

Winter 1-1-1998

Hard Bargains: The Politics of Heterosexuality

Linda Hirshman

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Law and Society Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Linda Hirshman, *Hard Bargains: The Politics of Heterosexuality*, 55 Wash. & Lee L. Rev. 185 (1998), <https://scholarlycommons.law.wlu.edu/wlulr/vol55/iss1/5>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

Hard Bargains: The Politics of Heterosexuality

Linda Hirshman*

I'm working on a couple of things at the moment – a book about sex, a woman's guide to law schools, and a book based on my dissertation, which is a revision of Thomas Hobbes's social contract theory. And since I know you're not interested in sex, I thought I'd talk about the social contract – just kidding!

As you know, Jane Larson, a legal historian from the University of Wisconsin, and I have written a book, to be published by the Oxford University Press this year, which we call *Hard . . . Bargains: Sex and Politics*. And since in a very important sense Washington and Lee School of Law enabled me to get started on the book when I was the Lewis Scholar here two years ago, it seems very fitting to present the grand conclusions in the same place.¹

You may think it is a little weird to talk about sex and politics in the same sentence (other than perhaps about some female's knowledge of the President's anatomy), so the first subject in a grand theory of the politics of sex is "why bother?"

Let's start to answer that question with a definition of politics, or at least political theory. Since no one has elected me queen of the world yet that I've noticed, I'm more doing political theory than politics.

Political theory, according to the *Encyclopedia of Philosophy*, is the study of the real or ideal organization of people into societies.² Now you

* Allen/Berenson Distinguished Visiting Professor, Brandeis University; J.D., University of Chicago, 1969; Ph.D. (Philosophy), University of Illinois at Chicago, 1994. In the Fall of 1995, Professor Hirshman was the Frances M. Lewis Scholar in Residence at the Washington and Lee University School of Law. On October 10, 1997, Professor Hirshman delivered this address as the John Randolph Tucker Lecture at the Washington and Lee University School of Law.

1. Without the time and resources provided by Frances and Sidney Lewis and Washington and Lee School of Law, including its superb library, the book of which this essay is a piece would not have been possible. This essay is dedicated to the Lewises and to the men and women of the Washington and Lee School of Law faculty and Law Center.

2. 5 THE ENCYCLOPEDIA OF PHILOSOPHY 370 (1967) ("The history of political philoso-

notice there's nothing in that definition which limits what can constitute a human society, and it is in fact the case that political theory for centuries addressed itself to relationships of all sorts: ruler/ruled, to be sure, but also master/servant, husband/wife, father (no one was very interested in mothers until recently)/son, deity/worshipper, and so forth.³ It is only in the aftermath of the wars of religion in the sixteenth and seventeenth centuries that people began to worry about the murderous possibilities of the state and to theorize that politics should be limited to only certain aspects of life, like keeping us from killing one another, rather than telling us how to treat our spouses.⁴

Thus the state/society or public/private divide was born. Now the alert among you may be thinking that nothing in this process of reining in a murderous state necessarily requires us to withdraw political analysis from the relationships we have assigned to the "private" sphere—and there have always been philosophers who understood that. The great analyst of American Democracy, Alexis de Tocqueville, about whom I will have more to say later, was one of them.

But for reasons both honorable and dishonorable, after the Catholics and Protestants agreed to disagree in England in the seventeenth century, and in most of the rest of Europe thereafter, the state was limited and the society of the family and of the heterosexual pairing (among many other things) was largely relegated to the private sphere.⁵

But just because it's been going on for three hundred years doesn't mean it's right to cast the sexual relationship into the unexamined private sphere. Think about it: politics is about the terms in which people "live" together. Controlling violence or defining the legitimate limits of coercion within that living together is the core subject matter of even the most limited, post-sixteenth century political theory.

Like the problem of violence, the problem of sex involves human beings seeking physical access to each other. Like the problem of force, sex raises the question of the just terms of such access; when, if ever, is it just to force, extort, pressure, or persuade others to submit to one's will? Like the problem of force, sex raises the question of controlling the exposure to harm from necessary contact, as well as the danger of overreaching and the possibility of life-altering consequences.

phy is the succession of notions about the actual and proper organization of men into collectivities and the discussion of those notions.").

