-party enforcement of easement conditions.[125] If state governments can enforce the terms of the easement against

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123. Madden v. The Nature Conservancy, 823 F. Supp. 815 (D. Mont. 1992) (holding that a conservation servitude could be created by reservation); Bennett v. Commissioner of Food & Agriculture, 576 N.E.2d 1365 (Mass. 1991) (holding enforceable a conservation restriction on the location of a dwelling even though the state conservation restriction statute did not specifically reference dwelling location restrictions); Goldmuntz v. Town of Chilmark, 651 N.E.2d 864 (Mass. App. Ct. 1995) (holding that construction of in-ground swimming pool was not improvement of existing dwelling subject on property subject to conservation restriction).

124. LIND, *supra* note 102, at 59-61.

125. The Uniform Conservation Easement Statute takes a significant step in this direction by including a "third-party right of enforcement" to be held by a party other than the easement holder. The comment accompanying the statute states:

> Recognition of a "third-party right of enforcement" enables the parties to structure into the transaction a party that is not an easement "holder," but which, nonetheless, has the right to enforce the terms of the easement . . . . But the possessor of the third-party enforcement right must be a governmental body or a charitable corporation, association, or trust. Thus, if Owner transfers a conservation easement on Blackacre to Conservation, Inc., he could grant to Preservation, Inc., a charitable corporation, the right to enforce the terms of the easement, even though Preservation was not the holder, and Preservation would be free of the common law impediments eliminated by the Act (Section 4). Under this Act, however, Owner could not grant a similar right to Neighbor, a private person.

Nora or defend in any action she brings to break the easement, then the financial power of the state more than matches her multi-million dollar incentive. Of greater value, the state may speak in court, for the people, about the public value of the easement. But if we create such a public right, will future Laura Deadlocks grant easements? Will they come to see the whole land trust movement as a disguised public land grab? Will the private magic disappear?

As we wandered out of the auditorium into the misty California sunshine, it occurred to me that the pile-clad activists around me—few of whom were lawyers—had put their trust in the complex and sometimes contradictory balance of public and private law that undergirds the land trust movement. The validity of the work they did and the future of the places they loved best depended upon it. We lawyers may smile secretly at "private magic" and the idea of legal limitations in perpetuity, but they take these ideas at face value and sell them to landowners across the country. We owe them our best thinking and best efforts in preserving the balance and the magic.

UNIF. CONSERV. EASEMENT ACT § 3.5 cmt. (1981).

ALIENATION OF CONSERVATION EASEMENTS

RICHARD B. COLLINS*

A few weeks ago I was listening to my car radio during the Paul Harvey talk show. I have an imperfect knowledge of radio talk shows because I listen to them only in the car, and I don't drive much. But my general impression had been that Mr. Harvey had mellowed in recent years and was not nearly as ardent as the new wave of hard-righters, such as Rush Limbaugh. Harvey had seemed related to Limbaugh the way that Barry Goldwater is to Phil Gramm.

On the subject of land trusts, I was wrong. Harvey delivered a jeremiad against the Nature Conservancy worthy of anything one might hear from Rush. The evil moguls of the Nature Conservancy, flush with cash, sneak up on unsuspecting land owners and (horrors) buy their land on the open market!

Since then, Pat Buchanan has assumed the national mantle of anti-market political guru. So maybe Mr. Harvey will be backing Pat for Commander-in-Chief. That used to be a military post, but in the New World Order, Pat would switch the position to mercantilism. There is a cheery sort of nostalgia for Japan as the enemy.

It is useful to have markets in mind as we evaluate conservation easements and land trusts. As Professor Cheever has shown, there are various public interest arguments against enforcement of some conservation easements after the passage of a generation or two.[1]

The danger in judicialized America is to avoid turning judges loose to do whatever they wish according to their view of the public interest, or to make conservation easements into one more version of litigation lotto. The hypothetical case of Deadlock Ranch is a fine example. We are told that Nora will make over $14 million if her lawyers can break the land trust created by her grandmother and paid for by tax deductions. This is another variation on $4 million for a repainted BMW.[2] We need to leave such inducements to Las Vegas.

Historically, the courts have done a pretty good job of addressing obsolescent land restrictions. The problem they have tried to address is maintaining the alienability of land—that is, freeing land markets from private efforts to

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* Professor of Law, University of Colorado. B.A., Yale University, 1960; L.L.B., Harvard University School of Law, 1966.

1. *See* Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077 (1996).

2. *See* BMW of N. Am., Inc. v. Gore, 646 So. 2d 619 (Ala. 1994), *rev'd*, 116 S. Ct. 1589 (1995) (overturning jury award of $4 million for failing to disclose that a new BMW had been repainted).

gum them up and from the unintended effects of private arrangements made long ago under very different conditions.

The proper solution, which courts have followed, is to make sure that there are owners in the present generation who can bargain about whether dead-hand restrictions should be maintained. Courts have used various devices to achieve this, such as the Rule Against Perpetuities,[3] the rule against unreasonable restraints on alienation,[4] the doctrine of changed conditions for covenants,[5] and the courts' power to interpret ambiguous conveyances and statutes in favor of alienability.[6] Some courts have gone further under the rubric of relative hardship.[7]

Even when there are persons in the present generation who can bargain over land restrictions, transaction costs can block effective bargaining. When subdivision covenants benefit many owners and no provision for majority rule is in place, it is unlikely that one can obtain unanimous consent for modification or release. To meet this problem, courts have developed the doctrine of changed conditions, and, in its proper use, the doctrine of relative hardship.[8]

A related problem occurs when future interests are retained by creators of defeasible fee interests and come to be owned by many scattered heirs of the original owners. Common law courts have failed to find a generally satisfactory solution to this problem. Various strategies, however, have overcome some barriers. The situation is not common and is diminishing as defeasible fees are less often created.[9]

Conservation easements present none of these problems because ownership cannot be divided. The easement is created in a unitary organization, either a government or private corporation. The common law rule against division of ownership of the benefit of an easement in gross ought to apply (the "one-stock" rule),[10] so there should always be one owner in the present generation who can bargain about modification or release of a restriction.

This is not to say that conservation easements cannot become obsolete. But when they do, barriers to alienation do not arise from multiple ownership. Rather, any barriers must derive from the terms of the easement itself or from governing legislation.

Deadlock Ranch is an example. Laura did not like government and preferred a land trust because it was private. So the terms of the easement may

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3. *See* 3 THOMPSON ON REAL PROPERTY ch. 28 (Thomas ed. 1994) [hereinafter THOMPSON].

4. *See id.* ch. 29.

5. *See* 7 *id.* § 62.15.

6. The previous rules were created by English judges. Ambiguities are construed against other barriers to alienation, such as defeasible fee interests. *See* 2 *id.* § 20.07.

7. *E.g.*, Lange v. Schofield, 567 So. 2d 1299, 1302 (Ala. 1990).

8. *See* 7 THOMPSON, *supra* note 3, § 62.15. The doctrine of changed conditions is recognized by § 3 of the Uniform Act and its comments, but the comments acknowledge that its application to interests called "easements" may be "problematic" under the law of some states. UNIF. CONSERV. EASEMENT ACT § 3, 12 U.L.A. 68, 77 (Supp. 1995); *see infra* notes 13-15 and accompanying text.

9. *See* 2 THOMPSON, *supra* note 3, ch. 20.

10. *See* Miller v. Lutheran Conference & Camp Ass'n, 200 A. 646, 651-52 (Pa. 1938).

bar conveyance to a government. Other contractual barriers to alienation can appear in the terms of a conservation easement. When these become serious barriers to alienability, however, they should be subject to the common law rule barring unreasonable restraints on alienation.[11] This would free a moribund or broke land trust to convey either to government or to a robust land trust.

Turn now to governing legislation. Common law easements may be reunited with the fee by voluntary, private action. What of statutory conservation easements? May private land trusts reconvey to the fee owner? Is the rule otherwise when an easement is owned by government?

Governing state legislation might prohibit a conveyance to the fee owner. For example, the Colorado statute that would govern Deadlock Ranch provides: "A conservation easement in gross is an interest in real property freely transferable in whole or in part for the purposes stated in [this article] and transferable by any lawful method for the transfer of interests in real property in this state."[12] One can argue that this bans transfers to the fee owner because such would not be for the purposes stated in the statute. If so, this is contrary to the common law. It is a permanent restraint on alienation of the development rights in the land. And it can, over time, create a barrier to alienability of the burdened fee interest, when allowed uses become obsolete. However, the Colorado statute is not clear, and courts concerned with alienability should read it otherwise. A land trust holding an obsolete restriction could sell it to the fee owner and reinvest the proceeds in other easements or land, thus serving the statutory purposes. Government-held easements could be sold yet more freely.

The Uniform Conservation Easement Act[13] is friendlier still to alienability. Section 2(a) states: "Except as otherwise provided in this Act, a conservation easement may be . . . assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements."[14] The comments expressly recite:

> The state's requirements concerning release of conventional easements apply as well to conservation easements because nothing in the Act provides otherwise. On the other hand, if the state's existing law does not permit easements in gross to be assigned, it will not be applicable to conservation easements because Section 4(2) effectively authorizes their assignment.[15]

If land trusts can reconvey to fee owners, one may argue that the trusts will not behave like rational market actors, so the bilateral monopoly problem[16] is heightened, and intervention by judges is justified. I would not

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11. *See supra* note 4.

12. COLO. REV. STAT. §§ 38-30.5-101 to -110 (1982 & Supp. 1995).

13. UNIF. CONSERV. EASEMENT ACT § 2, 12 U.L.A. 173 (1996). The U.L.A. edition reported that 16 states and the District of Columbia had adopted this act. *Id.*

14. *Id.* § 2(a) at 173.

15. *Id.* at 174. Section 4(2) provides, "A conservation easement is valid even though: . . . (2) it can be or has been assigned to another holder." *Id.* at 179.

16. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 61-62, 253-54 (4th ed. 1992).

accept this argument. If there are parties able to bargain over ending land restrictions, that ought to end any need for judicial intervention. If the need is great enough, legislatures will respond. Eminent domain is available. Any greater judicial intervention will destabilize the conservation easement. Security of property rights in conservation easements is as much in the public interest as any other. If judges with Paul Harvey's mindset persuade themselves that conservation easements are uniquely evil interests, they will be tempted to undo them and try to confine the rule to conservation easements. But the genie of remaking property won't be so easily confined. Judges with other attitudes will apply "public interest" reasoning elsewhere. True, lawyers will be busy. Too busy.

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

MARTHA M. ERTMAN*

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* Assistant Professor, University of Denver College of Law. B.A., Wellesley College, 1985; J.D., Northwestern University School of Law, 1990. Numerous people commented on this paper, both from the margins and from the center. I thank the New Private Law study group, the participants in the conference itself, and other colleagues including David Barnes, Mary Becker, Brooke Chaffin, Fred Cheever, Alan Chen, Roberto Corrada, Nancy Ehrenreich, Dan Farber, Katherine Franke, Clayton Gillette, Anne Goldstein, Jennifer Levi, Julie Nice, Richard Posner, and Sheryl Scheible Wolf. The University of Denver supported this research financially and administratively through research assistants Venkat Balasubramani, Jeff Joseph, and Mike Greenfeig, and secretaries Callie Matthews and Joan Pope. Tracy Craige and Sue Chrisman of the *Denver University Law Review* also worked tirelessly throughout the planning and execution of the Symposium. Finally, I thank my partner Julie Nice, who read numerous drafts, always providing clarifying insights.

How does God reward or punish us after death?

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

What is Hell?

Hell is the place of everlasting suffering.

What is Purgatory?

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

What is Heaven?

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

I. INTRODUCTION

Choosing between purgatory and hell is easy. I argue in this article that contract may offer sexual marginorities[2] a legal purgatory, where they suffer until they are sufficiently purified to enter the heavenly realm of public rights (or until the law is purified of anti-gay bias). By sexual marginority I mean groups generally associated with the gay rights movement (gay men, lesbians,

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

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

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

I challenge the conventional wisdom that contracting is hazardous for the health and wealth of people on the margins[4] by asserting that sexual marginorities may be a limited exception to the rule. Specifically, I explore whether contract may benefit sexual marginorities by offering a purgatory between the hell of public condemnation and the heaven of public rights.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

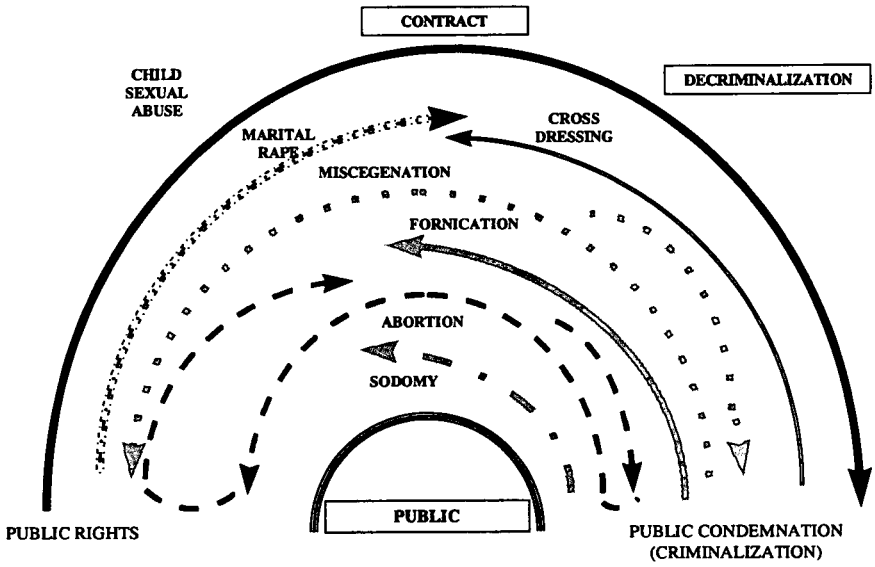
9. Patricia Williams has challenged the dichotomy between public rights and contract rights by pointing out that for some minorities the right to contract is an essential element of personhood, given that their ancestors were the object of contract rather than contracting parties. Patricia J. Williams,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

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

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

II. THE MODEL

In this model, public and private are separate spheres linked by a horseshoe progression at one end of which is public condemnation (usually through criminalization) and at the other, public rights.[12] Contract sits midway in the trajectory between the two public extremes, with decriminalization between contract and criminalization. The model also reflects the role of different branches of government. The judiciary perches at the top, enforcing private agreements, and the legislature[13] sits at either end of the model, legislating morality through either public condemnation or public rights.



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

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

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

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

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

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

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

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

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

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

Hohfeld's jural opposites:

right	privilege	power	immunity
no-right	duty	disability	liability

Hohfeld's jural correlatives:

right	privilege	power	immunity
duty	no-right	liability	disability

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

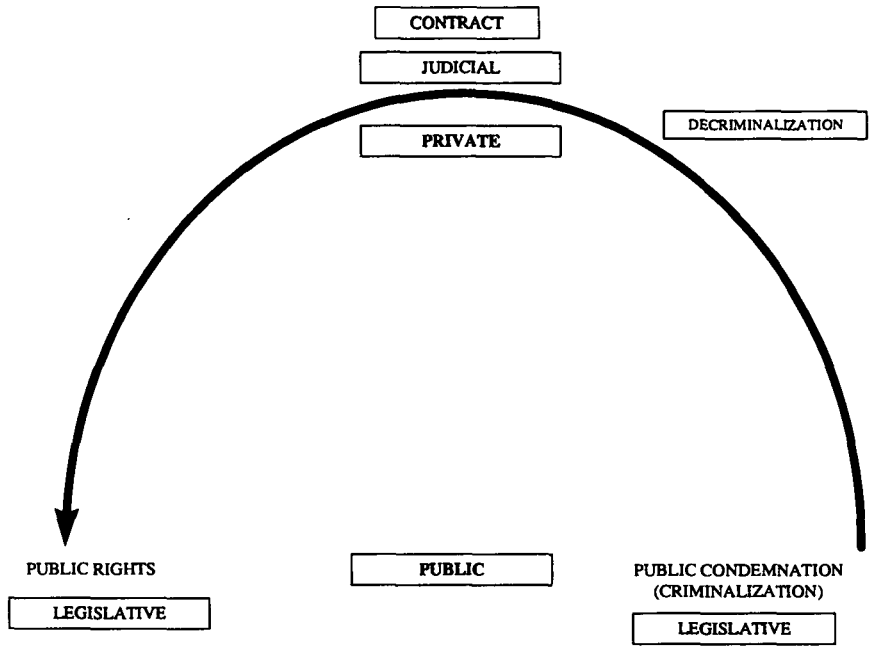
27. *See supra* notes 6-9 and accompanying text.

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

29. *Id.* at 79.

30. *See* MACKINNON, *supra* note 3.

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



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

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

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

between consenting adults is a victimless crime, so a progressive trajectory prefers individual autonomy[33] over morality-based legislation and the arrow should go from criminalization toward public rights. In contrast, where there is an identifiable victim (as in marital rape and child sexual abuse) the progressive pattern is from public right to criminalization. In other words, the progressive effect of the pattern is that victims get legal protection from abuse, and that victimless crimes get reclassified as non-crimes or even public rights.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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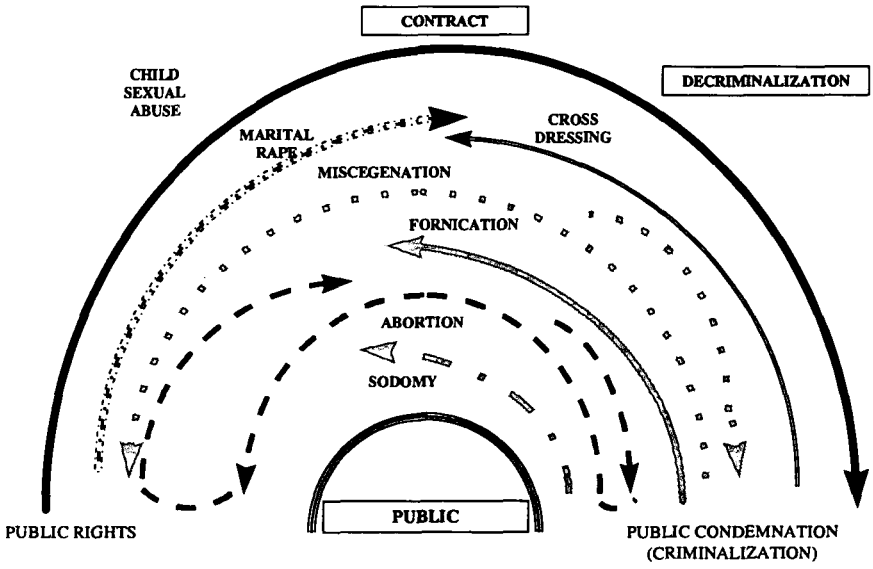
42. Kenneth Sherrill, *The Political Power of Lesbians, Gays, and Bisexuals*, PS: POLITICAL SCI. & POL. 469 (Sept. 1996) ("In electoral politics [gay and bisexual] voters must be dependent on the support of heterosexuals in order to win elections."). Sherrill notes that while even New York City does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

III. PROGRESSION OF SEXUAL REGULATIONS

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



A. *Salvation from Criminalization to Public Rights*

1. Sodomy

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

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

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

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

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

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

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

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

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

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

2. Abortion

The history of American abortion regulation suggests a progression from decriminalization to criminalization to public rights, and possibly back toward contractual purgatory. The common law did not interfere with a woman who chose to terminate her pregnancy before viability.[48] Abortion was thus essentially decriminalized through the first half of the nineteenth century.[49] There were no criminal statutes prohibiting the procedure, and professional abortionists widely advertised their services.[50] Early abortion laws restricted access to abortion after quickening, but were rarely enforced.[51] Later abortion laws criminalized all abortion, penalizing both the woman and the person performing the abortion.[52] Thus, abortion moved from being decriminalized[53] to being a crime between the colonial era and the late nineteenth century.

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

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

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

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

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

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

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

51. *Id.* at 12-13.

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

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

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

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

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

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

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

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

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

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

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

59. I thank Clayton Gillette for this example.

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

3. Miscegenation

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

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

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

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

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

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

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

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

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

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

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

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

4. Fornication

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

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prohibiting:

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

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

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

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

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

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

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

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

rassment of interracial couples.[73] Because of abusive selective enforcement, and reasoning that "private immorality should be beyond the reach of the law," the Model Penal Code decriminalized fornication and adultery.[74] Many states have retained their fornication and adultery statutes.[75] Retention of these rarely enforced statutes, however, is far outweighed by judicial enforcement of implied contract claims between cohabitants, beginning with *Marvin v. Marvin* in 1976.[76]

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

5. Cross-Dressing

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

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

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

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

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

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

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

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

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

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

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

6. Summary: The Trend Seems Progressive

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

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

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

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

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

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

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

B. *Damnation from Public Rights to Criminalization*

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

1. Marital Rape

Rape was traditionally defined as non-consensual sexual intercourse, by force, with a woman other than the defendant's wife.[86] The marital rape exemption thus conferred on married men the public right to rape[87] their wives with impunity until the exemption was widely repealed in response to feminist activism. The absolute version of the marital rape exemption no

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

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

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

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

2. Child Sexual Abuse

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

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

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

90. *Id.* at 242. Professors Becker, Bowman, and Torrey describe problems in obtaining a conviction in one of the first marital rape cases under South Carolina law. A husband

> [d]ragged [his wife] by the throat into a bedroom, tied her hands and legs with rope and a belt, put duct tape on her eyes and mouth, and dressed her in stockings and a garter belt. He then had intercourse with her, sexually assaulted her with foreign objects, and threatened her with a knife. . . . The jury saw this transpire because the husband had made a 30 minute video tape of the event . . . .

Id. at 241-42.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 43.

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

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

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100. *Id.* at 39.

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

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

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

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

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

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

3. Summary: The Trend Also Seems Progressive

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

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

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

106. *Id.* at 551.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Contracts: Where Like Minds Meet*

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

1. Contracts for Love: Cohabitation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. *Express Cohabitation Contracts*

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

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

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

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

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

129. *Id.*

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

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

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

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

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

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

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

b. *Implied Cohabitation Contracts*

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

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

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

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

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

136. *Id.*

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

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

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

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

2. Contracts for Money: Employment

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

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

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

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

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

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

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

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

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

Tumeo has added significance for contractual purgatory. The *Tumeo* court distinguished cases where courts refused to enforce sexual orientation/marital status non-discrimination clauses[147] on the grounds that those cases involved

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

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

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

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

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

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

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

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

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

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

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

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

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

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

151. *Id.* at 1069.

C. *Public Rights*

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

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

1. Gay Marriage

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

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152. *See* discussion *supra* in part II.

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

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

155. *See* Shenon, *supra* note 154.

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

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

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

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

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

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

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

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

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

2. Non-Discrimination and Domestic Partnership Legislation

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

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

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

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

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

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

Id. at 598-99.

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

166. HRC LIST, *supra* note 22.

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

es have been enforced to remedy a restaurant's refusing to seat a lesbian couple[168] and a health club's terminating a gay man's membership.[169] But the very same ordinance that prohibited discrimination in health club membership did not prevent Big Brothers, Inc. from asking prospective big brothers about their sexual orientation, and outing any gay prospective big brothers to all prospective little brothers and their mothers.[170]

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

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

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

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

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

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

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

3. Taking the Anti-Gay Initiative

Anti-gay initiatives were the strongest weapon for opposing gay public rights until *Evans*. They are sodomy laws with bite, particularly in relation to my model. Even if sodomy laws are on the books, they are rarely enforced. But an initiative such as Colorado's Amendment 2, which provided no state entity could accord protection from discrimination on the basis of sexual orientation, would have barred gay people from any real civil rights in a far more comprehensive way than sodomy laws. If Amendment 2 had gone into effect, Colorado could have enforced any statute solely against gay people, without any fear of liability for sexual orientation discrimination. The Denver Public Library could deny library cards to any gay person. Public schools could ban gay students from attending. Police could ticket only owners of cars with rainbow flag stickers[174] for traffic violations. Finally, any efforts to contract around the anti-gay default rule might not have been enforceable.[175]

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

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

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

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

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

177. *Id.*

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

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

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

4. Conclusion: Inchoate Public Rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. *Practical Implications of Contractual Purgatory*

1. The (Half) Loaf You Save May Be Your Own[198]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Safety in (Small) Numbers

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

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

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

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

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

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

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

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

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

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

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

211. HRC LIST, *supra* note 22.

212. *Id.*

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

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

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

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

3. Navigating Around Morality

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

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

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

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

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

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

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216. Becker, *supra* note 34.

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

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

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

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

4. Tolerance on the Way to Support

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

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

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

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

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

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

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

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

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

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

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

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222. I thank Julie Nice for this insight.

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

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

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

B. *Theoretical Possibilities*

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

1. Constructing Personhood

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

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

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

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

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

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

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

Gender[229] and sex[230] are also socially constructed. Indeed, according to Judith Butler, a person who refuses or fails to conform to sex and gender identity is often treated as if he or she were not a person at all.[231] If gender is defined in part as conduct intended to attract the opposite sex,[232] then gay people are likely to fall outside gender norms since they aim to attract the same sex. As such, gay people are less likely to be deemed legal persons (or less full legal persons than their heterosexual counterparts). Since states can criminalize conduct by gay people that would be constitutionally protected were they heterosexual,[233] gay people are clearly less than full legal persons. But opportunities to enforce gay-related contracts may contribute to the process of developing gay people's legal personhood.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Master Carpentry

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

One radical reading of *Babe* is that no animals should be food for people; this interpretation suggests to children that there is something terribly wrong with eating meat (particularly pork). Another radical reading of the film challenges barnyard hierarchy à la George Orwell[242] to suggest that even the

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

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

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

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

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

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

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

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

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and claiming all are equal.

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

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

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

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

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

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

VI. CONCLUSION

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

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basic institution.").

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

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

248. I thank Dan Farber for this insight.

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

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

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

PROBLEMS WITH THE PRIVATIZATION OF HETEROSEXUALITY

MARY BECKER*

INTRODUCTION

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

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

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

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* Arnold I. Shure Professor of Law at the University of Chicago Law School. B.A., Loyola University of Chicago, 1969; J.D., University of Chicago Law School, 1980. I thank participants in the *Denver University Law Review* Symposium on The New Private Law for helpful comments on an earlier version of this essay and my partner Joanne Trapani. I also thank Paul Bryan, Shirley Evans, Connie Fleischer, Jacqueline Guynn, Ruth Halibey, Carol Jones, Kortney Kloppe, Lyonette Louis-Jacques, Amy Mayer, Beth Mitchell, William Schwesig, and Charles Ten Brink for research and other assistance. Research support was provided by the Jerome S. Weiss Faculty Research Fund and the Jerome F. Kutak Faculty Fund.

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

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

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

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

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

I. PROGRESSIVE CONTRACT ENFORCEMENT

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

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

1. Heterosexual Male Entitlement

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

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

4. *Id.* at 1150.

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

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

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

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

2. Relative Commitment to Marriage and Children

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

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

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

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

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

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

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

3. Comfort Level with Contracting in this Situation

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

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

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

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

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

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

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

4. Alternatives to Contract

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

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

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

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

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

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

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

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

Thus far, I have suggested that although Ertman is right in noting the progressive potential of partnership contracts for same-sex couples, that same progressive potential is absent in most heterosexual partnership contracts for two reasons. First, for the many reasons described above, the two members of a heterosexual couple are more likely than a same-sex couple to have unequal bargaining power, giving the economically stronger party a great deal of control over the contract. Second, the two members of a heterosexual couple bargain in the shadow of family law rules which apply to marriage (in the absence of a contract); whereas the same-sex couple bargains in the shadow of a legal regime that gives no economic protection to either partner other than claims based on economic contributions to property titled only in one person's name. Thus, when same-sex couples fail to contract there is no court-ordered sharing of resources under marriage-like rules. There are no applicable rules other than the general presumption that property is owned by the title holder[15] and the assumption that if property has been acquired with *economic* contributions from both, both own some share of the property.[16] For these reasons, enforcement of cohabitation/marital contracts is likely *today* to be generally progressive for same-sex couples but regressive for heterosexual couples.

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

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

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

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

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

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

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

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

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

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

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

II. MORAL OBJECTIONS TO MALE HETEROSEXUALITY

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

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20. *Id.* at 301-02.

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

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

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

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

A. *Objectification*

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

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

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

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

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or copulation is therefore a strategic mistake).

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

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

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

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

1. Autonomy-Denying Encounters

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

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

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

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

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

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

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

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

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

> First, they may sustain injuries to their capacities for self-assertion: the "psychic connection," so to speak, between pleasure, desire, motivation, and action is weakened or severed. *Acting* on the basis of our own felt pleasures and pains is an important component of forging our own way in the world—of "asserting" our "selves." Consenting to *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.

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

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

2. Autonomy-Respecting Encounters

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

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

The three categories I have described are not firm and distinct. Participants in the same sexual encounter may have different understandings of what kind of encounter occurred and may even be unsure how to classify an encounter. To the extent that women define themselves as "giving,"—as wanting to give that which would otherwise be taken from them[27]—women will often be unable to identify sex as wanted or unwanted because those concepts have no meaning. In addition, each of these kinds of sexual interaction shades into the others; the lines between them are not clear or sharp. These concerns do

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

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

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

B. *Mapping Sexuality*

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

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

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

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

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

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

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

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

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

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of working class marriages). Rubin reports that

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

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

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

Id. at 110.

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

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

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

34. *Id.* at 214-15.

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

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

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

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

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

35. *Id.* at 197.

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

37. *See supra* notes 30-32.

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

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

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

CONCLUSION

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

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

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

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

OPTING OUT OF PUBLIC PROVISION

CLAYTON P. GILLETTE*

I. INTRODUCTION: THE CASE FOR OPTING OUT

There exist multiple sources to which we look for satisfaction of our material wants or needs, that is for the allocation of resources. Rough classification divides these sources into self-production, or the household; transactions with strangers, or the market; provision (either contractual or donative) by those outside a kinship group, but within a narrow community (such as a church group or social club); and provision by government either with (as in the case of services provided for user fees) or without (as in the case of goods provided by general taxation) direct compensation.[1] Much legal regulation deals with the proper mix of these sources of provision by creating incentives, prohibitions, and mandates for one or more of these groups to provide a particular good or service. Legal rules that mandate[2] or preclude[3] government involvement in production or that constrain market transactions or that allow transactions in families[4] that might be prohibited among strangers are essentially mechanisms for allocating the resource allocation function itself among these different institutions.

Recent years have seen substantial argument in favor of shifting to the market provision and production functions previously undertaken by government. The increased intensity of arguments for privatization in all its forms[5] is

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* Perre Bowen Professor of Law, University of Virginia School of Law. B.A., Amherst College, 1972; J.D., University of Michigan Law School, 1985. Thanks to Saul Levmore, Bill Stuntz, Fred Schauer, participants at the Symposium on the New Private Law at the University of Denver Law School and at workshops at the University of Virginia School of Law, George Mason University School of Law, and the Canadian Law and Economics Association.

1. *See, e.g.*, PARTHA DASGUPTA, AN INQUIRY INTO WELL-BEING AND DESTITUTION 26 (1993).

2. See, for instance, the various state constitutional clauses that require the provision of a system of public education. For a summary, see Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995).

3. For instance, the "public purpose" requirement prohibits governmental entities from participating in enterprises that provide benefits to an insufficient proportion of the general public. *See, e.g.*, State *ex rel.* McLeod v. Riley, 278 S.E.2d 612, 616-17 (S.C. 1981).

4. Children may work in family businesses under circumstances that would not be permitted if they were working outside the family. *See* 29 U.S.C. §§ 203(1), 212 (1994).

5. Privatization is a phrase that has been loosely applied to a myriad of arrangements that shift government responsibilities to the marketplace. Only in its extreme form, however, does the market entirely displace government. In more moderate forms, government retains some role in the provision of the "privatized" good or service. For instance, government may specify the characteristics of the good or service to be provided, such as where government contracts out for the manufacture of goods that the government itself distributes; or, government may regulate and retain the right to dismiss the private actor, such as where cities contract with private firms for collection of garbage. For an examination of the range of privatization, see Ronald A. Cass, *Pri-*

neither novel nor surprising. The economist Albert O. Hirschman has documented the shifting preferences that people share for dependence on the public and the private realms, as reliance on either generates disappointment and a desire for change.[6] In legal literature, the absence of a clear public/private distinction has been the source of substantial commentary suggesting both that government might engage in heretofore "private" activities and that markets might invade the previously "public" realm.[7] That any such transformation would follow a long tradition of employing private entities to accomplish public goals is evidenced by Hendrik Hartog's rich description of privately supported municipal developments in New York,[8] and the Handlins' history of the interplay of public/private cooperation to construct the infrastructure of post-Revolutionary Massachusetts.[9]

In its most current incarnation, much of the debate about privatization centers on the replacement of public provision of goods and services with private markets.[10] This part of the debate implicitly assumes that public and private provision of services traditionally supplied by government are plausible alternatives. That is to say that the good or service at issue has sufficient characteristics of a public good that it may be appropriate for government to be involved in its provision; but that the good also exhibits sufficient characteristics of a private good that demand for it will not be significantly understated and adequate numbers of providers will arise if government provision is replaced by market forces.[11] Under these conditions, the relevant question becomes, which plausible source of a good or service will provide it in a manner most consistent with a selected standard, e.g., which source will provide the good most efficiently or most fairly?

