

2005

## Pets or Meat

Mary Anne Case

Follow this and additional works at: [https://chicagounbound.uchicago.edu/  
public\\_law\\_and\\_legal\\_theory](https://chicagounbound.uchicago.edu/public_law_and_legal_theory)

 Part of the [Law Commons](#)

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

---

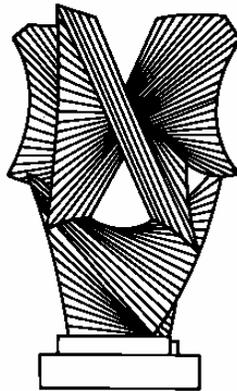
### Recommended Citation

Mary Anne Case, "Pets or Meat" (University of Chicago Public Law & Legal Theory Working Paper No. 100, 2005).

This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 100



## PETS OR MEAT

*Mary Anne Case*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

August 2005

This paper can be downloaded without charge at the Public Law and Legal Theory Working Paper Series: <http://www.law.uchicago.edu/academics/publiclaw/index.html> and The Social Science Research Network Electronic Paper Collection: [http://ssrn.com/abstract\\_id=786644](http://ssrn.com/abstract_id=786644)

## PETS OR MEAT

MARY ANNE CASE\*

The central question I am interested in exploring in this essay is whether and when commingling commodification with affection can be more problematic than naked commodification. The notion that it is problematic to allow commodification to leach into certain realms thought of as properly the domain of affection, the notion that such realms simply should not be commodified, is a familiar one, central to policy debates on matters such as the legalization of prostitution, premarital agreements, and organ donation. My concern here is with the possibility and danger of leaching in the opposite direction, with what happens when affection is commingled with a transaction whose commodification is taken as a given. I do not propose to resolve this concern here, but only to raise it and to begin an exploration of it.

My title comes from a scene in Michael Moore's early film *Roger and Me*, whose central theme is the decline of the auto industry in Michigan.<sup>1</sup> As one illustration of the effects of this decline, Moore examines other jobs available to workers in towns like Flint where unionized factory jobs have become scarce. Traveling down the road, he spots a crudely hand-lettered sign offering, "Rabbits or Bunnies, Pets or Meat for Sale." The female entrepreneur who posted this sign takes Moore around back to cages full of live rabbits of various ages and makes clear the choice she is offering her customers: pets or meat, you decide. If a customer wants rabbits as meat, she will provide them slaughtered and dressed, or her customer can take them home and butcher them; on the other hand, a customer who wants rabbits as pets, can buy them, think of them as bunnies, and take them home as pets. "Pets or meat" is an interesting way of framing the question, because the choice being presented is importantly not one between commodification and non-commodification, but between two fully commodified transactions. To the potential customers of the roadside stand, both the meat and the pets are available exclusively "for sale." Yet, in one case, and not necessarily in the other, the commodification is commingled with affection.

The dynamic with which I am concerned, the potential commingling of commodification with affection, is common in human relations with other animals from lab and farm animals to pets. It is also common in pink collar work: consider, for example, the secretary who is given flowers instead of a bonus, or the housekeeper whose employer insists she is "one of the family." Each of these cases we today think of as troubling, although it is not clear that more naked commodification of personal services would be preferable. Finally, the dynamic is common in situations where what is in question is the commodification of affection itself. Two related problematic assumptions are at issue here: where love is present there is no bargaining and one must not bargain about love.

---

\*Arnold I. Shure Professor of Law, University of Chicago Law School. This essay was initially prepared for the symposium on Commodification Futures at the University of Denver and then amplified for the Chicago-Kent, Gruter Institute, and Society for the Evolutionary Analysis in Law symposium "Must We Choose Between Rationality and Irrationality?" I am grateful to the other symposium participants, in particular Claire Hill, Michelle Brunsfold, Julia Mahoney, Richard McAdams, and Todd Preuss; to Douglas Baird, Adrienne Davis, Liz Emens, Jim Leitzel, Linda McClain, Martha Nussbaum, and Cass Sunstein for brainstorming and bibliographic help; to Jeremy Mallory for research assistance; and to the Frieda and Arnold Shure Research Fund for support.

1. See *ROGER & ME: A FILM BY MICHAEL MOORE* scene 18 (Warner Bros. 1989).

Of course, we do bargain about love all the time. While laws against prostitution may say that money may not legally buy certain kinds of love, we do, well within the bounds of the law, explicitly bargain and pay for other kinds of love. One question I want to pose is why do we not think of nannies as mistresses and babysitters as hookers.

I also want to take seriously the symposium's framework question "Must We Choose . . . ?"<sup>2</sup> by exploring, not only what is at stake in the choice "pets or meat," but also when choosing can be a problem and when not choosing can be a problem. One can readily imagine resisting the apparently dichotomous choice "pets or meat" by responding, "both." This may be what the woman Moore calls "the bunny lady" does as she affectionately cuddles and strokes the rabbit she tells Moore she plans to butcher for dinner.<sup>3</sup> But the failure to choose can have its own complications. Consider the argument a cadet at West Point, a hunter, makes as to why "meat taken in action always tastes better than food captured at the grocery."

"Take beef," he said. "That cow grows up thinking, 'The farmer is my buddy. He's always feeding me, he's always watering me, making sure I'm warm in the winter, cool in the summer. Here he comes now, what's he got in his hand? Wait a second, *I had this whole deal entirely wrong.*' That last instant of betrayal is what you can taste in every darn cut of beef. Deer, on the other hand, is meat that's never been lied to."<sup>4</sup>

Another related set of questions I want to pose is what value there may be to meat—or people—that have never been lied to and when if ever it can outweigh the value of the potential upside of the affection that can be imbricated with commodification.

The questions presented by the choice of "pets or meat" are variants of the double bind Peggy Radin identified for contested commodities. Taking as her principal focus situations in which both allowing and disallowing commodification risked injury to personhood, Radin argued that "one way to mediate the dilemma" would be through what she called "incomplete commodification."<sup>5</sup> Radin observed that "[i]f many kinds of sales retain a personal aspect even though money changes hands, those interactions are not fully described as sales of commodities" but rather "exhibit internally plural meanings." Radin urged that we honor these "internally plural understandings" and "foster the non-market aspect of much of what we buy and sell" as a "way to [the] less commodified society" she favored.<sup>6</sup> Whereas Radin focused on the hope and promise of incomplete commodification, I in this essay shall concentrate instead on its risks, on the double bind incomplete commodification itself can pose.

---

2. Although the full question posed in the symposium's title is "Must We Choose Between Rationality and Irrationality?," I do not so much wish to equate commodification with rationality and affection with irrationality as to stress the commonalities in the construction and complication of choices initially framed as dichotomous.

3. It may be worth noting that, as she begins in enthusiastic and gory detail to describe his fate, the rabbit, who has been calmly tolerating her stroking of his long floppy ears, begins to struggle and bite her, perhaps because she has begun to laugh and raise her voice. In the final credits of the movie, the bunny lady describes yet another way of commingling commodification with affection for animals, her plans to go to school as a veterinarian's assistant and dog groomer "because there's a lot of animals that need taking care of."

4. DAVID LIPSKY, *ABSOLUTELY AMERICAN: FOUR YEARS AT WEST POINT* 281 (2003).

5. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1917 (1987).

6. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 106–07 (1996).

Notwithstanding the colloquialism “dead meat,” I do not begin with the premise that being sold as meat, literally or figuratively, is necessarily worse than being sold as a pet. When “pets” and “meat” are both considered literally, there are better and worse farming mechanisms for animals raised for slaughter, and there are better and worse ways of treating a pet. Free range chickens may have better lives than those housed in the overcrowded cages of factory farms; it is less clear that their lives are necessarily worse than those of pet birds with clipped wings in gilded cages. The same uncertainty applies when the “bird in a gilded cage” is a metaphorical one, as in the old song about the unhappy woman whose “beauty was sold for an old man’s gold.”<sup>7</sup> Compare the situation, in chattel slavery, of the field hand and the house slave or slave concubine. These comparisons may illuminate the United States Supreme Court’s analogy, in *Frontiero v. Richardson*, of the position of women with that of slaves:

Traditionally, [sex] discrimination was rationalized by an attitude of “romantic paternalism” which, in practical effect, put women, not on a pedestal, but in a cage. . . .