3. *Id.*

4. CLASSICS OF MORAL AND POLITICAL THEORY 733 (Michael Morgan ed., 1992).

5. SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY, 14-17 *passim* (1989); SUSAN MOLLER OKIN, WOMEN IN WESTERN POLITICAL THOUGHT 15-96 (1979). As Okin points out, Rousseau was an interesting exception. *Id.* at 99-194.

Seen this way, the historical decision of some great enlightenment philosophers to assign sex out of the public sphere should not compel us to make the same mistake. Put another way, measured by the neutral scale of abstract theory rather than simply accepting the results of the particular story of western history, it seems relatively obvious that sex is political.

There are, of course, other arguments to make against treating sex as political rather than historical – and these other arguments are being made in this very exciting period of sexual transition. If you've been reading the elite press, some of the arguments will sound familiar to you. First, thinkers argue that sex is natural and wild and cannot be domesticated by politics.⁶ This strand of thought is usually associated with the contemporary revival of what we call "sociobiology." Sociobiology suggests that social behavior is the product of biological drives refined over millenia of natural selection in life on the African savanna, with certain social behaviors emerging as superior to others.⁷ Men rape, women weep, and no social structures or politics can change the picture.

This theory is particularly favored by editorialists at conservative places like the *Washington Times* and the *New York Times* defending sexual harassment⁸ and by their strange bedfellows – the ACLU-types defending pornography.⁹

On the other side of the spectrum, some thinkers believe that sex is a subject for religion and not politics.¹⁰ So whatever the Bible said to do – from

6. David M. Buss, *Evolution and Human Mating*, 18 HARV. J.L. & PUB. POL'Y 537, 538, 540 (1995) (discussing evolutionary psychology and male violence); see Richard A. Epstein, *Gender Is for Nouns*, 41 DEPAUL L. REV. 981, 987 (1992). See generally CAMILLE PAGLIA, *SEX, ART AND AMERICAN CULTURE* (1992).

7. See generally Bruce J. Ellis, *The Evolution of Sexual Attraction: Evaluative Mechanisms in Women*, in THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE 267 (Jerome Barkow et al. eds., 1992) [hereinafter ADAPTED MIND]; Margo Wilson & Martin Daly, *The Man Who Mistook His Wife for a Chattel*, in ADAPTED MIND, *supra*, at 289.

8. Richard Dooling, *Too Many Lawyers? Wait Until 2005*, N.Y. TIMES, Feb. 22, 1997, § 1, at 21; Suzanne Fields, *Art Survives in Spite of It All*, WASH. TIMES, Oct. 16, 1997, at A17; Suzanne Fields, *Women from Mars*, WASH. TIMES, Dec. 16, 1996, at A21; Wendy Kaminer, *Demasculinizing the Army*, N.Y. TIMES, June 15, 1997, § 7, at 7; Ted Lapkin, *Perils of Co-ed Combat Units*, WASH. TIMES, Sept. 21, 1997, at B4; Mackubin Thomas Owens, *The Eros of Women in the Military*, WASH. TIMES, Feb. 6, 1997, at A19; Jeffrey Rosen, *Fast Food Justice*, N.Y. TIMES, Nov. 16, 1993, at A27; Harvey A. Silverglate, *Harvard Law Caves in to the Censors*, WALL ST. J., Jan. 8, 1996, at A18.

9. See generally NADINE STROSSEN, *DEFENDING PORNOGRAPHY* (1995).

10. See, e.g., Don Thorsen & Wolfhart Pannenberg, *Revelation and Homosexual Experience: Bible's Assessment of Homosexuality*, CHRISTIANITY TODAY, Nov. 11, 1996, at 34, 34; *Jews Repent Their Sins During Yom Kippur* (NPR radio broadcast, Sept. 22, 1996) ("The three most serious sins in Judaism are murder, adultery and idolatry. It is said that a Jew should give

the missionary position in the nineteenth century to the Promise Keepers rally of last week – the goal of sexual regulation is to figure out and enforce what God said, rather than to meet the standards of political judgment that we apply to matters that seem on their face equally pressing: how to distribute wealth, when force is legitimate, who gets to make decisions in business or the state.

But we reject these arguments: as to sociobiology, rape may be natural, but cancer is also natural; nonetheless we continue to try to control it. Moreover, the picture of possessive yet philandering cave men and their subservient, coy wives is just too self-serving of the existing relationships of power to pass without at least a second look.