Implicit in much of this debate is the assumption that private provision displaces the need for government involvement in the same area, so that the

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vatization: Politics, Law and Theory, 71 MARQ. L. REV. 449 (1987).

6. *See* ALBERT O. HIRSCHMAN, SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION (1982).

7. *See generally* Symposium on the Public/Private Distinction, 130 U. PA. L. REV. 1289 (1982).

8. *See, e.g.*, HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER (1983).

9. OSCAR HANDLIN & MARY F. HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY (rev. ed. 1969).

10. *See, e.g.*, JOHN D. DONAHUE, THE PRIVATIZATION DECISION (1989); Cass, *supra* note 5.

11. A public good is defined by two characteristics: it can be jointly consumed by more than one person simultaneously (nonrivalness); and, once produced, no one can be excluded from enjoying its benefits, even those who did not contribute to its production (nonexclusivity). Classic examples include sunshine, knowledge, and national defense. Local public goods have these characteristics within more limited geographic boundaries, e.g., mosquito spraying or paved streets. Traditional public finance theory suggests that market forces will undersupply public goods because no one has an incentive to incur the costs related to their production, since no one has an incentive to purchase them from the producer (because once produced and paid for by some other party, the nonpayor can still enjoy the good's benefits). For that reason, government provision (and collection of taxes to pay for the good) is traditionally seen as a solution to the problem of public goods.

There is substantial literature on the substitutability of markets for government in the production of goods with public goods characteristics. *See, e.g.*, ANTHONY DE JASAY, SOCIAL CONTRACT, FREE RIDE: A STUDY OF THE PUBLIC GOODS PROBLEM (1989); Ronald Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974).

two sources of provision are acceptable substitutes for each other. Thus, privatization has typically taken the form of selling governmental assets to private firms or replacement of a government provider with a private one, either through government abandonment of the service or through competitive bidding between public and private providers. Examples include, for the first case, governmental sales of airlines, forests, or communications facilities, and, for the second case, government contracting for fire services or prison operations and competitive bidding for public defenders and ambulance services.[12] Frequently, some governmental involvement continues even after transition to the private firm. But in such cases, the governmental role is to regulate or cooperate with the private entity, rather than to compete with it.

In this article I examine a different element of "privatization" that does not involve government displacement by the private sector. Instead, my concern is with goods or services that are simultaneously offered by both the public and private sectors. What characterizes the difference in providers is that they offer different levels of the same service. Initially, the very existence of competition between private and public provision would seem anomalous. The fact that government provides a kind and level of service, typically paid for by tax revenues collected from the citizenry at large, is presumed to serve as a response to unmet demand from its constituents. But if that is the case, then why should a critical mass of residents (sufficient to support a private provider) desire to expend additional resources for a different level and kind of service, especially where (as in the case of services financed through general taxation)[13] they must still pay for the publicly provided services of which they do not partake? Nevertheless, the fact that we can easily call to mind examples in which residents have opted out of the service level offered by government—through the use of private schools, private security guards, or privatized mail delivery—suggests that this apparent anomaly occurs with substantial frequency. The source of the apparent anomaly may lie in any of several conditions. First, those who seek additional services may prefer that any of government provide the level that they personally desire, but a majority of the electorate prefers the level that government actually provides. Second, the government may provide a level of service that is inconsistent with the preferences of a majority of constituents, but a discrete interest group has been able to capture the decisionmaking process with respect to the level of that service provided by government. Third, constituents might vary dramatically in their preferences for the level of government provision of a service, so that a majority agrees that the government should provide a level consistent with the lowest common denominator, augmented by private supplementation in different degrees for those who desire it.[14] Indeed, given the strong assumptions

12. *See* KIERON WALSH, PUBLIC SERVICES AND MARKET MECHANISMS 110-37 (1995); Jim Flanagan & Susan Perkins, *Public/Private Competition in the City of Phoenix, Arizona*, 11 GOV'T FIN. REV. 7 (1995).

13. Simultaneous provision may be less puzzling in either of two situations. First, where the public good or service is financed through user fees, so utilization of the services of one entity does not require paying for the other; second, some jurisdictions credit payments made by constituents to private providers for services that would otherwise be provided by public providers.

14. *See* Dennis Epple & Richard E. Romano, *Public Provision of Private Goods*, 104 J. POL.

required to have perfectly harmonious preferences among the residents of a jurisdiction (roughly the assumptions of perfect mobility, financial independence, availability of diverse communities, and no externalities),[15] one would anticipate that residents of the same community frequently will have divergent demands for public services.

In each of these situations, the case for opting out of the governmentally supplied level of service proceeds from the desire to achieve one's preferences privately where one is unable to satisfy them through the political process. At least initially, this desire seems perfectly benign. After all, the decisions of an individual to select one level of service rather than another in the private market causes little comment. The fact that I prefer eating in full-service restaurants to fast-food restaurants does not generate much criticism. It is thus initially puzzling that more is made of the fact when people, in selecting a different level of service, choose a private provider that offers a different level rather than a public one, such as in the choice to attend private schools or to live in a residential association that has a gated or guarded entrance rather than to rely on public schools for education or solely on the local police for protection.[16] Seen simply as matters of contract between citizens and private providers, these latter arrangements presumptively increase welfare; the fact that a private party successfully offers the service (such as where a land developer attracts homeowners by creating a residential association with by-laws that require more aesthetic regulation than local zoning laws) indicates that there is a demand for that level that is not being met by governmental provision and that satisfaction of that demand is welfare enhancing, at least to the immediate parties.[17]

In these situations, residents may obtain desired services through private "clubs," the members of which share production costs and can exclude nonmembers who either do not desire the services offered by the club or whom the club does not wish to serve.[18] Assume, for instance, a community in which a minority of residents desires a swimming pool. Barring altruism and substantial differences in the intensity of those who favor and oppose a publicly funded pool, democratic voting would not produce a swimming pool for these individuals. Nevertheless, if the minority residents have the resources to construct a pool, they may be able to create a swimming club open only to members who have paid the "tax" in the form of dues sufficient to support the

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ECON. 57 (1996) (indicating that a majority would prefer a regime of government provision with market supplements to government-only or private-only provisions).

15. These are essentially the assumptions of the Tiebout model, under which government expenditures would be optimally allocated. *See* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

16. These two examples illustrate that sometimes opting out of private provision is a complete substitute for public, and sometimes private provision supplements the public. I explore the implications of this distinction below.

17. Here I am assuming that when people contract for a level of service, they do so because they believe that level is consistent with what is best for themselves, rather than out of some commitment to the welfare of others. For a discussion of the possible lack of fit between preferences and welfare, see Amartya Sen, *Behavior and the Concept of Preference*, 40 ECONOMICA 241 (1973).

18. *See* TODD SANDLER, COLLECTIVE ACTION 63 (1992).

pool. Because nonpayors can be excluded from the pool, by means of an entranceway at which membership cards must be shown, private providers have incentives to make the pool available, notwithstanding that it has some of the characteristics of a public good, i.e., it is nonrival to the extent that it allows multiple swimmers to enjoy the facility simultaneously.[19]

While clubs typically offer goods and services that are not otherwise governmentally provided, the same logic suggests that clubs can offer goods that are provided by government, but at a level of service other than what the potential club members desire. For instance, individuals with a taste for more rapid snow removal on residential streets than the locality might offer (e.g., because the locality places a priority on clearing major thoroughfares rather than residential areas) may live on privatized streets where abutters collectively contract privately for early snow removal.[20] Indeed, government sometimes encourages the formation of clubs to provide higher levels of service by authorizing the creation of business improvement districts that are statutorily enabled to collect "dues" from members, including involuntary members, and use the proceeds for functions such as street improvements, landscaping, signage, security, traffic safety devices, bicycle paths, and off-street parking facilities.[21] Where the club is able to achieve the preferences of its members, at least without cost to nonmembers, there initially seems even less reason (other than envy)[22] to object to differential provision than there is with respect to services offered only by market mechanisms, since purchasing additional services does not necessarily disadvantage those who do not make similar purchases. In the case of private providers in traditional markets (as in my restaurant example above), the potential consumer cannot obtain anything without active involvement in a transaction. Where the private provider offers only a different level of service, however, failure to enter into a transaction means that the resident still receives the level of service provided by the government, at least with respect to those services funded through general taxation.[23] The fact that failure to bargain does not deprive one of access to some level of a service might be thought to reinforce the propriety of opting out.

Indeed, the positive social consequences of opting out may involve more than satisfying the preferences of individuals. The claims that privatization will save production costs is typically attributed to economies of scale or reduced

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19. *See* DENNIS C. MUELLER, PUBLIC CHOICE II 150-52 (1989).

20. I discuss the theory of clubs as a justification for strict construction of covenants in residential associations in Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1391 (1994).

21. *See, e.g.*, COLO. REV. STAT. § 31-25-1201 (Supp. 1995); NEB. REV. STAT. § 19-4015 (1991); 53 PA. CONS. STAT. § 1623 (Supp. 1996). On the collection of "dues" from unwilling participants, see, e.g., Evans v. City of San Jose, 4 Cal. Rptr. 2d 601 (Ct. App. 1992); Jensen v. City & County of Denver, 806 P.2d 381 (Colo. 1991).

22. On envy, see JON ELSTER, THE CEMENT OF SOCIETY 252-63 (1989).

23. Services funded by user fees may require that residents actually request the service. But other forms of exaction do not require affirmative action by residents. For instance, services paid for through special assessments, such as some street paving, may be imposed even if the beneficiary never uses the service, because the benefit accrues to the property assessed and not to the individual payor. *See, e.g.*, Owatonna v. Chicago, Rock Island & Pacific R.R., 450 F.2d 87 (8th Cir. 1971).

agency costs in the private sector (resulting in part from better incentives to monitor) as a function of the capacity of private owners to claim residual profits of the firm.[24] But any increased efficiency in private provision may be attributable less to the nature of the provider (public or private) than to the presence of competition.[25] The simultaneous presence of public and private providers of different levels of service may improve the performance of each, since each has an interest in attracting customers of the other. Finally, opting out should even return benefits to those who subscribe only to the background levels of service, i.e., that level provided by government, since segregation by demand for service allows the jurisdiction's residents to form homogeneous groups that can avoid difficulties, such as cycling among voters, that are associated with heterogeneous populations.[26]

These consequences might be thought to make any effort by private providers to offer goods and services that the government could, but has chosen not to, make available to constituents relatively noncontroversial. Nevertheless, it is just the cases in which residents with different preferences have formed clubs for local public goods that create controversy. The private institutions to which people seeking to opt out have migrated are consistently under attack as exclusionary and elitist, if not unconstitutional, and are accused of either diluting the level of services available to those who have not opted out or of increasing costs to those others by making them bear a disproportionate burden of serving those excluded from the club.[27] These criticisms reflect two

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24. *See, e.g.*, DIETER BÖS, PRIVATIZATION: A THEORETICAL TREATMENT 33-50 (1991); Michael Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878 (1990).

25. *See* DONAHUE, *supra* note 10, at 67-68. Donahue contends that perusal of studies comparing the costs of private and public provision of the same service reveals that competition, rather than public or private supply, is the best determinant of efficiency. *See also* Thomas E. Borcherding et al., *Comparing the Efficiency of Private and Public Production: A Survey of the Evidence from Five Federal States*, ZEITSCHRIFT FUER NATIONALOKONOMIE [J. Econ.], Supp. 2, 127-56 (1982), where the authors conclude:

> The literature seems to indicate that (a) private production is cheaper than production in publicly owned and managed firms, and (b) given sufficient competition between public and private producers (and no discriminative regulations and subsidies), the difference in unit costs turns out to be insignificant. From this we may conclude that it is not so much the difference in the transferability of ownership but the lack of competition which leads to the often observed less efficient production in public firms.

Id. at 136.

These studies assume provision at equal levels by public and private entities. My concern is less with efficient provision of a given level of service than with competition between public and private about the level of service provided.

26. *See* MUELLER, *supra* note 19, at 393. It might be ideal, from the perspective of sorting for service provision, if potential residents could signal their preferences in advance of moving to jurisdictions or if jurisdictions could precommit to a level of service that would attract like-minded residents. We would then see a better fit of residents and services that would minimize the costs related to opting out. This is the intuition behind Boudreaux and Holcombe's view of residential associations as "contractual governments" that reduce transaction costs of bargaining for a set of public goods or for a set of procedural rules to determine which goods will be provided. *See* Donald J. Boudreaux & Randall G. Holcombe, *Government by Contract*, 17 PUB. FIN. Q. 264 (1989); Donald J. Boudreaux and Randall G. Holcombe, Contractual Governments in Theory and Practice (1996) (unpublished manuscript, on file with the author).

27. The primary target of the attack is often residential community associations. *See, e.g.*, EVAN MCKENZIE, PRIVATOPIA (1994); Daniel A. Bell, *Residential Community Associations: Com-*

concerns. One concern is that certain characteristics of public provision are themselves valuable, presumably by embodying a procedure that is not reflected in privatized decisionmaking.[28] That criticism seems particularly telling where the private alternative is selected by those who are unable to achieve their preferences in the political market, rather than where private alternatives simply reflect wide variations of preferences above a generally accepted minimum. The other concern, which seems implicit in much of the criticism of opting out, but that I hope to make more explicit and to examine more closely, is that the practice imposes more tangible political costs on those who accept only the background level of service. The extent of these costs may depend on the motivations for opting out that I mentioned above. If, for instance, those who opt out do so because political markets do not provide their preferred level of service (either because they are outvoted or because the decisionmaking process has been captured), then opting out may reduce the chances of forming a coalition that would change the background level. On the other hand, if opting out is a response to variation in the demand for public goods, those with relatively low and relatively high demand may seek to keep governmental expenditures relatively low, in order to avoid subsidizing large numbers of individuals who favor different levels of service. In any of these cases, the competitive benefits created by the availability of private options must be balanced against the political costs that interfere with government provision at a level consistent with resident preferences.

If we believed that the level of public goods provision was determined by consideration of all relevant interests, then any concern that some residents were dissatisfied would simply be the inevitable result of democratic decisionmaking. In short, motivations for opting out would consistently fall within the first, relatively benign, condition set forth above, i.e., individuals would opt out because a majority of residents preferred a different level of service. My present concern, therefore, is with the ways in which the mix of public and private provision affects the composition of interests that are considered in decisionmaking about the level of provision for a public good. The fact that the goods at issue share some "public goods" characteristics suggests that they may be provided best when provided collectively.[29] But those same

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munity or Disunity?, 5 RESPONSIVE COMMUNITY 25 (Fall 1995); David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761 (1995). A related attack may be directed at business improvement districts (BIDs). If these entities hire private security forces to remove "undesirables" from the area, those who are removed will migrate to less hostile areas, i.e., those that have not or cannot create BIDs, and these areas will have to bear a greater burden related to having a larger population of "undesirables."

28. *See, e.g.*, Clayton P. Gillette, *Who Puts the Public in the Public Good?*, 71 MARQ. L. REV. 534, 548-50 (1988); Paul Starr, *The Case for Skepticism, in* PRIVATIZATION AND ITS ALTERNATIVES 25 (William T. Gormley, Jr. ed., 1991).

29. I am not suggesting that goods with "public" characteristics cannot be supplied by the market. Indeed, there is much reason to suggest that private providers will produce public goods. *See, e.g.*, DE JASAY, *supra* note 11. But private provision means that the amount of the good provided will correspond to the interests of the private provider, which may deviate from the interests of the public. Of course, as the next sentences of the text indicate, public providers may also supply goods in amounts that deviate from the interests of the public. My modest claim at this point is that in at least some cases, the latter deviation will be smaller than the former.

characteristics and the susceptibility to collective provision suggest that the good or service will be available only when a political coalition forms to signal public officials of the preferred service level, since traditional problems of collective action deter the statement of individual preferences for public goods. Political coalitions, however, notoriously *misrepresent* the public's interest, in large part because joining or forming a coalition is itself a public good.[30] The consequence is that if those who opt out would otherwise join competing coalitions that are more representative of the collective will, the social costs of opting out may be considerable. In that case, those who disfavor voluntary arrangements would not simply be acting out of envy; rather, now they would realistically fear that those voluntary arrangements actually conflict with the provision of services to those who remain.

There will, however, be situations in which opting out imposes no or negligible costs on those who accept the background level of service. Thus, wholesale condemnation or endorsement of opting out is inappropriate. My concern here is to identify those characteristics of goods that would tend to increase or decrease either the political costs or the competitive benefits of opting out so that, with respect to any particular good or service, we could determine more readily the desirability of opting out. Even if I were successful at completing a typology of factors that tended towards increased political costs or competitive benefits, I am not confident that it would provide a solution to the issue of opting out. As I discuss later in this article, one of the concerns about opting out is that reducing homogeneity among services inherently reduces the sense of community among residents of a jurisdiction. I am less convinced of the force of this claim than some, but I credit it sufficiently to conclude that weighing political costs and competitive benefits cannot be looked at in isolation in determining the propriety of opting out.

Most of my examples focus on the area with which I am most familiar, the provision of services by local governments. Nevertheless, the principles that I suggest do or ought to inform the debate about private contracting around public provision should remain the same regardless of the level of government serving as the background provider. But the focus on local government does pose one anomaly. One of the features that makes decentralized government most attractive is its capacity to offer different packages of goods and services and thus to appeal to the various preferences of different actors who can, with relative ease, migrate to jurisdictions that offer the package that is most attractive. Opting out plays very much the same role, although the mechanism for registering preferences is now through contracting with private providers rather than through physical exit to another locality. Thus, to the extent that we believe that opting out generates undesirable political costs, we implicitly question the desirability of decentralization generally.[31] Nevertheless, there may be important distinctions between opting out contractually and through physical exit. For instance, if our ultimate objective is the

30. *See* CLAYTON P. GILLETTE, LOCAL GOVERNMENT LAW 50-54 (1994).

31. For a critique of unfettered decentralization, see Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993).

maintenance of community, we may be less concerned about opting out through physical exit to another community, notwithstanding the disruptive effect that physical movement has on community continuity. When a resident moves, the loss from membership in one community is offset by the gain in membership to another. Opting out through contract while remaining a physical resident of the community does not necessarily produce the same offsetting benefit. Yet to the extent that any decentralized delivery of services produces other effects that I discuss herein, we may need to rethink the priority that much of local government law scholarship gives to the value of smaller governmental units.

A final introductory point relates to the nature of the public goods themselves. Governments provide an array of goods and services that range from the essential to the convenient. Our reaction to opting out may reflect the relative importance that we attribute to the service at issue, especially where we face substantial uncertainty in trying to quantify or balance the competitive benefits and political costs of opting out. In the face of such uncertainty, we may be more willing, for example, to risk excess political costs in the provision of a municipal golf course than in the provision of public education. Again, a typology of factors that tends towards increasing political costs or competitive benefits, standing alone, seems inadequate to the ultimate task of determining our reactions to opting out with respect to any particular service. Nevertheless, I believe that trying to isolate factors that might be used in any such typology will significantly advance our thinking about the issue and help us understand our different reactions to individual pursuit of preferences in different contexts.

II. GOVERNMENT PROVISION AS A DEFAULT

A. *Majoritarian Defaults and Their Implications*

There would be little reason for concern about opting out if we believed that government generally delivered service levels consistent with the preferences of the majority of its constituents. If that were the case, then those who opt out are presumably idiosyncratic. Allowing opting out under these circumstances would appear, at least initially, to evince neither capture of the decisionmaking process nor the imposition of substantial political costs on those who accept the background level. Instead, opting out would only represent the inevitable dissatisfaction with government provision that some would feel, given that governmental decisions are made in gross rather than through highly tailored transactions with individual constituents.

Redistributional concerns aside, government appropriately intervenes in market transactions to overcome obstacles that inhibit consumers from signaling their preferences or that inhibit potential providers from meeting the signaled demand. Governmental intervention to correct these market failures typically does not take the form of individually dickered contracts. Instead, general purpose governments[32] provide a package of goods and services to all

32. Special purpose governments, such as authorities and special districts may be even closer

constituents and exact payments in the form of taxes that are charged to individuals regardless of whether they utilize the proffered goods and services. These same governments offer other services to all constituents, whether requested or not, but impose charges or user fees only for the service utilized by or made available to the payor.[33] Whether the package offered is sufficiently consistent with constituent needs is ideally determined by markets that trade in votes rather than in dollars. Initial governmental involvement in these activities, however, seeks the same objective as market transactions—to provide individuals the goods and services they desire at prices that reflect their cost.

Once we recognize that government cannot perfectly replicate the results of private markets, permitting those who could attain greater satisfaction through individualized transactions seems plausible. This is not to say that market transactions perfectly meet all private wants. Transactions in private markets are costly to construct. Suppliers and purchasers must seek each other out and bargain over prices and risks. Reducing these costs is typically seen as a benefit, even if the result is to constrain choice in individual transactions. Thus, private markets offer ready-made goods designed to cater to the desires of a substantial number of, but not all, potential purchasers. Those whose preferences are not a precise "fit" with the off-the-rack selection would prefer the slight misfit to incurring the costs of more individually tailored bargains. Thus, clothing comes in predetermined sizes even though there are people who are "somewhere between" a size 38 and a size 39. New automobiles come with a pre-set array of features, or "standard options" that some buyers would prefer not to purchase. Restaurants offer entrees accompanied by a previously established set of side dishes. In each of these cases, it is possible for those who desire a precise fit to bargain away from the off-the-rack selection. Clothes can be custom made, automobile options can be ordered, restaurants may substitute rice for potatoes on request. The party seeking the change, however, must bargain for it, and frequently must incur additional costs involved in meeting the request.[34] In each case, then, the pre-determined selection constitutes a default away from which the parties to the particular transaction can contract. Each of these defaults is presumably set to appeal to a broad range of potential consumers (hopefully a substantial majority), thus minimizing the costs that would attach to highly stylized transactions.

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to market transactions in that they provide only a single service, traditionally supported by user fees rather than taxes. Government involvement in such activities may offer fewer advantages over market transactions. *See* CLAYTON P. GILLETTE, PUBLIC AUTHORITIES AND PRIVATE FIRMS AS PROVIDERS OF PUBLIC GOODS, REASON FOUNDATION POLICY STUDY NO. 180 (1994). Nevertheless, it is conceivable that governmental involvement in such activities effectively reduces transaction costs (by providing a mechanism for collective production and payment for goods that would otherwise require substantial organization among diffuse individuals, such as a toll bridge), internalizes externalities, or solves the collective action problem that interferes with the supply of goods that are nonexclusive and nonrival.

33. Some non-tax governmental exactions may be imposed on parties who do not or cannot directly utilize the underlying service, on the theory that the benefit made available by the government increases the value of the constituent's property and thus justifies governmental charges in the form of cost recovery. *See supra* note 12.

34. Even then, we have all had the experience of finding a favorite product discontinued, presumably because an inadequate number of others shared our tastes.

To the extent that legal rules offer a means of allocating transactional risks, analogous to the allocation of characteristics that are the focus of mass marketed products, the same principles suggest that these rules should also align with majoritarian preferences. As in product markets, legal default rules seek to reduce transaction costs by conferring on parties allocations for which they would presumably bargain if left to their own devices.[35] While these defaults may not fit perfectly with personal preferences, the savings in negotiations warrants acceptance of less than ideal terms for all parties. Thus, Article 2 of the Uniform Commercial Code provides background rules around which the parties are free to negotiate, but that apply in the absence of any contrary agreement.[36] Default rules thus differ from mandatory rules, which parties may not adjust even if they desire. In order to achieve this reduction in transaction costs, default rules must reflect the terms for which a majority (or at least a plurality) of parties would bargain. Failure to generate majoritarian rules means that there is some alternative rule (the one that would satisfy majority preferences) that would reduce transaction costs even more than the one reflected in the default.

Recall that—at least for tax-supported services such as police protection, road paving, or admission to most public parks—governments offer a background level of service to all constituents without any additional bargain. It is tempting to consider this level of service as equivalent to a default rule under contract law. Once a community decides to offer a service, residents are entitled to a certain level of that service simply by virtue of their membership in that community. The background level of service thus may be thought to serve the same function as preordained product characteristics or legal rules that apply to parties in a particular relationship who do not explicitly bargain for a contrary legal outcome. Assuming, as suggested above, that individuals gravitate toward jurisdictions that hold themselves out as offering a package of goods and services, the package offered by any jurisdiction should be consistent with the preferences of a significant percentage of that jurisdiction.

Whether or not such a conclusion is appropriate depends on whether those who gravitate to a particular community do tend to have similar, if not identical interests; that is, if we believe that the Tiebout assumptions for the provisions of local public goals work well enough to define in general terms the sorting of residents among jurisdictions. The assumptions of that model suggest that we should see substantial homogeneity in the preferences of residents of any decentralized government.[37] The smaller the jurisdiction, the more

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35. *See, e.g.*, Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 588 (1977); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983). Alternative explanations include forcing persons with superior information to reveal that information to contracting parties. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). For a compendium and critique of arguments about non-majoritarian default rules, see Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISCIPLINARY L.J. 389 (1993).

36. *See, e.g.*, U.C.C. § 2-509(1)(a) (1990) (assigning risk of shipment loss).

37. Homogeneity, however, is not the only way of producing an equilibrium in which every-

homogeneous the population of the jurisdiction would tend to be, and the greater similarity we would expect to see in the preferences of residents. Given the variety of services and service levels that any government might provide, individuals with mobility will not want to gravitate to jurisdictions in which they must pay for services that they neither enjoy nor desire. Thus, we would expect that mobile individuals will tend to migrate to jurisdictions that provide preferred services.[38] The result is that jurisdictions will attract individuals who are relatively like-minded, at least with respect to governmental services. In addition, we would then expect to see little in the way of opting out because residents would presumptively be satisfied with the default level of service.

Application of the contractual default model to governmental services implies that, if the level of government provision were set to satisfy majoritarian wants, no negative implications should be drawn from the fact that some individuals within the jurisdiction opt for a different level of service. If the analogy to default rules holds, parties who bargain out would be characterized solely by the idiosyncratic nature of their preferences, not by any selfishness or the desire to impose costs on those who accept the background level. Majoritarian rules in contract law or in designing mass-marketed products do not depend on any deontological underpinning for their currency.[39] Bargaining out of default rules betokens (tautologically) only that those are the rules selected by a majority, and the person seeking an alternative is not part of that majority.[40] Far from reflecting some moral norm, default rules may be irrational (such as where they are based on commonly shared biases or low-probability events)[41] or antisocial insofar as they impose costs on non-parties, notwithstanding that they increase the wealth of the parties to the bargain (imagine, for instance, a price-fixing default rule). Nor would opting out imply the disruption of potential coalitions for change, since any such coalitions would either be unnecessary (since the level of provision would be consistent

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one prefers his or her community to all others. Susan Rose-Ackerman suggests how heterogeneous populations could also produce an inefficient, but stable, equilibrium. For instance, in a universe of two towns and ten people, five of whom are high demanders of public goods and five of whom are low demanders, equilibrium could be reached either by sorting the high demanders and low demanders in separate towns or by having two towns of five high and five low demanders, where each town produces identical levels of public services. Any shift by a resident of one town to the other town would make the resident better off (by tipping the voting balance) only at the cost of making members of the new minority worse off. Susan Rose-Ackerman, *Beyond Tiebout: Modeling the Political Economy of Local Government*, *in* LOCAL PROVISION OF PUBLIC SERVICES: THE TIEBOUT MODEL AFTER TWENTY-FIVE YEARS 55, 58-59 (George R. Zodrow ed., 1983).

38. Endowment effects suggest that even among mobile residents, many will form preferences based on what is available to them where they currently reside. Thus, they will not gravitate to a jurisdiction that would be more appealing if they had no prior preferences.

39. For a view that default rules ought to be rooted in concepts of fairness, see Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. CAL. INTERDISCIPLINARY L.J. 115 (1993). For a response, see Clayton P. Gillette, *Cooperation and Convention in Contractual Defaults*, 3 S. CAL. INTERDISCIPLINARY L.J. 167 (1993).

40. This may be weaker than is necessary. Default rules may also betoken efficiency if the default arises out of repeated negotiations between similarly situated parties and the negotiations tend to generate the same allocation of risks that is reflected in the rule.

41. *See* Clayton P. Gillette, *Commercial Relationships and the Selection of Default Rules for Remote Risks*, 19 J. LEGAL STUD. 535 (1990).

with majoritarian preferences) or superfluous (since those dissatisfied with the level of service provision could migrate to more hospitable jurisdictions).

Allowing persons to opt out of public provision, therefore, might be no more momentous than allowing opting out of default rules in contract. Within a jurisdiction, those who seek a level of service different from the background level provided by government may, but again, must bargain for a different level of service. Indeed, typically, that bargain must take place with a third party. Governments rarely offer a menu of service levels from which residents can select. To the contrary, once government provides a service to any constituent, the legal doctrine of equal service provision presumptively obligates the government to offer the same level of service to all residents.[42] Provision of differential levels of service within the same jurisdiction is typically seen as a basis for complaint. As a matter of legal doctrine, the delivery of a higher level of service to the wealthy side of town rather than to the poor side of town is considered an inequity to be remedied, often by judicial intervention, rather than an indication of disparate preferences.[43] It is only the infrequent case in which governments offer residents a choice among service levels. A student in public school, for example, may decide whether to take courses oriented toward college or vocational training. The set of cases expands if we mean by different levels of "the same" service any governmental function in which residents can choose how much to consume. Then, virtually any good financed through user fees or service charges will qualify as differentially provided. A municipal gas company will sell as much gas as any user wants, so that one user may obtain 100 cubic feet while another purchases 200 cubic feet (and pays twice as much). If the concern is qualitative rather than quantitative, however, there does not appear to be any difference in demand between the two users in that (assuming ability to pay) each has equal access to the service.

Some financing mechanisms employed by government explicitly make possible the satisfaction of dissimilar preferences among residents. Special assessments or special benefit taxes, for instance, allow those who seek a level of service different from what is otherwise offered to obtain that objective, as long as they are willing to bear the relevant costs. Thus, street paving may be generally unavailable from government, except on petition of a critical mass of abutters who petition the city for the service and indicate their willingness to pay for it.[44] Distributional effects would follow where some, but not all,

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42. Veach v. City of Phoenix, 427 P.2d 335, 336 (Ariz. 1967).

43. *See, e.g.*, Clayton P. Gillette, *Equality and Variety in the Delivery of Municipal Services*, 100 HARV. L. REV. 946 (1987). For cases involving judicial intervention to address allegations of unequal service provision, see Mlikotin v. City of Los Angeles, 643 F.2d 652 (9th Cir. 1981); Reid Dev. Corp. v. Parsippany-Troy Hills Township, 89 A.2d 667 (N.J. 1952). Such cases are also brought on the basis of claims of racial, not wealth, discrimination. *See* Ammons v. Dade City, 783 F.2d 982 (11th Cir. 1986). For an examination of unequal service provision within cities, see Carl S. Shoup, *Rules for Distributing a Free Government Service Among Areas of a City*, 42 NAT'L TAX J. 103 (1989).

44. *See, e.g.*, KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985). Jackson indicates that certain services were made available differentially within the same municipality:

constituents lacked the resources to contract for their desired level of service. But, since those effects will exist whether the source of inequality is a public or private provider, their presence does not help us to determine the propriety of opting out.[45]

We see additional examples of menus at the federal level.[46] Postal services offer one rate for first class, another for overnight mail. An overnight visitor to a national park may choose to sleep in a campground at one rate, and at a governmentally operated (or franchised) hotel for another. But aside from these rare cases of menus, constituents do not select among service levels from governmental providers. One does not, for instance, receive a default level of police services simply by virtue of paying local property taxes but then receive an option to obtain an additional level of police protection on payment of an additional sum. Thus, one who desires more of a service than is offered generally must find a private provider. One who seeks more security than is offered to citizens generally typically hires a private security guard or resides behind private walls. One who seeks more religious training in education typically hires private tutors or sends a child to parochial school rather than pay additional fees to the public school system.

B. *Background Service Levels as Majoritarian Defaults*

My assumption to this point has been that the background level of service can be considered as a majoritarian default rule, so that individual efforts to opt out are idiosyncratic and confer negligible harm on others. If this assumption is untrue, if the background level of service does not reflect majority preferences within the jurisdiction, there may be substantial implications for the propriety of allowing individuals to opt out of public provision. Those implications, however, simultaneously cut in different directions. Opting out might be considered more appropriate because it signals officials that they have misread the popular will and creates opportunities for political entrepreneurs who are more attentive to the majority's preferences. Thus, opting out would create competition that should generate efficiency gains. Opting out, however, may be a second-best solution to the problem of official failure to satisfy majority preferences. Direct political appeals by those who would otherwise opt out, e.g., through the formation of political coalitions to alter the level of provision, might be preferable to the relatively haphazard process of

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> Before the Civil War, streets were paved or widened when owners of a certain percentage (usually three-fourths) of the property facing the right-of-way petitioned the city to do so. To finance such improvements, property-owners "abutting and directly affected" paid special assessments. The municipal government played a limited role: the basic decisions as to when and how to pave were made by private individuals.

Id. at 131.

45. Interestingly, special assessment funding appears to have declined as a basis for municipal improvements. *See* Stephen Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth-Century America*, 12 J. LEGAL STUD. 201 (1983).

46. We would expect to see a more centralized level of government offering more menus, since its constituency should have a more varied set of preferences than a decentralized government. Of course, these varied preferences might be handled by allowing constituents to opt out of the service level set by the centralized government.

signaling dissatisfaction and hoping that a political entrepreneur receives and acts on the signal. Thus, opting out may be less appropriate if it reduces the impact of individuals who are willing to lobby for the level of services that the majority prefers.