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.<sup>8</sup>

In the patriarchal household, both women and slaves were often seen as a little like pets. All three could be seen as beings incapable of surviving on their own, who needed to be taken care of in ways that commingled affection with their subordination and commodification, in ways that in the best case scenario were seen to be good both for their masters and for them.<sup>9</sup>

Throughout history up until the present day, women, servants, and animals are among the groups most frequently associated with the “pets or meat” problematic. Not only is the issue gendered, it is closely associated with the boundaries of the domestic sphere, and changes in the organization of that sphere in the last century may have com-

7. Arthur J. Lamb, *A Bird in a Gilded Cage* (Shapiro, Remick & Co. 1900).

The ballroom was filled with fashion’s throng,  
It shone with a thousand lights;  
And there was a woman who passed along,  
The fairest of all the sights.  
A girl to her lover then softly sighed,  
“There’s riches at her command.”  
“But she married for wealth, not for love,” he cried!  
“Though she lives in a mansion grand.”  
“She’s only a bird in a gilded cage,  
A beautiful sight to see.  
You may think she’s happy and free from care,  
She’s not, though she seems to be.  
'Tis sad when you think of her wasted life  
For youth cannot mate with age;  
And her beauty was sold for an old man’s gold,  
She’s a bird in a gilded cage.”

8. *Frontiero v. Richardson*, 411 U.S. 677, 684–85 (1973).

9. See, e.g., Eugene Genovese, “*Our Family, White and Black*”: *Family and Household in the Southern Slaveholders’ World View*, in *IN JOY AND IN SORROW: WOMEN, FAMILY, AND MARRIAGE IN THE VICTORIAN SOUTH, 1830–1900*, at 69, 69–87 (Carol Bleser ed., 1991) (recapitulating arguments of slavery apologists to this effect).

plicated the issue as much as did changes in the market.<sup>10</sup> To say “she is one of the family” about a domestic makes a different kind of sense in a world in which the family was, from top to bottom, hierarchically organized, a world in which wives, servants, slaves, and animals were all in interesting and important ways both members of the family and at the same time not likely to be regarded or treated as equals. Today, we tend to think that adult members of a family are all on an equal plane. Even the Southern Baptists who recently urged wives to submit to their husbands<sup>11</sup> placed emphasis on the equal worth of the spouses and on the servant leadership of the husband. A world in which equality is a presumption deals with hierarchical relations and the introduction of affection into them potentially differently than a world in which the presumption is of inequality, even among adult family members.<sup>12</sup> Perhaps paradoxically, while it may have seemed less jarring for the head of a hierarchically organized family in an earlier century to describe a servant as a member of his family, it may be, although more problematic, even more important to some domestic employers and employees in the modern egalitarian family and society to describe their relationship as personalized and quasi-familial precisely because they are uncomfortable with respectively employing or being seen as menials and are as a result eager to establish a peer relationship.<sup>13</sup> That is not to say that “pets or meat” was not a problematic question in patriarchal worlds. Seneca, for example, noting that historically the master was called the *paterfamilias* and the slaves “*familiares*,”<sup>14</sup> urged his contemporaries to develop the habit of treating slaves as friends.

The move from status to contract, which paralleled the move from a hierarchical to an egalitarian model of relationships, has also complicated in interesting ways what it means to describe someone as “a member of the family.” One standard objection to the validity of claims that employees are being treated as a “member of the family” raised by

10. Compare Ed Rubin’s contribution to this symposium, *Rational Choice and Rat Choice: Some Thoughts on the Relationship Among Rationality, Markets and Human Beings*, 80 CHI.-KENT L. REV. 1091 (2005) (tracing the evolution in behaviors and attitudes of participants from the medieval guild system to the modern market).

11. See, e.g., COMM. ON BAPTIST FAITH AND MESSAGE, REPORT TO THE SOUTHERN BAPTIST CONVENTION (1998), at <http://www.utm.edu/martinaarea/fbc/bfm/1963-1998/report1998.html> (“The husband and wife are of equal worth before God . . . The marriage relationship models the way God relates to His people. A husband is to love his wife as Christ loved the church. He has the God-given responsibility to provide for, to protect, and to lead his family. A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ. She, being in the image of God as is her husband and thus equal to him, has the God-given responsibility to respect her husband and to serve as his helper in managing the household and nurturing the next generation.”).

12. Pets, too, are encompassed in this changing family structure. Midas Dekkers argues:

If the relationship between human beings and dogs is that of master and servant, that of humans and cats is that of mother and child. That someone should get a dog in order finally to be the master is obvious, but . . . [c]an a cat replace a child [for someone who wants to mother]? Obviously it can, the statistics prove it: the average family has stayed the same size for the last century. In the past it consisted of Dad, Mum and six children; nowadays there are still eight of them, except that now it is Mum, Dad, John, Sharon, two cats, the rabbit and the guinea pig. It is not the size, but the constitution of the family which has changed.

MIDAS DEKKERS, DEAREST PET: ON BESTIALITY 175–76 (Paul Vincent trans., 1994).

13. See, e.g., MARY ROMERO, MAID IN THE U.S.A. 124 (1992) (“Although the phrase ‘one of the family’ represents ‘the epitome of the personalized employer-employee association,’ domestics’ use of the family analogy points to aspects of the emotional labor that some workers are willing to accept and those that they reject. On the one hand, this analogy suggests that domestics are engaged in the emotional labor involved in nurturing and caring; on the other hand, it suggests that domestics are treated with respect and are not forced into doing the emotional labor required to create deference.” (quoting Soraya Moore Coley, “And I Still Rise”: An Exploratory Study of Contemporary Black Private Household Workers (1981) (unpublished Ph.D. dissertation, Bryn Mawr College)).

14. Translated as “members of the household.” SENECA, Epistle XLVII, *On Master and Slave*, in EPISTLES 309 (Richard M. Gummere trans., Harvard Univ. Press 2002).

both modern-day employees themselves and the researchers who study their employers' relationships with them is that members of the family cannot be ordered about as employees are. Another is that family members cannot simply be fired as employees can be.<sup>15</sup> But, of course, in the hierarchical family of earlier centuries, a patriarch could indeed give enforceable orders, not only to his servants, but also to his wife and children.<sup>16</sup> And modern U.S. family law not only allows the relatively easy termination of family relationships created by contract, such as that between husband and wife, but also, to all practical purposes, the unilateral dissolution of ties between other adult family members. Thus, for example, both the hired caregiver and the unpaid grandmother can find themselves without recourse when suddenly cut off by the parent of a young child they had helped care for from further contact with the child. And the law allows termination of one's relationship, not only with an employee, but also with a spouse or an adult blood relative.

Where does all this leave the "pets or meat" dynamic in the modern world? In what instances does it come up and what kinds of implications does it have today? Of course, one area where it is worthy of being explored in much greater detail than this essay would allow is with respect to the treatment of animals, if not precisely animal rights. With respect to human beings, sociologists have documented a wide variety of problems that can arise around the "pets or meat" dynamic, focusing largely on what Arlie Russell Hochschild dubbed "emotional labor" in her early book *The Managed Heart: Commercialization of Human Feeling*. According to Hochschild, because those in jobs centered on emotional labor need to produce affect on demand in order to be successful at their jobs, they can develop problems distinguishing between real and fake affect, between affect in their personal lives and affect in their professional lives. Hochschild describes flight attendants who find both their "motherly capacity" and their "sexual attractiveness" placed "under company management" and used for profit, with the result that "some women feel estranged from the role of woman they play for the company" and develop sexual and social problems as "more and more . . . expressions [of the self we define as 'real'] are sensed as artifice."<sup>17</sup>

These sorts of problems can develop, not only for the provider, but also for the recipient of paid emotional labor. Julia Wrigley observes:

Children with teams of servants at their disposal . . . see all relationships as potential employment relationships. . . . As children get older, they recognize that caregivers are paid employees, yet many children have also experienced semi-maternal affection from them. This can create a complicated sense of how money can be used to buy emotional gratification. While these feelings may lie deeply submerged within relationships, caregivers sometimes interpret children's com-

---

15. See, e.g., Bridget Anderson, *Just Another Job? The Commodification of Domestic Labor*, in GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY 112 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2003) ("[T]he ['part of the family'] analogy does not withstand scrutiny. A relative who contracts a long-term illness is not expelled from the family; domestic workers usually are, even if they are given a nice severance package. And although being a part of the family does not entitle the worker to unconditional love or support, it does entitle the employer to encroach on the employee's off-duty hours for 'favors.'").

