SEXUAL AGREEMENTS

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ABSTRACT

Few would find it surprising that an agreement for sex falls outside the bounds of contract law. Prostitution—defined as an exchange of sex for money—has long been a crime, a point that courts often make in declining to enforce agreements between unmarried partners. In fact, courts routinely invalidate contracts when sex forms the basis of a couple's bargain, whether married or not, and whether the sex is explicit or inferred from the relationship itself.

A closer look at the legal treatment of sexual agreements, however, tells a more complicated story. Although courts reject sex as consideration for being "meretricious" or "immoral" and invoke the illegality of prostitution as the reason for this limit, sex not only can form a part of some contracts, it is inherent to the very definition of certain relationships. While courts reject private agreements between spouses regarding sex, they nonetheless deem sex "essential" to the existence of marriage, and they quantify just how much sex matters when considering loss of consortium claims. Moreover, several contemporary developments cast doubt on the proposition that sex, or a perceived similarity to prostitution, must always doom agreements. In the parentage context, for example, legislatures and courts increasingly treat paid surrogacy arrangements as enforceable contracts, rejecting earlier arguments that emphasized the parallels to illegal sex work. Courts have also become more willing to acknowledge parentage agreements that involve sexual conception, and surrogate partner sex therapy and adult entertainment employment have escaped legal sanction. Beyond the incipient recognition of sexual arrangements as legal contracts, contract-based ideas have become salient in contemporary sexual regulation. Modern understandings of crimes like rape and sexual assault emphasize sexual autonomy and make consent and its absence the

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pivotal considerations, displacing earlier elements of force, resistance, gender, and nonmarriage.

This Article juxtaposes the traditional approach to sexual contracts with the emerging convergence of sex and contract. In so doing, this Article argues that what is frustrating couples' contracts, both in and out of marriage, is neither sex, nor prostitution, but rather marriage itself. Given that sex is not actually differentiating the contracts that courts enforce from those they do not and given the various inequities that result from the current system, this Article ends by considering what it would mean to carry the contractual approach to its logical conclusion by recognizing sex itself as subject to contract.

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INTRODUCTION

A recent conversation simmering in the academy and the popular press alike asks whether fairness requires not only the redistribution of wealth but also, provocatively, the redistribution of sex.[1] Such head turning and hypothetical inquiries divert attention from a more fundamental and real-

1. *See* AMIA SRINIVASAN, THE RIGHT TO SEX: FEMINISM IN THE TWENTY-FIRST CENTURY 118–19 (2021). Srinivasan's book recounts how an ironic academic blog post inspired a polemical opinion piece by a conservative columnist for the *New York Times*, which she goes on to critique. *See id.* at 119–22 (responding to Ross Douthat, Opinion, *The Redistribution of Sex*, N.Y. TIMES (May 2, 2018), https://www.nytimes.com/2018/05/02/opinion/incels-sex-robots-redistribution.html?searchResultPosition=1 [https://perma.cc/BG3Y-K3VQ]).

world question about sex, wealth, and fairness: Whether the ordinary rules of redistribution spelled out by contract law should govern agreements that include a sexual component.[2] Case law says no, refusing to recognize as contracts agreements that entail sex in both nonmarital and marital relationships. We challenge the logic of these cases, the fairness of their outcomes, and their consistency with legal developments in other areas. Although our exploration takes us beyond such intimate relationships into domains like surrogacy and adult entertainment and although it certainly has implications for sex work more generally, we center our analysis and our call for change on the prevailing treatment of sex in agreements between nonmarital and marital partners.

It should come as no surprise that ordinary contract rules do not apply to agreements with a sexual component, given that sex is routinely distinguished from comparable human practices and subjected to singular regulation. This "sex exceptionalism"[3] manifests in many legal forms, but criminal laws prohibiting prostitution, defined as an exchange of sexual activity for money,[4] might well provide the paradigmatic illustration.[5]

As numerous commentators have noted, sex exceptionalism often reflects, at bottom, "sex negativity"—a view that sex is so base, dangerous, and morally problematic that the state must work to confine it to narrow,

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2. Discussions of redistribution assume some "natural baseline" for the allocation of resources—an original distribution that does not itself constitute a redistribution. Yet, we might challenge a host of such baselines accepted in law, from the absence of monetary compensation for domestic care work to the notion that the costs of reproductive decisions belong in the private family. *See, e.g.*, Susan Frelich Appleton, *The Forgotten Family Law of* Eisenstadt v. Baird, 28 YALE J.L. & FEMINISM 1, 51 (2016). Beyond assumed baselines, however, contract law and its remedies do redistribute resources (property and wealth), based on the promises and exchanges that parties make.