As to religion, one of the things our survey of western sexual regulation has turned up is how the same tradition some people invoke for man's natural mastery over his weaker female companion also provides powerful arguments for other arrangements. In the time of the Talmud, the rabbis used the example of God's responsibility to answer men's prayers to rein in the worst of male behavior toward unhappy spouses. Probably the most powerful forces behind the modern claim for female equality are religious concepts – the Christian equality of souls and Protestant individualism in relation to God. God may have told Promise Keepers founder Bill McCartney that, like Senate President and United States Vice President Al Gore (who he probably doesn't aspire to emulate as a general matter), in a dispute McCartney gets to cast the tie-breaking vote, but our survey of religious history presents quite a different picture of what the various gods of western history had in mind.

The question we insist on asking is "Qui bono?" Who is benefitted from the sexual arrangements set forth as natural and therefore unmodifiable or divine and similarly beyond human agency?

If sex is political, the next question is "whose politics apply?" There are many contenders for a governing theory: the ancient philosophy of virtue ethics asks what arrangements enable the most gifted among us to realize their full capacities as human beings.¹¹ Although most of the answers those philosophies provided rested on concepts of naturalness more like sociobiology than anything philosophical, a modern philosopher of the virtue school, Alexis de Tocqueville suggested an answer more explicitly political. He suggested that women should sacrifice themselves in relationships of subordination to their spouses not because female subordination was natural (or divine) but for political reasons.¹²

up his life before committing any of the three.").

11. See, e.g., TERENCE IRWIN, *CLASSICAL THOUGHT* 4 (1989).

12. 2 ALEXIS DE TOCQUEVILLE, *2 DEMOCRACY IN AMERICA* 211-14 (Francis Bowen trans., Alfred A. Knopf 1972).

In a democracy like America, de Tocqueville wrote, where old habits of order and obedience have been overthrown, men need virtuous subordinate women to provide them with a happy home life so that they would be peaceful and not inclined to rebellion and so that they would be moderate in their political opinions.¹³

So if Queen Victoria is reputed to have enjoined her daughter on her wedding night to "close your eyes and think of England,"¹⁴ one can describe de Tocqueville's sexual philosophy as sort of "close your eyes and think of Washington, D.C."

Classical liberalism, with its roots in the toleration bargain of the early modern period, has always had an uneasy sexual politics. This is so because classical liberalism is a mixture of belief in human equality and in the primacy of freedom and individualism.¹⁵ These commitments come apart when private individuals use their freedom to engage in acts of private oppression. An example is the family, in which the male is always the tie breaker. Classical liberalism solved this problem at the beginning by assuming that sexual oppression was natural;¹⁶ in recent years liberals have come back to the idea that sexual activity is natural and ungovernable, only this time it is the libertinism of the Playboy era that has the stamp of nature on it.¹⁷ Natural monogamy, natural libertinism – it's amazing how the irresistible natural course of sexuality ALWAYS benefits the group on the top.

Finally, since the late eighteenth century the western world has been heavily influenced by the philosophy of utilitarianism, which concentrates heavily on the physical world and attempts to maximize the sum of pleasures and minimize pain.¹⁸ We have never seen a strictly utilitarian sexual philosophy, although a lot of the present regime of libertinism rests on the spoken or unspoken assumption that more sex equals more pleasure.

We say: "a pox on all your houses." Women should not have to sacrifice themselves for the well-being of the ship of state in sort of a horrible reversal of the women and children first rule about life boats. Oppression is oppression regardless of whether it is the President of the United States or of the President of the ACLU in the privacy of his own home, and more sex is not

13. *Id.* at 212-14.

14. Paul Johnson, *100 Years On: Just How Have We British Changed?; Queen Victoria's Diamond Jubilee in 1897 Was a High Point for this Country*, DAILY MAIL (LONDON), May 24, 1997, at 10.

15. WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 2 (1990).

16. OKIN, *supra* note 5, *passim*.

17. Sharon Begley, *Infidelity and the Science of Cheating*, NEWSWEEK, Dec. 30, 1996, at 56, 58. See generally DAVID M. BUSS, *THE EVOLUTION OF DESIRE* (1994).

18. KYMLICKA, *supra* note 15, at 9, 12.

always better, either for the society or for the individuals involved. A whole new approach is required.

We suggest, instead, a more light-hearted approach to the matter: we think sex should be treated as a game. But before you get your hopes up, let me hasten to say that it's not the game of strip poker we're proposing. It's something a lot more like the social contract theory I promised you I wouldn't talk about before.