In light of these effects, it is necessary to consider whether background levels can be treated as simple default rules that imply majoritarian preferences. Given the assumptions of the Tiebout model, it would seem paradoxical for the background level of service offered by a government not to reflect the preferences of a majority of constituents.[47] I have referred above to one plausible reason why this result may occur. Given the public goods nature of the services with which I am concerned, and the public goods nature of the lobbying efforts that will be employed to indicate levels of services to political officials, one would expect that dominant interest groups would successfully seek idiosyncratic levels of their preferred services.

There exists, however, a more robust explanation of why the default rule model does not easily fit the delivery of municipal services. That explanation concerns the inability to provide a background level to any stable majority view. This inability stems from two sources. First, note that contractual default rules allocate risks between parties in a manner that is likely to be binary in nature. Risk of loss is typically allocated to buyer or to seller; battles of forms will either generate binding contracts or they will not. Loss sharing rules are exceptional. One consequence of this binary choice is that a majority of parties is likely to prefer one allocation to the other. Any given government service, however, can typically be provided on a continuum, rather than in a binary manner. Even where the level of service provided by government corresponds to the preferences of the median voter,[48] there is no reason to believe that the median voter is likely to represent the views of a majority, or even those of a substantial plurality. Instead, the median voter reflects only that point that can attract more support than any other position in a winner-take-all contest. The fact that others will "go along" with a median position in order to avoid shifts to even more disfavored positions, however, does not entail that the median voter represents the first choice of a majority of the relevant constituents. Nevertheless, taken in combination with the Tiebout theory, which suggests that local governments will attract a population with homogeneous preferences, a proposition for which there is at least some empirical support,[49] there is a

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47. For survey evidence that individuals choose places of residence for reasons other than the available services of this proposition, inconsistent with the Tiebout model, see David P. Varady, *Determinants of Residential Mobility Decisions*, APAJ, June 1983, at 184.

48. The premise of the median voter principle is

> simply an observation that a decisive coalition in a one-person one-vote democracy consists of the median voter plus all voters either to the left or to the right of that voter. For example, the conservative must start from the right and reach far enough to the left to bring in the median voter. The liberal starts from the left and must reach far enough to the right to bring in the same voter. The election then becomes a fight for that median voter.

Herbert Hovenkamp, *Regulation History as Politics or Markets*, 12 YALE J. ON REG. 549, 554 (1995). For an assumption that local government service provision shifts with the identity of the median voter, see Susan Rose-Ackerman, *Market Models of Local Government: Exit, Voting, and the Market*, 6 J. URB. ECON. 319, 329 (1979)

49. *See* Edward M. Gramlich & Daniel L. Rubinfeld, *Micro Estimates of Public Spending*

greater possibility that the median voter will represent something close to a majority view.

The second impediment to providing services consistent with the preferences of a stable majority arises from the fact that public budgets tend to be multidimensional, so that different pieces of the budget pie can be increased or decreased while retaining the same total expenditure. Reference to the preferences of the median voter might make sense if the level of each governmental service were decided independently. Under that condition, residents are likely to have single-peaked preferences with respect to individual goods and services. Voters in general-purpose governments,[50] however, register their preferences on a package of public goods and services simultaneously since they vote for officials, not for individual goods and services.[51] A voter in a local election who is satisfied with the locality's level of education, garbage collection, and snow removal might vote to re-elect local officials, even if the voter was dissatisfied with the level of local cable television regulation. The fact that services must be voted on as a package means that officials will be unable to disaggregate from voting results those service levels that satisfy a majority of voters from those that do not. Indeed, the same process reduces the chance that any package will appeal to a majority, since small tradeoffs among different services could shift preferences or produce cycling among packages. For instance, a majority formed by advocacy of one level of spending on a package of police services, welfare services, and educational services could be displaced by another majority that traded more welfare services for fewer educational services. As a result, there is unlikely to be a stable majority that prefers any particular package, even if there exist majorities with respect to individual services.[52]

Of course, even where is simultaneous voting on multidimensional issues, there are substitutes for voting that allow officials to hear complaints or praise about the level of provision with respect to particular services. Direct complaint, or "voice" in the vernacular,[53] provides an alternative opportunity for voters to inform political leaders that their decisions deviate from constituent preferences. We rely on these political substitutes for voting when we speak of political coalitions that can make their preferences known. But there is no reason to believe that these alternatives will reflect majoritarian or widespread interests. Indeed, just the opposite is true. Given the characteristics of the public goods that government is providing, those in the majority are most

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Demand Functions and Tests of the Tiebout and Median-Voter Hypotheses, 90 J. POL. ECON. 536 (1982). Gramlich and Rubinfeld find support for the median-voter hypothesis in the substantial number of survey respondents who want no change in the overall level of local public spending. While these results are consistent with the median-voter hypothesis, they do not demonstrate that voters want no change in spending for any individual service. In addition, endowment effects may skew the responses.

50. Single-purpose governments, such as authorities and special districts, may be more appropriate for the median-voter analysis.

51. *See* James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government, in* JAMES D. GWARTNEY & RICHARD E. WAGNER, PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 10 (1988).

52. *See* DENNIS MUELLER, CONSTITUTIONAL DEMOCRACY 199-21 (1996).

53. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

likely to be able to free ride on the efforts of others. Thus, one would anticipate that complaints and praise would issue from those who suffered or enjoyed the most salient consequences from the level of provision and who were least able to rely on others to represent their interests. For instance, debates concerning levels of educational funding may be dominated by teacher groups and administrators who want to maximize budgets. As long as the level of service demanded by those with idiosyncratic preferences is not so costly as to disrupt the entire package on which all constituents vote, officials have incentives to satisfy the preferences of these idiosyncratic interests. Doing so gains officials the support of those with intense interests, without alienating the support of those still relatively satisfied with the overall package of goods and services. The necessary result is that where the level of each service within the package is decided simultaneously, the level of any given service is even less likely to reflect the interests of the median voter or of the majority.

These consequences are likely to be exacerbated in some ways, but diminished in others, when we move from decentralized to more centralized governments. Madisonian theory suggests that we are more likely to see competition among interest groups at centralized levels, where entrepreneurial leaders are more likely to arise and the chances of finding enough interested parties to create an effective coalition is enhanced. Decentralized decisionmaking, on the contrary, is more likely to be dominated by a monopolistic interest group. Thus, we might expect decisionmaking at the centralized level on any one issue would be more consistent with the views of the median voter, though still not consistent with the desires of a majority. At the same time, the variance of interests within the nation is likely to be greater than the variance of interests within any given community in the nation, again assuming that the Tiebout model accurately predicts relative homogeneity within localities. Thus, where discrete interest groups do not face competition at the centralized level, we might expect that the level of public goods that are centrally provided will be less likely to reflect the interests of the median voter. National defense, for instance, is traditionally viewed as a public good whose supply is properly determined at a centralized level. Nevertheless, Boston residents would want more expenditures on naval defense than Omaha residents. But if Omaha residents do not see naval expenditures as a direct tradeoff for other expenditures they would prefer, e.g., agricultural subsidies, they may not coalesce to defeat what, from a national perspective, is an overexpenditure on naval defense.

The result is that we are unlikely to see expenditures that reflect the preferences of the median voter on issues where there are substantial variations in preferences for the service and in intensity for different quantities (or qualities) of the service. Instead, we would expect the default level of service to reflect the preferences of a discrete, yet dominant minority. Then the analogy between opting out of default rules in contract and opting out of public provision dissolves. Whereas in contract law opting out is the signal of idiosyncratic behavior, opting out with respect to publicly provided services may actually be the preference of a substantial majority.

C. *The Use and Costs of Opting Out as a Signal*

What should we infer about the propriety of opting out if we conclude that the background level of service does not reflect majoritarian preferences? First, the lack of fit between the background level of service and majoritarian preferences suggests that opting out is even more appropriate in these circumstances, because—as I discuss below—opting out cannot be opposed on the argument that doing so removes one from the core of the community. Second, it plausibly emits a more highly tailored signal than the opaque signals of electoral markets, clouded by multidimensional choices, that there is constituent dissatisfaction with the background level of service. Thus, the objection to the analogy between contract default rules and public service levels may turn out not to be an objection to opting out, but instead a basis of support for the practice.

If the above is true, then it might tell an optimistic story about opting out, since it provides reasons to believe that opting out plays a productive role, providing competition that obligates the government provider to be attentive to the demands of its constituents, without imposing significant political costs in the form of diluting coalitions or commonalities. Indeed, where opting out is available, the signal to officials may be effective even where those who exercise the option constitute a small minority, since the resulting signal would be that the current level of provision is acceptable to most residents.

Nevertheless, the signal emitted by opting out itself contains some opaqueness. Opting out may have limited reliability as a signal because the decision to select a level of service other than the background level may reflect dissatisfaction with one feature of the service, and that feature may vary for different parties. Those who opt for private schools rather than public may not be concerned that the budget for education is inadequate. Rather, one group may believe that too much of it is spent on programs for the disadvantaged or on teachers' salaries and not enough on football teams or on programs for the gifted. Others who opt out of the same system may do so because insufficient time is dedicated to religious education or to traditional reading programs. Similarly, residents may be satisfied with the level of spending on police services but believe that not enough of the police budget is spent on foot patrols. The difficulty is that officials cannot easily distill the reasons why different people opt out and thus have little basis for translating the act of opting out into a signal of a specific source of dissatisfaction. Whether we want to employ this signaling device, therefore, may depend on whether we believe that there exist offsetting costs and whether we can define discrete instances when those costs would be outweighed by the benefits of opting out.

These limitations on the value of opting out must be considered when weighing the benefits of the practice against the costs that private options may impose. If the net result of opting out is to threaten the coalition for shifts in service levels, then we might want to encourage alternative means of registering complaint that retain the political participation of potential emigrants. If, for instance, those likely to opt out would otherwise be most likely to monitor

public officials or to become political entrepreneurs for the preferred service level, we might want them to remain customers of the public provider. At least, that would be the case if we thought that, once they opt out, these individuals will have a less intense interest in monitoring the conduct of officials. That seems to be a reasonable assumption. Monitoring is a costly activity, so that we would imagine the task would be undertaken by those who had the most to lose should public officials misbehave (i.e., behave in ways that are inconsistent with the interests of the monitors). To the extent that they reflect the preferences of others, use of voice options by this group means that they would presumptively "raise all boats" when increasing services for themselves. But once potential monitors are no longer receiving publicly available benefits, they have little incentive to ensure that the background level is consistent with public preferences.

The political costs of opting out are more likely to materialize if dissatisfied constituents have independent reasons to favor exit over voice. Where the background level of service is determined by capture of the local decision-making process rather than majority preferences (or even median voters), effective exercise of voice requires creation of countervailing interest groups. This effort, however, necessarily suffers from traditional collective action problems that reduce the likelihood that any complainer will be successful. Indeed, the very presence of an exit option deters membership in potential coalitions because the cooperation of others cannot be assured. Thus, opting out may be a less costly option than voice. Even if exit is more costly than voice (because it requires contracting with a private party for a privatized substitute), a dissatisfied resident may choose the former because exit also increases the certainty of obtaining the desired good. The existence of the alternative market eliminates the need to rely on the participation of others to obtain the desired level of service, so that the expected value of investing in costly exit may be higher than the expected value of investing in voice.[54]

If we want to induce those capable of exiting to remain within or to join a coalition for changing the background level, we may pursue either (or a combination) of two strategies. First, we could raise the costs of exit, up to the point of prohibition. Assume, for instance, that we believe that public transportation is inadequate, but that those who can afford cars will not lobby for better mass transit (even though better mass transit might reduce congestion on the roads), and without their participation we would not expect efforts for better public transportation to be successful. If private cars were banned in the central city, however, we would anticipate that former drivers would join the lobbying effort for better public transportation.

We rarely explicitly employ this strategy of prohibiting opting out. Even where we mandate participation in a collective enterprise, the obligation typically requires a minimum contribution, but does not preclude additional

54. The increased certainty that exit provides for achieving a desired good is discussed in HIRSCHMAN, *supra* note 53, at 37-39; *see also* Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 137 (1996).

contributions, even though supplements return more personal than collective benefit. I may augment my Social Security payments with contributions to retirement plans, I may volunteer for more military service than is required, or I may purchase more automobile insurance than the statutory requirement.

Opting out, however, can be deterred without being prohibited. When trying to decide which level of government should provide a good or service, it is commonplace to note that centralized provision makes it more difficult to avoid making contributions by physical exit. Thus, redistributive services are perhaps best provided by more centralized governments, so that those from whom wealth is redistributed cannot readily emigrate to less redistributive jurisdictions.[55] This sentiment, for instance, may underlie much of the recent school finance litigation that seeks state funding rather than local funding for education. One may imagine an analogue in raising the costs to opting out privately. If we believe that there is independent value in avoiding opting out, then it may be possible to restructure the provision of services in a manner that takes that value into account. Centralizing the provision of services, for instance, could conceivably raise barriers to entry for privatized suppliers who were unable to compete on a centralized scale, although they might easily offer decentralized competition in smaller jurisdictions. Alternatively, centralized jurisdictions might regulate private entities or permit local jurisdictions to do so in a manner that provided governmental monopolies free from antitrust liability.[56] The creation of such a monopoly would have the desired effect of making it more difficult for dissatisfied constituents to select a provider who offers a preferred level of service. Continuing the vocabulary from an earlier part of this article, we can look at the increased exit costs as an effective means of transforming the background service level from a default rule into an immutable rule. But lest we conclude that immutable rules are an unequivocal benefit, recall these same constraints will necessarily impose the costs of noncompetitiveness and inability of some residents to attain their preferences.

Alternatively, we could lower the costs of remaining within the coalition by offering informal "bribes" to those most likely to opt out. As a doctrinal matter, the equal service provision doctrine makes explicit bribes difficult. But implicit bribes may exist in the form of establishing priorities for serving individuals who have substantial influence over governmentally provided goods and services consistent with the interests of those who might otherwise exit. This influence may exist either with respect to political officials or with respect to like-minded residents who would not want to lose the support of those who might otherwise opt out. In either case, those with the capacity to opt out will be able to exercise disproportionate influence even though they

55. *See, e.g.*, Helen F. Ladd & Fred C. Doolittle, *Which Level of Government Should Assist the Poor?*, 35 NAT'L TAX J. 323 (1982).

56. On the scope of municipal antitrust immunity, see City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Einer R. Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 672-76 (1991); Glen O. Robinson, *The Sherman Act as a Home Rule Charter:* Community Communications Co. v. City of Boulder, 2 SUP. CT. ECON. REV. 131 (1983).

have little capacity to organize or to generate collective political action.[57] Officials have incentives to provide desired services to these individuals in order to avoid their exit, a result that would reduce the tax base and require either additional taxation or reduction of services, either of which would continue the spiral of exit by shifting additional mobile residents to the margin between living within that jurisdiction and their next preferred residence.[58]

Our reaction to opting out, therefore, may depend on whether we think that public officials tend to be influenced more by the preferences of the electoral majority or by those of a rent-paying minority. Perhaps perversely, the more we think that public officials respond to the interests of their constituents, the more confident we should be in allowing those with other preferences to opt for private provision. Where public officials are attentive to the interests of their constituents, there is less need for retaining political coalitions that might contest the status quo. Hence, in those situations, the costs of opting out are less likely to outweigh the competitive benefits and the increased utility of satisfying individual preferences. But the discussion to this point also suggests that certain characteristics of the public provider may affect the propriety of opting out. Political costs will tend to be less in small jurisdictions, *if* those jurisdictions contain constituents with relatively homogeneous tastes for public goods and services, that is, if the Tiebout assumptions work fairly well. In such a case, the range of constituent preferences is likely to be smaller, as is the possibility that the level of service provided deviates substantially from the level widely preferred. If that is the case, then it is likely that those individuals who do opt out have preferences that deviate only marginally from the background level, and the political costs related to opting out should therefore be small. If, however, the small jurisdiction is not composed of residents with homogeneous preferences, the inference from opting out is more complicated. It may reveal the traditional Madisonian concern about factions dominating in small areas. Alternatively, substantial opting out may reveal that residents are in agreement that the government should provide a level of service that reflects the lowest common denominator preferred by all residents, while additional increments are purchased privately.

Homogeneity, moreover, does not unambiguously support liberal opting out. Public goods that have significant distributional effects may require more stringent measures to keep coalitions together, and allowing individuals to satisfy more tailored and homogeneous preferences may interfere with the ability to provide public goods to others. In these situations, the political costs of allowing opting out may be significant, notwithstanding that constraints on exit eliminate the benefits of competition. In the next Section, therefore, I concentrate on the characteristics of specific goods and services to determine the factors that favor and disfavor opting out of the background level of service.

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57. *See* Rose-Ackerman, *supra* note 48, at 77.

58. *See* David F. Bradford & Harry H. Kelejian, *An Econometric Model of the Flight to the Suburbs*, 81 J. POL. ECON. 566 (1973).

III. OPTING OUT AND EXTERNAL EFFECTS

A. *The Imposition of Substantive Costs*

To this point, I have been alluding to the possibility that opting out could impose costs on those who continue to accept the background level of a service. I have suggested that these costs frequently take a political form in that opting out alters the mix of opinions that are heard by political officials who make decisions about the level of service to provide to constituents. In this Section, I identify different types of costs and the conditions under which they would arise. The result is to afford a more complex, but more thorough means of determining whether allowing or discouraging opting out is a socially desirable strategy in a particular situation.

There are two senses in which the decision by some members of the community to opt out of the background level of service provision may adversely affect others in the collective. First, the level of service selected by those who opt out may impose explicit and direct costs on those who remain and whose interests are not considered in the decision to opt out. Think, for instance, of a university that uses its own disciplinary system for sanctioning students rather than turning students who violate public laws over to local authorities for prosecution.[59] The punishment meted out by college officials in such circumstances is typically less than we would expect from public prosecution of the same offense. Indeed, given that college officials will not have the power of the state to deprive defendants of liberty or substantial property, it is axiomatic that private punishment will result in less severe sanctions.[60] The reasons for the decision to use in-house sanctions exclusively may be relatively benign. College officials may believe that publicity of the punishment within the college community means that the official sanction will be augmented by communal shaming that has a more serious effect on the malefactor than prosecution within the larger society.[61] Or officials may be motivated by more malign motives, such as the desire to avoid adverse publicity for the institution (e.g., as a place where crimes occur or where there is rampant drug or alcohol use) or to protect members of an athletic team.[62] Regardless of motive, however, the private decision to prosecute within the small community threatens to disserve the interests of the larger society. For instance, to the extent that the violator engages in recidivism that would have been forestalled by public prosecution and incarceration, and to the extent that recidivism takes place outside the college community, the private system may punish insufficiently. These effects are essentially the same as would occur in any system of private

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59. *See* Nina Bernstein, *With Colleges Holding Court, Discretion Vies with Fairness*, N.Y. TIMES, May 5, 1996, at A1.

60. Of course, the college could both impose internal sanctions and turn the offender over for public prosecution. Public prosecution may be favored by alleged offenders insofar as it entitles them to procedural protections that may be unavailable privately.

61. On the efficacy of shaming as a punitive measure, see Daniel Kahan, *What Do Alternative Sanctions Mean?*, 61 U. CHI. L. REV. 563 (1996). It appears to be the case, however, that frequently those who bring the offense to light are the ones who suffer communal shame. *See* Bernstein, *supra* note 59.

62. *See, e.g.*, Michael Farber, *Coach and Jury*, SPORTS ILLUSTRATED, Sept. 25, 1995, at 31.

justice, since such systems leave punishment decisions in the hands of those who typically have personal motivations that lead them to impose too little or too much punishment compared to the social ideal.[63] Similarly, a privatized security force hired by a business improvement district may deter crime in that district, but possibly only by shifting the location of misbehavior and thus increasing crime elsewhere.

The second sense in which opting out may impose costs on others, the imposition of political costs with which I am primarily concerned, is different in nature from these more substantive externalities. The political costs affect the procedures by which officials set the background level of a particular service. Thus, the ultimate decision in these cases continues to be made by representatives of constituents. The issue is whether opting out by some residents alters the decision made by those representatives.

B. *Opting Out of Political Participation*

There are several ways in which those who opt out may change the roles they play in public debate about the background level of service. I alluded above to the possibility that those who serve as superior monitors of official misbehavior might be less interested in fulfilling that function once they privately contract out of the background level of service. But the more serious claim is that those who opt out will not simply be passive about the service level for those who remain, but will react with animosity or selfishness to restrict the background level of service. The suspicion is that if those who seek a higher level of service must pay for it, they will fail to support the background level of which they do not take advantage.

It is worthwhile to consider these claims separately, as they raise significantly different issues. The first claim is addressed to the willingness of those who opt out to exclude themselves from the affairs of the larger community. The claim is reminiscent of deTocqueville's assertion that democracies foster individualism, defined as "a calm and considered feeling which disposes each citizen to isolate himself from the mass of his fellows and withdraw into the circle of family and friends; with this little society formed to his taste, he gladly leaves the greater society to look after itself."[64] Thus, detractors of residential associations claim that individuals who live within private groups are likely to suffer a diminished sense of civic responsibility.[65] But the claim

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63. This is not to say that social mechanisms of justice consistently impose punishments that correspond to the social ideal. The incentives of litigants and their attorneys often cause what from a social perspective appears to be underinvestment or overinvestment in litigation. But failure to implement perfectly a system designed to reflect all social interests is different in kind from private enforcement mechanisms that are not designed in the first instance to reflect the interests of all those affected by criminal activity.

64. ALEXIS DETOCQUEVILLE, DEMOCRACY IN AMERICA 506 (J.P. Mayer ed., 1969).

65. *See, e.g.*, MCKENZIE, *supra* note 27, at 141; Kennedy, *supra* note 27, at 777. *But see* ROBERT J. DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE 134-35 (1992) (concluding that "the evidence concerning [residential associations'] impact on political participation is mixed," and that in some cases membership in such an association increases participation in local politics).

is somewhat ambiguous in its reach, and it has very different merit depending on how one interprets it.

The most general form of this claim implies that those who opt for privatized versions of public functions will withdraw from the public sphere generally. This form of the claim is the most problematic. Individuals who opt out of background levels of service of residential street paving or safety protection remain members of the larger polity for multiple other functions, including schools, foreign policy, and federal income tax levels. That those who live in gated communities thereby are less affected by and become less interested in crime rates in other parts of the locality (and if they work, shop, or socialize in those areas, even that assumption may be unjustified) does not entail that they ignore civic concerns over zoning, state and federal legislative elections, or ethnic cleansing in Bosnia. Indeed, the fact that members of residential associations share a community of interest suggests that they may become more involved in civic affairs, because their common interests facilitate solutions to collective action problems that would otherwise make efforts at civic action improvident.

There are, however, narrower forms of the claim that may be more telling. Detractors may be objecting that those who opt out are likely to form coalitions only to foster the narrow interests of the association's members rather than for the common good. One would, in fact, be concerned that once members of a privatized business improvement district had "taxed" themselves to repair sidewalks and promote their stores (thus creating an advantage over competitors) they would lobby against proposed tax expenditures by the locality to provide similar services to other commercial areas in the jurisdiction. Similarly, those who send their children to private school may oppose additional public school funding. Any such objection is very different from the claim that those who opt out will fail to exercise civic responsibility at all.

Opting out, however, does not necessarily generate conflict between those who opt out and those who select the background level of service, nor does it necessarily reflect conflict of an undesirable sort. Take first the latter point, the possibility that any conflict may actually be desirable. Certainly, if the choice of background rules is itself governed by dominant interests rather than by majoritarian concerns, those who choose to opt out cannot readily be described as excluding themselves from the community, since the background level of services does not reflect the choice of the community in the first place. Indeed, if we believe that public debate is already informed by entrenched interests, then the addition of another cohesive group may actually generate more publicly interested decisionmaking. Assume, for instance, that commercial developers are attempting to displace current zoning regulations to permit more commercial development and face little opposition from residents because of traditional obstacles to collective action. The increased capacity of "privatized" residents to use their neighborhood association as a competing interest group may actually increase the chances that anti-development voices will be heard in the process. Thus, the political implications of opting out may turn out to be political benefits rather than costs.

Moreover, whether those who opt out will oppose public expenditures on similar services depends on the relationship between the privately supplied level of service and the publicly supplied background level. In some cases, those who opt out of the background level of service purchase an additional increment of service from a private provider; in other cases, opting out entails complete displacement of the government provider. For instance, the members of a business improvement district who contribute to a fund for private security guards should still be willing to support a high level of police service, because they receive benefits from both public and private sources. Since these merchants must pay all the direct costs of the incremental service, they would presumably prefer that the basic service, supported by tax dollars, be optimal in order to reduce their additional cost. (Although, a district comprising stores that could afford private protection more readily than their competitors might oppose public financing in order to give themselves a competitive advantage by offering a safe shopping area.) I may believe that police services are adequate to provide my business with sufficient protection during daytime hours, so that I only have to hire private guards during evening hours; but I might object to reduction in police budgets because that would cause me to hire private guards during daytime hours as well. Similarly, those who send their children to public schools but who hire tutors to augment their children's education might become more concerned about the level of public education, since they would prefer to save the tutoring costs and not want to incur the still higher costs of private school. The fact that individuals seek higher levels of service in these cases, therefore, does not suggest that they will attempt to undermine or abandon political coalitions that seek to deliver socially optimal levels of the desired service.

In other situations, however, the higher level of service cannot be purchased in increments above the basic level. Opting out in these cases subsumes provision of the background level as well as the desired increment. Those who send their children to private schools in search of a more religious education than the locality provides, for instance, may be less willing to support public schools because their children receive all their formal education, not just a marginal amount, from private schools. In this situation those who opt out may not simply fail to support the level of the background service that is preferred by those who do not opt out, but may actively encourage governments to underinvest in impure public goods for which there are reasonable club or private substitutes. This is the situation represented by the merchants who opt out by repairing their own sidewalks and then lobby to reduce their tax outlay for the background level of service that they do not utilize, and that may actually compete with their privatized benefits.

Indeed, legal doctrine may exacerbate the problem by giving those with the capacity to opt for higher levels of service incentives to constrain governmentally provided services at artificially low levels. Given obligations of equal service provision, providing amenities to the wealthy requires officials to provide those same amenities to all within the jurisdiction. It is unlikely that increased police protection, parks, or school budgets could be offered only to

those willing and able to pay for them.[66] Once offered throughout the jurisdiction, however, these same amenities are likely to attract more poor households.[67] Any such shift in population will, in turn, increase the costs of supplying both the new services and other welfare services that require redistributive taxation from the relatively wealthy, again triggering the spiral of exit by the relatively wealthy, who are most capable of exercising that option. Those who are capable of contracting for club goods may attempt to avoid this spiral, without formal violation of the equal service doctrine, by lobbying for relatively low levels of public service, augmented by privately provided services for those who can contract for them.

Even in these cases, however, there exist countervailing incentives that might deter both officials and those who could opt out from artificially limiting the scope of public services. From the perspective of officials, reducing local expenditures is inconsistent with explanations of bureaucratic behavior that contend budget-maximizing bureaucrats spend larger sums of money than an informed majority would prefer;[68] publicly interested officials might want to avoid disparities in the provision of services; officials may have particular programmatic concerns that require service delivery that is inconsistent with the preferences of those who opt out (e.g., officials who want to support working mothers may sponsor municipal day-care centers notwithstanding that constituents capable of opting for private services are unlikely to use them); officials concerned about personal advancement may be attentive to accusations that they provided low levels of service in their current office; and officials faced with the possibility of competition from private providers might prefer to raise the level of service to all in order to disguise inefficiencies that would be apparent in a competitive environment.

Similarly, residents who are able to opt out might prefer to pay for benefits that they do not enjoy, either out of altruism or to avoid reductions in property values, which are likely to reflect the quality of services. This latter phenomenon is plausible where even the wealthy have limited mobility, such as where the relevant jurisdiction is large or where wealth is tied to the particular jurisdiction (through jobs or proximity to kinship groups). In this situation, even if conditions otherwise favor imposing political costs, e.g., even where the higher level of service subsumes the background level, those who opt out have incentives to be concerned with the service available to others. Those who send their children to private schools (or who do not have

66. With respect to some services, however, it appears that localities may offer differential services, depending on residents' willingness to pay, even if that willingness reflects ability to pay or creates other divisions, such as racial ones. For instance, in Hadnott v. City of Prattville, 309 F. Supp. 967 (M.D. Ala. 1970), a locality was deemed not to have violated any constitutional equal protection obligation when it failed to pave streets unless abutters agreed to pay for the improvement through special assessments. The result of the local policy was that 3% percent of the city's white residents lived along unpaved streets, compared to approximately 35% of the black residents.

67. *See* Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1723 (1979).

68. *See* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

children), for instance, may support public schools because the value of the public education system is capitalized into the value of their homes.[69] These homeowners cannot be certain that their purchasers will share their preferences; hence, if they believe that educational quality is an important factor in housing prices, they have reason to support educational expenditures of which they do not take direct advantage.

Political costs may be exacerbated where opting out adversely affects the feasibility of providing the background level preferred by those who remain. Under these circumstances, those who opt out are not merely exercising disproportionate political influence in opposing public provision of public goods. Instead, the very act of opting out may render public provision of the good infeasible, because opting out eliminates certain economies that make collective provision attractive. Municipal facilities frequently have elements of "publicness" because they require substantial capital outlays. But these same characteristics frequently mean that the goods are in the nature of step goods that cannot be provided in small increments but only in large, expensive doses (half a bridge is as useless as no bridge). Opting out may create a situation where public provision is abandoned because there remain an insufficient number of people to make investment in the next step worthwhile, notwithstanding that provision would have been appropriate if all residents participated. For instance, charges for the service may be based on costs to those who actually use it, and if departure by some residents does not reduce the fixed costs made by the jurisdiction (e.g., one garbage truck must be purchased for a city of 1000 households whether all residents have governmental garbage collection or only one does), then those who opt out may increase per capita costs to those who accept the background level.

It is equally plausible, however, that opting out could reduce costs for those who remain. This result would occur when the publicly provided good is subject to congestion, but congestion (which would require provision of additional increments of the good) is avoided because some residents select private providers of substitute goods. Assume, for instance, that no families within a locality sent their children to private schools. It might be necessary to construct and staff additional public schools in order to avoid overcrowding. If the capital expense incurred to meet congestion increases the pro rata cost to each resident, then the fact that opting out eliminates the need for the new facility can return a benefit to those who use public facilities.

The indefinite consequences of opting out on the costs for those who remain can be illustrated by the following example. Assume that a municipal swimming pool can comfortably accommodate 100 persons, that the swimming pool costs $1000 to construct and operate, and that it makes no sense to construct a second smaller swimming pool if there are fewer than 100 potential users per pool, perhaps because future population growth is expected to materialize within the useful life of the pool. If there are 150 swimmers in the community, two swimming pools will be necessary, with the cost to be shared

69. *See, e.g.*, Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: A Reply and Yet Further Results*, 81 J. POL. ECON. 1004 (1973).

by 150 swimmers. Thus, each swimmer will have to pay $2000/150, or $13.33 towards the pools. Now, assume that we again have 150 swimmers within the jurisdiction, but 50 swimmers join a private pool club (they may, for instance, be willing to pay for less crowding, longer hours of operation, status, etc.). There is now no current need for the second pool, so that each of the remaining "municipal" swimmers needs only pay only $1000/100, or $10 toward the pool.

Unfortunately, this argument may also work in the opposite direction. Assume that the residents value the pool at $15 as long as no more than 100 people use it, but at no more than $9 if between 100 and 150 use it. Now assume that if all 150 swimmers use the municipal pool, the municipality will construct a second pool, so that each swimmer pays $13.33. If only 110 swimmers use the pool, the municipality may find it more appropriate to tolerate congestion than to construct a new pool. (Under these conditions, the 110 swimmers would have to pay $18.18 for two pools, in excess of what they would be willing to pay.) If 40 swimmers opt for the private pool, the 110 remaining swimmers would have to pay $9.09, an amount in excess of what they would be willing to pay for the congested pool. Hence, some swimmers will be unable to use the pool at a price they are willing to pay, even though they would have been willing to pay for a less congested pool.[70]

Ex ante, there is no reason to believe that opting out is more likely to reduce the capital expenditure to a manageable amount (the first case) than it is to frustrate the ability to make the service available at a price that would be affordable if all participated (the second case). None of this is to say that restrictions on mandatory participation would not reduce the utility to those who would like to opt out but could not. It is only to say that the marginal effect of opting out is difficult to calculate ex ante.

But let us take as given that those who opt out and thereby do not take advantage of the background level of service subsequently fail to support that level. Does it follow either that the background level will be inefficient (in that those who would have been subsidized by the payments made by those who opt out gain more than the defectors lose) or that any inefficiency favors redistributional goals? One can tell a more complicated story about the cross subsidies inherent in the decision to opt out without any offset for the payments made in respect of the foregone service.[71] If the background level of service is financed through compulsory taxation that those who opt out cannot escape (such as residents who pay taxes to support public schools even while sending their children to private schools), then wealth is being redistributed.