3. For uses of this term in legal scholarship, see, for example, Susan Ekberg Stiritz & Susan Frelich Appleton, *Sex Therapy in the Age of Viagra: "Money Can't Buy Me Love*", 35 WASH. U. J.L. & POL'Y 363, 383–88 (2011); Aya Gruber, *Sex Exceptionalism in Criminal Law*, 75 STAN. L. REV. (forthcoming 2023) (on file with authors); Jennifer E. Rothman, *Sex Exceptionalism in Intellectual Property*, 23 STAN. L. & POL'Y REV. 119 (2012). *See also* Adrienne D. Davis, *Bad Girls of Art and Law: Abjection, Power, and Sexuality Exceptionalism in (Kara Walker's) Art and (Janet Halley's) Law*, 23 YALE J.L. & FEMINISM 1 (2011) (using "sexuality exceptionalism").

4. *See, e.g.*, Allen v. Kentucky, 997 S.W.2d 483, 486 (Ky. Ct. App. 1999); Patten v. Raddatz, 895 P.2d 633, 637 (Mont. 1995).

5. Additional examples abound, including the singling out of sex offenders for registration and other preventive measures that do not apply even to murderers, today's judicial solicitude for religion-based discrimination against those who deviate from normative sexual conduct, and the persistence of federal funding for abstinence-only sex education in the face of overwhelming evidence of its ineffectiveness. *See, e.g.*, Laura Mansnerus, *For What They Might Do: A Sex Offender Exception to the Constitution*, *in* THE WAR ON SEX 268 (David M. Halperin & Trevor Hoppe, eds. 2017) (singling out of sex offenders); Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969 (2011) (singling out of sex offenders); Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (judicial solicitude for religion-based discrimination in foster care). *Compare* 42 U.S.C. § 710 (section governing "[s]exual risk avoidance education"), *with* Jesseca Boyer, *New Name, Same Harm: Rebranding of Federal Abstinence-Only Programs*, 21 GUTTMACHER POL'Y REV. 11, 11 (2018) (criticizing abstinence-only sex education).

preapproved settings.[6] Even with the contemporary loosening of some traditional strictures, others persist. The criminalization of prostitution again supports our point; it has proven to be both durable and versatile, despite many calls for legalization and regulation.[7] In what could have signaled a shift in the law by according constitutional protection to private consensual LGBTQ sex in *Lawrence v. Texas*, the Supreme Court made clear that prostitution bans lay outside its holding.[8]

Indeed, sex exceptionalism, sex negativity, and pushback against both present challenges for the language we use throughout this Article. Because we focus on civil cases that use the term "prostitution," we employ that word as those cases do, even though the definition in a criminal statute—which the civil cases rarely quote or cite—might differ. Further, because "prostitution" itself epitomizes sex exceptionalism and sex negativity and communicates gendered denigration, authorities supporting decriminalization and destigmatization favor the less disparaging and often more expansive term "sex work."[9] Despite our preference for abandoning the word "prostitution," our analysis requires us to use it, because it appears in civil cases brought to enforce nonmarital contracts and in some of the scholarly literature.[10]

As this explanation of terminology previews, criminalization of prostitution infiltrates civil litigation. The *Restatement First of Contracts* invalidated sex for hire agreements, given that their performance would

6. *See, e.g.*, Rothman, *supra* note 3, at 120; *see also* Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 92 (2014) (challenging "the sex-negative assumptions that distort legal discourse"); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 812–23 (2010) (describing and critiquing the sex-negative legal landscape). Of course, the paradigmatic preapproved setting for sex is marriage, with the implication that marital sex lies outside the market. *But see infra* Part III.