16. Even today some minor children perform duties in a service capacity for their parents, for example, serving and clearing food at dinner parties, rather than joining the parents and their guests at table.

17. ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 182-83 (1983).

ments as indicating that they see their parents as having purchased caregivers for their enjoyment, just as other possessions are supplied for them.<sup>18</sup>

Conversely, some employers can seek to substitute emotional gratification for money in compensating workers caught in the “pets or meat” dynamic. Rosabeth Moss Kanter observed:

[S]ecretaries were rewarded for the quality of their relationship with bosses: appearing to like their jobs and being willing to take care of bosses’ personal needs. . . . But they were not necessarily rewarded for professional skills. . . .

If secretaries were evaluated on non-utilitarian grounds, they were also *expected to accept non-utilitarian rewards*. In many cases, secretaries willingly did so. . . .

“Love” was one non-material reward secretaries were supposed to appreciate. Some . . . secretaries reported that their bosses managed to turn their complaints about salary or working conditions into expression of concern about whether or not they were “loved,” assuming that women at work were motivated by such noneconomic, emotional factors. . . .

Elaborate praise . . . , coupled with flowery requests for services, also helped bosses reduce . . . any concern they had about their position of differential authority. When secretaries’ rights organizations began to agitate for “raises, not roses,” they were challenging this notion of what motivated women.<sup>19</sup>

Some employers are hurt if caregivers ask for more money, because they believe the relationship goes beyond money. One such employer is quoted by Julia Wrigley as saying “We really thought we had developed more of a personal relationship, and things shouldn’t be on a dollar basis.”<sup>20</sup> On the other hand, “In some cases, a woman will decide to work for low wages precisely because she feels that a particular family is ‘nice’ or an employer ‘treats me as part of the family.’”<sup>21</sup> Employers were advised to take advantage of the commingling of affection with commodified labor by the *Ladies Home Journal*, which, in 1963, suggested:

If you are so fortunate as to find a maid you love with your whole heart, you might try binding her to you by having a child or two born during her tenure. Not high wages or Christmas gifts of blue-chip stock or every weekend off will prove so much as a lure as children to whom she has grown attached.<sup>22</sup>

How should such strategically incomplete commodification be evaluated? According to Arlie Hochschild, in the global market for carework, feelings of love and affection have become “a distributable resource,” “renewable” but still “scarce and limited,” such that caregivers may “redirect their love” to some extent from their own children to their employers’ children,<sup>23</sup> while, from the employers’ perspective, the love of a nanny for the

18. JULIA WRIGLEY, *OTHER PEOPLE’S CHILDREN: AN INTIMATE ACCOUNT OF THE DILEMMAS FACING MIDDLE-CLASS PARENTS AND THE WOMEN THEY HIRE TO RAISE THEIR CHILDREN* 127–28 (1995).

19. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 86–87 (1977) (emphasis in original).

20. WRIGLEY, *supra* note 18, at 88.

21. Anderson, *supra* note 15, at 113.

22. ROMERO, *supra* note 13, at 107.

23. Arlie Russell Hochschild, *Love and Gold*, in *GLOBAL WOMEN*, *supra* note 15, at 23.

children in her care becomes “unique, private—fetishized.”<sup>24</sup> In language echoing the debate about the commodification of body organs, Hochschild speaks of immigrant careworkers as “tak[ing] part in a global heart transplant . . . [w]ithout intending it.”<sup>25</sup> Researchers have noted that some careworkers who do develop deep emotional attachments to children in their charge learn, to their great emotional cost, that “should the employer decide to terminate the relationship, the worker will have no further right to see the child. As far as the employer is concerned, money expresses the full extent of her obligations to the worker.”<sup>26</sup> In other instances, it is the careworkers who wish to emphasize the commodified character of the transaction<sup>27</sup> to maintain a strong sense of “separation between tasks completed for their employers and ‘work of love’ given to their families.”<sup>28</sup>

Elizabeth Clark-Lewis uses both fictionalized accounts and oral histories of African American domestics from the era of the Great Migration to stress the value such workers placed on having their privacy respected. One such worker, Mary Ruth Ingraham, spoke favorably about the comparative willingness of employers in the South to stop short of demanding emotional labor or seeking to establish an intrusive personal relationship even with live-in workers. Precisely because “they saw you as no better than they animals,” such employers would let “you . . . do your job and mainly that’s all. You were a worker. And after that you was free. . . . [A]fter you’d worked you be let to rest—like they cow or horse.”<sup>29</sup> By contrast, employers in Washington, D.C. seemed more inclined to “infringement on African American servants’ personal space,” demanding the emotional labor of compliments on an employer’s appearance<sup>30</sup> or asking intrusively about a servant’s personal life.<sup>31</sup>

On the whole, it seems, the domestics Clark-Lewis studied preferred, as it were, to be treated as “meat that has never been lied to” than as pets. Similarly, the Chicana domestics studied by Mary Romero, “not unlike African American and Japanese American domestics, did not necessarily find an affective relationship the ingredient for a satisfying working relationship. In fact, the opposite is the case, because affective relationships pro-

---

24.*Id.* at 26.

25.*Id.* at 22.

26.Anderson, *supra* note 15, at 112. Anderson and other researchers quote women who become depressed and vow never to take another child care job when they are abruptly cut off from contact with children they had come to love. *See, e.g., id.* at 112; Pierrette Hondagneu-Sotelo, *Blowups and Other Unhappy Endings*, in *GLOBAL WOMEN*, *supra* note 15, at 61.

27.*See, e.g.,* Anderson, *supra* note 15, at 111 (quoting a Dominican nanny as saying, “Sometimes when they say to me that I should give her lots of love, I feel like saying, well, for my family I give love free, and I’m not discriminating, but if it’s a job you’ll have to pay me.”).

28.ROMERO, *supra* note 13, at 157.

29.ELIZABETH CLARK-LEWIS, *LIVING IN, LIVING OUT: AFRICAN AMERICAN DOMESTICS AND THE GREAT MIGRATION* 113 (1996).

30.*See, e.g., id.* at 114 (quoting Velma Davis as saying, “It wasn’t like your job only. You’d have to do more just plain makin’ them happy. . . . Tell her how she looked so nice, the kids being so this or that.”).

31.*See, e.g.,* CLARK-LEWIS, *supra* note 29, at 124 (quoting ALICE CHILDRESS, *LIKE ONE OF THE FAMILY: CONVERSATIONS FROM A DOMESTIC’S LIFE* 19–21, 69 (1986)). A protagonist in Childress’s novel complains that employers are “just tryin’ to nose in my business . . . . They ask you, ‘How’s your boyfriend?’ Like it’s funny as all get out that you should have a boyfriend! Or save money? ‘Do you people . . . do this or that?’” *Id.* *See also* Elaine Kaplan, *‘I Don’t Do No Windows’: Competition Between the Domestic Worker and the Housewife*, in *COMPETITION: A FEMINIST TABOO* 92, 101 (Valerie Miner & Helen E. Longino eds., 1987) (quoting the author’s mother, a domestic, as saying, “I have to listen to them, but I don’t talk. It’s none of their business. When they ask me how I’m doing, I just say fine. They just want to know my business so that they can tell their friends.”).

vide more opportunities for exploitation.”<sup>32</sup> Those who have studied such relationships from the employers’ perspective point to the simultaneous growth of both “hidden commodification” and “hidden familification”:<sup>33</sup>

The strong and trusting relationship that parents build with their nannies allows for the gradual development of a high commodification strategy . . . [C]aregivers begin to assume responsibility for a number of household tasks that go well beyond formal childcare duties. . . . These types of services are examples of “hidden” commodification [because] . . . (1) families are not locating or paying additional service providers to accomplish these tasks; and (2) parents are not doing the tasks themselves.<sup>34</sup>

Observing such developments, one commentator has stressed “how stealthily these employees take on an almost familial flexibility in their activities. The job configuration begins to sound less joblike . . . bring[ing] us back to old questions about family definition.”<sup>35</sup>

Many researchers (and many of the workers they study) stress that the “disadvantages of being ‘one of the family’ far outweighed the advantages.”<sup>36</sup> But, “while informality clearly leaves workers open to exploitation—excessive hours, for instance, or low pay—workers also value having personal relationships with their employers.”<sup>37</sup> Some of the employees interviewed by Mary Romero, for example, classify relationships “as a dichotomy of extremes: treatment as a ‘non-person’ versus treatment as a ‘family member’” and expressed a clear preference for employers with whom they “felt like one of the family on this job.”<sup>38</sup>

Counterpoised to the many instances such as those described above in which employees resisted their employers’ attempts to personalize or “familify” the relationship or to commingle affection with commodification are instances of employees who wish to inject affection into relationships their employers wish to keep more businesslike. One study by Lynn May Rivas found this dynamic to be particularly present between disabled and/or elderly adults and their paid caregivers. According to Rivas:

32.ROMERO, *supra* note 13, at 152. Employers, as well, can find that affective relationships provide more opportunities for exploitation, for example, by employees who ask for loans of money or other help for themselves or their family. *See, e.g.,* WRIGLEY, *supra* note 18, at 89–90.