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70. For another example, assume that there are three members of a society, all of whom desire garbage to be collected. Two of the members would value weekly garbage collection if they did not have to pay more than $4 per week for it. The third member would be willing to spend at least $4 for weekly garbage collection, but also values twice-a-week garbage collection and is willing to pay $12 per week for it. Weekly garbage collection costs $9, and twice-a-week garbage collection costs $12. If permitted, the third member will contract for twice-a-week garbage collection. The result is that the first two members will not get weekly garbage collection at all, since they will be unable to obtain it at a cost that they are willing to spend on it.

71. *See* Gillette, *supra* note 20, at 1393.

Assume, for instance, that property tax payments are used to pay for snow plowing of all city streets. Individuals may live on private streets in part because they can contract with private snow plowers for speedier service than the locality is able to provide to residential neighborhoods. Taxes paid by those individuals, however, are used to plow public streets. Once the owners of the privatized streets emerge from their enclave and drive on the plowed public streets, they are obtaining the benefit of their tax payments. Nevertheless, the locality would have had to plow their residential streets out of tax payments had the residents of the privatized area not done so themselves. Hence, the fact that the locality did not have to plow those streets means that (1) the total local outlay for snow plowing was less than it otherwise would have been, a cost-reduction from which all local residents (not just the abutters of the private streets) benefit; and (2) the residents of private streets are paying a greater share of the snow plowing budget than similarly situated residents of public streets.[72] This redistribution, however, does not necessarily transfer wealth from wealthy to poor or from those who receive less utility from a service to those who receive more. Again, local homogeneity suggests that redistribution within the locality occurs within relatively narrow parameters of wealth.

It is, of course, possible to avoid "double payments," either by rebating tax payments to those who opt out,[73] or by allowing opting out with respect to services subsidized only by user fees (which those who opt out would not pay, since they would not be using the public facility). But in the absence of such adjustments, double payments complicate the issue of whether opting out redistributes wealth regressively.

C. *Opting Out and Community*

Although I have been attempting to distinguish between substantive externalities and the procedural political costs generated by opting out, there is one series of effects of the former that is worth additional attention. These effects are perhaps best captured by the term "community" which some have suggested is undermined by allowing individuals to opt out. Presumably the concern is that individuals within a constituency obtain additional value out of sharing the same public goods, and that value is diluted by allowing some members of the community to reject or supplement communally provided goods. For example, some of the literature on educational quality suggests that the best predictor of educational quality is not financial inputs or class size, but other variables, such as the quality of one's peers.[74] If we believe that those who are most likely to leave low-quality public schools for higher

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72. *See, e.g.*, DILGER, *supra* note 65, at 102.

73. *See, e.g.*, N.J. STAT. ANN. §§ 40:67-23.2 to -23.8 (West 1992).

74. The early entry into this debate was the *Coleman Report* in 1966. *See* JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966). The debate about the relationship between financial inputs and educational outputs has raged since. For a collection of the sources and their conclusions, see Michael Heise, *State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Analysis*, 63 U. CIN. L. REV. 1735, 1747-49 (1995).

quality private ones are individuals who would have been "better" peers of those who remain, then opting out imposes real, but less measurable, costs. Since, however, we do not expect all those who might contribute to educational equality to do so, i.e., we do not expect individuals to migrate to areas where they might provide the greatest advantage to other students, there appears to be some special claim about the obligation of those who live within a community to other residents of the same jurisdiction. Thus, many of the concerns about opting out ultimately depend on the independent value of maintaining equality within a defined community.

The value of community is rooted in a belief that differential service breeds dissent and inequality, each of which may tear at the soul of the community that service provision fosters. The problem is exacerbated to the extent that one obtains a differential level of service through arrangements with private providers. Circumventing public provision arguably violates what it means to *be* a member of the community, since the community is defined by the services it provides to all. If we return to the rough categorization of sources of provision with which I began, those who appeal to community seek to identify the community more closely with kinship groups and to distance the community from market and governmental transactions.

To the extent that one embraces the value of community, the delicate balance of political costs and competitive benefits, or appeals to individual preferences, are essentially irrelevant. The political costs inherent in opting out are necessarily so great (political cohesion being the basis of the community) that marginal gains in efficiency from competition are inevitably trumped. In addition, satisfaction of individual preferences is presumably of less concern, since the maintenance of community necessarily requires compromise of individual desires. I cannot claim that this value is (or should be) unknown in local government law. To the contrary, the desire to maintain a strong sense of community can be used to explain a significant amount of local government law.[75] One may, for instance, think of this concern as underlying the doctrine of equal service provision.[76]

Nevertheless, the equal-service doctrine, and preferences for community as embodied in current law generally, provide only limited support for the proposition that intrajurisdictional variations in service cannot be tolerated. With respect to many public goods, the mandate that service be provided "equally" does not translate into equality of result, but only to formal equality of opportunity. For instance, the doctrine applies to services that are financed through user fees, but in that context the doctrine only requires that individuals have an equal right to obtain the service on payment of the required fee. Since some individuals will have a preference for more of the fee-based service than others (those with gardens and swimming pools will use more publicly

75. *See, e.g.*, Nordlinger v. Hahn, 505 U.S. 1 (1992) (reasoning that desire to maintain stable population and hence advance concept of community justifies property tax based on value of home at time of acquisition rather than current market value).

76. *See* ROBERT L. LINEBERRY, EQUALITY AND URBAN POLICY 43-45 (1977); *see also supra* text accompanying notes 42-43.

supplied water than those without), the result will be different per capita usages of the same service, albeit the payments made by each individual will reflect the amount of use. As long as opting out entails making payments for the additional levels of service, and as long as all share the opportunity to opt out, exercise of that option does not violate the equal service requirement even as understood in communitarian accounts of local government. Hence, no greater concern arises when inequality stems from privately provided services. Nevertheless, one might claim that governments, by selecting when to utilize user fees, thereby choose appropriate levels of intrajurisdictional inequality. Private decisions to opt out may transcend acceptable boundaries of inequality.

Constraints on opting out to foster community, however, are subject to a broader attack. First, for those who advocate development of community, the fact that club goods require the creation of voluntary associations could be cause for support. That individuals share preferences for particular goods or services does not require homogeneity in other aspects of their lives. Individuals who desire more religion in their lives and who thus opt out of public schools for parochial education may find themselves in a subcommunity with whom, but for this preference, they would share little social or political interaction. If I live in a neighborhood that is socially and economically homogeneous, but send my children to a church school that attracts children from other neighborhoods, I may create a more complex series of relationships (some in my geographic neighborhood and some in my religious community) than would be the case if I sent my children to the public neighborhood school. Clubs, therefore, may engender a level of interaction among communities not otherwise readily available.

Even without the formation of stronger intrajurisdictional bonds, however, the appeal to community is not necessarily undermined by opting out, especially when the alternatives are considered. Opting out of the background level of service offers a private contractual analogue to a more traditional Tieboutian acquisition of the desired level of service through physical exit. Thus, one who is generally satisfied with the package of services in the community, but dissatisfied with the level of a particular service, may pursue any one of three strategies. She may remain in the community and accept a suboptimal level of service, or she may opt out with respect to the unsatisfactory service, or she may exit the jurisdiction. Which option the individual chooses depends on the private costs of each option. Physical exit may be relatively costly, so that it is selected only when the service at issue is of substantial importance. But if the individual is an outlier with respect to that service, then both she and the community (of which she would thereby remain a part) might be better off if she can opt out of that service alone. Assume, for instance, that an individual shares the communal interest in most services, but has an idiosyncratic preference for education. If the individual's concern about education is sufficiently great that exit would be worthwhile, it is unclear that anyone is better off when she exits the jurisdiction rather than contracts privately for better education.

Perhaps out of awareness of the greater costs of physical exit, the legal regime does not identify community with conformity, even where it encourag-

es the former. Recall the situations that I noted above in which mandatory participation is required, such as in areas of Social Security or automobile insurance. It is plausible to think of these situations not simply as solutions to common pool problems, but also as efforts to foster a sense of community by requiring subsidies and avoiding catastrophic losses to any resident of the jurisdiction. In all these cases, prohibitions on augmenting the basic requirement are possible. The consequence in each case, however, would be additional dissatisfaction among those forced to participate at a personally undesirable level. What we might infer from the combination of obligatory participation with the possibility of opting for additional service, therefore, is that the communitarian sentiment seeks to ensure a basic level for all constituents, but does not, at least within a wide range, support a prohibition on opting out.

IV. CAN YOU OPT FOR LESS?

To this point, the examples I have used assumed that those who opt out prefer a higher level of service than government otherwise provides. Presumably, one would opt for less of a governmentally provided service only if doing so generated some alternative good or service that was more valuable to the individual than what had been surrendered. The fact that one is attaining a net gain means that the definitional issue of what constitutes less, rather than more, services is difficult to resolve. In addition, the concept of "service" is sufficiently malleable to render the inquiry into "less" more sophistic than sophisticated. When a residential subdivision prohibits leafletting, is it providing *more* services, in the form of regimentation and conformity not available outside the gated walls, or *less* services, insofar as residents are denied restrictions on regulatory interference that would apply where governments are the relevant actors? The definitional conundrum is not what interests me here; rather I want, under the (perhaps unfortunate) rubric of "opting for less" than a background level of service, to inquire into the propriety of private regulations that cannot easily be administered by governmental bodies and that are imposed with respect to services typically associated with government.

With respect to some services, opting for less simply means that persons entitled to take advantage of services fail to do so, e.g., a failure to call the police when a crime has been committed or to use as much electricity as the municipal utility will provide. These forms of opting for less are trivial and are not my concern here. But there is another sense in which opting for less has significant import. One type of good or service the government provides is a series of protections against the government itself, that is, an embodiment of negative freedom. These protections typically take the form of rights that individuals have against governmental interference. But there may be occasions in which individuals would like to make pre-commitments enforceable by government, or in which individuals prefer to have government act paternalistically. Assume, for instance, that relatively poor individuals have limited options about where to reside. They value the safety of wealthy suburbs, but (private markets for housing being what they are) cannot afford them. They may attempt to "privatize" security by purchasing strong locks, carrying weapons in self-defense, or joining in collective security arrangements

that range from watching each other's homes to private policing (e.g., the "Guardian Angels"). But another alternative is to join an association of (contract with) like-minded individuals to agree to a regimentation that is inconsistent with our traditional concerns about protections from government. For instance, residents within an apartment complex may be willing to require identification cards for entrance or to abandon their rights to be free of searches and authorize random searches of the apartment for guns and drugs.[77] Would we think that this kind of "opting out" is appropriate?

Alternatively, think of Professor Katherine Van Wezel Stone's concerns about private procedures that displace judicial adjudication with arbitration that allegedly reduces workers' rights.[78] The move to private arbitration of labor disputes or disputes in other contexts typically entails fewer procedural safeguards than in full-fledged judicial proceedings. Presumably, those who agree to arbitrate believe that what they gain in speed of dispute resolution, cost savings, and avoidance of abusive discovery procedures outweighs what they surrender in terms of traditional safeguards in governmentally administered proceedings. Thus, opting out of background rights by selecting private dispute resolution allows parties to attain their preferences.

The possibility of opting out of substantive or procedural "rights," however, may cause the same concerns as opting out for more services than the background level provided by government. At least in some cases, we create rights not out of paternalism or to codify a bargain that we think most parties would prefer if left to their own devices. Instead, a right may be recognized to reduce the costs that serve as obstacles to the creation of public goods. Free speech, for instance, may be defended less as a benefit for the speaker than as an inducement to generate the public good of information for listeners. Where rights are rooted in public goods, failure to exercise a right generates costs for others. An individual who agrees to waive the right to speak freely may be acting autonomously, and thus in service of some objectives of the First Amendment. But that same individual thereby deprives others of information in abrogation of alternative objectives of that same concept. Indeed, the desire to avoid disincentives against providing the public good of information appears to lie behind doctrines such as "chilling effects" and tolerance for untruths that cannot easily withstand scrutiny on alternative justifications for free speech.

Perhaps this objection provides better support for Professor Stone's concerns. One may be relatively untroubled by the reduction of workers' statutory

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77. *Cf.* Amitai Etzioni, *Balancing Act; Don't Sacrifice the Common Good to Personal "Rights"*, CHI. TRIB., May 16, 1994, at 11. For a determination that warrantless searches for weapons in an apartment complex operated by a public housing authority is presumptively unconstitutional, see Pratt v. Chicago Housing Auth., 848 F. Supp. 792, 795-96 (N.D. Ill. 1994). More than 5,000 residents of projects operated by the authority signed a petition in favor of warrantless searches. *See* Pratt v. Chicago Housing Auth., 155 F.R.D. 177, 178 (N.D. Ill. 1994). For an argument that even governmental action is not unconstitutional in this context, see Steven Yarosh, Comment, *Operation Clean Sweep: Is the Chicago Housing Authority "Sweeping" Away the Fourth Amendment?*, 86 NW. U. L. REV. 1103 (1992).

78. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

rights either if one believed that they resulted from competition in a working political market between labor and management or that the ostensibly "defeated" had accepted arbitration as a trade-off for avoiding the costs inherent in adjudication. But reduction of those rights is less acceptable if the failure to exercise those rights deprives others, not parties to the bargain, of the benefits that those rights were created to generate. Arbitration, for instance, eliminates the public goods that adjudication confers on non-parties in the form of precedents that provide notice of acceptable conduct and that ensure the similar treatment of similar cases.[79]

Other instances of opting for less similarly threaten external benefits. Think, for instance, of failures to assert rightful claims against sellers of defective products who are supposed to invest optimally in safety as a result of the incentives of a negligence system, but who go underdeterred where potential cases are unlitigated. The point here is not that these cases systematically cause benefits to be forgone. There are, after all, offsetting correctives, such as high jury awards in cases that are litigated and that thus help compensate for the unlitigated cases. And in some cases, rights are intended to create highly privatized benefits that may generate public goods when surrendered; for instance, shopping mall owners may have the right to exclude solicitors and leafletters, but may increase the availability of information when they choose not to exercise that right.[80] My point instead is that the category of cases in which individuals opt for less is both far-ranging and susceptible to the same analysis as more traditional cases of opting out insofar as each one ultimately depends on the consequences of the act for those who could not participate in the bargain.

Nevertheless, the balance of political costs and competitive benefits may be more readily resolvable in cases of opting for less. It is unlikely that a critical mass of those protected by a right will abandon it, so that the public goods generated by rights are less likely to be foregone. Exercising fewer rights than one possesses, therefore, poses less of a risk of a downward spiral leading to a deterioration of the right itself. Thus, the signaling function of exit might work here with less threat that the political advantages of collective provision will be reduced.

V. CONCLUSION

Reactions to opting out tend to be somewhat visceral and to be derivative of other values. Whether one believes that such mundane, but visible acts such as living in a residential association, sending one's children to private school, or forming a business improvement district are elitist or part of democratic choice, frequently appears to reflect one's views of redistribution, community, and the acceptable level of externalities imposed by individual conduct. I have tried to show that there is more that we can say about this issue, and that the

79. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1978); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622-23 (1995).

80. *See* WITOLD RYBCZYNSKI, CITY LIFE 209 (1995).

complexities allow us to think in more precise terms about the propriety of opting out of public provision in any particular context. Opting out always signals some level of dissatisfaction with the status quo and may signal the presence of a competitive alternative that may correct faulty political decisions. Whether we should invite such signals depends on whether the process of amplification improves on more opaque alternatives or generates intolerable costs to political life. But even focusing on these factors fails to reveal the full complexity of opting out. Our willingness to risk efficient provision, efficient politics, or community, varies from service to service. Thus, some multidimensional matrix would be necessary to weigh properly all the variables that inform the propriety of opting out in a given context. My objective at the moment is simply to overcome the view that our reactions are readily reducible to a single-minded embrace of the public or the private.

OPTING OUT OF PUBLIC PROVISION: CONSTRAINTS AND POLICY CONSIDERATIONS

ELAINE A. WELLE*

In his thought-provoking article, Professor Clayton Gillette draws an analogy between contractual default theory and opting out of public provision.[1] This creative approach provides an interesting framework within which to study the propriety of opting out of government services. Given the current trend toward private governance and the controversial nature of this topic, Gillette's article should prove to be only the beginning of an important dialogue on the propriety of opting out of public provision.

With his characteristic completeness, Gillette astutely anticipates a myriad of possible concerns and directly addresses them. So, rather than laboriously reviewing his analysis, I have chosen instead to build upon his framework and identify issues that warrant further consideration and discussion. Specifically, I explore the constraints on an individual's freedom to opt out of certain governmentally supplied services by drawing further analogies to contract law.

This article begins with a brief discussion of default theory and its application in the public provision context. Various constraints on opting out of public provision are then described, and the appropriateness of these restrictions is considered. The article also examines how the default level of services is set and how opting out may alter the default level.

I. CONTRACTUAL DEFAULT THEORY AS APPLIED TO PUBLIC PROVISION

The default theory concept[2] is deceivingly simple. Contractual default

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* Assistant Professor of Law, University of Wyoming College of Law. B.A., University of Colorado, 1977; M.B.A., University of Colorado, 1981; J.D., University of Arizona, 1986. This article is a written version of comments prepared for a Symposium on The New Private Law: Perspectives on the Current Trend Toward Private Governance, held at the University of Denver College of Law on March 1-2, 1996. The author thanks Dean Dennis Lynch, the University of Denver law faculty, and the editors of the *Denver University Law Review* for sponsoring the Symposium and creating an environment conducive to a productive and stimulating exchange of ideas. This article benefitted greatly from conversations with Eric Muller and from the comments of participants at the Symposium. I would also like to thank Teresa Jensen and Federico Cheever who took the time to comment on an earlier draft, and Marcia Peterson for her research assistance. Research support for this project was provided by a grant from the George William Hopper Faculty Research Fund.

1. Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185 (1996).

2. While Gillette uses the contractual default model for his analogy, default rules are prevalent in other areas of the law that have contractual aspects, such as divorce law, the law of intestacy, tort law, and property law. For example, under the law of intestacy, default rules fill any testamentary gaps. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88 n.10 (1989); W. David Slawson, *The Futile Search for Principles for Default Rules*, 3 S. CAL. INTERDISCIPLINARY L.J. 29, 30 (1993).

rules establish contract rights and obligations when an agreement is silent with respect to certain topics.[3] Default rules often provide supplementary contract terms when the parties have not agreed otherwise.[4] The parties, however, are free to opt out of these standard default provisions by private agreement if they strike a different bargain.[5] For example, if a contract by a merchant for the sale of goods is silent with respect to warranties, a warranty of merchantability is implied.[6] The parties, however, may waive the warranty or opt for a different provision by express agreement.[7]

Gillette proposes we view the level of goods and services the government provides as a default or background level, since it is available to all residents simply by virtue of their membership in the community.[8] He argues individuals should be permitted to opt for a different level by privately contracting for more, or possibly even opting for fewer,[9] goods or services.[10] Gillette suggests the decision to select one level of service over another may simply reflect a desire to achieve individual preferences where that individual is unable to satisfy his preferences through the political process.[11] He submits allowing individuals to opt out of public provision may be no more momentous than opting out of the default rules under contract law.[12] Consequently, we should not necessarily draw any negative inferences from the fact that some individuals may opt for a different level of service,[13] just as they may decide to opt for a different contract term. Gillette concludes the propriety of opting out should be determined by weighing the competitive benefits of opting out (efficiency and satisfaction of individual preferences) against the costs of opting out (in terms of political participation and effect on community).[14]

However, even in the contract law context, default theory is not without constraints and controversy. The freedom to contract itself is limited. For example, some contracts are unenforceable on public policy grounds, such as

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3. The term "default rules" became popular when Ian Ayres and Robert Gertner used it in their seminal article, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, *supra* note 2. Ayres and Gertner noted that default rules also have been called "background, backstop, enabling, fallback, gap-filling, off-the-rack, opt-in, opt-out, preformulated, preset, presumptive, standby, standard-form and suppletory rules." *Id.* at 91 & n.25. For a small sampling of the literature on contractual default theory, see *Symposium on Default Rules and Contractual Consent*, 3 S. CAL. INTERDISCIPLINARY L.J. 1 (1993).

4. Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. CAL. INTERDISCIPLINARY L.J. 115, 116 (1993).

5. *See, e.g.*, U.C.C. § 1-102(3) (1994) ("The effect of provisions of this Act may be varied by agreement . . . .").

6. *See* U.C.C. § 2-314 (1994).

7. *Id.*

8. Gillette, *supra* note 1, at 1195.

9. *Id.* at 1216-20.

10. Even though Gillette presents a balanced approach in his inquiry into the propriety of opting out by addressing the various concerns voiced by Symposium participants, the article, taken as a whole, generally supports the position that individuals should be free to opt out of public provision. Implicit in his analysis is the assumption that one should be free to opt for a different level of government services.

11. Gillette, *supra* note 1, at 1188.

12. *Id.* at 1196-97.

13. *Id.* at 1196.

14. *Id.* at 1192-93, 1219.

contracts that restrain trade.[15] A number of these contractual constraints have been cast as immutable rules applicable to all contracts that may not be varied by private agreement.[16] The duty to act in good faith, for instance, is an immutable part of any contract.[17] The parties to a contract may not disclaim their obligations of good faith, diligence, reasonableness, or care.[18]

In the contract law context, there is also debate as to how default rules should be set.[19] Should default rules reflect what the parties would have wanted? Should they be designed simply to foster economic efficiency or preserve contractual relationships? Should default rules promote a certain result, such as encouraging parties to reveal information? Or should they reflect communitarian values, such as fairness? This debate focuses on whether default rules should just describe contracting behavior or prescribe appropriate rules.

While Gillette discusses the propriety of opting out of public provision, he only briefly addresses the constraints on one's freedom to opt out of certain governmentally supplied services.[20] If we are going to apply default rule theory in the public provision context, we must also consider *whether there are*, and *whether there should be*, certain constraints and immutable rules. In addition, we must gain a better understanding of what the default or background level of services *reflects* and consider what it *should reflect*.

II. CONSTRAINTS AND IMMUTABLE RULES

A. *Constraints on Opting Out of Public Provision*

Few will quarrel with the general proposition that an individual should be free to purchase greater security protection or opt out of the public school system for a private alternative. Nevertheless, there are clearly constraints on

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15. E. ALLAN FARNSWORTH, CONTRACTS ch. 5 (2d ed. 1990 & Supp. 1995); JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 98 (3d ed. 1990). Public policy grounds cited by courts to justify nonenforcement include moral values (policies against impairment of family relationships and against gambling), economic grounds (policies against restraint of trade and restraints on alienation of property), and the need to protect government institutions (policies against improperly influencing government officials). FARNSWORTH, *supra*, § 5.2, at 351.

16. *See, e.g.*, U.C.C. § 1-102(3) (1994) (good faith, diligence, reasonableness, and care may not be disclaimed by agreement); U.C.C. § 1-105(2) (1994) (limits a party's right to choose applicable law); U.C.C. § 1-204(1) (1994) (provision for disregarding a clause which fixes a time that is unreasonable); U.C.C. § 2-718 (1994) (liquidated damages clauses are allowed only where the amount involved is reasonable); U.C.C. § 2-719(3) (1994) (consequential damages clauses may not operate in an unconscionable manner).

17. U.C.C. § 1-203 (1994) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.").

18. U.C.C. § 1-102(3) (1994) (providing that "the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement").

19. The following articles discuss the debate regarding how default rules should be set and contain citations to the literature in the area: Ayres & Gertner, *supra* note 2, at 89-95; Burton, *supra* note 4, at 116-18; Slawson, *supra* note 2, at 33.

20. For example, in passing, Gillette suggests raising the cost of exit, up to the point of prohibition, to transform the background service level from a default rule to an immutable rule, but then notes that such constraints necessarily impose the costs of noncompetitiveness and result in the inability of some residents to satisfy their individual preferences. Gillette, *supra* note 1, at 1204.

an individual's freedom to opt out of public provision. At some point, the arms and explosives you have stockpiled for increased security protection endangers yourself and possibly others, so the government will step in.[21] If the private school system you and your neighbors have established endangers your child either because it uses corporal punishment or because it does not meet certain minimum standards, the government intervenes.[22]

The constraints on one's freedom to opt out of public provision are strikingly similar to the constraints found in contract law. As previously noted, contract law recognizes many important limitations on the freedom to contract. Restrictions are placed on the right to contract by legislation and by public policy.[23] As examples, parties cannot create a binding contract to commit a crime or to commit a tort on a third party.[24] There are also certain immutable rules that may not be varied by agreement, such as the duty to act in good faith.[25]

These contractual constraints and immutable rules are designed to protect the parties to the contract[26] or the parties outside the contract[27] from the socially deleterious effects of unregulated contracting.[28] These rules limit the freedom to contract on the grounds that parties internal or external to the contract cannot adequately protect themselves or others without government intervention.

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21. *See, e.g.*, COLO. REV. STAT. § 18-12-109 (1986 & Supp. 1995) (prohibits the possession or control of an explosive or incendiary device); N.D. CENT. CODE § 62.1-02-11 (1995) (prohibits possession of explosives); WYO. STAT. § 35-10-301 (1994) (prohibits storing explosive materials in or near any residence); *see also* People v. Rowerdink, 756 P.2d 986 (Colo. 1988) (defendant convicted of possessing incendiary devices); State v. Johnson, 417 N.W.2d 365 (N.D. 1987) (defendant convicted of criminal possession of explosives).

22. Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87, 92 (1996) ("Parents cannot elect to send their children to a school which refuses to teach reading or to a school which practices brutal corporal punishment."); *see, e.g.*, IOWA CODE ANN. § 280.21 (West 1996) ("An employee of an accredited public school district, accredited nonpublic school, or area education agency shall not inflict, or cause to be inflicted, corporal punishment upon a student."); MINN. STAT. ANN. § 120.101 (West 1993 & Supp. 1996) (sets forth compulsory instruction standards, including curriculum areas and requirements for instructors); OKLA. STAT. ANN. tit. 70, § 21-107 (West 1989) (authorizing a state board to set minimum standards for private schools); VT. STAT. ANN. tit. 16, § 1161a(c) (1989 & Supp. 1995) ("No person employed by or agent of a public or approved school shall inflict or cause to be inflicted corporal punishment upon a pupil attending the school or the institution.").

23. *See supra* note 15.

24. RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 12:1, at 570 (4th ed. 1993).

25. *See supra* notes 16-18.

26. Several of the nonvariable provisions in the Uniform Commercial Code are intended to prevent one party from taking undue advantage of another. *See, e.g.*, U.C.C. § 2-302 (1994) (protecting against unconscionable contracts); U.C.C. § 1-203 (1994) (protecting against bad faith).

27. Several Uniform Commercial Code provisions are designed to protect the interest of third parties. *See, e.g.*, U.C.C. § 2-403 (1994) (protects good faith purchasers for value); U.C.C. § 2-702(3) (1994) (protects the rights of buyers in the ordinary course and other good faith purchasers). Earlier drafts of U.C.C. § 1-102 provided that "[e]xcept as otherwise provided by this Act the rights and duties of a third party may not be adversely varied by an agreement to which he is not a party or by which he is not otherwise bound." The subsection, however, was deleted reportedly because it was deemed unnecessary. JAMES J. WHITE & ROBERT S. SUMMERS, 1 UNIFORM COMMERCIAL CODE § 3-11, at 183 (4th ed. 1995).

28. *See* Ayres & Gertner, *supra* note 2, at 88-89; Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

This same rationale explains certain constraints on an individual's freedom to opt out of public provision. In some situations, opting for more or less government services may have socially detrimental effects. Government intervenes to protect the parties themselves or to protect third parties from the possible consequences of an individual's actions. Intervention generally takes the form of prohibitions or restrictions on an individual's right to opt for a different level of services.[29]

For example, one's freedom to opt out of public provision is constrained by common law and by legislation. The term legislation is used here in the broadest sense, to include not only constitutions and statutes but also administrative regulations and local ordinances. Such constraints can be federal, state, or local. Assume, for instance, that your local government conducts a spraying program in your town each summer to control the mosquito population. The type of spray a local government may administer must comply with federal regulations.[30] Your local government is prohibited from using a pesticide that would be harmful to humans or a pesticide that would harm a local endangered species.[31] If the approved form of pesticide fails to eliminate all the pesky mosquitos in your yard, your individual ability to privately opt out and use a more lethal spray or a larger dosage may be constrained by federal, state, or even local regulations. Such constraints may be in part to protect you from the harmful effects of such a spray, to protect your neighbors from the

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29. This is not to say that it might not be better, from an economic perspective, to use financial penalties to discourage harm-producing behavior and financial rewards to encourage harm-reducing behavior. Several commentators have observed that it is economically inefficient for government to prohibit or restrict behavior. They have suggested that it would be better, on economic grounds, for government to create market incentives to engage in socially desirable conduct, rather than to prohibit socially undesirable behavior. *See, e.g.*, Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171 (1988); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 112-14 (1995).

30. *See, e.g.*, 7 U.S.C. § 136a (1994) ("[N]o person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this subchapter . . . .").

31. For instance, the United States Fish and Wildlife Service determined Bufo hemiophrys baxteri (the "Wyoming toad") had virtually disappeared from all known sites, in part, due to the use of certain herbicides and mosquito control techniques. The Service concluded that the Wyoming toad was an endangered species and therefore protected under the federal Endangered Species Act of 1973 (ESA). Endangered and Threatened Wildlife and Plants; Determination That Bufo Hemiophrys Baxteri (Wyoming Toad) is an Endangered Species, 49 Fed. Reg. 1992, 1992-93 (1984). The ESA makes it unlawful for any person to harm an endangered species, unless the Secretary of the Interior grants a permit allowing the activity under such terms as the Secretary shall prescribe. *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1532(19), 1538(a)(1), 1539(a)(1)(B) (1994) (the ESA prohibits "taking" of endangered species, defines "taking" to include "harm," and authorizes the Secretary of the Interior to grant permits for certain takings). *Compare* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2409-10 (1995) (facial challenge to the United States Fish and Wildlife Service definition of "harm," as part of the definition of "take," under the ESA; the United States Fish and Wildlife Service definition of "harm" specifically includes habitat modification that results in disruption of essential behavior patterns). Use of herbicides and mosquito control techniques that would harm the Wyoming toad therefore are prohibited, unless a permit is obtained and the herbicides and mosquito control techniques used comply with the terms of the permit.

effects, and also possibly to protect the environment and endangered species from your actions.

There also appear to be constraints in the public provision context analogous to immutable rules. Immutable rules are mandatory requirements applicable to all contracts which may not be altered by private agreement.[32] These rules often set minimum standards or basic requirements that apply to all contracts, such as the obligation to act in good faith. In the public provision context, there are standards and requirements applicable to all which are similar to immutable rules. As an example, compulsory education laws set minimum standards that apply to all.[33] A parent may decide to opt out of the public school system for a private alternative, but may not decide to forgo his or her child's education completely. Additionally, states often set minimum requirements for all schools, both public and private, by specifying curriculum areas, teacher certification standards, and the number of days or hours of instruction.[34] Another example is mandatory immunization programs. Many states require school children to be immunized against certain communicable diseases.[35]

Clearly, there are numerous constraints on an individual's freedom to opt out of public provision. Gillette, however, fails to address these constraints in his analysis. Given the pervasiveness of such constraints, it is difficult, if not impossible, to examine the propriety of opting out without first discussing the limitations on opting out. For Gillette's analytical framework to prove useful, we must either recognize and describe these limitations, or, at least, directly address why such constraints are not necessary.

B. *The Propriety of Constraints on Opting Out of Public Provision*

These limitations on the freedom to opt out of public provision raise the question: to what extent is government intrusion into private arrangements justified? The law and economics movement has fought long and hard in the contract law context to restrict the number and impact of governmentally imposed constraints and immutable rules. Yet even the most ardent supporters of the law and economics movement recognize the need for certain limitations on an individual's freedom to contract, such as when constraints are necessary to

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32. *See supra* notes 16-18.

33. *See, e.g.*, MINN. STAT. ANN. § 120.101 (West 1993) (compulsory instruction); *see also* Jon S. Lerner, Comment, *Protecting Home Schooling Through the* Casey *Undue Burden Standard*, 62 U. CHI. L. REV. 363, 370 (1995) ("[E]very state has enacted compulsory education laws, and many additionally regulate curriculum content, teacher certification, and the number of hours and days of instruction."); David M. Smolin, Comment, *State Regulation of Private Education: Ohio Law in the Shadow of the United States Supreme Court Decisions*, 54 U. CIN. L. REV. 1003, 1013 (1986) (noting that "every state has a compulsory education law, and every state regulates private education").

34. *See supra* notes 22 & 33.

35. ARIZ. REV. STAT. ANN. § 36-673 (1993) (local health department shall provide for required immunization of pupils attending school at no cost); COLO. REV. STAT. § 25-4-905 (Supp. 1995) (local health department shall provide, at public expense, required immunizations); FLA. STAT. ANN. § 232.032 (West Supp. 1996) (immunization shall be required for certain communicable diseases and shall be available at no cost from local county health units).

protect the interests of third parties.[36] It is generally agreed that if individual actions produce harm to others, government intervention is appropriate.[37] Similarly, one can argue that constraints on the freedom to opt out of the default level of services are warranted when such constraints protect the interests of third parties, including the general interests of society at large.