7. *See, e.g.*, JUNO MAC & MOLLY SMITH, REVOLTING PROSTITUTES: THE FIGHT FOR SEX WORKERS' RIGHTS (2018); Adrienne D. Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 CALIF. L. REV. 1195 (2015); I. India Thusi, *Harm, Sex, and Consequences*, 2019 UTAH L. REV. 159 (2019); Noah D. Zatz, *Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution*, 22 SIGNS 277 (1997). Competing reform measures have been introduced in the New York legislature. Cecilia Gentili, Opinion, *This Is What Will Make Sex Work in New York Safer*, N.Y. TIMES (Oct. 17, 2021), https://www.nytimes.com/2021/10/17/opinion/decriminalize-sex-work-new-york.html [https://perma.cc/DR93-JYHC] (contrasting "Stop the Violence in the Sex Trades" bill with the "Sex Trade Survivors Justice and Equality Act" bill and advocating for the former).

8. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

9. *See, e.g.*, Kate Lister, Opinion, *Sex Workers or Prostitutes? Why Words Matter*, INEWS (July 17, 2020, 10:55 AM) https://inews.co.uk/opinion/columnists/sex-workers-prostitutes-words-matter-95447 [https://perma.cc/BZ8C-59NM]. For a more detailed examination of the history of sex work and associated words, see KATE LISTER, A CURIOUS HISTORY OF SEX 7–15, 307–46 (2020) (chapters on the word "whore" and on "sex and money").

10. *See* Zatz, *supra* note 7, at 294.

obviously be criminal.[11] In addition, the *Restatement First* addresses "immoral sex relations," more broadly providing that "[a] bargain in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal . . . ."[12] The *Restatement Second* absorbs these rules into a general invitation for courts to consider public policy so that "[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."[13] Courts have relied on a combination of these approaches, citing prostitution bans or otherwise rejecting sex as "meretricious" or "illicit" when it forms the basis of an exchange between unmarried partners.[14]

Yet the way sex figures into agreements is more complicated than this blanket bar or mere mention of the crime of prostitution suggests. While contracts cannot provide for sex as a matter of stated doctrine, sex does form an important part of certain agreements, which the law explicitly acknowledges. Sex, for example, has long been recognized as an "essential" of the marital relationship; it also provides a foundation for a spousal loss of consortium claim.

Nonetheless, marriage, along with relationships that include sex outside of marriage, appears to set forth outer limits on the ability to contract. Neither married nor unmarried couples can enter into a contract *for* sex. Courts often conflate the provision of sex with the provision of domestic services and end up refusing to recognize both; but sex itself provides a distinct basis for invalidating a contract that merits attention.[15] And, unlike the limit on contracting for domestic services, the limit on contracting for sex has largely escaped critical attention.[16] This inattention persists even

11. RESTATEMENT (FIRST) OF CONTRACTS § 512 (AM. L. INST. 1931) ("A bargain is illegal . . . if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy.").

12. *Id.* § 589.

13. RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. L. INST. 1981). Unlike the *Restatement First*, the *Restatement Second* no longer addresses sex as a separate reason to invalidate a contract; *see also id.* § 179(b) (specifying that a court may derive public policy from "the need to protect some aspect of public welfare").

14. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 112, 116 (Cal. 1976) (in bank); Rabinowitz v. Suvillaga, No. 17 CVS 244, 2019 WL 386853, at *7 (N.C. Super. Ct. Jan. 28, 2019).

15. *See* Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 104–09 (2021) (arguing that courts rely on sex to invalidate contracts where domestic services were rendered).

16. *But see* LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 276–77 (1998) ("[O]nce sexual exchange outside marriage is a better alternative to the negotiated agreement to marry, there will be less need for women to seek refuge in marriage, and marriage itself should change."); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1104–05 (1985) (examining judicial understanding of "meretricious consideration" in nonmarital contracts); Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65 (1998) (invoking justice and gender equity to criticize courts' patterns of enforcing monetary terms of marriage but not nonmonetary terms).

though the consequences of failing to enforce a contract for sex are similar to those for failing to enforce a contract for domestic services: courts ignore the parties' agreed-to terms of exchange. The cases thus designate sex as a realm in which contract cannot enter, a realm that coincides with the contours of an intimate relationship. Accordingly, not allowing contracts in this context reinforces the divisions between family and market[17] and prevents the individual seeking earned or promised property from accessing it.[18] In other words, sex suspends a distribution of property that contract law would sanction if sex were not part of the bargain.