We mean "game" as in game theory, the mid-twentieth century genius John von Neumann's elegant scheme for figuring out what will happen if people act in their own self-interest absent any authoritative structures of coordination.¹⁹ In the sex game, a male and a female player would rather have sex than remain celibate. But, for example, he may want to have sex with her on terms of her fidelity and his profligate freedom while she may prefer to have sex in a context of mutual fidelity or even the reverse of his scenario. What is to be done? Maybe God will tell them what to do, as many have throughout history contended. Or maybe they won't have a conflict, because she's evolved into a creature who craves subordination.

We contend that, implicitly or explicitly, coyly or overtly, the sexual partners are actually going to bargain with each other, in a political transaction in which each is going to try to have sex on terms as close to his or her ideal as possible. Why do we say this? First of all, we contend that all the conditions of bargaining are present, and I'm going to review them for you. Second, we contend that treating sexual politics as an occasion for bargaining is actually politically optimal. Bargaining maximizes individual freedom – a value we take from classical liberalism – but, if properly supported by background structures of law, sexual bargaining will avoid the extremes of private oppression that liberalism allows.

As I run through the conditions of bargaining for sexual politics, I want you to note how the competing constructions of sexuality – sociobiology, revelation, etc. – all are directed at avoiding the bargaining situation. This, I contend, is not a coincidence. If there is no bargaining, the existing structures of power remain in place.

First, what are the conditions of bargaining?

1. The two parties are interdependent. So for this condition we must rule out celibacy and make heterosexual sexuality desirable in a significant number of the cases. Only the social constructionists resist this, contending that men and women would not desire to have sex if they didn't read about it first.²⁰ This was a subject I addressed when I was here last time, and if you

19. DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 1 (1994).

20. This line of thinking is generally treated as originating in the deeply original work of

want my take on it you have to read the 1996 issue of the *Washington and Lee Law Review*²¹ (which you should be doing anyway).

2. Conflict exists. This rules out the happy sociobiological picture of men who want to dominate and women who naturally want to submit.

3. The two parties have some options for bargaining. For this we must assume that the weaker player, usually the woman, has some bargaining chips in the form of the value of consensual sex or some rudimentary law against rape.

4. There is room to come to agreement without dying as a result. This rules out a lot of sociobiology because, if men must rape to reproduce their genes, bargaining away their raping power consigns them to the dust bin of evolution. If women must submit to get men to help them raise the children (this is the Promise Keepers's bargain, as well as the sociobiologists, by the way), resisting submission consigns them and their children to the same evolutionary dead end. The children won't live long enough to reproduce.

So the parties want to have sex, they have somewhat different agendas for the terms of the transaction, they aren't completely disempowered with regard to one another, and they can compromise without dying.

So he says let's have sex. She says what's it worth to you?

Now the old Borscht Belt comedian Henny Youngman had a story which answers this and all political questions. Henny Youngman was walking down the street one day when he met an old friend.

"Henny," said the old friend. "How are you; how's your wife?"

"How's my wife?" answered Henny. "Compared to what?"

Game theorists call Henny Youngman's comparison the Best Alternative to a Negotiated Agreement (BATNA).²²

How's sex on your terms? Compared to what?

And here's where the law comes in (you knew it had to be in here somewhere). If he can't get her to agree to have sex, what's his BATNA? If there is no law against rape, his BATNA is to have sex with her without her agreement. If she doesn't want to have sex on his terms, what's her BATNA? If there is no law against rape, her BATNA is rape. How easy is it going to be to get someone to agree to have sex if the alternative is a free shot at being a rape victim?

Michel Foucault, who actually addressed himself to the social construction of the objects of desire, not desire itself. See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., Pantheon Books 1978) (1976).

21. Linda R. Hirshman, *Was There Sex Before Calvin Klein?*, 53 WASH. & LEE L. REV. 929 (1996).

22. RHONA MAHONY, *KIDDING OURSELVES* 43 (1995).

Worse than this, as the work of former Tucker lecturer Carol Rose reveals, her "agreement" in this situation of disempowerment sets in motion a downward spiral of disempowerment in which every time she agrees to a bad bargain it weakens her social situation for the next time.²³ I saw a wonderful example of this in the popular press while I was working on the book: the autobiography of actress Claire Bloom.²⁴ In the course of her long concubinage relationship with the always overreaching writer Phillip Roth, Roth demanded one day that Bloom send her teenage daughter away from their household to live I think with her father in England. Bloom agreed. "After that," she says in her autobiography, "I was doomed. What could I say no to after agreeing to send away my daughter?"²⁵ She experienced perhaps the worst example of the downward spiral – the moral downward spiral. Absent some social floor under the bargaining, the weaker player is going to lose the first bargain, be weakened, lose worse the second time and so on down the line.