Most of the debate in the contract law area has focused on the propriety of what have been termed "paternalistic" constraints.[38] In general, any legal rule that prohibits an action on the grounds that it would be contrary to the actor's own welfare is considered paternalistic. Examples of contractual constraints that have been categorized as paternalistic include rules invalidating agreements to waive the right to obtain a divorce or to file for bankruptcy relief.[39] An example of a paternalistic constraint in the public provision context would be laws that make education compulsory.[40]

Gillette notes that, in the context of public provision, constraints impose on society the cost of noncompetitiveness and result in the inability of residents to satisfy their personal preferences.[41] But should economic considerations and personal preferences be considered sovereign? Commentators, such as Professor Daniel Farber, suggest that limited rationality, imperfect information, and transaction costs limit the ability of individuals to protect themselves.[42] The result is that an individual's ability to order his or her affairs through voluntary transactions is limited and therefore government intervention may be warranted in some situations.

In his seminal article, *Legal Interference with Private Preferences*, Professor Cass Sunstein criticizes the notion that existing private preferences should determine what government can and should do.[43] Sunstein concludes that, even where private arrangements do not harm others, a wide variety of factors may justify government intervention to overturn or counteract existing preferences. He suggests that there are distortions in a system based on individual preferences, distortions analogous to the problem of market failure, and that such distortions require collective action.

Sunstein identifies four basic categories where interference with private preferences may be justified.[44] First, sometimes the majority may have a collective preference that differs from the choices of its individual members. The public, acting through government, may wish to bind itself against its own

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36. *See, e.g.*, ANTHONY T. KRONMAN & RICHARD POSNER, THE ECONOMICS OF CONTRACT LAW 253-54 (1979) (acknowledging that certain limits on the freedom to contract may promote efficiency, reduce transaction costs, and facilitate voluntary transactions).

37. Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1130 (1986). Admittedly, in this era of relativism, it may be difficult to agree on what type of "harm to others" is sufficient to justify legal intervention.

38. *See, e.g.*, MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT ch. 7 (1993); Kronman, *supra* note 28; Sunstein, *supra* note 37, at 1130.

39. *See* Kronman, *supra* note 28, at 764.

40. *See supra* notes 22 & 33.

41. *See* Gillette, *supra* note 1, at 1204.

42. *See, e.g.*, Daniel A. Farber, *Contract Law and Modern Economic Theory*, 78 NW. U. L. REV. 303, 306 (1983).

43. *See* Sunstein, *supra* note 37.

44. *Id.* at 1138-68.

misguided choices. The second category includes preferences that are the product of legal rules or socialization. For instance, preferences may become distorted by the absence of available opportunities or the existing distribution of wealth and entitlements. In some circumstances, the endogenous character of these preferences will justify intervention. The third category consists of preferences that reflect motivational distortions, such as addictions, habits, and myopic behavior. When there is such a problem, government intervention may make the individual better off in terms of welfare and perhaps autonomy. Finally, personal preferences are sometimes based on inadequate information, including lack of knowledge or cognitive biases when dealing with low-probability events. When a decision is based on imperfect information, government may either provide the information or ban the decision entirely.

Other commentators have defended the notion that government may constrain an individual's freedom to contract on various grounds, such as considerations of economic efficiency[45] and distributive justice,[46] the idea of personal integrity,[47] and notions of sound judgment.[48] The same concerns and considerations appear equally applicable in the public provision context. Government intervention in the public provision context may be warranted to protect third parties, to secure collective preferences, to promote economic efficiency and distributive goals, and to address the problems created by endogenous preferences, motivational distortions, and inadequate information.

The formulation of a comprehensive theory to describe and evaluate the various limitations on an individual's freedom to opt out of public provision is well beyond the scope of this short article. My intent is to suggest that certain constraints are warranted,[49] and to indicate the need for a conceptual framework to describe and evaluate these constraints before we can even begin to

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45. In *Paternalism and the Law of Contracts,* Professor Anthony Kronman argues that certain contractual rules, such as nondisclaimable warranties, are efficiency-enhancing adjuncts to the fraud remedy that reduce transaction costs. Kronman, *supra* note 28, at 766-70.

46. Kronman suggests that prohibitions against waiver of contractual entitlements may promote distributive goals. For example, the nondisclaimable warranty of habitability promotes the redistributive goal of providing minimally decent housing for all. *Id.* at 770-74.

47. Kronman contends that prohibitions against contracting away too large a part of one's personal liberties protect against the threat such contractual provisions would pose to a promisor's integrity or self-respect, especially in situations where the promisor's values could change dramatically after entering into the contract. This explains, in part, prohibitions against agreements waiving the right to sue for divorce. *Id.* at 774-86.

48. Restrictions prohibiting enforcement of agreements entered into while the promisor's reasoning may have been impaired, such as when the promisor is a minor, incompetent, or during mandatory "cooling-off periods," have been justified as reflecting a respect for the notion of sound judgment. *Id.* at 786-97.

49. This is not to suggest that government intervention is some form of panacea. I agree with Pildes's and Sunstein's assessment that modern regulation suffers from "myopia, interest-group pressure, draconian responses to sensationalist anecdotes, poor priority setting, and simple confusion." Pildes & Sunstein, *supra* note 29, at 4. Government intervention is not without risk. Government action does not necessarily make things better and the risks inherent in interfering with individual preferences can be formidable. The risk of abuse is also significant. Nevertheless, government intervention in some situations appears warranted. The solution is not to completely reject the notion of intervention, but instead to consider regulatory reform, such as market incentives rather than outright prohibitions. *See supra* note 29.

assess the propriety of allowing individuals the unrestrained ability to opt out of public provision.

III. THE DEFAULT LEVEL

A. *The Default Level and What It Represents in the Public Provision Context*

Gillette proposes we view the level of goods and services the government provides to its constituents as a default or background level.[50] He suggests this default level serves the same function as contractual default rules in that it applies to those who do not expressly bargain for a contrary outcome. But how is the default level of goods and services determined and what does it represent?

Obviously the package of goods and services the government provides is determined in large part through the political process. Gillette observes that the default level may not necessarily reflect the preferences of a majority of constituents.[51] Instead, the mix may reflect the preferences of the median voter or the desires of a discrete, yet dominant, minority.[52]

As is clear to anyone who has complained about police protection, street paving, snow removal, or mosquito control, the level of public services provided does not necessarily reflect consumer demand. One must remember, however, that government plays an allocative role.[53] The default level reflects a myriad of considerations and a variety of goals. Since unrestrained voluntary market transactions do not always produce socially optimal results, the government's role is also to correct market deficiencies, such as problems created by externalities, distributional inequities, informational disabilities, and free riders. As a result, the mix of goods and services provided reflects, among other things, an allocation of resources, political compromise, regard for external effects, distributional considerations, and other societal interests.

Allocation of resources. Only a finite amount of resources and a limited amount of tax dollars are available for governmentally supplied services. Given these constraints, the government must allocate resources. Theoretically, the government examines and prioritizes its constituents' wants and needs, and then determines what and how much of each good and service to provide. In theory at least, the government represents the interests of society at large. The

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50. *See* Gillette, *supra* note 1, at 1195.

51. *Id.* at 1199-1201. Gillette suggests that since any government service typically can be provided on a continuum and individual services in the mix may be traded against each other, a majority of constituents is unlikely to prefer any particular package, even though a majority might prefer a certain level of an individual service. *Id.* at 1200-01.

52. *See id.* at 1199-1201. Public choice theory indicates the level of services provided by the government will correspond to the preferences of the median voter. The median voter reflects the position that can attract more support than any other position in an election. *Id.* Gillette hypothesizes that on issues where a certain group of voters exhibit great intensity of interest, and other voters appear less interested in the issue, the default level is more likely to reflect the preferences of the interested minority. *Id.*

53. *See* CLAYTON P. GILLETTE, LOCAL GOVERNMENT LAW, CASES AND MATERIALS 37-55 (1994) (discussing government functions and collective action problems).

mix of services the government provides constitutes an allocation, reflecting social costs and benefits.

Political compromise. Compromise is inevitable. No one should be surprised that the mix of governmentally provided services reflects majoritarian preferences with respect to the level of some services, but also reflects the desires of dominant minorities with respect to the level of other services. No individual or group has all of its preferences satisfied.

External effects. In deciding whether and how much of a service to provide, the government takes into account external effects that individual self-interested transacting parties may not consider. The default level reflects a weighing of the positive and negative effects of services on parties and nonparties. Implicit in the level of services provided are the legislative and public policy constraints previously discussed.

Distributional considerations. The maintenance of a minimum or baseline standard of living is also implicit in the mix. Government serves a redistributive function.[54] It limits variations in wealth, or at least insures that the financially or physically disadvantaged do not fall below a given baseline. Redistribution efforts take the form of nonfinancial rights and policies, such as passage and enforcement of civil rights legislation. Redistribution efforts also take the form of services and financial support, such as welfare payments, social security disability benefits, and Medicaid which are funded by a progressive taxation scheme. In effect, government provides a social safety net which is reflected in its allocation of goods and services.

Other societal interests. The default level also reflects notions of fairness, equality, and social contract. For example, the common law doctrine of equal service provision obligates the government to offer the same level of services to all its constituents.[55] It may not discriminate. The mix of governmentally supplied goods and services includes the provision of basic services on an equal basis to all constituents, such as public education and public health services. The mix includes goods and services to which all are entitled regardless of ability to pay.

B. *The Effect of Opting Out of the Default Level in the Public Provision Context*

But what should the default level reflect? In the contract law context, a central focus of recent scholarship has been a debate over the role and content of contractual default rules.[56] Commentators have questioned whether contractual default rules should reflect what the majority of parties would have

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54. *Id.* at 57.

55. *See, e.g.*, Veach v. City of Phoenix, 427 P.2d 335 (Ariz. 1967); *see also* CHARLES M. HAAR & DANIEL W. FESSLER, THE WRONG SIDE OF THE TRACKS, A REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION OF FAIRNESS IN THE STRUGGLE AGAINST INEQUALITY (1986); Clayton P. Gillette, *Equality and Variety in the Delivery of Municipal Services*, 100 HARV. L. REV. 946 (1987) (reviewing Haar and Fessler's book, *The Wrong Side of the Tracks*, and offering theoretical bases to support the doctrine of equal service provision).

56. *See supra* note 19.

wanted, principles of economic efficiency, communitarian values, or norms implicit in the parties' relationship. The default level in the public provision context appears susceptible to the same type of inquiry and critical analysis. Should the default level in the context of public provision reflect majoritarian preferences, simply correct market deficiencies, provide a social safety net, or promote communitarian values? Without a greater understanding of what the default level of services represents and without considering what it should reflect, it is difficult to assess the propriety of opting out of the default level.

Gillette suggests that if the default level of services does not reflect majoritarian preferences, then opting for a different level of services might be appropriate because opting out does not remove you from the core of the community and it may play a productive signaling role.[57] On the other hand, there are strong reasons not to allow individuals to bargain their way out of the default level. If the default level reflects an allocation of resources, political compromise, consideration of external effects, redistributive goals, and other societal interests, opting out may disrupt what appears to be a very delicate balance. Opting out may very well change the default level and what it represents, without the benefit of public deliberation and debate.

Effect on the mix of goods and services provided. Unconstrained opting out may alter the mix of governmentally supplied goods and services, thereby changing the default level. For instance, if certain economies of scale are necessary for the provision of a service, opting out may adversely affect the feasibility of providing the default level preferred by those who remain.[58] Opting out may lead to a situation where public provision of a service is abandoned because there remains an insufficient number of people to make the investment worthwhile or the increased per capita cost results in the service becoming prohibitively expensive.

Political impact. As Gillette indicates, opting out may also impose political costs by reducing the ability of those who remain to form effective coalitions to obtain public provision at the level they desire.[59] Additionally, if those who opt out of public provision must pay for the default level, they may actively encourage reduced outlays for services they do not use or refuse to support the default level.[60] Unconstrained opting out therefore may affect the allocation of resources, the default level of services provided, the political dynamics, and even undermine to some extent, collective provision.

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57. *See* Gillette, *supra* note 1, at 1202-04.
58. *Id.* at 1211.
59. *Id.* at 1201-02.
60. *Id.* at 1207. For example, Daniel Bell observed:

> Local government officials and even state legislatures are facing demands from [Residential Community Association (RCA)] members for tax reimbursements for the provision of local services such as snow and ice removal, street lighting, and the collection of garbage. RCAs argue that since they pay for their own services through homeowner associations, why should they pay property taxes for duplicating public services that they do not need?

Daniel A. Bell, *Residential Community Associations: Community or Disunity?*, 5 RESPONSIVE COMMUNITY 25, 34 (Fall 1995).

Social consequences. The default level currently serves as a social safety net by providing certain basic services to all constituents. If opting out results in a reduction in the level or availability of these basic services, then opting out may tear at the social safety net and undermine redistributive goals.

Many current government services are a response to the needs of disadvantaged groups that were ignored by the private sector. If opting out results in the elimination of certain public services, private providers may be unwilling to render the services to some segments of society. Private firms have a strong economic incentive to skim off the best clients and the most profitable services.[61] Opting out may leave those most in need of certain services without private providers and therefore without services. As a result, opting out is likely to have a disproportionate effect on the disadvantaged.

Gillette notes that in the public provision context the law only requires equality of opportunity, not equality of result.[62] Thus, if everyone is free to opt out, the equal service requirement is not violated. As Gillette himself pointed out in an earlier writing, this argument has the "quality of denying the rich as well as the poor the right to sleep under bridges."[63] Since many public services are now available to all regardless of the ability to pay, the disadvantaged will be most affected if public services are reduced. The disadvantaged may find themselves with certain public services eliminated, with the right to opt for more services, but with no ability to pay for such services and no private providers. Hence, opting out provides a vehicle to grant the disadvantaged a meaningless right in exchange for a possible decrease in benefits.

Opting out also has the potential to create and magnify social division and conflict. Individuals who pay for private services are likely to resent paying for duplicate public services they do not need.[64] This resentment may result in a decreased sense of loyalty and commitment to the larger community.[65] We have already witnessed the trend that Robert Reich characterized as "the secession of the successful."[66] The wealthy have begun to withdraw to residential communities that privately provide their own parks, streets, swimming pools, and security guards, from which the public is excluded. Exclusive communities and gated neighborhoods exacerbate the schism between the rich and

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61. ROBERT J. DILGER, NEIGHBORHOOD POLITICS, RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE 85 (1992) (citing as an example experiences under the Job Training Partnership Act).

62. Gillette, *supra* note 1, at 1214.

63. Gillette, *supra* note 55, at 955. Gillette was paraphrasing a quote from Antole France's *Le Lys Rouge*, "The law, in its majestic equality, forbids the rich, as well as the poor, to sleep under bridges, to beg in the streets . . . ." *See id.* at 955 n.26 (quoting A. France, Le Lys Rouge (1894), also quoted in Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring)).

64. EVAN MCKENZIE, PRIVATOPIA, HOMEOWNERS ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 186 (1994); *see also supra* note 60.

65. Gillette counters that residents who are able to opt out might choose to pay for benefits they do not enjoy either out of altruism or to protect property values. Gillette, *supra* note 1, at 1209-11. William Schneider may have dealt with this type of argument best when addressing the problems facing urban centers: "But isn't it 'in the national interest' to bail out the cities? The suburbs have given their answer: walled communities." William Schneider, *The Suburban Century Begins*, THE ATLANTIC, July 1992, at 33.

66. Robert Reich, *Secession of the Successful*, N. Y. TIMES, Jan. 20, 1991, § 6 (Magazine), at 42.

the poor. As Gillette points out, these and other institutions that would be used to effect opting out are consistently under attack as exclusionary, discriminatory, and elitist.[67] A preoccupation with the virtues of competitive benefits and individual autonomy may cause one to overlook other interests vital to our well-being as a nation, such as fairness and decency.

Cause for Concern. Certain characteristics of public provision are themselves valuable, such as the process of public deliberation and debate. Implicit in proposals such as Gillette's that champion unconstrained opting out is the belief that private contract and personal preferences should be sovereign and inviolable, therefore insulated from public review. Yet opting out of the default level has public consequences. It is more than simply a matter of private contract and personal preference. Such private transactions have public effects: effects on the parties to the contract, effects on third parties, and effects on the community. As previously discussed, some individual preferences are objectionable, such as when they harm third parties, when they interfere with collective preferences, or when they are the product of cognitive distortions.[68] Proposals that champion unconstrained opting out are attempting a sleight of hand by dressing up something that is public as private, and then suggesting it is sacred and outside the realm of public debate. Given the public effects of opting out and the potential effect on the default level itself, these private choices must continue to be subject to critical scrutiny, public debate, and regulation, not canonized.

Gillette characterizes opting out as an alternative form of privatization.[69] The danger of this form of privatization is that it does not require a conscious public decision to shift government functions to private providers.[70] Privatization occurs without public discussion, without consideration of other approaches, without analysis of the costs and benefits, without knowing the implications of the decision, and without government action. Opting out results in de facto privatization as government functions are gradually transferred to private providers. The default level of services is altered without public deliberation and debate, despite possibly significant public consequences. Before we enthusiastically embrace the concept of opting out, we must collectively consider the broader economic, political, and social implications.

IV. CONCLUSION

Professor Gillette's use of default rule theory in the public provision context provides an excellent framework within which to examine the propriety of opting out of public provision. By drawing further analogies to contract law, I have attempted to build on his analysis and identify issues that warrant

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67. Gillette, *supra* note 1, at 1190; *see, e.g.*, MCKENZIE, *supra* note 64; Bell, *supra* note 60; David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761 (1995).

68. *See supra* part II.B.

69. Gillette, *supra* note 1, at 1187.

70. *Cf.* MCKENZIE, *supra* note 64, at 180 (arguing community-interest developments constitute de facto privatization undertaken without the benefit of public deliberation or debate).

consideration and discussion. For example, the constraints on one's freedom to opt out of public provision appear analogous to the limitations on one's freedom to contract. Many of these constraints on opting out may be defended on the same grounds used to justify limitations on the freedom to contract. Unless one is willing to blindly accept the virtues of unconstrained opting out, a more sophisticated theoretical framework, which describes these constraints and evaluates the propriety of such constraints, appears needed. In addition, parallels are drawn between the default level in the public provision context and contractual default rules. The role and content of contractual default rules have been a focus of recent contract scholarship. The default level in the public provision context appears susceptible to the same type of inquiry and analysis. Since opting out may potentially alter the default level of services provided, what the default level reflects and what it should reflect must be considered, particularly in light of the possible economic, political, and social effects of opting out.

Edmund Burke wrote, "The effect of liberty to individuals is that they may do what they please; we ought to see what it will please them to do, before we risk congratulations . . . ."[71] We should heed Burke's warning. Before enthusiastically embracing the concept of unconstrained opting out of public provision, we should first examine what individuals may desire to do and then consider the consequences.

71. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 8 (J.G.A. Pocock ed., Hackett Publishing Co. 1987) (1790).

THE PROGRESSIVE POTENTIAL IN PRIVATIZATION

NANCY EHRENREICH*

> [T]he master's tools will never dismantle the master's house.
>
> - *Audre Lorde*[1]

> [T]he power mask in the right hands can transform itself from burden into blessing.
>
> - *Patricia Williams*[2]

> [T]he argument that the category of "sex" is the instrument or effect of "sexism" or that "gender" only exists in the service of heterosexism, does *not* entail that we ought never to make use of such terms, as if such terms could only and always reconsolidate the oppressive regimes of power by which they were spawned. On the contrary, precisely because such terms have been produced and constrained within such regimes, they ought to be repeated in directions that reverse and displace their originating aims.
>
> - *Judith Butler*[3]

I. INTRODUCTION: THE TURN TO THE PRIVATE

Antigovernment sentiment is running high in the United States today. The Republican candidate for the presidency, Bob Dole, charged that President Clinton is a big-government liberal speaking small-government rhetoric. Clinton objected that he, like the Republicans, wants to limit the size of the federal bureaucracy.[4] When Newt Gingrich castigated the organizers of the March for Children as offering the same old liberal solutions, Marion Wright

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* Associate Professor of Law, University of Denver College of Law. B.A., Yale University, 1974; J.D., University of Virginia School of Law, 1979; L.L.M., University of Virginia School of Law, 1982. I would like to thank David Barnes, Roberto Corrada, and Martha Ertman for their helpful comments. In addition, I am grateful to the participants in the University of Denver Symposium on the New Private Law for their responses to an earlier version of this paper delivered at the Symposium, and to my research assistant, Venkat Balasubramani.

1. Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER 112 (1984).

2. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 432 (1987).

3. JUDITH BUTLER, BODIES THAT MATTER 123 (1993).

4. Judy Keen, *'We will work together': Clinton Urges Lean, Not Mean, Government*, U.S.A. TODAY, Jan. 25, 1995, at 1A.

Edelman responded that they merely want "just government," not big government.[5] No one says that more government is better; privatization is the pet solution of the day.

Responding to the notion that governmental programs are top-heavy and inefficient, many states and municipalities are experimenting with returning traditional governmental functions to the private sphere. The profit motive and market competition, it is said, will assure the quality of such programs. Thus, private companies are trying their hand at running school systems,[6] building and administering prisons,[7] even meting out foreign aid.[8]

Governmental bureaucracy is said to be not only inefficient, but also unresponsive to citizens' needs and concerns. Thus, as several of the papers in this Symposium indicate, the turn to the private signals an attempt to increase individual autonomy by allowing personal choices to determine the allocation of governmental entitlements and obligations. For instance, Roberto Corrada discusses the landmark case of *Gilmer v. Interstate/Johnson Lane Corp.*,[9] in which the Supreme Court allowed the meaning of the Age Discrimination in Employment Act to be determined in a private arbitration instead of in a court of law.[10] Federico Cheever describes a current trend in land conservation efforts directed at convincing individuals to convey land and development rights to private conservation trusts.[11] Similarly, vouchers allowing parents to "vote with their feet" are said to be the solution to the crisis in public education, while private surrogacy contracts are touted as the appropriate approach to the personal and policy dilemmas posed by infertility. Small government and individual choice are the panaceas of the day.

Many progressives, accustomed to relying on the government to produce social change, have viewed these developments with dismay.[12] To legal scholars, the current tendency to seek solutions in the world of the free market and the choices of private decisionmakers sounds frighteningly like a return to the laissez-faire era of *Lochner v. New York*.[13] Abandoning individual citizens to the whims of the most powerful private actors, privatization seems like an abdication of the governmental role as protector of the less powerful and a return to ruthless and unfettered competition.[14] Equating the common good

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5. David G. Savage, *Tens of Thousands Rally in Defense of Aid to Children*, L.A. TIMES, June 2, 1996, at A1.

6. *See* Bill Zlatos, *Privatizing Schools Tests a Pittsburgh Suburb*, N.Y. TIMES, Aug. 30, 1995, at B6.

7. *See* Matthew Purdy, *In Jail Business: Nashville Company Leads Crowded Field*, N.Y. TIMES, Jan. 16, 1996, at B4.

8. *See* Leslie Eaton, *A Billion at Risk: Public Money Foots the Bills for 'Privatized' Foreign Aid*, N.Y. TIMES, Feb. 7, 1996, A1.

9. 500 U.S. 20 (1991).

10. Roberto L. Corrada, *Claiming Private Law for the Left: Exploring* Gilmer's *Impact and Legacy*, 73 DENV. U. L. REV. 1051 (1996).

11. Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077 (1996).

12. *See, e.g.*, Mimi Abramovitz, *The Bottom Line is Society Loses: Health Care Privatization*, 245 NATION 410 (Oct. 17, 1987); Larry V. Amsel, *Bad Medicine: Health Care Reform*, 11 TIKKUN 1, 25 (Jan. 1996).

13. 198 U.S. 45 (1905).

14. In reality, however, competition in the American economy was probably never com-

with the preferences of individual market actors, the turn to the private looks like a return to classical liberal individualism and a rejection of any community- or society-focused definition of the nation's goals.

Moreover, the emphasis that privatization proponents place on private decisionmaking seems to represent a return to the reification of choice. It ignores several decades of scholarship problematizing the notion that one can objectively determine whether an individual has freely chosen to engage in particular conduct, or whether particular governmental policies constitute an interference with individual choice.[15] In particular, it ignores numerous illustrations of the role that governmental power plays in constructing private choices.[16]

One recent critique of the reification of the concept of individual choice is found in Katherine Van Wezel Stone's article for this Symposium issue, discussing contracts for employment. She provides the example of a salesperson who accepts a job, unaware that the employee handbook contains a mandatory arbitration provision.[17] Emphasizing the unequal bargaining power of the employee, Stone characterizes such provisions as modern "yellow dog contracts" and concludes that they are "imposed on workers without even the illusion of bargaining or consent."[18] As her analysis shows, where the players in the private sphere are not equal, the product of choices made within that sphere cannot be assumed to protect the weaker parties as well as governmental regulation would. To characterize such employment contracts as the repository of employees' "true" preferences is to reify choice. Such reification, in turn, creates the impression that social inequality is the product of individual preferences, not social policy.

Despite the trenchancy of critiques like Stone's, however, both political discourse and legal doctrine continue to treat choice as an unproblematic concept, leading progressives to conclude that the privatization impulse is necessarily conservative in substantive content. What I want to argue here, however, is that this pessimistic assessment may be unjustified. That is, the move to the private may not necessarily be always, in all contexts, a conservative political move. Moreover, avoiding a reflexive negative reaction to privatization rhetoric might actually allow progressives to discover a subversive potential in private solutions.

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pletely unfettered. *See* Robert W. Gordon, *The Elusive Transformation*, 6 YALE J.L. & HUMAN. 137 (1994) (reviewing MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960).

15. *See, e.g.*, Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985). The doctrinal conundrum that most starkly raises the problem of determining whether government has interfered with private choice is the unconstitutional conditions doctrine, explored thoughtfully—but clearly not *solved*—in a previous Symposium issue of the *Denver University Law Review*. Symposium, *The Unconstitutional Conditions Doctrine*, 72 DENV. U. L. REV. 854 (1995).

16. *See, e.g.*, Louis J. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

17. *See, e.g.*, Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1017-18, 1033-34 (1996).

18. *Id.* at 1033-34.

Thus, in Part II, I will argue that the traditional progressive critique of the public/private dichotomy, while essentially correct, has been inadequate to the task of providing workable tools for obtaining progressive political change.[19] In Part III, I will argue that it is, indeed, possible to use the master's tools to dismantle the master's house—to accomplish progressive ends through privatization.[20] My argument will consist of the following points: first, whether a move to the private is conservative depends on the nature of the public realm that is being left behind. If public regulation of a particular arena disfavors a particular oppressed group, privatization might constitute a progressive move.[21]

Second, whether a scheme of private decisionmaking is conservative or progressive depends upon the background rules and distribution of resources that affect the choices individuals make under that scheme. If critical legal scholars are right in their argument that private choices are themselves a product of governmental power—that they merely constitute governmental regulation by another name—then it should be possible to structure a choice-based regulatory scheme that is progressive, rather than conservative.

Finally, like other legal constructs, the notions of the private sphere and individual choice can be deployed to undermine the very power structures that they have traditionally buttressed. Of course, feminists and scholars of color have long (and persuasively) argued that rights claims can be used to benefit minority groups, not just to justify their oppression. The same, I would argue, goes for privatization claims, although for slightly different reasons. What I want to suggest is that such claims can have a disruptive influence on the very notion of what we mean by private and public. Rather than necessarily reinforcing the notion that there is a realm of private choice separate from governmental action, certain types of unconventional privatization arguments might actually have the effect of undermining the public/private dichotomy. Such claims might actually draw attention to the constructedness of the concept of individual choice, rather than reinforcing its reification. In short, the very terms that to progressives have seemed the most dangerous—terms like autonomy, choice, and freedom—can actually be used to undermine the classic public/private dichotomy they are often thought to support. By proposing so-called private solutions, progressives might do more to disrupt traditional notions of private freedom and individual choice than their direct assaults upon those concepts have ever done.

II. TRADITIONAL LEFT SKEPTICISM ABOUT THE PRIVATE

The meat and potatoes of Critical Legal Studies scholarship has, of course, been to deconstruct the public/private dichotomy of liberal legal thought. While there is no need to rehearse the details of that deconstruction here, it is worth briefly recounting the thrust of the CLS critique in order to

19. *See infra* notes 22-30 and accompanying text.
20. *See infra* notes 31-70 and accompanying text.
21. I am indebted to both Alan Chen and Martha Ertman for this insight.

highlight the concerns that motivate progressive reactions to privatization proposals. Identifying the shortcomings of the CLS analysis will also lend support to my argument that private approaches should not be seen as inevitably conservative.

In a wide variety of articles addressing a wide variety of contexts, critical legal scholars and feminists have repeatedly and convincingly demonstrated that the private sphere of individual freedom and choice that grounds much of liberal legal analysis is an illusion.[22] These critics have made two central points:[23] first, they maintain that choice is an indeterminate concept—that whether an individual action seems to have been the result of an exercise of free will depends on the values of the person answering the question. One person's choice is another's coercion, and courts do not in fact determine *whether* someone's autonomy was constrained, but rather *what* will count as coercion and what will count as choice.

Second, and more importantly, they argue that the content of individual choices—and, more broadly, individual preference structures themselves—are the product of governmental structuring of the contexts in which choices are made. Legal rules about who can marry and the nature of the marital relation affect people's decisions to marry.[24] Legal rules about the economy and how it is structured affect people's preference structures and their decisions about what marketplace behavior to engage in.[25] The private, in other words, is a function of the public.[26]

Thus, powerful private actors owe their power not only, or even principally, to their own success but rather to public policies. Those with economic resources are wealthy not merely because of their innate abilities and drive but also because the economic and legal systems benefit them. Even social, as opposed to economic, policies have wealth effects.[27] Thus, as Gary Peller argues in his article for this Symposium, to the extent that legal rules allow male employers to sexually harass female employees without paying damages,[28]

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22. *See generally* Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

23. For a similar description, *see* Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 322-24 (1993).

24. Olsen, *supra* note 15.

25. Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (arguing that existing distribution of legal entitlements affects bargaining behavior).

26. Robin West puts the point nicely:

> [W]hen a legislature fails to act—fails to protect a citizen against violence, discrimination, or pollution—we cannot sensibly describe that as mere "inaction" in the face of a prelegal status quo. . . . Rather, the status quo the legislature failed to change is itself a product of legally created—hence state created—rights and obligations.

Robin L. West, *The Constitution of Reasons*, 92 MICH. L. REV. 1409, 1410 (1994) (citation omitted) (reviewing CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 1993).

27. "[P]rivate action is invariably and inevitably facilitated by, structured by, permitted by, made possible by, no less than constrained by—the actions of states." *Id.* at 1412 (describing Sunstein's argument); *see* Gary Peller, *Public Imperialism and Private Resistance: Progressive Possibilities and the New Private Law*, 73 DENV. U. L. REV. 1001 (1996).

28. Existing legal remedies do not cover all incidents of harassment. Sexual harassment is not considered a tort, and Title VII excludes workplaces with less than 15 employees. *See* 42 U.S.C. § 2000e(b) (1994). Moreover, despite the current availability of punitive damages in sexual

those employers are enriched and their employees are impoverished. The employees must spend time and money to change jobs in order to avoid the harassment, while the employers save the money that they would otherwise have to pay (in damage payments) for the privilege of harassing. Private power can, in short, be seen as merely a delegation of governmental power to particular private actors—as a creation of the public.

The importance of this deconstruction of the public/private dichotomy is to demonstrate that government regulates even when it claims not to. If the private sphere is itself a product of governmental power, then conduct that initially seemed to flow from individual choice can be revealed to be the result of governmental coercion. Thus, the thrust of the Critical Legal Studies argument has been that the public/private dichotomy merely obscures the operation of governmental power, causing individuals to believe that their fates are of their own choosing. It prevents people from seeing the broader society's responsibility for individual situations. Once this governmental role in the so-called private has been revealed, of course, it then becomes possible to argue for changes in the rules structures that created the individual choices—changes designed to produce more equitable outcomes. Individuals cannot be blamed for their purported choices, government has to take responsibility.

This deconstruction of the public/private dichotomy was a crucial step in the progressive critique of modern legal analysis. It suffered, however, from the same weaknesses that one might expect of any rigidly constructivist account. By suggesting that individual choices are merely the product of governmental power, critical analysis precluded any notion of individual agency, any role for the individual at all. Yet it belies many people's experience of their lives to suggest they have no control whatsoever over even the most personal choices, such as whom to have sex with or whom to marry. Even those who accept the basic argument that individual choices are socially constructed often see the need for a more dynamic, fluid account that somehow allows for the possibility of individual agency and societal change.

Perhaps it is its constructivism that prevented Critical Legal Studies scholarship from producing the epiphany that many of us, in the first decade of its existence, expected it to produce. Although it was not usually so explicitly stated, I think that the implicit expectation was that, once the emperor was revealed to have no clothes, the population would rise up in (figurative, if not literal) revolt. Once the formerly invisible hand of government was seen in the private fates of individuals, the citizenry would demand a fundamental restructuring of society, including a radical redistribution of wealth. Once the notion that government's role was to stay out of the private sphere was destroyed, a substantive national conversation on how to set up our social and economic arrangements could begin.

But it didn't happen. And perhaps one of the reasons that it didn't is that it just isn't liberating to that many people to think that everything they do is

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harassment cases, many attorneys will not take such cases if the only significant damages argument that the plaintiff could make is for punitives (e.g., if the amount of back pay lost is insignificant). *See* Corrada, *supra* note 10, at 1052.

controlled by the government. Indeed, it is perhaps not surprising that, in such an individualistic nation as the United States, even the notion that culture constructs the individual is a very hard sell. In any event, whatever the reason, the initial optimism produced by this scholarship has dissipated, and progressive scholars and activists are desperately in need of a new rhetoric, a way to argue for progressive change that doesn't first require people to imagine themselves as helpless victims of a monolithic and impersonal power structure.