Certainly, critics could take aim at this state of affairs as just one more example of sex exceptionalism or sex negativity.[19] Alternatively, they could use this line of cases to make a point about how public policy is so indeterminate and so hospitable to value judgments that it easily makes room for sex to foil a contract.[20] But these would only be partial observations. A deeper and more careful interrogation of the cases about sexual agreements between nonmarital and marital partners reveals that courts' reliance on the crime of prostitution does not hold up to scrutiny. Further, such reasoning actually goes *against* the grain of other legal developments.

Part I begins by cataloguing courts' reasoning in refusing to recognize sex as the basis for a contract. It first considers unmarried couples, who present courts with ample opportunity to address the question. The stated reason for not upholding contracts in this realm is prostitution—because prostitution is a crime, contract law cannot sanction an explicit sex-for-property exchange. Part I continues by turning to sex within marriage, which is also prohibited as a basis for contract. The reason is no longer prostitution but rather the duties inherent in marriage. Sex is "essential" to the very definition of the marital relationship and constitutes an economically valuable activity, as shown by the cause of action for loss of

17. Viviana Zelizer labels the erection of "distinct arenas for economic relations and intimate relations" as the "separate spheres and hostile worlds" approach. VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 20 (2005). An extensive literature addresses this would-be divide. *See, e.g.*, Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005); Kimberly D. Krawiec, *Markets, Morals, and Limits in the Exchange of Human Eggs*, 13 GEO. J.L. & PUB. POL'Y 349 (2015); Marion Crain & Kimberly D. Krawiec, *For Love or Money? Defining Relationships in Law and Life*, 35 WASH. U. J.L. & POL'Y 1 (2011). *See generally* MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORALITY OF MARKETS (2012).

18. By "property" we mean to include distribution of assets, support awards, and any other economic claims raised by the parties.

19. *See generally* Kaplan, *supra* note 6 (criticizing law's sex negativity but without discussing case law on nonmarital contracts).

20. *See generally* Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163, 209 (1985) (noting inconsistent rulings in cohabitation-agreement cases and criticizing courts' routine reliance on public policy interests "without critically defining those interests").

consortium. Courts thus refuse to allow parties to write around a contract not because contract is prohibited, but rather because the terms of the contract, which include sex, are already set by the state.

Part II then canvasses legal developments that challenge the purported blanket bar on sex in contracts. First, we show how, despite the conventional wisdom, sex and contract legally coexist in several sites, including surrogacy arrangements, other parentage agreements, surrogate partner therapy, and adult entertainment employment. Second, we highlight how sex and contract converge in contemporary criminal law and related regulatory spheres. The central role of consent in distinguishing lawful from unlawful sex has prompted reliance on contract principles and values, unsettling any notion that sex and contract must be incompatible.

Stepping back from the rationales articulated in the nonmarital cases and the challenges posed by other legal developments, Part III questions how courts deploy the prostitution rationale. It argues that fears of condoning prostitution do not in fact determine what will be subject to contract outside of marriage. Nonmarital agreements that clearly entail more than a strict sex-for-property exchange and relationships that fall well outside the boundaries of criminal prohibition nonetheless evoke the limit imposed by prostitution bans. If prostitution is not doing the work of predicting when a contract fails, then what else could be taking place? This analysis reveals that marriage, rather than any stated concern about prostitution, determines the outcome, despite courts' silence or even disclaimer of a marriage-based rationale.[21] That is, sex is not the problem; marriage is, and prostitution serves as a proxy for marriage and its presumed exchanges in the courts' reasoning.

Some reinforcement for this conclusion comes from developing law in the other areas that we consider in Part II. Contracts for gestational surrogacy, parentage of sexually conceived children, surrogate partner therapy, and adult entertainment employment all resemble prostitution in more salient ways than nonmarital cohabitation agreements yet escape invalidation on this basis. At the same time, to conclude that sex is not the problem in contract law, but that marriage is, sets up a clash with fundamental changes in the way that criminal law now approaches sex (notwithstanding prostitution bans). After examining the treatment of sex in these situations, Part III explores the connection between prostitution and marriage made by scholars and, in effect, by the cases that decline to enforce such agreements.