33.The former term is Carolyn P. Stuenkel’s, the latter Tom Fricke’s, commenting on Stuenkel’s work. *See* Carolyn P. Stuenkel, *A Strategy for Working Families: High-Level Commodification of Household Services*, in BEING TOGETHER, WORKING APART: DUAL-CAREER FAMILIES AND THE WORK-LIFE BALANCE 259 (Barbara Schneider & Linda J. Waite eds., 2005); Tom Fricke, *Commentary*, in BEING TOGETHER, WORKING APART, *supra*, at 275.

34.Stuenkel, *supra* note 33, at 259.

35.Fricke, *supra* note 33, at 275. Wrigley’s work suggests that class differences may play a role in employees’ attitudes to such strategies on the part of employers, whether they view it negatively as “hidden commodification” or positively as “familification.” On the one hand, Wrigley observes that what she calls “family-incorporation strategies” involving “delegat[ing] significant amounts of work to the caregiver” can work well with au pairs who can see themselves as “[c]lass peers . . . doing the work semi-voluntarily, as contributing members of a family system.” WRIGLEY, *supra* note 18, at 66. On the other hand, she quotes a representative low-wage, lower-class caregiver, who “does not express any affection for [the child in] her charge” and dislikes caring for him, describing her duties as “Everything! Little by little duties get added.” *Id.* at 37.

36.Anderson, *supra* note 15, at 112 (quoting Miranda Miles, *Working in the City: The Case of Migrant Women in Swaziland’s Domestic Service Sector*, in GENDER, MIGRATING AND DOMESTIC SERVICE (Janet H. Momson ed., 1999)).

37.*Id.* at 113.

38.ROMERO, *supra* note 13, at 125.

The attendants I interviewed described their work almost as a religious calling. . . . Working as a personal attendant is a labor of love. Money changes hands, but this is not commodified care. The immigrant women and women of color in my sample unanimously said that good care required that they love the receiver. . . . Nothing brought attendants more satisfaction than when care receivers loved them back. . . . These were relationships that seemed more familial than businesslike. . . .

The consumers I interviewed, however, including those who were close to their attendants, expressed a desire for a different kind of relationship. [One] echoed many of their sentiments when she said, “I tend to like to put up a wall with my attendants” . . . .

When care is commodified, the care receiver becomes an independent purchaser of services . . . . The care receiver does not experience the caregiver as generously expressing affection and concern through his or her work; rather, the worker is simply doing a paid job. . . . The consumers felt that they had fully purchased the time of their personal attendant . . . . [I]t becomes impossible for the caregiver to express real caring, because nothing he or she does is understood as a gift.<sup>39</sup>

Another study, by Pierrette Hondagneu-Sotelo, while noting that “[m]any Latina immigrant employees and their U.S. employers fall easily into a familial rhetoric . . . [which], as many analysts have noted . . . often leads to exploitation,” also observed that many “[c]ontemporary employers [unlike their predecessors] . . . regard their domestic workers with a new distance and sterility. It’s the employees, meanwhile, who *want* personal recognition from their employers.”<sup>40</sup> “Professionalizing employment relations and rendering them more anonymous may therefore introduce new difficulties,” concluded Bridget Anderson about the commodification of domestic labor.<sup>41</sup>

Some of these difficulties are the double bind at work. For example, being asked about one’s personal life—boyfriends, children, taste in reading, etc.—can feel like an invasion of privacy. On the other hand, never being asked about any of these matters can feel dehumanizing. This is not a dilemma limited to domestic workers,<sup>42</sup> although it is

39.Lynn May Rivas, *Invisible Labor: Caring for the Independent Person*, in GLOBAL WOMEN, *supra* note 15, 81–82. While Rivas seeks to draw a sharp contrast between “feel[ing] entitled” to carework because one had paid for it and receiving it in non-commodified form from kin, my own view is that many who do receive care from kin have similar feelings of entitlement. Just as nothing a paid careworker does is outside the job description for the care recipients in Rivas’s account, nothing a familial caregiver does is seen as outside the bounds of familial duty by some recipients of familial care.

40.Hondagneu-Sotelo, *supra* note 26, at 67–68 (emphasis in original). Hondagneu-Sotelo stresses, however, that the employees “do not want to be taken for granted like members of the employer’s own family, or to be expected to perform their duties solely out of love for their employer’s children. Rather, they want *consideracion* (understanding) and acknowledgement that they have lives and families of their own.” *Id.* at 68.

41.Anderson, *supra* note 15, at 113.

42.In an earlier published interchange with Marc Fajer, for example, I agreed with him that “gay men and lesbians will not have achieved true equality until they are free to publicize [‘their partners and their search for partners’] to the same extent [as] heterosexuals . . .” but went on to express, in contrast to his call for more open discussion, on the job and elsewhere, by people of all orientations, my personal preference for “a world in which my sex life was not the business of . . . my employer, my co-workers, nor anyone else with whom I was not on intimate terms.” Mary Anne 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, 1672 n.123 (1993) (quoting Marc A. 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, 604 (1992)).

possibly more frequent and severe among them due to both the extent of power disparity between employers and their employees and the necessarily personal aspects of some of the work.

Far from valuing the commingling of affectionate interest in their lives, some employees (and employers) resent or resist it. In part this may reflect the difference between expressions of interest and affection seen as genuine and those seen as exploitative, but in part it may result from a real difference in the tastes and attitudes of individual workers and bosses. Again, the difficulties are not limited to, although they may be intensified in, domestic employment. Being “one of the family” may not lead to better working conditions, more job security, or better pay either nepotistically in the business world or in the household. Commingling affection with commodified transactions may lead in a positive way to more affection, or, in a more complicated or negative way, to the displaced affection documented in Hochschild’s recent work or to the potentially compromised, corrupted, or confused affection documented in her earlier work and that of others.

To focus on such problems is not to suggest that we ought to treat all relations in the modern commercial market as not involving affection. I think the best of the solutions to “pets or meat” problems, if it could indeed be implemented on a case-by-case basis, was proposed by Jane Addams, who said:

I should consider myself an unpardonable snob if, because a woman did my cooking, I should not hold myself ready to have her for my best friend, to drive, to read, to attend receptions with her, but that friendship might or might not come about, according to her nature and mine, just as it might or might not come about between me and my college colleague. On the other hand, I should consider myself very stupid if merely because a woman cooked my food and lived in my house I should insist upon having a friendship with her, whether her nature and mine responded to it or not. It would be folly to force the companionship of myself or my family upon her when doubtless she would vastly prefer the companionship of her own friends and her own family.<sup>43</sup>

Being able to make the nuanced choice Addams proposes might be ideal, but we see again and again in the sociological and psychological literature that many people have problems walking her fine line.