In the nonsexual context, a wife agrees to quit her job and raise the kids (I'm using real social data here, not an imaginary world of male nurturers and female green berets). Cut off from the world of wage labor when he announces he wants to move to another town, what does she have to bargain with? She moves. Cut off from wage labor and living in a strange town, he says he wants her to type his dissertation, say. What does she then have to bargain with?

And so the game theory analysis of sex reveals a dirty little secret behind the debate over the requirement of force in rape, the rape shield law, the offense of date rape, and the Antioch college date rape rules.²⁶ We're not talking about what sex is: We're just talking about the price. In the world of sexual bargains, the more demanding the law of rape is, the better is the BATNA of the weaker player. The better the weaker's alternatives, the more the stronger player has to yield to the weaker to get to a bargain to have sex.

If there's no law against rape, or the law cannot be enforced in this life as we know it, then the price of sex will be low. Historically, most societies that did not prohibit rape on behalf of the female nonetheless extracted a high price for sex not by prohibiting rape, but by prohibiting adultery and fornication.

23. Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 448 (1992).

24. CLAIRE BLOOM, *LEAVING A DOLL'S HOUSE: A MEMOIR* 6 (1996).

25. *Id.*

26. In 1991, Antioch College, in Yellow Springs, Ohio, made national headlines after adopting a controversial policy requiring students to get verbal consent from their partner at each level of intimacy, from kissing to sexual intercourse. Kay S. Hymowitz, *Where Has Our Love Gone?*, WALL ST. J., Apr. 6, 1995, at A16.

tion, making heterosexual monogamous marriage the price of sex. But that did not necessarily empower the weaker player; the empowerment depended in turn on the terms of marriage. In a marriage system in which there is no prohibition of marital rape, for example, laws against adultery which make marriage the price of sexual access simply create a situation in which the weaker player gets to say no, but once she says yes she exhausts her bargaining power.

In any event, starting in the late nineteenth century, the legal and social strictures around fornication in America declined²⁷ to the point where the only legal support for the weaker player in the sexual bargain is the law of rape.

All the talk about false claims and sociobiological rapists and the rest is a guise for the real issue. What do we as a society want to establish as the BATNA when the parties come together to bargain over sex? Remember: if there is no crime of rape or fornication, sex is free. If there is no crime of date rape, the price of sex is a hamburger and a movie, and sometimes just a movie.

Now maybe as a society we want it like that; individuals will bargain for sexual access on a case-by-case basis, and we as a society will provide no alternative to a negotiated agreement, leaving the strong to extract the last ounce of advantage from their natural physical or social superiority. This is basically the libertarian position on sex and here, again, the so called liberals of the ACLU type find themselves in strange political beds.²⁸ I want to note, by the way, that a truly committed libertarian would be opposed to any law against rape, including the law against forcible rape. Unlike the laws against murder, there is no coherent libertarian argument for a law against rape.²⁹

27. JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS* 6 (1988).

28. Stuart Taylor, Jr., *Humor and Anger Mark End of Supreme Court Term*, CONN. L. TRIB., July 11, 1994, at 8.

As for Scalia's anger, it came June 30 as he read his bitter dissent in *Madsen v. Women's Health Center, Inc.*, the abortion clinic case, in which the majority said that judges could protect clinic access through injunctions against anti-abortion protesters. For eight minutes, Scalia excoriated the majority led by Chief Justice Rehnquist, with whom Scalia is typically allied. Scalia gave a stirring defense of the First Amendment and expressed concerns that judges could abuse the powerful new tool that the court was giving them. *One American Civil Liberties Union lawyer in the audience whispered afterward, 'I think I'm with Scalia on this one.'* Another, asked if Scalia was the ACLU's new ally, said, 'I think I'm going to be sick.' Officially, the ACLU, torn by its twin loyalties to abortion rights and speech rights, declined comment.

Id. (emphasis added).