21. Marvin v. Marvin, 557 P.2d 106, 120, 122 n.24 (Cal. 1976) (in bank) (rejecting application of marriage dissolution statute at the end of nonmarital cohabitation and asserting that recognition of nonmarital contracts does not resurrect common law marriage).

Finally, Part IV explores what it would mean to make sex subject to contract. Here, we examine complications and consequences, including the limits of consent-focused regimes, the advantages and difficulties of viewing sex through a contractual lens, and potential remedies for breached agreements in the cases analyzed in Part I. The Article ends with the claim that sex ought to be subject to contract and, at the very least, should not be an uncontroversial reason to invalidate an agreement. This claim follows directly from our conclusion that sex is not doing the work that courts ascribe to it and foils contracts mostly in situations that approximate marriage or that conflict with marriage. We recognize that this argument invites the reconsideration of prostitution bans and even the current approach to adult entertainment contracts. For now, however, we focus on ridding the cases of misleading rationales.

I. SEX CANNOT BE THE BASIS FOR CONTRACT APART FROM MARRIAGE

Courts have occasion to address sex in the context of couples—unmarried and married—who enter into agreements and then litigate enforcement of economic provisions after the relationship ends.[22] For both (the nonmarriage/marriage cases, as we refer to them), sex foils enforcement of the contract. For unwed couples, courts articulate a concern about validating prostitution.[23] For the relatively few cases addressing married couples, courts generally refuse to recognize the agreement on the ground that the state has already written the terms of the contract. At times, this approach treats sex as a preexisting requirement in the marriage contract that the parties cannot alter.[24] At other times, this approach means that parties cannot enter into a contract interpreted to conflict with the way the state has chosen to regulate the marital relationship—for instance, when the parties try to penalize sexual infidelity upon divorce in a no-fault regime.[25] Both outside and within marriage then, courts treat sex as a bar to recognizing and enforcing a private agreement. The result outside of marriage is to prevent an agreed-upon distribution of property between

22. The cases on which this Article focuses explicitly address the presence of sex in determining whether to enforce a contract in nonmarital and marital relationships. The Article does not address all nonmarital cases, nor does it address all divorce cases that involve any sort of agreement. Finally, although our analysis develops against the backdrop of prostitution prohibitions and we examine legal arrangements that we believe resemble prostitution, our target in this Article is not the criminal status of prostitution itself. That topic has produced a rich literature and a notable law reform movement. *See supra* note 7 (citing sources).

23. *Marvin*, 557 P.2d at 116.

24. Favrot v. Barnes, 332 So. 2d 873, 875 (La. Ct. App.) ("The law does not authorize contractual modification of the 'conjugal association' except '(i)n relation to property.'" (citation omitted)), *rev'd on other grounds*, 339 So. 2d. 843 (La. 1976).

25. *See, e.g.*, *In re* Marriage of Cooper, 769 N.W.2d 582, 586–87 (Iowa 2009).

individuals; in marriage, it is generally to prevent the individuals from rewriting the rules of distribution already set forth by law.

A. Sexual Contracts Outside Marriage

The case that still captures the state of the law on nonmarriage today was decided over forty years ago. In *Marvin v. Marvin*, the Supreme Court of California established in no uncertain terms that unmarried couples had economic rights against each other.[26] While the court allowed both contractual and equitable claims to be raised moving forward, the case centrally involved a contract claim.[27] Although considered a watershed opinion, *Marvin* in many ways cemented what courts in California had already held in prior cases.[28] It concluded: "The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses."[29] But contracts "that [] rest upon a consideration of meretricious sexual services" must "fail[]."[30] The reason for this failure is straightforward—a couple cannot contract for sex because "such a contract is, in essence, an agreement for prostitution and unlawful for that reason."[31] The court in *Marvin* observed that nonmarital relationships are, of course, distinct from prostitution and "equat[ing] the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice."[32]

The rule *Marvin* imposed is seemingly clear—contracts are not invalid just because the individuals who entered into them are having sex, but contracts *for* sex are void. Even then, the court held that a contract would fail only if the consideration "was expressly founded upon . . . illicit sexual services."[33] Thus, the mere presence or mention of sexual services in the agreement is not automatically a bar to enforcing the contract—instead, a contract fails "only if sexual acts form an inseparable part of the

26. *Marvin*, 557 P.2d 106.