Having discussed the social science aspects, now let me treat briefly the implications for the law, centered, again, around two propositions—where there is love there can be no bargaining and you cannot bargain about love. A century ago, one site of regulatory contestation was the practice of tipping. As Viviana Zelizer reminds us,<sup>44</sup> not only was there an avalanche of editorializing against tipping, led by no less than Rudolf von Jhering,<sup>45</sup> “there were nationwide efforts, some successful, by state legislatures to abolish tipping by turning it into a punishable misdemeanor.”<sup>46</sup> Defenders of tipping, such as a commentator for *The Atlantic Monthly*, saw it as “indeed a gift, the emotional supplement

43.ROMERO, *supra* note 13, at 14 (quoting Jane Addams, *A Belated Industry*, 1 AM. J. SOC. 536, 545 (1896)). Seneca made a similar recommendation. See SENECA, *supra* note 14, at 309 (“‘Do you mean to say,’ comes the retort, ‘that I must seat all my slaves at my own table?’ No, not any more than that you should invite all free men to it. . . . I propose to value them according to their character, and not according to their duties.”).

44.See VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 91–99 (1994).

45.See, e.g., Courtney Kenny, *Jhering on Trinkgeld and Tips*, 32 L.Q. REV. 306 (1916).

46.ZELIZER, *supra* note 44, at 94.

to the wage, a singular transfer of money that personalized commercial exchanges” and let one show a “measure of fraternity, good-will, affection, obligation, that it is not susceptible of measure.”<sup>47</sup> Opponents of tipping and excessive Christmas bonuses editorialized that tipping generated ““a deceptive show of friendliness which may in a moment be thrown off,’ thus lessening ‘the chance of genuine friendliness.’”<sup>48</sup> Some anti-tipping laws, however, were declared unconstitutional because they “interfered with the common law right to make gifts.”<sup>49</sup>

Several things are interesting about the early twentieth-century tipping debate from a “pets or meat” perspective. First, American opponents of tipping in particular saw it as inconsistent with the national premise of political equality. Just as describing your children’s nanny as a member of your family was less jarring in a hierarchical, patriarchal family than in a modern egalitarian one, so tipping your valet was less jarring to “the aristocratic mind” than in a world in which there was “[t]he prospect of a street cleaner or [a] valet being your social and industrial equal” as well as your political equal.<sup>50</sup> “The slavery system is not worse in competition with free labor than is the tipping system of compensation. In neither system are values determined by merit or production,” insisted one American critic.<sup>51</sup> Another insisted that to accept a tip was “to enter into a relation of dependence to the giver and by implication to acknowledge his superiority.”<sup>52</sup> On the other hand, *The Atlantic Monthly’s* defender of tipping rejected as “quite inadequate” the “definition of the tip generally adopted, that it is a gratuity given to an inferior which an equal would not tolerate,” pointing instead to the “universality of the principle” that “much of what we get is . . . due to good feeling rather than merit.”<sup>53</sup> In some respects, those who criticized the receipt of tips as servile have won out: it remains the custom today not to tip the proprietor of an establishment, for example.

On the other hand, the notion of the tip as not “fairly earned,” but the product of “good feeling” rather than “barter,” may have lost out. I suspect few among us today think of a tip as anything other than purely commodified. Exactly what some of tipping’s critics suggested might happen did: we no longer think of a tip as a gift or a token of affection or in any way connected to genuine friendliness. Paradoxically this may have come closer to solving than to intensifying the problem stressed by these critics. Today we are at no risk of confusion; both sides of a tipping transaction now typically have a very clear notion of the distinction between a gift and a tip. When given to a cab driver or a waiter, a tip is clearly seen to be, not a gift, but just a ratcheting upwards of the price. Most employee bonuses also now fit clearly into this same category. They have been disambiguated, removed from the realm of incomplete commodification, which Radin in general seems to favor expanding. While we may not thereby have answered *The Atlantic Monthly’s* pro-tipping question, “Is it more honorable to commercialize the give-and-take

---

47.*Id.* (quoting *Tips*, ATLANTIC MONTHLY, Dec. 1911, at 856, 857).

48.*Id.* at 95.

49.*Id.* (citing WILLIAM R. SCOTT, THE ITCHING PALM: A STUDY OF THE HABIT OF TIPPING IN AMERICA 126 (1916)).

50.SCOTT, *supra* note 49, at 115.

51.*Id.* at 116.

52.*Tipping*, LIVING AGE, May 23, 1908, at 508.

53.*Tips*, *supra* note 47, at 856.

of life than to humanize it?,"<sup>54</sup> we now see most tips and most bonuses as clearly commercializing, not humanizing. The ability to monetize and routinize them somehow takes them out of the realm of affection, eliminating much chance of the "plural meanings" Radin associates with transactions that "retain a personal aspect."

There is evidence that many potential recipients welcome the turn to more complete commodification. While some commentators may lament the depersonalization involved in the transmogrification of in-kind gifts into monetary bonuses, for example, most recipients stress that, far from being dehumanizing, giving money is more respectful of them as persons. As one domestic worker put it, "They give you things, but me, I need the money. Why? I am a human being."<sup>55</sup>

But, just as women are more likely to be involved in emotional labor as providers, they are more likely to face resistance to full monetization of the labor they provide. Not only child care workers and domestics, but, as noted above, secretaries, as well as nurses and teachers, are expected to accept some portion of their compensation in affection. It is no accident that the areas in which the "pets or meat" question comes up most often and potentially most problematically are pink collar areas, in which women are predominant providers. Much of what women have market power over, such as their sexual and reproductive services, they have long been expected not to commodify at all. Even when monetary compensation is allowed, it is often kept low and female providers are expected to be interested in rewards other than money. Nowhere is this clearer than in the comparison of sperm and egg donors. Sperm donation is safe, easy, quick, and painless (indeed, the activity involved, masturbation to orgasm, is generally thought pleasurable). Egg donation is time-consuming, painful, and risky, involving invasive physical examinations, multiple injections with hormones, and surgery. Yet, it is egg donation for which monetary compensation is seen as more problematic. Many countries prohibit all compensation of egg donors. In the United States, where compensation is legal, the price has gradually risen from at most a few hundred dollars in the 1980s, when procedures were first developed, to an average of several thousand today, much less per minute of time than sperm donors are paid. That sperm donors do it for the money is generally seen as unproblematic. But, "if an egg donor applicant is in it for the money, she'll either be rejected by the program or disappointed with the results: The stipend doesn't cover the time and discomfort the donation process requires."<sup>56</sup> That most egg donors list altruistic motives among their reasons for participating is not surprising, given that "reputable agencies" reject prospective donors who "can't give . . . a good answer" to the question, "What are you hoping to gain from this experience outside of the check?"<sup>57</sup> Like Lori Andrews, I am inclined to respond to those who argue that "payment for reproductive materials . . . devalues the contributor" that "it may be even more devaluing of women to not pay them and only allow their participation out of altruism."<sup>58</sup>

---

54.*Id.* at 857.

55.Anderson, *supra* note 15, at 111. Inter alia, a gift of money respects the economic decision-making ability of the recipient.

56.Peggy O'Farrell, *The Gift of Life*, CINCINNATI ENQUIRER, May 23, 2001, at 1F. According to Dr. Michael Thomas, whose Alliance Center for Reproductive Health surveyed donors to find out their motivations, "The sperm donors are actually looking to make a few bucks to go out for beer that night. With egg donors, they truly want to help other people." *Id.*

57.*All Things Considered: Reproductive Egg Donation* (National Public Radio, July 28, 2005) (quoting Kathy Stern of Southwest Surrogacy Arrangements and Parenting Options).

58.Lori B. Andrews, *Reproductive Technology Comes of Age*, 21 WHITTIER L. REV. 375, 379 (1999).

The same can be said in other areas central to the regulation of sexuality and gender where the “pets or meat” question comes up. Consider two other situations, each infused with both sex in the sense of gender and sex in the sense of sexuality, where the law has continuing problems with the notion that “the laborer is worthy of [her] hire.”<sup>59</sup> One is prostitution and its related activities, including the activity of being a kept woman or a mistress, and the other is marriage and marriage-like relationships. The two come together under the heading of what the law calls meretricious relationships. Today that term is often used to refer to quasi-marital relationships,<sup>60</sup> such as those between unmarried cohabiting couples, but etymologically it goes back to the Latin *meretrix*, the prostitute, from *merere*, to earn.<sup>61</sup> In both marriage and cohabitation agreements on the one hand and prostitution transactions on the other, difficulties frequently arise around the notion, not only that one cannot and should not buy love, but that if love is involved, money should not be.