I will argue below that inspiration for that new rhetoric can come from two sources. First, feminists and critical race scholars have for many years been articulating a more nuanced understanding of liberal discourse—an understanding that sees liberal legal constructs such as the public/private dichotomy as both enemy and friend, both tools of oppression and tools of revolt.[29] Second, post-structuralist thinkers such as Judith Butler have begun to explore the subversive potential within existing discourses of power, the ways that existing constructs and practices can be used in new ways that reveal the constructedness and contingency of their meanings.[30] Both of these bodies of thought, which I view as complementary not conflicting, provide the basis for my argument that advocating "private" solutions can sometimes be a progressive thing to do.

III. USING THE MASTER'S TOOLS

Privatization is not necessarily any more or less conservative than governmental control. First, if, as Dan Farber puts it, privatization is just "another form of regulation,"[31] then, like any regulation, it can be either conservative or progressive in content. In this sense, my position is a logical extension of the Critical Legal Studies argument that the private is really a product of public power. If that is true, then why should progressives necessarily fear private solutions any more than public solutions?[32] Second, whether a private solution is substantively progressive or conservative depends on the nature of the particular private and public realms involved. If social and economic power is evenly distributed in the private realm, a private solution can be progressive, for it can increase individual autonomy. Concomitantly, if public regulation

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29. *See, e.g.*, Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Williams, *supra* note 2, at 431.

30. *See generally* BUTLER, *supra* note 3; JUDITH P. BUTLER, GENDER TROUBLE (1990); Katherine Franke, *Cunning Stunts: From Hegemony to Desire: A Review of Madonna's Sex*, 20 N.Y.U. REV. L. & SOC. CHANGE 549 (1994); Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973 (1995).

31. Dan Farber, *Whither Socialism?*, 73 DENV. U. L. REV. 1011, 1013 (1996). In this Part, I will use the terms "privatization" and "regulation," as well as "private" and "public," as if they have determinate and coherent meaning. In doing so, I do not mean to suggest that the CLS critique of the public/private dichotomy is incorrect, for I think it is valid. However, I believe that citizens and lawmakers still perceive private and public approaches as distinct, and I would agree that, at least formally (although not substantively), they are.

32. What progressives have feared in such solutions is the invisibility of the role played by the government. But the main thing that renders that invisibility so dangerous is the substantively harmful content of the regulation—that is, the fact that *conservative* governmental conduct is obscured. Of course, the obscuring of governmental regulation might be harmful no matter what the content of that regulation, as I discuss *infra*, note 49 and accompanying text.

has been particularly pernicious, privatizing might be a more progressive alternative. Third, just as public/private rhetoric has been used to make conservative governmental regulation seem like individual choice, so it can also be used to make progressive regulation seem like private choice. And finally, when privatization arguments are made by progressives, such arguments might fundamentally alter the terms of the debate about the public and the private. As I will explore further below, traditional conservative discourse arguably contains within it a subversive potential that can be exploited by progressives. Prevailing cultural categories (and the laws that reflect as well as produce them) can be subverted through the creative use of private ordering.

A. *Disguising Progressive Regulation as Private Choice*

The thrust of the critique of the public/private dichotomy outlined in Part II is that the distinction between public and private is incoherent. Since even private choices are essentially the product of public structuring of the decisionmaking context, even private conduct could really be said to represent public policy. However, if this critique is true, if private ordering of individual affairs is really just a less obvious form of governmental regulation, then progressives ought not to be particularly upset at the thought of private approaches to social problems per se. Like any regulatory programs, those approaches will either be progressive or not depending upon their substantive content. And the substantive content of a private program need not necessarily be conservative. Whether it is or not will depend, of course, both on the nature of the private realm in which the program is being conducted and on the nature of the alternative regulatory arrangements that prevailed under formal governmental regulation.

Turning to the latter point first, the nature of pre-existing direct public regulation will affect whether privatization seems progressive or regressive.[33] To adopt Martha Ertman's metaphors, purgatory is a step up from hell and a step down from heaven.[34] Thus, if the formal regulatory regime is relatively benign, privatization will seem conservative; but if the formal regulatory regime operates harshly against a particular group or groups, privatization might seem a progressive move. For example, if it is illegal for gays and lesbians to marry,[35] then the privatization of marriage, allowing individuals to decide for themselves whom to marry (through contract, for example), with no explicit governmental sanctioning of the institution of marriage, is a progressive move

33. The nature of pre-existing *indirect* regulation—what I call the background rules—will also affect the impact of privatization, as I discuss *infra*, notes 42-44 and accompanying text.

34. Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996).

35. No state currently sanctions same-sex marriages. Moreover, in response to a Hawaii court's recent holding that prohibiting same-sex unions violates the state constitution, Baehr v. Lewin, 852 P.2d 44, 48 (Haw. 1993), many states are moving to adopt statutes denying full faith and credit to gay marriages performed elsewhere. *See, e.g.*, O.C.G.A. § 19-3-3.1 (1996); UTAH CODE ANN. § 30-1-2 (1996); *see also* the Defense of Marriage Act, 104 Pub. L. No. 104-199, 110 Stat. 2419 (1996) (federal statute defining the term "marriage" when used in federal programs to exclude same-sex marriage and allowing states to refuse to give full faith and credit to such marriages).

for gays and lesbians.[36] Moreover, such a move might actually be more likely to be instituted than a formal change in marriage laws allowing same-sex couples to wed, for it would be less visible. In other words, it seems quite possible that some groups could fare better under formally private ordering than under explicit governmental regulation, for governments are willing to do sub rosa (through supposedly private arrangements) what they might not be willing to do explicitly (through formal governmental rules or programs).

In comparing a private regulatory approach with a public one, it is necessary to examine not only the substance of the original public stance toward the conduct in question but also the nature of the context in which the private ordering occurs. Gary Peller's article on public school reform illustrates the progressive potential in private ordering. Professor Peller suggests that privatization reforms—such as, for example, hiring private corporations to administer schools—could actually result in institutions that are more responsive to parental and community concerns than are the elitist and technocratic school boards of today: "If 'pleasing the consumer' would mean not acting as if parents and students represent impediments to the smooth running of schools, this form of privatization might be a progressive improvement in the day to day school life."[37]

What has made private ordering anathema to progressives is that such ordering has constituted covert governmental preservation of existing social inequalities. It is, in short, the inequality within the (governmentally-created) private realm that has made deference to private decisionmaking problematic. If women had viable economic options and power equal to men, progressives might not be as concerned about their decisions to become surrogate mothers,[38] to accept employment in hazardous workplaces,[39] or to forego abortions.[40] It is only because they do not have such equality that their "right" to make such choices has come to look like a state policy of oppression.[41] Thus, the distribution of power and resources within the particular private context will determine the impact of privatization.

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36. Of course, privatization of marriage would not necessarily be a positive development for everyone. For example, women in opposite-sex relationships might be pressured into marriage on unfavorable terms by more powerful partners or parents. Also, I should emphasize that I am not saying here that governmental power would really be absent under a purely contractual approach to marriage; rather, I am merely saying that it would be exercised (towards some, at least) more benignly—perhaps as a result of being less visible.

37. Peller, *supra* note 27, at 1007.

38. For articles expressing such concerns, see, e.g., Margaret J. Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1930-31 (1987); Norma J. Wikler, *Society's Response to the New Reproductive Technologies: The Feminist Perspectives*, 59 S. CAL. L. REV. 1043, 1049 (1986).

39. *Cf.* Lucinda Finley, *The Exclusion of Fertile Women from the Hazardous Workplace: The Latest Example of Discriminatory Protective Policies, or a Legitimate, Neutral Response to an Emerging Social Problem?*, 16-1 (Proceedings of New York University Thirty-Eighth Conference on Labor, 1985) (critiquing company policies that prohibit fertile women from working around hazardous substances); *see also* Automobile Workers v. Johnson Controls, 499 U.S. 187, 198-99 (1991) (holding that Johnson Controls' "fetal protection policy" excluding women from jobs requiring exposure to lead was discriminatory).

40. *See, e.g.*, Catharine A. MacKinnon, *Privacy v. Equality: Beyond* Roe v. Wade (1983), *in* FEMINISM UNMODIFIED 93-96 (1987) (criticizing the notion that poor women's lack of access to abortions is a result of their own choices).

41. *See generally* Symposium: *A Critique of Rights*, 62 TEX. L. REV. 1363 (1984).

And the unequal distribution of power discussed above is, of course, in turn a function of the background rules that structure the decisionmaking that occurs under the private approach. Depending on the nature of those background rules, the substantive impact of the regulation that is being (covertly) imposed through private ordering can be either progressive or conservative. For example, imagine that the tax code imposed upon all noncustodial parents[42] a "child tax" equivalent to half the amount of money that it costs to raise a child to 22 years (perhaps including a college education), divided by 22 (to produce a per-year, per-parent cost of child-rearing). Imagine also that the custodial parents, in turn, received a tax credit equivalent to the amount of "child tax" that the other parent paid. Now, imagine that the noncustodial parent (usually the father)[43] were given the option of avoiding the tax; he could do so simply by proving that he had paid the custodial parent (usually the mother) an annual child support payment of whatever amount the two parents could agree on (which we can assume would usually be substantially less than the tax).[44] The substance of this program would seem to most to be progressive; it works against parents who shirk their responsibilities and in favor of the economic welfare of the young.

Now, some might object that this would obviously be a public program, not a private one, because the government would be threatening citizens with a tax payment; clearly government is acting here. But compare this program with the conservation trust program described in Federico Cheever's article in this Symposium. Professor Cheever discusses a governmental program which essentially enables landowners to give their land to relatives when they die without creating significant estate tax burdens on the heirs. The landowner simply grants a "conservation easement" to a conservation trust, which allows the intended beneficiaries to inherit and continue to use the land but gives the trust a right to prevent them from developing it. This scheme is just as coercive as my proposed child tax described above.[45] The government creates the

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42. I am assuming here that the parents would be either unmarried, legally separated, or divorced. Court orders would not, of course, be involved where two married parents happened to live apart.

43. *See* U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES No. 616, at 391 (1995) [hereinafter STATISTICAL ABSTRACT].

44. Of course, in any particular case, there is no guaranty that the private agreement reached by the parents would not itself be the product of coercion. *See* Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992). However, I am willing to assume that such an agreement would provide more support to the woman than many women get right now, since child support orders are notoriously unenforceable. *See* STATISTICAL ABSTRACT, *supra* note 43 (reporting that, of the 5,326,000 custodial parents who were supposed to receive child support payments in 1991, only 2,742,000 received the full amount due to them). In fact, it is clearly the unenforceability of such orders, not their substantive content, that would be the target of the child tax scheme that I am imagining. In short, the lesser alternative of the two options available under the "child tax" program would still provide more support than many women receive currently. This example thus provides another illustration of the point that the nature of the prior context determines whether a particular move to privatization will seem progressive or conservative.

45. Cheever, *supra* note 11, at 1078-79, 1087-88. Professor Cheever emphasizes the public nature of the conservation easement—the fact that many of its terms are dictated by the conservation trust authorizing statute—as evidence of the fact that the easement constitutes regulation, not merely a private land transaction. *Id.* at 1091-92.

conditions under which the conservation trust option looks appealing to the landowner. When the alternative is hefty estate taxes that might force the beneficiaries to sell the land, the donor will prefer the land trust. Here, as with the child tax, the choice the individual makes (to covenant not to develop the land or to pay the child support) is the product of a wish to avoid a governmentally imposed tax burden. While presented as private choice, it is really governmental regulation.

Note, also, how the conservation trust approach appears less coercive than a more public alternative program might appear. The conservation trust system could have been set up completely through environmental regulation. That is, instead of allowing people to avoid taxes by conveying their property to conservation trusts, the government could have merely imposed an affirmative obligation on certain categories of landowners not to develop their lands in certain ways. But this approach would be much more politically controversial, for it would make more visible the governmental hand in the conservation program.[46] It also might trigger allegations of a governmental taking.

In contrast, under the current structuring, the program appears voluntary and non-coercive. Grantors likely experience their choice to enter into the covenant with the conservation trust as a genuine choice, rather than as coerced conservation.[47] After all, theoretically, they can always choose not to do it. Substantively, however, the program is far from voluntary. Since the testator's family would often lose the land if the trust option was not used—it would have to be sold to pay the estate taxes—the substantive effect of the program is not much different from that of one which mandates the conservation. While the substance of the program is the same either way, the structuring makes all the difference in how the program is perceived. Just as other legal rules or governmental programs obscure conservative governmental policies as merely the exercise of private freedom, this program similarly disguises pro-environment initiatives as individual choice. And, like the conservation trust, the child tax proposed above serves as an example of how privatization can be strategically used to further progressive ends. It suggests that, instead of focusing on trying to reveal the wolf in sheep's clothing—the governmental hand in supposedly private arrangements—progressives might benefit by trying some disguises of their own.[48]

Indeed, because constructivist accounts are anathema in an individualist culture like that of the United States, such privatization of progressive programs might insulate them from attack. Those subject to the programs might

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46. Similarly, a statute prohibiting low-income women from obtaining abortions would probably be scandalous, while the Hyde Amendment, which has virtually the same effect, has not drawn widespread public disapproval.

47. *See* Cheever, *supra* note 11, at 1090.

48. In making this point, I am not unaware of the fact that this disguise has often failed in the past. That is, progressive governmental programs often tend to be seen as coercive of individual will, while conservative programs often tend to be seen as merely effectuating private choices. *See generally* Olsen, *supra* note 23, at 324; Olsen, *supra* note 15. Nevertheless, the conservation trust program suggests that this is not *always* the case, and that private ordering might sometimes be a preferable approach, especially perhaps where the governmental program is something that politicians want to allow without seeming to support.

experience their effects as the result of their own choices, just as some people experience the effects of conservative programs as the product of their own decisions. (For example, some low-income people blame themselves for their poverty, rather than seeing it as at least partly produced by governmental policy.) Because the notion of private freedom is very powerful, it might be harder to argue that such freedom doesn't exist (i.e., that a person has been coerced by government) than to argue that it does, even when the substantive content of the regulation being obscured by such an argument is progressive.

Of course, if privatizing facilitates the view that one's conduct is freely chosen instead of coerced, it might thereby further entrench the ideology of choice that obscures the governmental hand in many conservative social programs. Since the illusion of choice is precisely what has prevented social critics on the left from successfully challenging the policy preferences underlying such programs, privatizing progressive programs might thus reinforce the very ideology that has sustained the conservative agenda. On the other hand, just as social theorists are beginning to acknowledge the need to develop analyses that are neither rigidly constructivist nor rigidly essentialist,[49] legal thinkers may need to be more nuanced in their consideration of the public/private dichotomy as well. That is, a conceptualization of the impact of governmental programs as somehow the products of both public policy and individual will might ultimately prove more palatable to the individualist North American public, and hence more successful as an ideological hook for progressive policies, than the more unidimensional traditional deconstruction of the public/private dichotomy.

It is important, perhaps, to note here that I mean to present these ideas as preliminary and tentative. In fact, even as I write them, I cringe. Am I merely getting old, I ask myself? Have I lost my critical edge? Can I really be saying that radical critiques are unsubtle? Thus, while I am convinced that the left critique of the public/private dichotomy has not proven an effective rhetorical tool in articulating a progressive agenda, I am uncertain of whether a return to the private would in fact be a productive antidote to that situation. However, as I will discuss further in the next subsection, I believe that it is nevertheless useful to explore the possibility that, in fact, packaging policies as private might actually legitimate left programs and delegitimate the right's reliance on the rhetoric of choice. That is, the ultimate CLS goal of deconstruction of the public/private dichotomy might, ironically, be more successfully pursued by *using* that dichotomy, rather than by abandoning it.

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49. Judith Butler writes:

> Construction is not opposed to agency; it is the necessary scene of agency, the very terms in which agency is articulated and becomes culturally intelligible. The critical task for feminism is not to establish a point of view outside of constructed identities . . . [but] to locate strategies of subversive repetition enabled by those constructions, to affirm the local possibilities of intervention through participating in precisely those practices of repetition that constitute identity and, therefore, present the imminent possibility of contesting them.

BUTLER, *supra* note 30, at 147, *quoted in* Franke, *supra* note 30, at 562.

B. *Subverting Cultural Categories Through Private Ordering*

Privatization might have a progressive impact not only by disguising progressive programs but also by subverting the cultural categories that give credence to choice-based conservative programs. Certain progressive scholars have long recognized the subversive potential in mainstream legal rhetoric. For example, both Patricia Williams and Elizabeth Schneider have argued that, although rights language often obscures the political judgments behind judicial outcomes, arguments based on rights can also produce a sense of group solidarity, legitimate a group's claims (in both the group's and others' eyes), and sometimes extract concessions from a system that wants to perceive itself as true to its ideals.[50] For these and other authors representing subordinated groups, mainstream legal discourse is a two-edged sword. The trick is to deploy the discourse without falling prey to its seductive power—to use it without fully believing it.

Post-structuralist theorists taking their lead from philosopher Judith Butler have expanded these insights a step further, focusing their attention on the particular ways in which individuals use existing cultural categories to disrupt the interpretive frames that those very categories have established. In her analysis of what she calls "performativity," Butler emphasizes how the repetition of cultural norms can either reinforce those norms or disrupt them, or do both at the same time.[51] By exaggeratedly complying with a cultural norm (or "law," as Butler calls it), the actor actually draws attention to its contingency, to the fact that it can be violated.[52] Thus, "where the behavioral conformity of the subject is commanded, there might be produced the refusal of the law in the form of the parodic inhabiting of conformity that subtly calls into question the legitimacy of the command, a repetition of the law into hyperbole, a rearticulation of the law against the authority of the one who delivers it."[53]

For example, in discussing *Paris Is Burning*, a documentary film on male drag, Butler takes issue with the view expressed by some feminists "that drag is offensive to women and that it is an imitation based in ridicule and degradation."[54] Instead, Butler argues, the drag depicted in the film "simultaneously appropriates and subverts racist, misogynist, and homophobic norms of oppression."[55] On the one hand, to the extent that the Latino and African-American men in the movie fantasize about becoming "real" women with homes in the suburbs, and thus seem to perceive becoming female as an escape from poverty and violence, they appropriate (without challenging) existing patriarchal myths that ignore the harsh realities of the single-parenting lives of many women of color. "On the other hand, insofar as black men who are queer can become feminized by hegemonic straight culture, there is in the performative

50. Schneider, *supra* note 29; Williams, *supra* note 2, at 431.
51. BUTLER, *supra* note 3, at 128-32.
52. *Id.* at 137.
53. *Id.* at 122.
54. *Id.* at 126; *see also* bell hooks, *Is Paris Burning?*, Z MAGAZINE 61 (June 1991) (criticizing some productions of gay male drag as misogynist).
55. BUTLER, *supra* note 3, at 128.

dimension of the [drag] ball a significant reworking of that feminization . . . ."[56] It becomes, perhaps, something playful, flamboyant, joyful, and confident, rather than a symbol of loss, absence, or failure. Such performative behavior as the cross-dressing of drag queens points to the constructedness of gender, and hence serves to disrupt (or "denaturalize," as Butler puts it) gender categories. "This is not an appropriation of dominant culture in order to remain subordinated by its terms, but an appropriation that seeks to make over the terms of domination, a making over which is itself a kind of agency . . . ."[57]

Another example of the ways in which existing cultural categories can be challenged through subversive repetition is suggested by lesbian pornography. Authors like Susie Bright,[58] who writes steamy stories about lesbian sex, might seem to some to be merely reinforcing the objectification of women to which feminists have long objected.[59] I would argue, however, that there is a difference between Bright's essays and similar discussions of *heterosexual* sex written by men. In fact, it seems to me that it is the very fact that Bright is not a man that makes all the difference between her and, say, Henry Miller. There is simply something inherently subversive about a lesbian openly and enthusiastically proclaiming her feelings of sexual attraction towards other women. To do so is not to internalize and reinforce the patriarchal habit of reducing women to their bodies, for that reduction is intimately tied to a set of gender understandings that reinforce and construct female inferiority to males. Lesbian "objectification" of women cannot possibly be the same thing. Rather, because it necessarily challenges the patriarchal imperative of heterosexuality, it is subversive of the very discourse of objectification that it employs.[60]

In law as well as in pornography, then, it may be possible to deploy traditional discourse against itself. It may be possible (with all due respect to

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56. *Id.* at 132.

57. *Id.* at 137.

58. SUSIE BRIGHT, SUSIE BRIGHT'S SEXUAL REALITY: A VIRTUAL SEX WORLD READER (1992).

59. Bright has also been criticized for objectifying men. She writes that, when she and some women friends had a "tea party" in which they were served by nude men, some invitees refused to attend, arguing that a similar affair with the roles reversed would be seen as very disrespectful to women. *Id.* at 51. To Bright, however, there is a huge difference between the two scenarios. Similarly, same-sex marriage has been criticized by some in the gay community, on the grounds that it constitutes capitulation to heterosexual norms. Others, however, see it as a radical effort to transform the very concept of marriage.

60. For example, to the extent that the act of objectifying women is thought to be paradigmatically male conduct—is conduct, in short, that *defines* and *identifies* a man as a man—women's acts of objectifying other women necessarily destabilize this set of associations. They suggest that not all people who objectify women are men, and, concomitantly, that not all men need to objectify women—that such behavior is not required in order for a male to be a "real" man. *See* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 U. COLO. L. REV. 304, 339 (1995) (arguing that "[g]ay or lesbian pornography that depicts dominance relations associated with heterosexuality in non-heterosexual contexts may '[b]ring into relief the utterly constructed status of the so-called heterosexual original'" (quoting Susan E. Keller, *Viewing and Doing: Complicating Pornography's Meaning*, 81 GEO. L.J. 2195, 2238 (1993) (quoting BUTLER, *supra* note 30, at 31) and that "Madonna's use of her body as a 'metafeminist prop' or her appropriation of the Marilyn Monroe look may expose widely accepted images of female desirability as male-created constructs, which can be challenged through rearrangement, exaggeration, or parody by women." (citations omitted)).

Audre Lorde)[61] to use the master's tools to dismantle the master's house. Consider, for example, the impact of a program like the child tax discussed above. In order to challenge it, conservatives would have to argue that it constituted the coercive taking of individuals' property. They would have to challenge the choice to pay the child support (so as to avoid taxes) as not a choice at all. Perhaps they would contend, for example, that the contexts in which choices are made, and the background rules that affect individuals' interests, influence the content of those choices. Perhaps they would find themselves suggesting that choice is socially constructed, and that courts should be defining it less formalistically. It is unlikely that such arguments would be without impact. The traditional liberal categories of thought, in which the private is equated with individual freedom and the public is equated with governmental regulation, would probably not survive unscathed in a world where both left and right contended that choice is socially constructed.[62] By using the very constructs that have been their nemesis, progressives might most effectively begin to unravel them.[63]

The case of *Crooke v. Gilden*,[64] discussed by Martha Ertman in this Symposium issue,[65] provides another example of the subversive potential in conventional legal structures. In that case, a lesbian succeeded in enforcing a cohabitation contract against her former partner. However, the opinion in the case gave no indication that the contract was between two lesbians,[66] treating the two individuals as essentially arms' length transactors. Thus, while the result of the case was substantively favorable to gays, providing a mechanism they can use to enter into relationships that are formally precluded by marriage prohibitions, the legal fiction employed to reach that result is more troublesome. The fact that the parties essentially had to remain closeted to obtain judicial enforcement of their agreement makes *Crooke* initially seem like a Pyrrhic victory, at best. Yet Professor Ertman's discussion of the case raises provocative questions about whether, in fact, *Crooke* ought not instead to be seen, if not as an unqualified step forward, at least as a mixed blessing.

Like the drag balls discussed by Butler, *Crooke* seems likely to have both a reinforcing and a subversive effect on mainstream ideas about lesbians and gays. On the one hand, it clearly conveys the message that homosexuality is

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61. *See* the quote at the beginning of this article, *supra* note 1.

62. I owe this insight to an exchange I had with a former student, Rich Mitchell.

63. I am aware that, to some extent, progressive programs packaged as private already exist (witness the conservation trust program), and yet liberal discourse remains intact. Frances Olsen has, in fact, made a career of lucidly pointing out how governmental coercion of have-nots comes to be seen as choice and governmental coercion of haves comes to be seen as coercion. Olsen, *supra* note 15 (arguing that when a governmental program challenges existing power structures it tends to be viewed as interference with the private sphere, but when it reinforces those structures it is not so seen). In short, one should not underestimate the ability of our society to be blind to its own contradictions. Nevertheless, I think that Butler is correct that we must look to those contradictions as the locus of transformative potential as well.

64. 414 S.E.2d 645 (Ga. 1992).

65. Ertman, *supra* note 34, at 1154-55.

66. One of the parties tried to bring in evidence of their relationship, but it was barred under the parol evidence rule. *Crooke*, 414 S.E.2d at 646; *see also* MARY BECKER ET AL., FEMINIST JURISPRUDENCE 523 (1994).

deviant and shameful, and that gay men and lesbians can only hope to obtain legal rights by hiding their sexual orientation and invoking existing legal doctrines that would apply to straights as well. On the other hand, the case also represents a concrete benefit for gays. As a result of *Crooke* and other similar cases that might be decided in the future, same-sex couples will be able to create binding legal obligations between themselves even in the absence of a formal marriage. *Crooke* has found its way into legal casebooks[67] and gay and lesbian newspapers, and will no doubt be widely known in the gay legal community. Thus, it seems likely that, as a result of the case and others like it, gay and lesbian partners will increasingly use contracts to structure their relationships, and will feel increasingly more certain of the enforceability of such contracts. If that occurs, one can expect that same-sex partnerships will eventually come to look, in legal terms, very similar to formal legal marriages. The closer that the legal structuring of such relationships comes to resemble marriage, the more the prohibition on gay marriage will come to seem formalistic and unreasonable. In time, then, cases like *Crooke* might actually lead to the legalization of same-sex marriage.[68]

Moreover, once same-sex marriages become legal, the very idea of marriage itself is likely to be transformed. Just as drag's deployment of traditional gender conventions ultimately subverts the notion of gender, lesbian and gay couples' following of traditional heterosexual marriage practices may ultimately transform the notion of family. In addition, because heterosexual norms underlie so much of the content of gender roles,[69] same-sex marriages can be expected to have a transformative impact on gender relations as well. Thus, *Crooke* represents another example of how a formally private approach, in which individual choices are allowed to structure interpersonal relationships with no overt interference by the government, can actually have the ultimate effect of producing progressive cultural change.[70]

IV. CONCLUSION

While the public/private dichotomy and the notion of choice have often been used to justify governmental policies with conservative political slants, there is no reason why privatization should necessarily always work against

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67. *See, e.g.*, BECKER ET AL., *supra* note 66, at 523-24.

68. Martha Ertman develops some of these, and other, points in her thought-provoking discussion of *Crooke*, *supra* note 34, at 1164-66. *But see* Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169 (1996) (arguing that privatization is of limited progressive value).

69. Much of the content of gender norms assumes that men and women are (and should be) different. At least in part, that prescriptive difference seems tied to the assumption that women and men are meant to form couples, and that the two members of the couple cannot (read: should not) be the same.

70. Of course the positive impact of choice-based solutions in the gay and lesbian context might be due, at least in part, to the relative equality that exists between the partners in gay and lesbian relationships, given that they are between members of the same sex. *See* Becker, *supra* note 68, at 1169-72. Private orderings between, for example, gay employees and their employers, might not produce such salutary results. Nevertheless, *Crooke* still represents an interesting example of how conventional constructs can be subverted when used in unconventional ways.

progressive goals. Regulations clothed in privatization garb can be either conservative or progressive in content. Their substantive content will be determined by the ways in which the private regime structures individual choices, including: the nature of the (direct) public regulatory scheme (if any) that the private one is supplanting, the existing power relations that prevail in the private sphere in which the choices are made, and the (indirect) background rules that constrain the choices available to the individuals doing the choosing.

Privatization's progressive potential lies not only in the possibility that private approaches might be structured to be substantively progressive, but also in the rhetorical impact that might be produced when private solutions are advocated by the left. When substantively progressive policies are structured so as to appear to be merely the product of individual choices, they create pressure on the right to challenge that appearance by arguing that the choices were really constrained. When the right, as well as the left, is forced to contend that choice is socially constructed, rather than solely a product of individual agency, a fissure in the rhetorical fabric of liberalism is created. Within that fissure, it is just possible that progressives will be able to wedge the beginning of a substantive, as opposed to formal, social as opposed to individualist, public policy discourse.

"MEET THE NEW BOSS . . . "*

ALAN K. CHEN†

As my colleagues and I met during the early stages of planning the conference at which many of these papers were presented, the conversation turned toward the possibilities of a burgeoning jurisprudential movement or development loosely labeled "The New Private Law." The topic was derived from a series of discussions about the emerging contemporary political movement toward (or resurrection of) privatization, spurred in part by the 1994 congressional elections and the Republican Party's so-called "Contract With America."[1] Perhaps, some argued, this political movement might reflect, or could be said to be the antecedent to, a broader, parallel transformation in jurisprudential thought.

Other topics were discussed, but with increasing enthusiasm, many of my colleagues began to see a pattern emerge that, at least for me, was not evident. As several of the contributors to this issue have acknowledged, the tendency to alternate between public and private provision and regulation of public goods (or some combination thereof) has enjoyed a long and cyclical history in our legal and political culture.[2] Being one of the more cynical (or perhaps least imaginative) of the group, in the midst of an exchange on these issues I muttered, "Meet the new boss, same as the old boss,"[3] a familiar line from a song

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* PETE TOWNSHEND, *Won't Get Fooled Again, on* WHO'S NEXT (Decca 1971).

† Assistant Professor, University of Denver College of Law. B.A., Case Western Reserve University, 1982; J.D., Stanford University Law School, 1985. Thanks to all of the participants from other law schools who contributed so meaningfully to this Symposium: Mary Becker, Rick Collins, Dan Farber, Clayton Gillette, Gary Peller, Katherine Van Wezel Stone, Elaine Welle, and Sheryl Scheible-Wolf. Their creative and interesting ideas, both at the conference and in their papers, helped me immensely in formulating and clarifying my own thoughts on the New Private Law. I would especially like to thank my colleagues at the University of Denver, Fred Cheever, Roberto Corrada, Nancy Ehrenreich, Martha Ertman, Dennis Lynch, Julie Nice, and Celia Taylor, who conceived and put together a fascinating conference and symposium. Dean Lynch also deserves credit, along with the University of Denver College of Law, for the continuing support and encouragement for the Denver University Law Review Symposium. Many of the aforementioned also read and commented on a draft of this essay, as did David Barnes, George Martinez, Steve Pepper, and Bob Weisberg. Faculty Services Librarian Diane Burkhardt, my assistant Leslie Pagett, and research assistant Wendy Hess also helped me immeasurably in conducting research. Finally, the symposium would not have been possible without the superior effort of Law Review editors Sue Chrisman and Tracy Craige and their staff.

1. *GOP's "Contract with America"*, STAR-TRIB. (Minneapolis-St. Paul), Nov. 9, 1994, at 14A. The Republican Party's Contract With America symbolizes a political commitment to decentralize power and to "end . . . government that is too big, too intrusive and too easy with the public's money." *Id.*

2. *See, e.g.*, Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

3. PETE TOWNSHEND, *Won't Get Fooled Again, on* WHO'S NEXT (Decca 1971) [hereinafter TOWNSHEND, *Won't Get Fooled Again*]. Another possibility, of course, is that I am simply our faculty's most dedicated fan of The Who.

by the rock group, The Who. My comment was meant not to be flippant, but to reflect my initial impression that the topic we were examining was a recycled version or aspect of the public/private distinction, which has been exhaustively and insightfully explored by adherents of existing jurisprudential schools.

Over the course of several months, I began to understand more of what my colleagues saw. The prospect of a new jurisprudential framework was seductive. Yet I remained skeptical about what we were actually examining, often invoking The Who's lyrics as shorthand for my doubt.

This essay raises a few challenges for the believers in the New Private Law and questions what defining characteristics this new school of legal thought might be said to bear. It draws in large part from the lyrics of *Won't Get Fooled Again*, The Who's anthem of youthful dissatisfaction[4] from which I initially drew my cynical comments. The selection of this theme is not facetious (and only partly humorous).[5] That song has long sounded the tones of disillusionment and was released at a time in our political culture when many on the political left were soured by the unfulfilled, yet seductive, promises of meaningful political change.[6] Now, as substantial changes in the political climate toward the right have emerged, while those on the left simultaneously begin to embrace context-specific forms of private governance, it seems appropriate to return to the wisdom the song's lyrics offer to intellectual inquiry.[7] Its critical tone is surely appropriate for exploring, with some skepticism, a symposium dedicated to the proposition that a new jurisprudential movement is afoot.

To be sure, none of the papers published here unequivocally contends that a new jurisprudential movement has arisen. Yet this important conceptual question is implicit in the work produced here.[8] While each of the papers in

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4. *Cf.* MICK JAGGER & KEITH RICHARD, *Satisfaction, on* OUT OF OUR HEADS (London 1965).

5. *Cf.* Jim Chen, *But Cf. . . . Rock 'N' Roll Law School*, 12 CONST. COMMENT. 315 (1995) (assembling, in a humorous fashion, various rock lyrics to demonstrate their explanatory power regarding multiple constitutional law doctrines).