27. The plaintiff, Michelle Marvin, "sued to enforce a contract under which she was entitled to half the property and to support payments." *Id.* at 110.

28. *See* Ann Lacquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1381 (2001).

29. *Marvin*, 557 P.2d at 113.

30. *Id.*

31. *Id.* at 116.

32. *Id.* at 122.

33. *Id.* at 113. The court explained that this rule was more easily administrable than the rule proposed by the defendant that a contract must fail "if it is 'involved in' or 'made in contemplation of' a nonmarital relationship." *Id.* at 113; *see also id.* at 114 (describing the court's rule as "offer[ing] a far more precise and workable standard than that advocated by defendant").

consideration."[34] Courts should therefore enforce the part of the contract that can be severed from any sexual terms.

Courts in California have followed *Marvin*'s asserted dividing line, upholding contracts as long as they find that they are not based wholly or inseparably on sex. In *Whorton v. Dillingham*, for example, the court enforced an agreement between two unmarried men that expressly included sexual services in exchange for property.[35] The court reasoned, however, that it was possible to sever such services from the rest of the agreement, which had independent consideration. In particular, the services of "chauffeur, bodyguard, secretary, partner and business counselor" provided a separate and adequate basis for the contract.[36] In this way, an agreement that explicitly contemplates sexual services does not as a matter of law invalidate the contract.[37] Only when "sex form[s] an inseparable part of the consideration," as it did in *Taylor v. Fields*, do courts decline to enforce the agreement.[38] There, the court characterized the parties' forty-two-year nonmarital relationship as one of "intimate lovers."[39] While Flossie Taylor alleged that the relevant consideration for the agreement was not furnished by sex, but rather by her activities as "confidante, friend, [and] travel companion" to Leo Fields, the court could not differentiate among them.[40] Indeed, the court found that "acting as a friend, traveling companion or confidante" was indistinguishable from being a "paramour."[41] The whole contract was therefore "unenforceable as based on illegal meretricious consideration."[42]

Other jurisdictions have followed suit both in recognizing contracts between unmarried couples and describing the limit on doing so by referring to prostitution. In *Boland v. Catalano*, the Supreme Court of Connecticut expressly affirmed *Marvin*'s reasoning and explained that recognizing contracts between individuals outside of marriage was in line with the

34. *Id.* at 114.

35. Whorton v. Dillingham, 248 Cal. Rptr. 405, 408 (Ct. App. 1988) ("Unlike the facts of *Marvin*, here the parties' sexual relationship was an express, rather than implied, part of the consideration for their contract.").

36. *Id.* at 410.

37. *Id.*

38. Taylor v. Fields, 224 Cal. Rptr. 186, 189 (Ct. App. 1986).

39. *Id.*

40. *Id.* at 193.

41. *Id.*

42. *Id.* at 194; *see also* Jones v. Daly, 176 Cal. Rptr. 130, 133 (Ct. App. 1981) (holding that "sexual services . . . [were] an inseparable part of the consideration" for agreement); Bergen v. Wood, 18 Cal. Rptr. 2d 75, 79 (Ct. App. 1993) (finding that plaintiff "failed to show any consideration independent of the sexual aspect of the relationship"). For an explanation of the cases that turn on the wifely nature of the services provided in determining whether they can be severed from sex, see Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2169 (2019) (describing the phenomenon of courts declining to "distribute property where one individual engaged in wife-like services, but [doing] so where the services rendered are far afield from those a wife should provide").

current trend of decriminalizing sex outside of marriage.[43] That prostitution is still considered illegal, however, demarcates the types of contracts the court would recognize. "[C]ontemporary mores" have only gone so far—they "decriminalize sexual activities between unmarried consenting adults *not involving prostitution*."[44] As in *Marvin*, the court created a space in which couples who are not married but are having sex can contract, as long as they are not engaged in what the court deems to be prostitution. In *Wilcox v. Trautz*, the court also relied on the increasing acceptability of cohabitation as a reason to recognize contracts between unmarried couples.[45] While courts in Massachusetts once invalidated any contract made in consideration of cohabitation, it explained that "[s]ocial mores regarding cohabitation between unmarried parties ha[d] changed dramatically in recent years . . . ."[46] An express agreement is still invalid, however, "to the extent that it explicitly and inseparably is founded on sexual relations."[47]