Although both married and cohabiting couples are increasingly free to make enforceable agreements with one another,<sup>62</sup> the more an activity is traditionally gendered feminine, the less likely a court is to hold that it can be the subject of an enforceable agreement between the members of a couple and the more likely a court is to find that it is provided only out of affection or that it is so inextricably linked to the sexual relationship as not to be compensable. Thus, for example, in *Borelli v. Brusseau*, a wife who had agreed, in exchange for the promise of receiving certain property in his will, to nurse her husband personally at home rather than hire professional care in a nursing home, was held to have no enforceable right to the property because public policy dictated she was already “obligated by the marriage contract to provide nursing-type care to an ill husband” without additional compensation.<sup>63</sup> And, while, in *Jones v. Daly*, one member of a gay couple was held unable to collect from the other for services as a “traveling companion, housekeeper [and] cook”<sup>64</sup> because he “did not allege contracting to provide services apart from those normally incident to the state of cohabitation itself,”<sup>65</sup> in *Whorton v. Dillingham* a member of another gay couple was able successfully to claim from the man with whom he cohabited compensation for services as a “chauffeur, bodyguard, secretary, and partner and counselor in real estate investments.”<sup>66</sup> These latter services, said the court, “are of monetary value, and the type for which one would expect to be compensated . . . . By way of comparison, such services as being a constant companion and confidant are not the type which are usually monetarily compensated nor considered to have

---

59. *Luke* 10:7.

60. The law of the state of Washington, for example, now defines “meretricious as a ‘stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.’” *In re Marriage of Pennington*, 14 P.3d 764, 770 (Wash. 2000).

61. *See, e.g.*, AMERICAN HERITAGE DICTIONARY 787 (2d College ed. 1985).

62. Or at least they were in the period from the so-called palimony case of *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), until 2004, when a raft of state constitutional amendments and state laws, whose target was same-sex marriage and whose scope remains to date uncertain, limited the extent to which state law could recognize unmarried couples. *See, e.g.*, the Virginia Marriage Affirmation Act, H.B. 750, 2004 Leg. (Va. 2004) (providing inter alia that a “partnership contract or other arrangement [between persons of the same sex] purporting to bestow any of the privileges or obligations of marriage [is prohibited.]”).

63. *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 19 (Cal. Ct. App. 1993).

64. *Jones v. Daly*, 176 Cal. Rptr. 130, 134 (Cal. Ct. App. 1981).

65. *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 410 (Cal. Ct. App. 1988) (characterizing the holding in *Jones v. Daly*).

66. *Id.* at 409.

a 'value' for purposes of contract consideration."<sup>67</sup> There are two related but conceptually distinguishable problems with a failure to "allege contracting to provide services apart from those normally incident to the state of cohabitation itself." The first is that these services are seen to be "so intertwined with the sexual relationship"<sup>68</sup> as to make compensation for them too close to compensating for the sex itself. The second is that there tends to remain a presumption, albeit nowadays potentially rebuttable, "that intra-household services are motivated by affection, not money."<sup>69</sup>

This brings us to situations where affection really is part of a bargain and to my quite serious question, why do we not conceptualize nannies as mistresses and babysitters as hookers.<sup>70</sup> Consider first that, for the nanny, unlike for the prostitute, the intended recipient of the affection is not usually the purchaser. The love is being purchased for someone else, for a child, someone who is construed of as intrinsically lovable. But what is sought to be purchased is just exactly love, I think, and not the "as if" behavior of the stewardess Hochschild describes. The stewardess, like many emotional laborers, may just be asked to smile, and her passengers may not expect of her that she is genuinely happy to see and serve them. I do not know of any who hire a caregiver for their children who do not profoundly wish and expect that love is, in fact, what they are getting for their money, not just good behavior or skill and not just the appearance of affection, but affection itself. By contrast, as noted above, at least one study has found that adults hiring caregivers for themselves "considered businesslike relationships with their personal attendants to be ideal."<sup>71</sup>

Asking the "pets or meat" question may help illuminate the extent to which opposition to legalized prostitution is not really opposition to the purchase of affection or the purchase of love, but is far more narrowly opposition to the purchase of sex. It strikes me as far easier to imagine an act of prostitution that is uncontaminated by affection, one in which what is bargained for in no way includes affection, than it is, for me, at least, to imagine the act of hiring a nanny or babysitter untainted by the purchase of affection. (The only exception I can readily imagine is a babysitter hired simply to watch over an already sleeping child and to call the parents and 911 should anything go wrong.) That affection is called for in a far higher percentage of interactions between nannies and their charges than of prostitutes and their clients may help clarify the perceived problem these days with legalizing sex for money.

As one Dutch prostitute and activist put it:

[P]eople think if you have sex for any reason other than to satisfy your own desire you will be destroyed. Didn't it used to be that sex without "love" would deeply damage a woman? And before love, it was understood that sex outside of marriage would destroy her . . . . Look we've already survived sex outside of marriage and sex without love so it's likely we can survive sex outside of desire, too.

---

<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

<sup>69</sup>Robertson v. Reinhart, No. A095025, 2003 Cal. App. Unpub. LEXIS 204, at \*19 (Cal. Ct. App. Jan. 8, 2003).

<sup>70</sup>I should say that I posed this question in a variety of contexts to a variety of people and so far only one person has responded, "But we do, at least I do." This fundamentalist Christian law professor explained that this was one reason why he avoided having babysitters or nannies for his children.

<sup>71</sup>Rivas, *supra* note 39, at 80.

Now it's true that there are parts of myself that I don't want to share with my clients. But drawing boundaries in my work doesn't mean that I am in danger of being destroyed by it. The way you deal with clients is different than the way you deal with friends or sweethearts. It's always used so negatively that you've got to separate your work from your private life, as if that's unique to prostitution.<sup>72</sup>

Legal theorist Mary Becker seems to adopt the view that "to satisfy your own desire" is the only acceptable reason to have sex. She seeks to include in a category she calls "autonomy-denying sex," not only nonconsensual sex, but also "consensual unwanted sex (sex one would rather forego than endure were there no negative consequences)."<sup>73</sup> According to Becker, "[v]irtually all prostitution, phone sex, nude dancing, etc., appears to be is [sic] unwanted sexual activity by this definition, since these workers require payment."<sup>74</sup> She also includes in the category "engag[ing] in genital sex to get affection" when one "want[s] to cuddle or hug."<sup>75</sup> On this view, sex should be removed not just from trade for money, but from trade for any other thing except reciprocal sexual desire.

Unsurprisingly, some sex workers see it differently. According to Annie Sprinkle: The money is important. . . . [S]omehow when the money is there, we can have a fabulous time with these people, really give and be loving and totally be of service. And if the money isn't there, forget it, don't want you in the same room with me. . . . What is it that the money provides? Maybe it's just a clear exchange, especially when you are with someone that you don't like that much, somehow if they give to you, you can give to them. You've been compensated in a clear, clean way.<sup>76</sup>

As with many of the examples cited in this essay, lack of awareness or confusion in the face of "internally plural understandings" can in itself be a problem. Either commodified or non-commodified exchange, either "pets or meat," or even some of both, may under the right circumstances be workable, except that commingling the two can lead to confusion among the participants as to what is at stake. Even when the sex is not commodified, of course, confusion is common. The misplaced or exaggerated expectation that someone "really cares about you as a person" leads far more frequently to a sense of betrayal between sexual partners than between employers and employees such as some of those discussed above.

72. Interview with Jo Doezema of the Red Thread, in WENDY CHAPKIS, *LIVE SEX ACTS: WOMEN PERFORMING EROTIC LABOR* 121 (1997).

73. Mary Becker, *Women, Morality and Sexual Orientation*, 8 *UCLA WOMEN'S L.J.* 165, 196 (1998). Becker makes clear that she "does not propose any direct prohibition on consent to autonomy-denying sex for any woman, whether wife, girlfriend or sex worker," but just to raise awareness of the damage it can do to women as sexual subjects. *Id.* at 195.

74. *Id.* at 196 n.96.