6. *See generally* JOHN ORMAN, THE POLITICS OF ROCK MUSIC 160 (1984) (noting that Pete Townshend's *Won't Get Fooled Again* "warned people not to follow the new revolutionary leaders and the rhetoric of the movement because everyone got fooled by those leaders and gurus in the 1960's").

7. For a different view, see Chen, *supra* note 5, at 318 (arguing that "Pete Townshend might be able to see for miles, but not when it comes to constitutional law") (footnotes omitted).

8. Our collective thought process is explained in somewhat more detail by Julie Nice. Julie A. Nice, *The New Private Law: An Introduction*, 73 DENV. U. L. REV. 993 (1996). Whether recent trends toward privatization are described as a political trend, a legal development, or a jurisprudential movement, it is incumbent upon those who identify it as "new" to describe exactly what *it* is. In my view, it was at least implicit that a new school of legal thought could be associated with the various modes of private governance examined here. Indeed, our topic was self-consciously modeled, at least in part, on the exploration of jurisprudential change surrounding the New Public Law in the Michigan Law Review. *See* Symposium, *The New Public Law*, 89 MICH. L. REV. 707 (1991). Martha Ertman and Roberto Corrada argue that there is at least a possibility that the New Private Law is associated with a transformation in legal thought. Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1161-67 (1996); Roberto L. Corrada, *Claiming Private Law for the Left: Exploring* Gilmer*'s Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1055-65 (1996). Fred Cheever maintains

this Symposium represents an important, creative contribution to the scholarly literature and to the discourse on privatization, I argue in this essay that collectively they do not represent and are not characterized by any new jurisprudential framework or perspective. Rather, they can easily be fit into existing modes of legal thought and intellectual discourse. Drawing from some of these papers, I explore three possibilities of how the New Private Law could conceivably be characterized as a new jurisprudential movement, but conclude that none of these characteristics makes the New Private Law new.

I. LINER NOTES

A natural starting point for any serious inquiry along these lines should be an examination of what constitutes a jurisprudential movement or school of thought. While this is a daunting task whose scope far exceeds the ambition of this essay, I must at least stake out some basic ground rules for my arguments.

Several identifying characteristics come to mind. First, we could characterize a jurisprudential movement as an analytical tool or set of tools for the comprehensive examination or critique of a system of law that contributes meaningfully to our understanding of that system.[9] Another necessary characteristic of a new jurisprudential framework is that it should probably offer some explanatory power, either as a descriptive or normative matter.[10] That is, it should be useful in identifying in some systematic way why legal problems are, or should be, resolved in a particular manner. A jurisprudential school must also offer a distinctive analytical approach to looking at legal problems and differ in important respects from existing schools of thought.[11]

Both traditional and contemporary schools of legal thought share these basic characteristics. Early classical Formalist and Conceptualist traditions in

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that in the conservation easements context, the unique blending of public and private mechanisms of land use regulation creates some sort of "magic." Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1078 (1996). Nancy Ehrenreich, however, limits her observations to the possibilities that a traditionally conservative tool might be used not only to achieve progressive ends, but also to undermine conventional discourse about the social construction of "choice," thus generating a more substantive public policy discourse. Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235, 1251 (1996)

9. ROBERT L. HAYMAN, JR. & NANCY LEVIT, JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES 6 (1995) ("Jurisprudence encompasses the study of a legal system's scope, function, methodology, and guiding precepts. It considers the basic, general, universal and theoretical ideas of law, as well as their underlying premises."); *see also* Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 638 (1989) (describing the common feature of Law and Economics, Critical Legal Studies, and Feminist Legal Theory as attempting to develop a new theoretical approach that analyzes law "across the board"); Peter M. Shane, *Structure, Relationship, Ideology, or, How Would We Know a "New Public Law" If We Saw It?*, 89 MICH. L. REV. 837, 840-41 (1991) (arguing that one characteristic of a new jurisprudential movement is that it be recognized as new from multiple perspectives). Minda describes Law and Economics as "purport[ing] to offer a new theoretical framework for *systematically* describing and reformulating adjudication and legal decisionmaking." *See, e.g.*, Minda, *supra* at 604.

10. HAYMAN & LEVIT, *supra* note 9, at 6 (arguing that the "essential questions" of jurisprudence "can be of a positive or descriptive nature or of a suggestive or normative nature").

11. *Id.* at 7 (describing a "contemporary" school of jurisprudence as "one which can meaningful be differentiated both from the schools that dominated an earlier age *and* from the other schools of today").

American legal thought sought to characterize law and adjudication in categorical, quasi-scientific terms, promising that deductive reasoning from basic principles would lead to determinate outcomes.[12] The hallmarks of this classical school were the embracing of formal logic to derive legal decisions from broad, general principles or truths.[13] The Legal Realists reacted to the classical tradition, creating a distinct conceptual framework that questioned the existence of "right" answers to hard legal questions, undermined assumptions of judicial objectivity, and called for the introduction of social science and other sources of knowledge external to law to create a better understanding of law.[14] The Realists also viewed law as an instrumental or utilitarian device, an appropriate vehicle for social change.[15] Some of them sought to question the fundamental dividing line between law and politics.

The Legal Process school, in turn, rejected many of the Realists' conceptions, looking back to a more hopeful vision of "neutral principles."[16] Process theorists emphasized the ideals of the legal decisionmaking process and the confinement of legal institutions (courts, legislatures, agencies) to roles within their competence, rather than normative outcomes.[17] As one description offers:

> The legal process synthesis was a brilliant achievement, for it transcended the realist/formalist debate in a way that fit well with the relativist theory of democracy. The scholars were able to marginalize *Lochner*-style constitutional law as impermissible value-imposition by unelected judges while simultaneously moving mainstream American jurisprudence into the modern era by acknowledging and legitimating the inescapably political character of the common law, statutory interpretation, and administrative law. In short, legal process asserted the illegitimacy of activist judicial review while asserting activism in virtually all other institutional settings.[18]

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12. *See, e.g.*, William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 711-12 & n.5 (1991) (providing a slightly broader definition of formalism); Minda, *supra* note 9, at 633-34 (describing Realist reaction to mechanical jurisprudence of the Formalist and Conceptualist schools). The descriptions of jurisprudential schools in this section are necessarily abbreviated and incomplete, yet in providing them I seek to capture some of the characteristics that allow us to view them as distinct.

13. HAYMAN & LEVIT, *supra* note 9, at 11-12.

14. *See generally* JEROME FRANK, LAW AND THE MODERN MIND (1949); Karl N. Llewelyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

15. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 688-89 (2d ed. 1985) ("Realist judges and writers were openly instrumental; they asked: what use is this doctrine or rule? . . . Law had to be a working social tool; and it had to be *seen* in that light.").

16. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19-20 (1959) (arguing that the courts' interpretation of the Constitution must rest on "reasons that in their generality and their neutrality transcend any immediate result that is involved"). The foremost Legal Process thinkers were, of course, Professors Hart and Sacks. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958).

17. Eskridge & Peller, *supra* note 12, at 746 (noting that the legal process school "celebrated the neutrality of law"); Minda, *supra* note 9, at 642 ("A major tenet of [Legal Process] school was to provide an objective 'process' determined by legitimate procedures and proper institutions for resolving subjective questions of 'public policy.'").

18. Eskridge & Peller, *supra* note 12, at 723.

Three of the widely-acknowledged contemporary legal schools—Law and Economics, Critical Legal Studies, and Feminist Jurisprudence—also offer distinctive and different analytical approaches to the system of law. The Law and Economics school, for example, can be viewed as a systematic approach to describing or prescribing legal rulemaking as a means of achieving individual and social wealth maximization.[19] Through the lens of classical economic theory, Law and Economics proponents seek to understand law as reliant on the rational behavior of individuals to maximize their personal utility.[20] The aggregation of these preferences, in turn, is seen as maximizing societal welfare.[21] On this understanding, legal rules can be described or criticized with reference to their success in promoting these economic objectives.

The Critical Legal Studies (CLS) movement, in contrast, has attempted to develop "a totalistic critique of legal doctrine."[22] CLS scholars focus on the indeterminacy of legal doctrine and on the ways in which doctrine masks ideological forces that perpetuate hierarchical social structures.[23] From this perspective, law and legal doctrine are viewed as obfuscating forces, hiding the ideological and socially and historically contingent forces that truly underlie law.[24] In pursuing this enterprise, CLS seeks to import perspectives from other disciplines, using "different nonlegal methodologies and insights."[25]

Feminist legal theorists, too, take critical perspectives, but examine law and the legal system from the perspective of exposing its historically male orientation.[26] On one account, the objective of Feminist Legal Theory "is to explain how the law subordinates women by relying upon theoretical distinctions which are both reified and ordered to favor male interests and values over those of women."[27]

While these modern jurisprudential movements are surely diverse, they share the common feature of promoting comprehensive analytical or critical approaches to law that are distinct from the Formalist, Realist, and Process traditions.[28]

Moreover, when groups of legal scholars have attempted to define a break from the past toward a new jurisprudential vision, they have sought to identify the characteristics or perspectives that mark the new "school's" territory.

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19. Minda, *supra* note 9, at 605. The work of this movement, in a broad sense, is characterized by Richard Posner's work. *See* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

20. HAYMAN & LEVIT, *supra* note 9, at 95.

21. *Id.* at 96.

22. Minda, *supra* note 9, at 614. *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 1-14 (1987); Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984); Symposium, *Critical Legal Studies*, 36 STAN. L. REV. 1 (1984).

23. *See* HAYMAN & LEVIT, *supra* note 9, at 213-14.

24. *Id.* at 214-15.

25. Minda, *supra* note 9, at 614; *see also* HAYMAN & LEVIT, *supra* note 9, at 215 (describing CLS as "a significantly interdisciplinary enterprise").

26. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 161-62, 237-38 (1989).

27. Minda, *supra* note 9, at 625.

28. *See Id.* at 638-41.

Several years ago, the *Michigan Law Review* published a symposium attempting to classify a new school labeled "The New Public Law."[29] While commentators differed over the precise definition of New Public Law, the appellation can be loosely defined as an amalgam of widely diverse post-Legal Process scholarship advanced during the 1970s and 1980s, with a decided centrist bent away from the ideologically polar Law and Economics and CLS movements.

In their essay on the New Public Law, William Eskridge and Gary Peller placed the New Public Law in the context of the intellectual history of American legal thought.[30] Their contribution to the Michigan symposium described three different accounts of the emergence of New Public Law scholarship. From one view, the New Public Law could be seen as an improvement on or refinement of the basic structures of the Legal Process tradition—a sort of "new legal process."[31] From this perspective, contemporary scholarship refined Legal Process thought by shaping it to respond to new problems, to new theories and information, and to the attacks from Law and Economics and the CLS movement.[32] It did so by engaging extralegal sources and other academic disciplines, such as civic republicanism, theology, feminism, hermeneutics, pragmatism, and public choice theory.[33]

A second account of the New Public Law was the "conscious rejection of the pluralist political features of legal process theory."[34] On this view, the New Public Law was a reaction to the concerns of an increasingly diverse group among left-leaning scholars who viewed the legitimacy of law as relating to its normative content, considered law to be a powerful transformative force that creates, more than it responds to, society, and understood the process of law to be a practical, dialogic discourse that seeks to reconcile, rather than to impose, public values.[35]

Finally, Eskridge and Peller argued that the New Public Law could be viewed as a contemporary response to the critiques of Legal Process launched by the Law and Economics movement on the right, and CLS on the left.[36] In this sense, it can be seen as a mediating force to reconcile the polarization of academic discourse in the 1970s and 1980s.[37]

In that same symposium, Dan Farber and Phillip Frickey attempted to characterize the New Public Law as a noteworthy departure from mainstream legal theory. They maintained that "[o]ne of [the] most distinctive attributes [of this school] . . . is the much more careful and explicit attention granted to political theory."[38] The New Public Law scholarship, they maintained, can be

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29. *Supra* note 8.
30. Eskridge & Peller, *supra* note 12.
31. *Id.* at 709-37.
32. *Id.* at 727.
33. *Id.*
34. *Id.* at 737.
35. *Id.* at 737-61.
36. *Id.* at 726-28.
37. *Id.* at 709.
38. Daniel A. Farber & Philip R. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 877 (1991).

characterized by its attention to informing legal discourse by reference to two distinct, but arguably adverse, political theories—public choice theory and neo-republicanism.[39]

Peter Shane played the skeptic's role in the New Public Law symposium, thoughtfully articulating some important points about the essentially interpretive nature of assessing paradigm shifts in legal thought.[40] He identified several reference points for the task of interpreting what is new. First, he claimed that an initial task in assessing change is identifying an appropriate baseline from which the law had moved.[41] Second, Professor Shane proposed that identifiable jurisprudential movements might entail "a theory of the state" that differs from the theory of the state during the baseline period.[42] A theory of the state is a "widespread understanding of the relationship of the state to its citizens, of official institutions to one another, or of the core purposes of government activity."[43] While debatable, application of this standard allows for distinction between long-term jurisprudential transformation and short-term political shifts that may not have an enduring impact.[44] Professor Shane ultimately concluded that the New Public Law, while feeling new, represented continuity rather than innovation.[45]

Again, the common feature of these descriptions is that they attempted to locate a potentially new movement in historical and political context and define how it both inherits and departs from existing or recognized intellectual traditions. In contrast, none of the work in this Symposium successfully attempts to situate the New Private Law in this manner; moreover, it is difficult to infer comprehensive analytical approaches from the interesting doctrinal issues generated by these articles.[46]

II. "THE CHANGE, IT HAD TO COME, WE KNEW IT ALL ALONG"[47]

The New Private Law, as described to differing degrees in the essays in this Symposium, is an attempt to describe the possibilities of, and concerns with, new forms of private governance—i.e., of regulating and promoting the conduct of individuals in the acquisition and distribution of public goods.[48] Capturing the traditional rhetoric of the "market," the contemporary privatization movement suggests that market-driven behavior may be preferable to

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39. *Id.*
40. Shane, *supra* note 9, at 837-38.
41. *Id.* at 838-39.
42. *Id.* at 839-40.
43. *Id.* at 840.
44. *Id.*
45. *Id.* at 873-74.
46. It is noteworthy that throughout the historical shifts in broader legal thought, the public/private distinction has enjoyed a dubious history. Indeed, one could invert Martha Ertman's horseshoe arc from public rights to public condemnation to form a pendulum, symbolizing the alternating visions of public and private spheres of governance as "good" or "bad" for left or right. Ertman, *supra* note 8, at 1111. The private sphere was viewed as privileged under classical legal thought, subordinate in Realist and Process theory, and indistinct from the public sphere in the modern movements. Eskridge & Peller, *supra* note 12, at 717 & Table 1.
47. TOWNSHEND, *Won't Get Fooled Again*, *supra* note 3.
48. Where I refer to "public goods," I mean also to include public services and public rights.

traditional distribution of scarce resources through the ordinary political process. Privileging individual autonomy and choice in particular contexts may constitute a superior mode of delivering public goods and protecting them from encroachment.

Of course, private governance can have many different meanings. An earlier view of private law arose from the classical legal Formalist conception of private economic ordering, symbolized both historically and conceptually by the Supreme Court's decision in *Lochner v. New York*.[49] On this view, private decisionmakers, governed by market forces, allocate resources free from state intrusion, while public institutions represent a sort of backstop to protect personal liberty only to the extent that the market has been distorted or altered in some unnatural way.[50] In this sense, private acquisition and allocation of resources is privileged because contract and property rights are "natural" or prepolitical.[51]

This view reflected the Formalist conception of the public/private distinction, under which the private sphere could be conceptually separated from the public because of this natural rights based conception of property and contract as a fundamental liberty.[52] Beginning with the Realists, however, legal observers attacked the sharp division between public and private spheres, noting that all property-based rights were themselves the product of public choices made by the state at an earlier time.[53] This conception challenged the idea that any right existed except by virtue of the state. Scholars from the CLS movement took the critique further, arguing that not only was the public/private distinction conceptually indefensible, but also that it was an obscuring mechanism through which the state could permit individuals to believe that their choices were private, when in fact all choices are the product of some previous state action.[54]

What are the "new" forms of private governance that have emerged in late twentieth century legal and political thought, and how do they differ from the more traditional conceptions of private ordering described above? Three general models come to mind, each reflected to some degree by essays in this Symposium.[55]

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49. 198 U.S. 45, 62 (1905) (holding that state law regulating wages and working conditions of bakery employees constituted unconstitutional deprivation of due process of law by interfering with liberty of contract).

50. Eskridge & Peller, *supra* note 12, at 711-12.

51. For a critical view of this understanding, see Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1697, 1718 (1984) (arguing that the theoretical basis for the *Lochner* decision is undermined when one recognizes that the market status quo is itself the product of previous governmental choices).

52. Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1299-1300 (1982) (describing natural rights regime under which individual contractual and property rights are immune from state regulation).

53. *See generally* Duncan Kennedy, *The Stages of Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351-52 (1982) (describing the collapse of the public/private distinction); *see also* Sunstein, *supra* note 51, at 1697, 1718.

54. Professor Ehrenreich summarizes this position in her essay. Ehrenreich, *supra* note 8, at 1239-40.

55. *Cf.* JOHN D. DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS 7-8 (1989) (establishing four models for the delivery of services, depending upon two vari-

First, there is a contractual delegation model, under which a private group maintains power by virtue of delegation from the state. An early and traditional focus of privatization has been a system under which the government merely enters into a contract with a private business entity to perform a function traditionally performed in the past exclusively, or predominantly, by the government.[56] Under this model, the private actors are likely to take on the essential attributes of the traditional state, but private entrepreneurship is said to provide a better vehicle for delivery of traditionally government-provided services. This model relies upon a faith in economic incentives to create and benefit both private and public welfare. Two typical examples involve contracting with private entities to operate schools or prisons, but there are countless others.

In the educational context, private entrepreneurs have undertaken a national movement to develop alternatives to public schools. The most high profile of these endeavors, The Edison Project, has recently taken hold in some jurisdictions.[57] The federal government is, at the same time, encouraging state and local governments to experiment with school privatization.[58] In the case of correctional institutions, a common political response to the increasing costs and problems associated with state-run prisons and jails has been to turn their operation over to the private sector.[59]

Government agencies have a long tradition of contracting or subcontracting out certain aspects of their public functions to the private sector. In both the educational and correctional contexts, however, it is difficult to ascertain what is exactly new about such approaches. The idea of privatizing schools, in one form or another, has existed for as long as the public school system has been a predominant societal presence.[60] And, of course, private schools have always existed as *alternatives* to public school systems. Moreover, the

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ables—who pays and who delivers; the four models are collective payment/public sector delivery; collective payment/private sector delivery; individual payment/public sector delivery; individual payment/private sector delivery).

56. The government may delegate a previously public function to a private entity in the form of statutory authorization or contract, or some combination thereof. *See, e.g.*, COLO. REV. STAT. § 17-1-104.4 (1996 Cum. Supp.) (authorizing state department of corrections to consider proposals for provision of minimum security beds through contracts at facilities operated by nonstate entities); COLO. REV. STAT. § 17-1-202 (1996 Cum. Supp.) (authorizing state department of corrections to entertain proposals from private contractors for construction and operation of prison facilities).

57. Peter Applebome, *Edison Project Getting Good Grades*, N.Y. TIMES, June 26, 1996, at A02 (describing Edison Project schools in four states).

58. A few years ago, Congress enacted the Goals 2000: Educate America Act, which included a provision authorizing state educational agencies to use federal funds to support "activities relating to the planning of, and evaluation of, projects under which local educational agencies or schools contract with private management organizations to reform a school." Pub. L. No. 103-227, § 308(b)(2)(J), 108 Stat. 125 (1994) (codified as amended at 20 U.S.C. § 5888(b)(2)(J) (1996)).

59. *See* Symposium, *Privatization of Prisons*, 40 VAND. L. REV. 813 (1987); Susan L. Kay, *The Implications of Prison Privatization on the Conduct of Prisoner Litigation Under 42 U.S.C. Section 1983*, 40 VAND. L. REV. 867 (1987); Ira P. Robbins, *Privatization of Prisons: An Analysis of the State Action Requirement of the Fourteenth Amendment and 42 U.S.C. Section 1983*, 20 CONN. L. REV. 835 (1988); E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, 890-93 (1987) (reporting statistics on privatization of public services in the United States).

60. *See* ALEX MOLNAR, GIVING KIDS THE BUSINESS: THE COMMERCIALIZATION OF AMERICA'S SCHOOLS 1-2, 9, 39 (1996).

common rhetorical contentions that contemporary school privatization advocates have asserted are remarkably similar to the school privatization arguments that emerged at the beginning of this century.[61] Similar rhetorical choruses are sounded in the private prison movement, which is also not a particularly new idea.[62] In that context, the increasing contractualization of prison services has raised relatively mundane issues about agency principles, albeit agency principles in the context of state action.[63] Moreover, critics of the privatization of traditional government services raise comparably conventional critiques.[64]

Gary Peller's essay[65] reflects the New Private Law contractual delegation model, which is somewhat analogous to the "public function" model of the state action doctrine.[66] Professor Peller contends that there might exist in the New Private Law movement a potential for a progressive vision that facilitates the recapture of popular control over institutions such as schools now run by elite, unresponsive bureaucrats.[67] Under one privatization scheme, school districts could subcontract out the administration of their school systems to private corporations. Under this fairly conventional view, corporate entities might be more responsive to parents and students than public school administrators because the former must react to market concerns or go out of business.[68] A more radical proposal would be to turn schools over to the private market. Providing for "auctioning" of public schools to private community groups that might advance their particularized interests or emphases could generate opportunities for institutions that would not, or perhaps could not, exist under the traditional, top-down public management of education.[69] For example, in an

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61. *Id.*

62. Ward M. McAfee, *Tennesee's Private Prison Act of 1986: An Historical Perspective with Special Attention to California's Experience*, 40 VAND. L. REV. 851, 852 & n.6 (1987) (discussing nineteenth century experience of several states in allowing private companies to operate state prisons).

63. *See, e.g.*, West v. Atkins, 487 U.S. 42, 56 (1988) ("Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the state's prisoners of the means to vindicate their Eighth Amendment rights."). Perhaps it is overstating the case to contend that the issues are mundane, as the Court continues to take cases to clarify these issues. *See* Richardson v. McKnight, 117 S. Ct. 504 (1996) (order granting certiorari on whether employees of private corporations that operate prisons under government contract are entitled to qualified immunity from constitutional tort claims under 42 U.S.C. § 1983).

64. MOLNAR, *supra* note 60, at 178-79, 184 (arguing that private, profit-driven corporations are not intended to further the public good).

65. *See* Gary Peller, *Public Imperialism and Private Resistance: Progressive Possibilities of the New Private Law*, 73 DENV. U. L. REV. 1001 (1996).

66. *See* Marsh v. Alabama, 326 U.S. 501, 504-09 (1946) (holding that privately-owned "company town" could not constitutionally invoke state trespass laws to interfere with religious speech). *But see* Jackson v. Metropolitan Edison, 419 U.S. 345, 351-53 (1974) (holding that private utility company operating by virtue of government-created monopoly is not a state actor obligated to comply with constitutional due process guarantees).

67. Peller, *supra* note 65, at 1005 ("American public schools by and large represent the paradigm of alienating, unresponsive, often corrupt, inefficient, and culturally repressive social institutions.").

68. *Id.* at 1007.

69. *Id.* at 1008.

African-American community, commonly interested residents could band together to purchase and operate an Afro-centric school.[70]

A second model of private governance might involve joint or cooperative endeavors by public and private entities. In some circumstances, for example, the state and private parties have expressly agreed to act jointly or are so intertwined that the law may not view them as legally distinct.[71] None of the articles in this Symposium suggest a conventional joint enterprise or conspiracy model. Perhaps this should not be surprising, since the forms of New Private Law explored here seem to value the formal separation of public and private rather than their explicit merger.

Several pieces do, however, suggest a sort of hybrid enterprise model that signals more than some sort of public/private cooperation. These hybrid proposals envision a third model of privatization under which government may create, through public law, a scheme that facilitates allocation and distribution of public goods by a system of private individual transactions. In this category, I place the work of Clayton Gillette,[72] Martha Ertman,[73] and Fred Cheever.[74] Somewhat like the government encouragement/approval model of state action,[75] under this model the state is more of a background player that consciously makes private transactions possible. The hybrid model suggests that the concepts of public and private governance lie on a continuum, rather than at two extreme poles.[76]

Clayton Gillette examines in great detail the notion that private individuals and groups might be offered the opportunity to "opt out" of the public provision of many public goods.[77] Using the analogy of contractual default rules, he proposes that public decisions about the distribution of public goods may serve as a background against which individuals might choose to opt for a private supplier to either replace or supplement the state's delivery of that good.[78] In this manner, Professor Gillette envisions a system in which private entities compete with, rather than replace, public institutions.[79] He observes that the selection of public or private delivery of various public goods

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70. Professor Peller offered this example in his oral remarks at the New Private Law conference.

71. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-25 (1961) (holding that privately-owned coffee shop in a publicly-owned building on publicly-owned land was so closely intertwined with the public that it engaged in state action for purposes of the Equal Protection Clause). *But see* Rendell-Baker v. Kohn, 457 U.S. 830, 840-42 (1982) (private school that receives 90% of its funding from government and is closely regulated is not state actor bound by procedural due process clause).

72. Gillette, *supra* note 2.

73. Ertman, *supra* note 8.

74. Cheever, *supra* note 8.

75. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 18-20 (1948) (holding that private party's enforcement in public courts of racially restrictive covenant was state action governed by the equal protection clause).

76. *See* Kennedy, *supra* note 53, at 1352-53 (describing "continuumization" as one stage in the decline of the public/private distinction).

77. Gillette, *supra* note 2.

78. *Id.* at 1188-92. He also suggests that some people might even choose to opt for less than the default level of public goods. *Id.* at 1216-18.

79. *Id.* at 1187.

implicates complex social choices and costs not accurately depicted by simplistic rhetorical attacks that celebrate the public and demonize the private.[80]

Professors Ertman and Cheever have contributed provocative articles exploring whether the New Private Law may suggest that progressive alternatives to the advancement of public rights may be accomplished in a second-best form through private ordering and enforcement of private contractual choices about families and land use, respectively. Martha Ertman argues that if the law (or politics) will not permit us to achieve full recognition of public rights for, say, gay marriage, perhaps the New Private Law provides a "subversive" doctrinal opportunity to accomplish politically progressive goals.[81] She proposes that a contractual model may promote individual choice for sexual marginorities in the same way that traditional contract doctrine is said to reify economic liberty.[82] Fred Cheever's essay on conservation easements offers similar possibilities for devotees of open space.[83] He maintains that the creation of an elaborate scheme of public incentives to encourage private land transactions that constrain the development of land provides an opportunity to accomplish environmental protection that public law does not.[84] Both of their proposals are set against the background of the state, as judicial enforcer of private contractual obligations and, in Professor Cheever's case, as creator of the "private" conservation easements interest.

The critical commentaries in this Symposium, in turn, track traditional concerns about turning government functions over to the private sector. Professors Becker, Stone, and Welle, for example, sound the cautions of the old boss. Their contributions to this Symposium reflect a profound skepticism about the private realm. Mary Becker cautions that private contractual regimes may not always be beneficial for have-nots, and that a more complete analysis requires the examination of the relative power of the parties to whom the state allocates the bargaining.[85] Katherine Van Wezel Stone's article highlights the dangers of allocating dispute resolution in the labor and employment law context to private arbitrators.[86] She raises important concerns about undermining and obscuring public rights under the private regime. Elaine Welle acutely observes the necessity for consideration of broader public values in establishing a baseline for a "default" level of public services as well as in setting limits on Professor Gillette's proposal for opting out of public provision of goods.[87]

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80. *Id.* at 1193-1216.

81. Ertman, *supra* note 8, at 1144-53, 1156-58.

82. *Id.* at 1109.

83. Cheever, *supra* note 8, at 1078-87.

84. *Id.* at 1086.

85. Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169, 1173-75 (1996).

86. Stone, *supra* note 2, at 1036-43. As Professor Stone's piece underscores, at least you could sue the old boss in a public and accountable forum.

87. Elaine A. Welle, *Opting Out of Public Provision: Constraints and Policy Considerations*, 73 DENV. U. L. REV. 1221, 1226-33 (1996).

III. ". . . SAME AS THE OLD BOSS[?]"[88]

Without acknowledging the existence of a distinct jurisprudential movement, one can surely see something "new" in the papers described above. The task of identifying a movement, however, must involve more. There must be deliberation about what it is that makes the analysis new, and how it can be distinguished from existing analytical frameworks.[89]

What is new about modern incarnations of private law? Is it the marriage or partnership of the public and private, and if so, where is the "magic" of which Fred Cheever speaks?[90] Is it new simply because it "feels" different? Will New Private Law be the miracle cure[91] for the postmodern blues?

The various authors' intriguing discussions of the possibilities of New Private Law offer some insights into what might be "new." First, a common feature of New Private Law seems to be a preference for decentralized, relatively autonomous decisionmaking over issues that previously were the conventional subject of public regulation and public discourse.[92] The decentralization of the New Private Law suggests a regime under which goods and resources are allocated and protected in a highly atomistic manner, with "communities" of decreasing size (and, presumably, increasing homogeneity). Thus, these models each reflect a desire to reallocate power not only by privatizing it, but also by decentralizing its exercise. Indeed, as I discuss below, it is not clear to me which is the more important move, privatization or decentralization.

Another connecting feature of the New Private Law is that it is manifested in ways that reject the left's romanticization of government as the heroic protector of public rights and values.[93] On this view, private governance may offer the proponents of left-leaning social agendas an opportunity to promote "public" values, rather than to undermine them. As a number of the papers argue, the "New" Private Law need not have a political valence.[94]

Finally, another element that one could draw from the New Private Law is that it reflects a new understanding of private law as a liberating or transformative concept that promotes progressive values in a subversive way. On this understanding, the New Private Law operates as a tool through which substantive policy goals can be reached; the newness is reflected in the use of what might be considered to be the historically "conservative" mechanism of

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88. TOWNSHEND, *Won't Get Fooled Again*, *supra* note 3.

89. *See* Shane, *supra* note 9, at 838-42 (describing factors to be considered in evaluating new movements in legal thought).

90. Cheever, *supra* note 8, at 1078.

91. PETE TOWNSHEND, *Miracle Cure*, *on* TOMMY (Decca 1969).

92. Cheever, *supra* note 8, at 1085-86; Ertman, *supra* note 8, at 1156-58; Peller, *supra* note 65, at 1001-03.

93. Corrada, *supra* note 8, at 1056-57; Ehrenreich, *supra* note 8, at 1236-37; Ertman, *supra* note 8, at 1144-53; Peller, *supra* note 65, at 1002.

94. *See, e.g.*, Corrada, *supra* note 8, at 1054-55. Nancy Ehrenreich discusses this point as well, but not in the context of arguing that it is indicative of any broader change in legal thought. Ehrenreich, *supra* note 8, at 1242-48.

privatization.[95] In this manner, the very concept of private governance is itself transformed through its cooptation by the left.

In the following discussion, I address and critique each of these possibilities.

A. *"And a Shotgun Sings the Song"*[96]

It could be that the New Private Law represents a different way of looking at institutional power relationships. On this view, the allocation to the private realm of not only the authority to create and define substantive interests, but also to carry out the procedures that give life to those interests, may require a new way of looking at these quasi-legal institutions. Traditional understandings of the public and private, or even of their non-distinctness, may not capture or reflect the underlying transformation of legal institutions that is occurring.

When commentators speak of private forms of governance, they generally mean the transfer of decisionmaking authority away from deliberative, theoretically accountable public institutions toward private institutions or individuals. This requires faith in the market, however defined, to encourage private property and contractual agreements that advance the welfare of the individual parties and, on some accounts, society itself. To a greater or lesser degree, the New Private Law, as illustrated in various contexts, suggests that the traditional realms of private transactional law offer superior mechanisms for achieving socially desirable outcomes.

Under the New Private Law regime, then, private transactional choices replace, in whole or part, governmental decisions. This conceptualization of the New Private Law centers on the redistribution of power from government to private lawmakers to allocate goods. It also requires the decentralization of decisionmaking authority to autonomous "private" decisionmakers who act through individualized "market" transactions. By definition, then, this angle on the New Private Law requires a conceptual acceptance of at least some meaningful difference between public and private realms of governance. I offer here two general critiques of this aspect of the New Private Law as a jurisprudential shift.