The opinion in *Wilcox* is, however, different from the others in that it does not explicitly mention prostitution; instead, it relies on the general proposition that sex itself is illicit. The *Restatement First of Contracts* captured this more sweeping concept in establishing that "illicit sexual intercourse" cannot be subject to contract, either "in whole or in part."[48] The Comments to the rule explain that the prohibition even extends to situations where "the intercourse is not criminal."[49] While the *Restatement Second of Contracts* abandoned that particular rule, and *Marvin* arguably narrowed its reach by allowing the sexual component to be severed from any otherwise valid consideration,[50] jurisdictions continue to follow this wholesale prohibition on sex. In *Poe v. Estate of Levy*, for example, the District Court of Appeal of Florida affirmed an unmarried couple's right to contract, while accepting that sex would invalidate the agreement.[51] Instead of appealing specifically to prostitution, the court in *Poe* set forth "the general rule," citing to the *First Restatement*, that "if the consideration for an agreement

43. Boland v. Catalano, 521 A.2d 142, 145 (Conn. 1987).

44. *Id.* (emphasis added) (citation omitted).

45. *See* Wilcox v. Trautz, 693 N.E.2d 141, 144–45 (Mass. 1998).

46. *Id.* at 144.

47. *Id.* at 145 (citations omitted); *see also* Kozlowski v. Kozlowski, 403 A.2d 902, 908 (N.J. 1979) (affirming *Marvin*'s reasoning and upholding agreements between parties living together "to the extent it is not based on a relationship proscribed by law"), *superseded by statute*, Act of Jan. 18, 2010, ch. 311, 2009 N.J. Sess. Law Serv. 311 (West).

48. RESTATEMENT (FIRST) OF CONTRACTS § 589 (AM. L. INST. 1932).

49. *Id.* cmt. a.

50. Case Comment, *Property Rights upon Termination of Unmarried Cohabitation:* Marvin v. Marvin, 90 HARV. L. REV. 1708, 1713 (1977) ("*Marvin*, while not a major departure from existing practice, limits the discretionary nonenforcement of contracts to those which are inseparably and explicitly founded on sexual services.").

51. Poe v. Est. of Levy, 411 So. 2d 253 (Fla. Dist. Ct. App. 1982).

is illicit sexual intercourse the agreement is unenforceable."[52] But, in keeping with *Marvin*, "the mere fact the parties are not married should not ipso facto preclude the parties from contracting . . . ."[53] That would be prohibited only when the object of the contract is the sexual relationship itself.[54]

These cases show that outside of marriage, courts prevent individuals from contracting for sex. Not a single case interrogates the illegality of sex or the relevance of prostitution in establishing the rights of contract for nonmarital couples. Sex is also likely to remain staunchly off limits in any potential statutory reform. The Uniform Law Commission's Uniform Cohabitants' Economic Remedies Act is illustrative. While the Act seeks to be expansive in recognizing different types of contributions as the basis for an agreement, it explicitly and repeatedly excludes sexual relations from its ambit.[55] The limit on contract established by sex remains, for the most part, unquestioned.

B. Sexual Contracts Within Marriage – Or Marriage Is Not "the timely delivery of a crate of oranges"[56]

Married couples cannot contract for sex. Legal authorities concur that "[i]nterspousal contracts about sex are . . . unenforceable."[57] The reason, however, differs from that invoked for unmarried couples. As an initial matter, courts have considered the question less often.[58] When courts have

52. *Id.* at 256 (citations omitted).

53. *Id.*

54. *Id.* at 256. True, after *Lawrence v. Texas*, 539 U.S. 558 (2003), required states to decriminalize private nonmarital adult sex, one might expect to see a change in the way courts approach nonmarital agreements that include sexual terms. Nonetheless, courts continue to describe sex in such settings as "illicit." *See, e.g.*, Rabinowitz v. Suvillaga, No. 17 CVS 244, 2019 WL 386853 (N.C. Super. Ct. Jan. 28, 2019). One reason might be that "illicit" need not mean "illegal." Another reason could be *Lawrence*'s decision to exempt prostitution from constitutional protection, given that many of the nonmarital agreement cases rely on the prohibition of prostitution. *See Lawrence*, 539 U.S. at 578. *See also* Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon, 880 F.3d 450 (9th Cir.) (declining to extend *Lawrence* to invalidate criminal prohibition of prostitution), *amended by* 881 F.3d 792 (9th Cir. 2018).