75. *Id.* at 199. Taken to its logical limit, Becker's view would problematize any sex engaged in as an accommodation to another participant in the sexual activity. Her argument suggests that, even in an ongoing relationship, trading off one's partner's desire tonight against one's own desire on some other occasion, when one's partner may not be in the mood, may be morally problematic. A fortiori problematic would be trading one's own desire tonight against one's partner's desire that one do the dishes. Becker does say she is not referring to those "times [in any relationship] when one partner wants sex and the other is not equally interested but is quite willing to participate and enjoys the experience," *id.* at 193, but the qualification that both partners must "enjoy the experience" suggests that even in these situations she would insist that there be mutual, albeit unequally strong, sexual desire.

76. Annie Sprinkle, in CHAPKIS, *supra* note 72, at 92; see also PAT CALIFIA, *MACHO SLUTS* 20 (1988) ("The whore does not sell her body. She sells her time. So she has time that is not for sale, that belongs to no one but herself. Domesticated women don't dare put a price on their time.").

Even when the sex is in no way consensual, there may be something to be said for keeping the transaction “clear,” allowing the victim to escape lying or being lied to. During the debate about the Violence Against Women Act, Orrin Hatch famously, in debating what was going to be covered by the Act, tried to distinguish rape by someone who says “I love you” from rape by someone who says “I hate you.” According to Hatch, the latter “is much worse,”<sup>77</sup> and therefore only the latter should be covered by VAWA. A variant of “pets or meat” is the question whether it is indeed the case that the latter is necessarily much worse. Might it not potentially be much worse to be raped by someone who tells you he loves you as he rapes you, because the confusion of the affection and the violence can leave the victim much more devastated than a “clean, clear” brutal act devoid of protestations of affection? Consider the position of the “petted” slave mistress in southern chattel slavery as compared with that of a slave whose master brutally raped her. A master who insists on a display of affection may be asking even more of a slave than one who demands only the use of her body. On the other hand, the possibility of reciprocal and genuine affection, even under such extremes of domination and subordination as existed in chattel slavery, should neither be categorically ruled out nor devalued.

Let me return quite literally to the pet and to the question of bestiality. One conventional way to stop a parade of horrors well short of legalized bestiality is to focus on consent and to argue that non-human animals cannot be said to consent to sex with humans. This seems to me to be an odd way of looking at what many forms of bestiality with pets might in fact look like, especially when compared with other activity by pet owners few would wish to regulate. In some sense very little of what trainable pets are trained to do can fruitfully be differentiated with reference to consent, because in extreme cases animals may be beaten into submission, but, most of the time, it seems, they are persuaded into doing things as part of exactly the problematic relationship that this essay has focused on—commodification commingled with affection. It may therefore be worth asking whether training one’s pets, for example, to perform oral sex on one,<sup>78</sup> is anything different or worse than what David Letterman calls “stupid pet tricks.” If we think there should be more strict or rigorous legal controls on having one’s pets trained to do what would violate the bestiality laws than on other stupid pet tricks, we should acknowledge straightforwardly that it is our attitude toward sex, more than our concern for animal freedom of choice or animal welfare, that motivates us. Conservatives have up to now been more willing to do this than liberals. (Of course, one response at least some on the left might offer is that any difficulty in drawing sufficiently sharp conceptual distinctions

---

77.Senator Orrin Hatch said:

We’re not opening the federal doors to all gender-motivated crimes. Say you have a man who believes a woman is attractive. He feels encouraged by her and he’s so motivated by that encouragement that he rips her clothes off and has sex with her against her will. Now let’s say you have another man who grabs a woman off some lonely road and in the process of raping her says words like, “You’re wearing a skirt! You’re a woman! I hate women! I’m going to show you, you woman!” Now, the first one’s terrible. But the other’s much worse. If a man rapes a woman while telling her he loves her, that’s a far cry from saying he hates her. A lust factor does not spring from animus.

Ruth Shalit, *Caught in the Act*, NEW REPUBLIC, July 12, 1993, at 12, 14 (quoting Sen. Orrin Hatch).

78.*See, e.g.*, DEKKERS, *supra* note 12, at 64 (“A dog regards all the members of its household as fellow dogs. It is a pleasant duty for a male dog to service the members of his household from time to time. . . . [T]he dog is most commonly used for cunnilingus. Dogs have an ideal tongue for the purpose and can be taught it, like so many other tricks. As a reward, something edible can be applied to the appropriate spots, or the dog can be masturbated as a return favour.”).

between bestiality and other stupid pet tricks argues in favor of greater regulation of all that humans ask pets to do.)

\* \* \*

In 1912, at the height of the controversy over tipping discussed above, and two decades after his *Mrs. Warren's Profession* shocked audiences with its treatment of prostitution, George Bernard Shaw rang the changes on the “pets or meat” question in *Pygmalion*, a play about the incompletely commodified relationship between Henry Higgins, a teacher of phonetics, and Eliza Doolittle, the cockney flower seller he undertakes to pass off as a lady. What begins as the substitution of one proposed fully commodified exchange (Eliza's offer to pay Higgins for lessons in proper English) for another (Higgins offer of “a proper bedroom, and . . . lots to eat, and money to buy chocolates and take rides in taxis”<sup>79</sup> in exchange for her learning good enough English to pass as a lady), risks being mistaken for prostitution by Eliza's father, who wants his cut.<sup>80</sup> Over time, the relationship turns petlike, something both parties try to resist, with Eliza insisting she “won't be coaxed round as if I were a baby or a puppy”<sup>81</sup> and Higgins declaring that if she “dare[s] to set up your little dog's tricks of fetching and carrying slippers . . . I'll slam the door in your silly face.”<sup>82</sup> Higgins dismisses as “commercial principles” akin to her “selling violets” Eliza's insistence that she “won't care for anybody that doesn't care for me” and asserts for his own part “righteous contempt for Commercialism. I don't and won't trade in affection. . . . [Y]ou couldn't buy a claim on me by fetching my slippers.”<sup>83</sup> Yet her explanation that “what I did was not for the dresses and the taxis: I did it because we were pleasant together and I come—came—to care for you; not to want you to make love to me, and not forgetting the difference between us, but more friendly like”<sup>84</sup> meets ready acceptance from him. In the end then, Shaw, like Jane Addams and Seneca before her, offers friendship as a perhaps difficult but desirable alternative to “pets or meat.”

Readers with comments may address them to:

Professor Mary Anne Case  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637  
macase@law.uchicago.edu

79. GEORGE BERNARD SHAW, *PYGMALION* Act II, at 183 (Michael Holroyd ed., Bantam Books 1992) (1916). Higgins offers gold and diamonds in addition to chocolate and taxis, but Eliza insists, “I don't want no gold and no diamonds. I'm a good girl, I am.” *Id.* Act II, at 182.

80. *Id.* Act II, at 192 (“[I]f you want the girl, I'm not so set on having her back home again but what I might be open to an arrangement. . . . [Y]ou're the last man alive to expect me to let her go for nothing. . . . Well, what's a five pound note to you? And what's Eliza to me?”). The specter of prostitution arises again near the end of the play, when Eliza and Higgins try to come to terms with the fact that marriage is the only career her new ladylike demeanor may have left her fit for. *See id.* Act V, at 222–23 (“I sold flowers. I didn't sell myself. Now you've made a lady of me I'm not fit to sell anything else.”).

81. *Id.* Act V, at 247.

82. *Id.* Act V, at 244.

83. *Id.* Act V, at 243.

84. *Id.* Act V, at 246.