29. Women, the overwhelming class of rape victims, do not threaten men, the overwhelming majority of perpetrators, with the same violation. Accordingly, men have little reason to agree to forego violence against recognizable, systematically weaker players, and the core libertarian justification for law as a voluntary, self-interested agreement, falls short.

But if we wish to make political arrangements for people to live together in society and if we wish those arrangements to meet the minimum standards of value established by three thousand years of western secular philosophy for people who count as citizens – flourishing lives, individual freedom and maximum pleasure with minimum pain – then we will indeed have to provide some collective floor beneath which the bargaining cannot push the weaker player.

Since rape is the bottom line bargaining boundary in the current era of unenforceable fornication laws, I'll stay with that example, although in the book we make recommendations about fornication (setting the minimum price for concubinage), adultery (setting the minimum price of a long term contract of exclusive supply) and prostitution (setting a minimum wage for sex).

Beginning in the late middle ages, western law reconceived rape as a protection of female bodily integrity. This is one of the many payoffs for women from the development of Christianity; with the reconstitution of rape law, the church was trying to protect its nuns, the first women whose sexuality was more than a bargaining chip in the hands of their male guardians.³⁰ Nonetheless, from that day to this, doctrines like the requirement of force and ultimate resistance by the victim as well as a host of hidden behaviors throughout the legal system make rape a scant protection against sexual predation.³¹ Throughout the nineteenth and twentieth centuries, men and women have struggled over the extent of the protection. The social purity movement achieved the exclusion of the youngest girls from the free fire zone with the two decades long campaign to raise the age of consent from the year set in Roman Law: ten.³² The let-it-all-hang-out liberals of the Model Penal Code tried to move the age of consent back to ten, but that is a story for another day.³³ Recently, University of Chicago criminal law scholar Steven Schulhofer has outlined a theory of rape law that would focus on the sexual autonomy of the potential victim rather than the force used to conclude the bargain.³⁴ As a matter of theory, his change of terminology does little to advance the debate. We're not talking about what sex is; we're still talking about what it costs. But his elegant and careful taxonomy of sexual goods goes a long way to specify a fair structure for the minimum sexual price.

30. JAMES A. BRUNDAGE, *LAW, SEX AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 148 (1987).

31. Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 *LAW & PHIL.* 35, 75 (1992).

32. Jane E. Larson, *Even A Worm Will Turn at Last: Rape Reform in Late Nineteenth-Century America*, 9 *YALE J.L. & HUMAN.* 1, 26 (1997).

33. See generally MORRIS PLOSCOWE, *SEX AND THE LAW* (1951).

34. See generally Schulhofer, *supra* note 31.

First, according to Schulhofer's proposal, minor intrusions on the body such as unwanted kisses or hugs should cost only a small price – avoiding the explicit refusal of the supplier. No means no, but silence, as well as yes, means yes. The buyer does not have to pay the price of silence.

But where the unwanted intrusion is significant or directed at the sexual body, the rule is the opposite – positive and clear consent to contact would be required. No means no and silence means no. The burden of risk in a case of silence is shifted from the seller to the buyer: a price increase.

Finally, where force is used (presumably after silence or no), the strongest penalties would apply. This fits our analysis of sex as a bargaining or game transaction because force most strongly restrains the human freedom to bargain. That is why the fundamental bargain – the social contract – always involves foregoing some aspects of force.

These rules follow the conventional understandings of the zones of the body, clearly allocate the burdens of consent, ambiguity and silence, and force the stronger player to bargain with the weaker. Forced to bargain, each party will get a chance to ask for something of what he or she wants from the sex. The law will provide a limit on how little the weaker player can obtain and therefore limit the downward spiral that can be extracted from her. Hopefully, people will act in their own interest to attain flourishing, autonomous and pleasurable lives.

However, by focusing on forcing the bargaining we avoid the pitfall of the pre-libertine scheme of sexual content – imposing our vision of what the people should want. Maybe they'll want traditional marriage with the husband as the tie breaker as the condition of sexual transactions and maybe they won't. Maybe they'll want covenant marriage with attendant protections against abandonment and maybe they won't. Maybe she'll want him to cover himself all over with chocolate and then . . .

But one thing we'll know for sure: absent natural or divine sanctions for a particular set of arrangements, the people will have to deal with one another as people with desires and with aversions that they must respect. They will have to please each other enough to make the trade.

And it will be a hard bargain, but I hope I've convinced you that from a moral and political point of view, it's a good deal.

NOTES