First, it seems that the New Private Law, as reflected in this Symposium, could be better understood as a simple redistribution of existing power or a shift toward shared power among existing institutions, both public and private. To the extent this is an accurate characterization, it signals not a jurisprudential transformation, but yet another move in the continual historical alternation of public and private as the privileged sphere. Accordingly, it is difficult to see how this differs from the old private law, the classical conception of private rights as privileged that was one hallmark of Formalist legal thought. Nothing distinguishes the New Private Law from "old" views of privileging individual choice through private market ordering.[97] If one considers the

95. Ertman, *supra* note 8, at 1165-67.
96. TOWNSHEND, *Won't Get Fooled Again*, *supra* note 3.
97. Brest, *supra* note 52, at 1299-1300 (describing natural rights regime under which indi-

universe of authority to allocate public goods, that authority must be distributed among public actors, private actors, or some combination thereof. This has always been, and always will be, the case. Moreover, it will remain so even as the institutions themselves are blended or "married" in previously unforeseen ways.[98]

That does not, however, alter the notion that the private law realm exists only as a product of a public regime.[99] The conception of contract and property law as "private" has long been criticized.[100] One fundamental argument that obliterates the distinction arises from the fact that private law enforcement must come through the force of the state. The boundaries of "private" law are governed largely by common law rules, which are themselves developed through paradigmatic state agents, the courts. Moreover, the private realm of society is inherently governed by broader public choices. One of the critical aspects that forms the debate on the public/private distinction is the conception of what limits, in a liberal state, may be placed on government interference with "private" conduct.[101]

These arguments translate quite smoothly to the New Private Law as conceived here. Professors Ertman and Cheever argue that private forms of governance may advance public goals in manners that avoid or, more precisely, circumvent formal government institutions. Clever though it is, Professor Ertman's model relies upon state involvement to a substantial degree. Private ordering is only accomplished in a system that permits public enforcement of these contractual arrangements.[102] Unless there were some purely private enforcement mechanism, it is the coercive power of the state that makes possible

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vidual contractual and property rights are immune from state regulation); Sunstein, *supra* note 51, at 1701, 1717 (describing classical understanding of private economic ordering as presumptively protected from state interference).

98. In examining whether the New *Public* Law was marked by changing relationships between public and private institutions, Peter Shane argued that despite increasing efforts toward privatization, "no apparent change has occurred in legal understanding of the scope of either mandatory or permissible private decisionmaking." Shane, *supra* note 9, at 844. Noting the elusive dividing line between public and private, Professor Shane observed that even in an era of increased private institutional roles in providing public goods and services, the governing legal norms that private entities operate against were likely to be drawn from the state. *Id.*

99. Indeed, a purely private regime could be possible only if no state existed.

100. *See, e.g.*, Morris R. Cohen, *Property and Sovereignty and The Basis of Contract*, *in* LAW AND THE SOCIAL ORDER 41, 69, 102 (1933); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); *see also* Kennedy, *supra* note 53, at 1351-52 (describing Cohen's analysis as representing the collapse of the public/private distinction). Of course, as Larry Alexander has observed in the state action context, to recognize that the distinction between public and private action is conceptually unhelpful is not to say that there are not still unanswered normative questions about the constitutional limitations on private power. Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361, 364-66 (1993). Indeed, there are circumstances in which the public/private distinction is highly relevant to legal outcomes, even if not conceptually coherent.

101. *See* Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1429 (1982).

102. Professor Ertman acknowledges the critique generated by the public/private distinction in the contractual rights context, but contends that regardless of conceptual impossibilities, the distinction may have "tremendous impact on actual lives." Ertman, *supra* note 8, at 1120 (acknowledging public/private distinction). This supports, to some extent, my observation that the New Private Law represents a contemporary exercise in utilitarianism. *See infra* notes 139-46 and accompanying text.

the benefits under the contract. Ultimately, then, the state must still recognize the rights as enforceable. What is more, whether or not a judge decides to invoke the public policy exception to a contract designed to protect the choices of autonomous sexual marginorities is also ultimately a public choice. I am unconvinced that the imprimatur of the "private," through classical contract doctrine, will necessarily supersede moral judgments in this context.[103] Accordingly, Professor Ertman's jurisprudential move is inherently subject to the existence of public law as a promoter (through recognition of a public right) or destroyer (through public policy exception refusals to enforce such contracts) of her way station.

Professor Cheever's model, too, relies on a system of state enforced contractual rights to empower his conservation easements scheme. Moreover, as he concedes, this scheme is even more reliant on the state as the source of the "private" right. His substantial reliance on statutory creation of the conservation easement interest and, more importantly, on a *government-created market* for open space lends great weight to the obliteration of the public and private, not their "marriage."[104] Similarly, Professor Gillette's proposal requires a collective public decision to enable opting out in the first instance while Professor Peller's private school model relies on the state's authorization to sell off public schools under legislatively controlled conditions.

Furthermore, it is interesting that both Roberto Corrada's and Dennis Lynch's comments on Professor Stone's paper seem to be directed at the potential social problems associated with allocation of labor and employment disputes to private decisionmakers. The problem, they suggest, can be alleviated by adopting notions of due process, ensuring impartial decisionmaking bodies, etc.[105] In other words, the problems can be addressed by making these private institutions more like public ones! And how would that be achieved? Presumably, this would occur through legislative action setting the parameters of "private" labor arbitration.

Professor Corrada attempts a broader argument that the newness of the New Private Law is reflected in that it "expressly mistrusts public fora and seeks to enforce private law in private venues."[106] He argues that this disavowment not only of public law, but of public institutions to enforce private law, is a noteworthy departure from the old (i.e., *Lochner* era) private law. This account of the New Private Law does not, on reflection, offer anything new. First, Professor Corrada ignores the fact that the private labor arbitration model he explores is itself the product of public choice, federal arbitration law. Second, his attempt to distinguish the New Private Law with reference to the dispute resolution forum seems to be a nod to a conceptual distinction that has proved as unhelpful as the public/private distinction—the substance/procedure distinction. What is happening still represents a reallocation

103. Ertman, *supra* note 8, at 1158-59 (navigating around morality section).

104. Cheever, *supra* note 8, at 1091-92.

105. Corrada, *supra* note 8, at 1065-68; Dennis O. Lynch, *Conceptualizing Forum Selection as a "Public Good": A Response to Professor Stone*, 73 DENV. U. L. REV. 1071, 1072-76 (1996).

106. Corrada, *supra* note 8, at 1056.

of existing power from public forums to private forums, and that reallocation is always subject to change through the public law system. Indeed, the Federal Arbitration Act even includes an exemption for employment agreements, though that provision has sometimes been ignored.[107]

Moreover, the cautionary moves of the New Private Lawmakers reveal that the real concerns here are the underlying social and political values that are being pursued, and not the particular form of governance. While the proponents are willing to wade into the privatization waters, they are not willing to dive in. Some of the authors, even the ones who subscribe to privatization as a progressive tool, envision public law as a backstop against a private world gone awry.[108] Professor Cheever's proposal, for example, includes an express recognition that the state must always be in a position to reenter the picture should the land use restrictions imposed by private ordering become obsolete, outmoded, or no longer feasible.[109] Thus, the New Private Law contends that while the public is not necessarily good for progressive interests, public law should probably always exist to protect society from the potential evils of private ordering. It is the outcome, rather than the nature of the forum, that is most important.[110]

Once these issues are acknowledged, it seems that there is nothing quintessentially private about the choices made under any of these proposals. Both the rulemakers and the rule appliers are public. Each of the proposals necessitates reliance on the coercive power of the state to accomplish these goals directly, or at least to ensure that private actors facilitate their achievement.

Collectively these critiques fit within existing traditions of legal thought, and reflect the fact that public and private realms of governance cannot, in the end, be distinguished. They reveal the New Private Law more as private law guided by the not-so-invisible hand of state-created regulation and constructs, rather than as a new theoretical perspective or movement. Moreover, these critiques are not new. Building upon the Realists, the CLS movement has largely undermined the public/private distinction as a conceptual matter.[111] The New Private Law has not resurrected the distinction.

A second foundational way of addressing the power relationships thesis is to examine how it mirrors a long-standing traditional jurisprudential problem—countermajoritarian judicial review in a democratic society. In some ways, the New Private Law may be viewed as the "New Judicial Review" and

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107. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2 (1991) (refusing to apply § 1 of the Federal Arbitration Act, 9 U.S.C. § 1 (1994), which exempts employment contracts). A final rebuttal of Professor Corrada's argument arises from the existence of the *Gilmer* case itself. Surely it must be recognized that the actual enforcement of the private arbitral process in that context came from a paradigmatic public institution, the Supreme Court.

108. Cheever, *supra* note 8, at 1101-02.

109. *Id.*

110. *Cf.* Mnookin, *supra* note 101, at 1435-36 (1982) (describing lawyer-economists' critique of public/private distinction as contending that "in comparing alternative legal rules, the consequences are what count, no matter what the 'sphere'").

111. For an excellent collection of CLS scholarship on this matter, see Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

may therefore be viewed through the same analytical lens. The point of this discussion is not to critique the New Private Law substantively, but to demonstrate that the reallocation of institutional power it represents is subject to ready examination using existing analytical tools.

The argument goes like this. The American constitutional scheme necessitates a delicate balance of simultaneously facilitating majoritarian rule and protecting minority rights. To accomplish this, it is sometimes necessary for a politically independent legal institution—the courts—to disregard and override the will of the majority in order to assure faith in basic constitutional principles in a pluralistic society. But this presents an inherent conflict with the concept of majority will and creates tensions in the institutional relationship between the courts and the so-called political branches of government. Hence, we are cursed with the "countermajoritarian difficulty."[112]

Judicial review, in turn, is both celebrated and assailed for its countermajoritarian elements.[113] To its proponents, judicial review fulfills the promise of a constitutional democracy by ensuring a mechanism to protect against the excesses, and sometimes prejudices, of majoritarian will.[114] To its critics, judicial review is anathema to democratic self-governance, and is the product of arrogant, elitist decisionmakers, probably influenced by the leftist academy, overriding populist sentiment on what are essentially political value choices.[115]

The New Private Law, in comparison, establishes a landscape under which private decisionmaking bodies take on the institutional role of the judiciary under constitutional judicial review. Professor Ertman's model, for example, consciously advocates that small family units will be able to accomplish what the majority will not permit—legal recognition of alternative family structures and sexual autonomy.[116] These private decisionmaking bodies can be said to accomplish similar goals by protecting the rights or will of political minorities in a manner that balances out public decisions about the allocation of public goods in most circumstances.[117] But this makes private lawmakers similarly "countermajoritarian," and implicates concerns about creating an atomistic society under which the very concept of community decisions and "public good" are subsumed by the decentralization of decisionmaking.

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112. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (2d ed. 1986) (describing tension between democratic rule and judicial review); *see also* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4-9 (1980).

113. *Compare* Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 287 (1983) (arguing that judicial review guards against "the majority's worst excesses" and protects important constitutional values associated with the rights of political minorities) *with* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 6-8, 12, 16-17 (1990) (attacking judicial review as undemocratic imposition of elitist values on the public). For an interesting critique of the conventional mode of thinking about judicial review, see Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996).

114. *See, e.g.*, Karst, *supra* note 113, at 287.

115. BORK, *supra* note 113, at 7 ("[T]he heresy of political judging is systemic. A great many judges subscribe to it, a large number of left-wing activist groups promote it, many senators insist upon it, and in the legal academy this heresy is dominant.").

116. Ertman, *supra* note 8, at 1156-58.

117. Gillette, *supra* note 2, at 1193-98.

Moreover, the countermajoritarian element of privatization makes it vulnerable to the same attacks that are directed at activist judicial review, and these concerns can surely be seen in the essays in this Symposium. First, the New Private Law could be viewed as an elitist form of governance that circumvents "real" people. Professor Peller's model, for example, arguably promotes opportunities, even in disadvantaged communities, for the intellectual elite to counteract the dulling forces of public bureaucrats' decisionmaking about schools. Professor Ertman's contractual model for sexual marginorities is likely to be available to a class of marginorities that is relatively wealthy and well educated, positioning them to take full advantage of a sophisticated contractual regime. And Professor Cheever's model, which requires significant wealth such that the tax advantages of conservation easements make sense and access to legal counsel to structure such transactions is possible, can surely be branded with the elitism label.

Furthermore, ideas of private governance could arguably lead to isolated, insular, homogeneous communities (e.g., Peller's Afro-centric schools).[118] While these private lawmakers may serve the ends of individual autonomy, they also raise Madisonian concerns about insular decisionmaking, factional control, and the deprivation of choice for others.[119] These concerns exist, moreover, whether these decisions are made in a town meeting, a corporate board meeting, or a family meeting.

They also, in the privatization context, raise an additional concern not present in the judicial review discourse. While federal courts are formally insulated from the electoral process, they remain accountable to the public in ways that private lawmakers do not. Accordingly, progressives who view privatization with optimism should be concerned about privatization, even on their issues. For example, the relative autonomy for family structuring that might permit sexual marginorities to protect and gain legal recognition for their relationships may also mean the relative autonomy for parents to "direct and control the upbringing, education, values and discipline of their children"[120] to the exclusion of broader public concerns about matters such as child abuse.

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118. For a fascinating account of the contemporary cultural tendency of homogeneous groups to form isolated communities, see FRANCES FITZGERALD, CITIES ON A HILL (1986).

119. THE FEDERALIST No. 10 (James Madison).

120. Proposed Amendment 17 to the Colorado Constitution. In 1996, some Colorado voters proposed Amendment 17 to the Colorado Constitution through the state initiative process. *See* COLO. CONST. art. V, § 1(2). The amendment would have made parental control of issues such as education and discipline an "inalienable" state constitutional right. Michelle D. Johnston, *Hidden Agenda in Amend. 17?*, DENV. POST, Nov. 3, 1996, at A01. Colorado voters defeated the measure 58% to 42%. Michelle D. Johnston, *Of the People Faces Hearing on Election Law*, DENV. POST, Nov. 14, 1996, at B01. As Professor Ertman herself points out, child sexual abuse does not involve victimless sexual activity, and therefore has moved from public right to criminalization, consistent with the progressive trend she identifies. Ertman, *supra* note 8, at 1131-34. Protection of such activity would accordingly not fit her model. Moreover, the comparison I draw may not be entirely fair given the clearly unequal legal status of children in a bargaining context as well as their lack of formal political power. *Cf.* EDDIE COCHRAN & JERRY CAPEHART, *Summertime Blues*, [performed by The Who] *on* LIVE AT LEEDS (MCA 1970) ("Well I went to my congressman, He said: 'I'd like to help you son, but you're too young to vote.'").

To the extent that we divorce private decisionmaking from majoritarian public forces, we also insulate them from constitutional constraint, public accountability, and public discourse.[121] If the public and private are treated as formally different, those differences may obscure issues or background principles that are more critical to assessing law and its outcomes.[122] I return to the point about accountability and public discourse when I address the "subversive" nature of the New Private Law below.

Like activist judicial interference with democratic choice, then, the move toward privatization for progressive purposes can be seen as a reflection of dissatisfaction with pluralistic decisionmaking. The criticism of public versus private allocation of goods is likely to turn, as with assaults on activist judicial review, on whose ox is being gored.[123] These critiques are not new, and to some extent reflect a Realist acknowledgement of the subjective nature of legal decisionmaking.

B. *The Parting on the Right, Is Now a Parting on the Left*[124]

As illustrated through the articles in this Symposium, the New Private Law does not explicitly draw on a particular political theory. Thus, another manner in which the New Private Law could be said to be "new" is in its lack of political valence. That is, depending on the context, new forms of private governance may be used to advance objectives of any ideological color. The political leanings of the New Private Law's advocates may vary, as with the public/private distinction arguments, depending upon the policy outcomes sought.

On this view, the New Private Law establishes an analytical framework that challenges traditional conceptions of the privileging of private institutions. Contemporary understanding suggests that protection of the private realm advanced conservative agendas by protecting the status quo.[125] In contrast, several of the commentators here argue that the newness of the New Private Law is in the idea that private governance may possibly lead to progressive outcomes.

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121. Daniel A. Farber, *Whither Socialism?*, 73 DENV. U. L. REV. 1011, 1014-15 (1996).

122. Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1361 (1982) (arguing that the public/private "rhetoric obscures rather than illuminates, and that the social function of the public/private distinction is to repress aspirations for alternative political arrangements").

123. *See* ELY, *supra* note 112, at 1 (observing that terms such as activism and self-restraint are not indigenous to either interpretivist or noninterpretivist methodologies of constitutional interpretation). Moreover, both liberal and conservative constitutional theorists sometimes seek to legitimize their conceptions of judicial review with reference to external principles. *See generally* George A. Martinez, *The New Wittgensteinians and the End of Jurisprudence*, 29 LOY. L.A. L. REV. 545, 556-57 (1996) (describing theoretical approaches of both Ronald Dworkin and Robert Bork as bearing common characteristic of constraining constitutional inquiry by reference to external principles).

124. In keeping with making this essay reflect contemporary political transformation, the original phrase has been reversed. The actual line is, "The parting on the left, is now a parting on the right." TOWNSHEND, *Won't Get Fooled Again*, *supra* note 3.

125. Eskridge & Peller, *supra* note 12, at 712.

Under the New Private Law, moreover, private is not inherently bad, and public is not inherently good (or, at least, not inherently better). Professor Peller sees in privatization new educational opportunities for traditionally disempowered constituencies.[126] Professors Ertman and Cheever adopt private contractual models for the achievement of what may be said to be left-leaning substantive agendas—the securing of autonomy for victimless sexual activity and alternative family structures and the preservation of open space, respectively.[127] Roberto Corrada argues that there is no political valence to the New Private Law, that the theoretical frameworks that it provides can be used to the advantage of the left or the right.[128] Under this view, the progressive scholars of the New Private Law may have some sympathy for the Devil[129]—i.e., for the private ordering of goods. In contrast to these authors, Professor Stone and, to a lesser extent Professor Welle, identify sound reasons to be skeptical about private law and its ability to protect broader public interests.[130] Their essays capture the traditional concerns about private law as obscuring or impairing rights, or at least having the strong potential to do so.

But surely the lack of a singular political ideology cannot be the source of this jurisprudential movement's newness. Again, this is old boss stuff. A conventional understanding of other recognized jurisprudential schools of legal thought is that they provide similar "big tents" that accommodate radically different political/ideological visions, yet share a common, unifying *analytical* approach. For example, extreme differences as to normative outcomes exist among Law and Economics scholars, depending upon how the particular scholar assigns utility to various interests. The fact that Law and Economics theory suggests that legal rules should be designed to further social utility or wealth maximization, doesn't mean that uniformity exists about the definition of wealth.[131] More progressive economic theorists could say, and have, that the normative goals of legal rules should include the maximization of non-financial utilities as well.[132]

Similarly, feminist theory also encompasses perspectives arguably as variant as the differing experiences of individual women.[133] As Gary Minda has

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126. Peller, *supra* note 65, at 1008-09. In her thoughtful essay, Nancy Ehrenreich identifies the "progressive" potential of privatization on a number of different levels. Ehrenreich, *supra* note 8, at 1240-51. She does not, however, contend that this potential might constitute an element of a new jurisprudential movement.

127. Cheever, *supra* note 8, at 1087-92; Ertman, *supra* note 8, at 1137-44.

128. Corrada, *supra* note 8, at 1054-55.

129. MICK JAGGER & KEITH RICHARD, *Sympathy for the Devil, on* BEGGARS BANQUET (London 1968).

130. Stone, *supra* note 2, at 1036-43; Welle, *supra* note 87, at 1225-29.

131. *See, e.g.*, DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS 9 (1992) (explaining that gross domestic product may be too narrow a measure of social well-being because it does not account for valued "goods" such as clean air, privacy, and leisure time).

132. *See, e.g.*, Kenneth G. Dau-Schmidt, *Relaxing Traditional Economic Assumptions and Values: Toward a New Multi-Disciplinary Discourse on Law*, 42 SYRACUSE L. REV. 181 (1991). Moreover, this reflects the highly utilitarian and pragmatic nature of law and economics theory. *See, e.g.*, David W. Barnes, *Economics 2001: A Carpenter's Odyssey*, 42 SYRACUSE L. REV. 197 (1991) (arguing that law and economics is a "hammer" that can be used to build any kind of house).

133. Minda, *supra* note 9, at 624 (noting that "[l]ike CLS, there may be no single 'feminist

observed, "Today there are feminist legal scholars who could be characterized as conservative, liberal-center, or left-radical."[134] Furthermore, New Public Law scholarship represents a broad range of approaches to legal problems, rather than a unified analytical construct.[135] Indeed, one of its defining characteristics, to those who have identified it as a movement, is that it incorporates a multi-faceted analytical approach that encourages discourse among traditionally opposed disciplines.[136]

Finally, the fact that the New Private Law shares the characteristic of "no inherent political valence" with recognized jurisprudential movements does not itself make the New Private Law an independent perspective. While this may be a characteristic of jurisprudential movements, it is certainly not a *defining* characteristic.

Perhaps the confusion surrounding the argument that privatization can serve progressive as well as conservative ends stems from a basic element of the politics of privatization. During the 1980s, a political slogan often invoked by political leaders on the left was that the increasingly conservative Republican Party sought to "get government out of the boardroom, and into the bedroom."[137] The point, of course, was that a political party whose rallying cry was filled with small government rhetoric and the notion of reducing government's role in the regulation of private business, was also made up of people who endorsed state interference with private conduct in the personal and social realm. A reverse criticism could naturally be employed to attack the liberal/progressive politicians, who (arguably) desired the reverse.

It may well be that if the privatization movement has no political valence, it is because directly competing visions of the (broadly defined) private *do*. That is, conservative politicians wish to protect the private decisionmaking realm of commercial and financial activities, while relatively progressive politicians wish to privilege private decisionmaking in the social and personal realm. It should not be surprising, therefore, to come to understand that the same vision of private ordering—reduction of government involvement and allocation to transaction-oriented individuals—might protect either *political* vision of privacy.[138]

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method' or 'feminist epistemology' which can be identified to characterize feminist legal theory").

134. *Id.*

135. Eskridge & Peller, *supra* note 12, at 784-87.

136. *Id.* at 787-90; Farber & Frickey, *supra* note 38, at 905-06.

137. The origins of this slogan have eluded me. For a useful general reference, see J. M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1138 (1990) ("Conservatives have pressed for deregulation of business interests while simultaneously advocating regulation of reproductive interests. The systematic difference in conservative arguments regarding the sanctity of freedoms in the boardroom and the bedroom is a helpful insight into the sources of traditional conservative ideology, just as the opposing orientations in liberal thought allow us to understand its characteristic ideological features."). For a thoughtful discussion of the same political dichotomy, see Mnookin, *supra* note 101, at 1430-34 (describing competing conservative and liberal political visions of the private).

138. Admittedly, this observation does not translate as well to the work of Professors Cheever and Peller, which does not emphasize the private realm for the purpose of protecting personal privacy.

C. *"You Can't Always Get What You Want, but . . . You Just Might Find You Get What You Need"*[139]

Finally, the New Private Law could be said to be the possibility of achieving progressive goals through subversive mechanisms, of transforming legal thought by changing our fundamental understanding of legal institutions—of, as has been said, using the master's tools to destroy the master's house.[140] But I take issue with this aspect of private law's newness as well. First, the notion of using historically "conservative" tools to accomplish more liberal agendas seems fundamentally more like an application of utilitarianism than a new mode of legal thought. Second, the subversive nature of the New Private Law resurrects for me concerns about the false obfuscation of the public/private distinction and the nature of political and jurisprudential discourse.

As an illustration of the "subversive" potential of the New Private Law, let us examine Professor Ertman's and Professor Cheever's innovative approaches to addressing critical social issues through alternative legal structures. Martha Ertman argues that contractual freedom may offer liberty to sexual marginorities who are otherwise unable to obtain public rights in the ordinary political process. Her ideal, of course, would be a regime under which alternative family structures could be recognized and protected as a public right. The functional aspect of her approach is in identifying a system under which private ordering could achieve many, but not all, of the benefits the public right would provide. Private ordering is, for her, a way station on the road to full public recognition of rights. Or, stated differently, her proposal could be characterized as a step-by-step approach to the ultimate "heaven" of public rights.[141]

Fred Cheever's conservation easements proposal is similarly pragmatic. In a world where political efforts to protect broader "public" rights compete with the moneyed interests of land developers, a coherent plan for preservation of open space may seem like an unattainable goal. Through the magic of conservation easements and tax breaks, however, the state's role in ensuring environmental protection becomes obscured. Even the participants think they are pulling off something private![142]

These essays provide an interesting and insightful way to approach these particular issues, but somehow do not rise to the level of new jurisprudential theory. Rather, they suggest utilitarian structures that operate within the law to accomplish identified social benefits. In other words, while Professors Ertman

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139. MICK JAGGER & KEITH RICHARD, *You Can't Always Get What You Want, on* LET IT BLEED (London 1969). For different legal interpretations of these lyrics, see Chen, *supra* note 5, at 321 n.67 (listing uses of this song in legal literature).

140. Ehrenreich, *supra* note 8, at 1233 (citing Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House, in* SISTER OUTSIDER 112 (1984)); Ertman, *supra* note 8, at 1165 (same).

141. *Cf.* ROBERT PLANT & JIMMY PAGE, *Stairway to Heaven, on* (UNTITLED) (Atlantic 1971).

142. Cheever, *supra* note 8, at 1090-92. While this is consistent with Professor Cheever's characterization of magic as "sleight of hand," *id.* at 1078, it also provides my arguments about the utilitarian nature of the New Private Law with greater force.

and Cheever offer creative and exciting scenarios for social change, their approaches reflect and apply a long-standing tradition in legal thought. Their proposals are strongly reminiscent of the concept of legal functionalism,[143] which incorporates to some degree the idea that the legal system may be examined in light of its ability to adapt to changing social needs.[144] Moreover, the utilitarian elements of the New Private Law are strongly reminiscent of the Realist tradition of law as a tool for social change.[145] Similarly, in his remarks, Dan Farber pointed out a connection between the New Private Law and pragmatism.[146]

Beyond the utilitarianism issue, the subversive potential of the New Private Law, recognized by Martha Ertman, Nancy Ehrenreich, and Roberto Corrada, is surely a fascinating element of the discussion. In their papers, they maintain that it could be the notion that the left could coopt a traditionally conservative tool that provides the new or unconventional jurisprudential perspective I have been seeking.[147] Through this lens, the law itself is transformed by the radical and surreptitious subversion of the master's tools.

One wonders, however, about the ramifications of this subversiveness. For the subversiveness my colleagues propose is not simply derived from the coopting of conservative rhetoric for leftist causes. The subversiveness they celebrate derives directly from the lack of public attention and accountability for the policies generated by the New Private Law. While majoritarian moral opposition might preclude recognition of a public right of gay marriage, closeting the legal recognition of gay and lesbian relationships in the rhetoric of contract evades that political problem. While developers' lobbyists may torpedo comprehensive federal land use regulation in the halls of Congress, the New Private Lawyers will be carrying out similar, if disconnected, policies in the halls of county recorders' offices.

These new rights will be recognized because hiding them in the private realm will ensure that public objection to their existence or recognition will be obscured. But this attraction to the subversive, as Katherine Van Wezel Stone shows in the labor law context, may as easily result in the diminishment of rights rather than their expansion. If the New Private Law has no political valence, neither does the subversive achievement of atomistic private interests outside of the public eye.

The subversiveness of New Private Law, moreover, may in the long run be more of a concern for the left than for the right. Subversiveness in the context of private governance means that no accountability will exist for privatized decisions affecting broader public interests.[148] Public dialogue is likewise obscured if decisions on what collectively are important matters of public

143. *See generally* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 75-81 (1984) (describing and critiquing strong legal functionalism tradition reflected in both Formalism and Realism).

144. *Id.*

145. FRIEDMAN, *supra* note 15, at 688-89.

146. Farber, *supra* note 121, at 1012-13.

147. PETE TOWNSHEND, *The Seeker*, *on* MEATY, BEATY, BIG AND BOUNCY (Decca 1972).

148. This point is made quite nicely by Elaine Welle. Welle, *supra* note 87, at 1233.

concern are made in decentralized private realms. Such obfuscation historically has not been a positive element for the left.

What this means is that the New Private Law, like the old private law, likely obscures the fundamental substantive decisions that most affect society and misdirects attention toward the public or private institutions that implement those decisions. More to the point, whether or not subversiveness should be valued, we can view the New Private Law through an old jurisprudential lens.

Thus, the New Private Law is likely to raise concerns already reflected in the existing legal thought on private law and the public/private distinction. It will provoke continued discussion of what makes the public and private realms different, and of the role of discourse and accountability in the contemporary privatization movement. Furthermore, as Dan Farber points out, an important element of exploring the New Private Law is identifying the background legal principles against which it must operate, particularly regarding constitutional law.[149] But all this was true of the old private law as well.

IV. "I'LL TIP MY HAT TO THE NEW CONSTITUTION, TAKE A BOW FOR THE NEW REVOLUTION"[150]

Before concluding, I must acknowledge that there exist sound critiques of my own critique. I place these potential weaknesses in my own position in three broad categories.

First, none of the papers here expressly takes on the role of constructing the broader jurisprudential arguments I attempt to dismantle. Rather, I have set up three rather weak straw persons in order to prove my point. A deeper, more reflective examination of the New Private Law might reveal differences that I have overlooked.

Moreover, there is a good reason for the absence of a sort of comprehensive examination of the markers of New Private Law. One of the hallmarks of the *Denver University Law Review* Symposia has been the examination of broad problems of legal theory by contextualizing the examination.[151] By disaggregating theory across various legal contexts, we have hoped that a more satisfying comprehensive analysis can be produced or reconstructed. The contextual format of the Symposium does not lend itself to unifying approaches to legal theory, although that is the ultimate goal. But that is not a response to the lack of a unifying theory for New Private Law. If transformations occur

149. Farber, *supra* note 121, at 1014-15. Indeed, the examination is already beginning. *See, e.g.*, Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169 (1995).

150. TOWNSHEND, *Won't Get Fooled Again*, *supra* note 3.

151. I owe this particular idea to Julie Nice from conversations we have had about this Symposium. For a description of the contextual format of the Denver University Law Review Symposium, see Julie A. Nice, *Making Conditions Constitutional by Attaching Them to Welfare: The Dangers of Selective Contextual Ignorance of the Unconstitutional Conditions Doctrine*, 72 DENV. U. L. REV. 971, 971-72 (1995).

within subsets of doctrine, they do not necessarily identify a movement, which should be a way of approaching law universally across contexts.[152]

Another possible limitation on my analysis is that it may simply be too early to identify a distinct jurisprudential movement. It may be that the New Private Law is not new yet, because the innovative ideas described in the essays presented here are simply *too* new. That is, these ideas may be at the forefront of a movement in legal thought that is still emerging. The New Public Law Symposium had the luxury of looking back on a generation of scholarship. Perhaps my generation[153] of legal scholars, or the next, will one day look back upon the scholarship of the next thirty years and discover that, indeed, this was the beginning of something. I remain skeptical that this will occur, but surely cannot foreclose its possibility.

Finally, I am vulnerable to an argument that it may not be useful or meaningful to attempt to identify entire "schools" of legal thought. One might challenge the legitimacy of this enterprise, particularly in a postmodern world. The idea of attempting to classify the legal theory underlying these essays into a taxonomy of legal thought may be an ultimately fruitless task. Intellectual thought cannot be so easily divided into neat categories, but discourse is part of a "seamless web" of ideas that are continuously evolving.[154]

Perhaps legal scholars would be expending their time and energy more productively by examining trends and ideas in legal thought and how they relate to broader schools, rather than worrying about whether they fit into a new school. There are new aspects to the New Private Law essays, although they build (as do all theories) on existing schools. It may be more useful to draw from this work general theoretical assumptions that will help us better understand the system of law.[155] Moreover, if a new strand of thought emerges from New Private Law, it is possible in the course of its evolution that its important ideas will be absorbed into existing schools.[156] Thus, I must at least qualify my arguments to reflect the idea that transformation of legal thought is an ongoing, evolutionary process.

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152. Shane, *supra* note 9, at 840-41.

153. PETE TOWNSHEND, *My Generation*, *on* THE WHO SINGS MY GENERATION (Decca 1966). Unlike the Who, however, we simply hope to get published before we get old. *Cf. id.* ("I hope I die before I get old.").

154. Professors Eskridge and Peller made a similar point in their discussion of the New Public Law. They stated that perhaps a "more interesting inquiry" than examining whether a new school existed, was how the trends it reflected related to the politicization of jurisprudence. Eskridge & Peller, *supra* note 12, at 707, 761-90. They observed that the New Public Law movement could be characterized as "an attempt to mediate the ideological polarization of legal discourse" and in that respect represented centrism as a sort of postmodern cultural form. *Id.* at 764, 787-90.

155. For example, rather than attempt to fit the New Private Law into a broader jurisprudential framework, Nancy Ehrenreich takes a different approach. She argues that, even acknowledging the validity of the conventional critique of the public/private distinction, contemporary privatization reforms may peel away the veneer of that distinction by forcing the right to acknowledge that private choice is ultimately the product of public decisionmaking. As such, new forms of private governance may provoke the subversion of socially-constructed cultural categories in a manner that encourages a more honest discourse about public policy. Ehrenreich, *supra* note 8, at 1251.

156. Minda, *supra* note 9, at 599 (describing trend of new idea being incorporated into existing modes of legal thought).

While all this may be true, I believe that it is surely also worthwhile to attempt to fit these theories into an organized body of knowledge about broader categories of legal thought. The same arguments could be made about the well-recognized schools of legal thought, which themselves hardly represent a monolithic or unitary vision of law even within the broader systemic views that make them distinct.

I have been unable to identify the precise characteristics that differentiate this movement in any significant way that would justify its designation as a new jurisprudential school, and have been unable to infer this from the other work in this issue. Long live law, be it public or private.[157] Karl Llewelyn, meet Pete Townshend. As legal scholars, we must examine ideas with appropriate levels of critique and skepticism—the only way to ensure we *Won't Get Fooled Again.*[158]

157. *Cf.* PETE TOWNSHEND, *Long Live Rock, on* ODDS & SODS (MCA 1974) ("Long live rock, be it dead or alive.").

158. TOWNSHEND, *Won't Get Fooled Again, supra* note 3.