**The University of Chicago Law School  
Public Law and Legal Theory Working Paper Series**

1. Cass R. Sunstein and Edna Ullmann-Margalit, Second-Order Decisions (November 1999; *Ethics*, v.110, no. 1)
2. Joseph Isenbergh, Impeachment and Presidential Immunity from Judicial Process (November 1999; forthcoming *Yale Law and Policy Review* v.18 #1).
3. Cass R. Sunstein, Is the Clean Air Act Unconstitutional? (August 1999; *Michigan Law Review* #3).
4. Elizabeth Garrett, The Law and Economics of "Informed Voter" Ballot Notations (November 1999, *University of Virginia Law Review*, v. 85).
5. David A. Strauss, Do Constitutional Amendments Matter? (November 1999)
6. Cass R. Sunstein, Standing for Animals (November 1999)
7. Cass R. Sunstein, Culture and Government Money: A Guide for the Perplexed (April 2000).
8. Emily Buss, Without Peers? The Blind Spot in the Debate over How to Allocate Educational Control between Parent and State (April 2000).
9. David A. Strauss, Common Law, Common Ground, and Jefferson's Principle (June 2000).
10. Curtis A. Bradley and Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent (May 2000; *Pennsylvania Law Review* v. 149).
11. Mary Ann Case, Lessons for the Future of Affirmative Action from the Past of the Religion Clauses? (May 2001, *Supreme Court Review*, 2000)
12. Cass R. Sunstein, Social and Economic Rights? Lessons from South Africa (May, 2000).
13. Jill Elaine Hasday, Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations (June 2001)
14. Elizabeth Garrett, Institutional Lessons from the 2000 Presidential Election (May 2001).
15. Richard A. Epstein, The Allocation of the Commons: Parking and Stopping on the Commons (August 2001).
16. Jack Goldsmith, The Internet and the Legitimacy of Remote Cross-Border Searches (October 2001).
17. Adrian Vermeule, Does Commerce Clause Review Have Perverse Effects? (October 2001).
18. Cass R. Sunstein, Of Artificial Intelligence and Legal Reasoning (November 2001).
19. Elizabeth Garrett, The Future of Campaign Finance Reform Laws in the Courts and in Congress, The William J. Brennan Lecture in Constitutional Law (December 2001).
20. Julie Roin, Taxation without Coordination (March 2002).
21. Geoffrey R. Stone, Above the Law: Research Methods, Ethics, and the Law of Privilege (March 2002; forthcoming *J. Sociological Methodology* 2002).
22. Cass R. Sunstein, Is There a Constitutional Right to Clone? (March 2002).
23. Emily Buss, Parental Rights (May 2002, forthcoming *Virginia Law Review*).
24. David A. Strauss, Must Like Cases Be Treated Alike? (May 2002).
25. David A. Strauss, The Common Law Genius of the Warren Court (May 2002).
26. Jack Goldsmith and Ryan Goodman, U.S. Civil Litigation and International Terrorism (June 2002).
27. Jack Goldsmith and Cass R. Sunstein, Military Tribunals and Legal Culture: What a Difference Sixty Years Makes (June 2002).
28. Cass R. Sunstein and Adrian Vermeule, Interpretation and Institutions (July 2002).
29. Elizabeth Garrett, Is the Party Over? The Court and the Political Process (August 2002).
30. Cass R. Sunstein, The Rights of Animals: A Very Short Primer (August 2002).
31. Joseph Isenbergh, Activists Vote Twice (November 2002).
32. Julie Roin, Truth in Government: Beyond the Tax Expenditure Budget (November 2002).
33. Cass R. Sunstein, Hazardous Heuristics (November 2002).

34. Cass R. Sunstein, *Conformity and Dissent* (November 2002).
35. Jill Elaine Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education* (December 2002).
36. Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?* (January 2003).
37. Adrian Vermeule, *Mead in the Trenches* (January 2003).
38. Cass R. Sunstein, *Beyond the Precautionary Principle* (January 2003).
39. Adrian Vermeule, *The Constitutional Law of Congressional Procedure* (February 2003).
40. Eric A. Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice* (March 2003).
41. Emily Buss, *Children's Associational Rights? Why Less Is More* (March 2003)
42. Emily Buss, *The Speech Enhancing Effect of Internet Regulation* (March 2003)
43. Cass R. Sunstein and Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron* (May 2003)
44. Elizabeth Garrett, *Legislating Chevron* (April 2003)
45. Eric A. Posner, *Transfer Regulations and Cost-Effectiveness Analysis* (April 2003)
46. Mary Ann Case, *Developing a Taste for Not Being Discriminated Against* (May 2003)
47. Saul Levmore and Kyle Logue, *Insuring against Terrorism—and Crime* (June 2003)
48. Eric Posner and Adrian Vermeule, *Accommodating Emergencies* (September 2003)
49. Adrian Vermeule, *The Judiciary Is a They, Not an It: Two Fallacies of Interpretive Theory* (September 2003)
50. Cass R. Sunstein, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation* (September 2003)
51. Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally* (November 2003)
52. Jenia Iontcheva, *Nationalizing International Criminal Law: The International Criminal Court As a Roving Mixed Court* (January 2004)
53. Lior Jacob Strahilevitz, *The Right to Destroy* (January 2004)
54. Adrian Vermeule, *Submajority Rules (in Legislatures and Elsewhere)* (January 2004)
55. Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism* (January 2004)
56. Catharine A. MacKinnon, *Directions in Sexual Harassment Law: Afterword* (January 2004)
57. Cass R. Sunstein, *Black on Brown* (February 2004)
58. Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence* (February 2004)
59. Bernard E. Harcourt, *You Are Entering a Gay- and Lesbian-Free Zone: On the Radical Dissents of Justice Scalia and Other (Post-) Queers* (February 2004)
60. Adrian Vermeule, *Selection Effects in Constitutional Law* (March 2004)
61. Derek Jinks and David Sloss, *Is the President Bound by the Geneva Conventions?* (July 2004)
62. Derek Jinks and Ryan Goodman, *How to Influence States: Socialization and International Human Rights Law* (March 2004)
63. Eric A. Posner and Alan O. Sykes, *Optimal War and Jus Ad Bellum* (April 2004)
64. Derek Jinks, *Protective Parity and the Law of War* (April 2004)
65. Derek Jinks, *The Declining Significance of POW Status* (April 2004)
66. Bernard E. Harcourt, *Unconstitutional Police Searches and Collective Responsibility* (June 2004)
67. Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars {A Call to Historians}* (June 2004)

68. Jide Nzelibe, *The Uniqueness of Foreign Affairs* (July 2004)
69. Derek Jinks, *Disaggregating "War"* (July 2004)
70. Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act* (August 2004)
71. Eric A. Posner and Cass R. Sunstein, *Dollars and Death* (August 2004)
72. Cass R. Sunstein, *Group Judgments: Deliberation, Statistical Means, and Information Markets* (August 2004)
73. Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law* (September 2004)
74. Elizabeth Emens, *The Sympathetic Discriminator: Mental Illness and the ADA* (September 2004)
75. Adrian Vermeule, *Three Strategies of Interpretation* (October 2004)
76. Cass R. Sunstein, *The Right to Marry* (October 2004)
77. Jill Elaine Hasday, *The Canon of Family Law* (October 2004)
78. Adam M. Samaha, *Litigant Sensitivity in First Amendment Law* (November 2004)
79. Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy* (December 2004)
80. Cass R. Sunstein, *Minimalism at War* (December 2004)
81. Eric A. Posner, *The Decline of the International Court of Justice* (December 2004)
82. Tim Wu, *The Breach Theory of Treaty Enforcement* (February 2005, revised March 2005)
83. Adrian Vermeule, *Libertarian Panics* (February 2005)
84. Eric A. Posner and Adrian Vermeule, *Should Coercive Interrogation Be Legal?* (March 2005)
85. Cass R. Sunstein and Adrian Vermeule, *Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs* (March 2005)
86. Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting* (April 2005)
87. Eric A. Posner, *Political Trials in Domestic and International Law* (April 2005)
88. Cass R. Sunstein, *Irreversible and Catastrophic* (April 2005)
89. Adam B. Cox, *Partisan Fairness and Redistricting Politics* (April 2005, *NYU L. Rev.* 70, #3)
90. Cass R. Sunstein, *Administrative Law Goes to War* (May 2005, *Harvard L. Rev.*, *forthcoming*)
91. Cass R. Sunstein, *Chevron Step Zero* (May 2005)
92. Bernard E. Harcourt, *Policing L.A.'s Skid Row: Crime and Real Estate Development in Downtown Los Angeles [An Experiment in Real Time]* (May 2005)
93. Bernard E. Harcourt and Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment* (May 2005)
94. Bernard E. Harcourt, *Against Prediction: Sentencing, Policing, and Punishing in an Actuarial Age* (May 2005)
95. Philip Hamburger, *The New Censorship: Institutional Review Boards* (May 2005)
96. Eugene Kontorovich, *Disrespecting the "Opinions of Mankind"* (June 2005)
97. Tim Wu, *Intellectual Property, Innovation, and Decision Architectures* (June 2005)
98. Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Commons* (July 2005)
99. Cass R. Sunstein, *Ranking Law Schools: A Market Test?* (July 2005)
100. Mary Anne Case, *Pets or Meat* (August 2005)