55. UNIF. COHABITANTS' ECON. REMEDIES ACT § 2(3)(B) (UNIF. L. COMM'N 2021) (defining contributions to the relationship to "not include sexual relations"), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d021b0e0-682a-c72c-17d2-98d376f01ad8&forceDialog=0 [https://perma.cc/K7AA-JXP3].

56. *In re* Marriage of Cooper, 769 N.W.2d 582, 586 (Iowa 2009).

57. Hasday, *supra* note 17, at 501. Scholars have understood the reason to be lack of consideration. Sex, like domestic services and cohabitation, is a duty set forth by the marriage itself: as such, it "is a promise to do something that the spouse is already obliged to do[,] . . . and there is no consideration for a return promise of money." Silbaugh, *supra* note 16, at 80.

58. There are a number of possible explanations for why, including that marriage already provides a plethora of rights, in contrast to nonmarriage where no legal rights attach by virtue of the

addressed sex in this setting, they invalidate the privately drafted contract not because of a concern over prostitution, but rather because of the duties already inherent in the marital relationship. Instead of refusing to recognize sex because it is illegal, courts decline to uphold contracts for sex within marriage because marriage is understood already to include sex. Similarly, courts refuse to recognize contracts that address extramarital sex, such as those that contain no-adultery provisions, because they would rewrite state rules that exclude considerations of fault in divorce. Together, these cases show that, insofar as sex is concerned, the marriage contract as defined by the state cannot be superseded by a private contract written by the parties. Significantly, this principle does not mean that the exchange cannot take place because of a judgment that marital sex lacks value.[59] In fact, the cause of action for loss of spousal consortium not only reveals the importance of sex in marriage but also expresses its importance in economic terms.

1. The Marriage Contract Written by the State Makes Sex "Essential"

Courts deem sex to be "essential" to marriage. The absence of sex provides one of the few bases for annulling a marriage, which reflects a judicial determination that "a valid marriage cannot be contracted."[60] Of course, individuals can choose to marry and forego sex entirely;[61] but the absence of sex becomes meaningful when the spouses disagree and one of them is seeking exit.[62] Further, although at one time husbands had unfettered

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relationship. Washington is a notable exception to the way states treat nonmarriage; it employs a status-based approach that leads to economic rights and responsibilities for some unmarried couples. *See, e.g.*, Connell v. Francisco, 898 P.2d 831, 834 (Wash. 1995) (in bank) (applying Washington's doctrine of "meretricious relationships"); Olver v. Fowler, 168 P.3d 348, 350 n.1 (Wash. 2007) (in bank) (renaming doctrine governing "'committed intimate relationship[s]'" (citation omitted)). Such approaches, however, require couples to satisfy a series of criteria that are irrelevant for formally married couples. *See Connell*, 898 P.2d at 834; 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, 1666 (1993).

59. Some scholars have interpreted courts' reasoning that sex is a pre-existing duty as tantamount to finding that an agreement involving sex has no consideration. *See, e.g.*, Silbaugh, *supra* note 16, at 80 (explaining that because "[h]ome labor, sex, and cohabitation are considered basic legal duties of marriage" then "there is no consideration for a return promise of money"). Even under this account, the law does not conclude that sex has no independent value.

60. Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 8 (2003) (footnote omitted).

61. *See, e.g.*, Danielle Braff, *From Best Friends to Platonic Spouses*, N.Y. TIMES (May 7, 2021), https://www.nytimes.com/2021/05/01/fashion/weddings/from-best-friends-to-platonic-spouses.html [https://perma.cc/LTZ2-MSKY].

62. *See* Anita Bernstein, *Toward More Parsimony and Transparency in "The Essentials of Marriage"*, 2011 MICH. ST. L. REV. 83, 107 (2011) ("The Essential that pertains to sex will . . . reach the attention of the state only when someone protests."). Accordingly, if both spouses are content with a platonic relationship, or at least do not seek relief from the state, the marriage will continue despite the absence of this "essential" element.

access to their wives, today sex—albeit still inherent in marriage—requires consent for each spousal engagement.[63]

Because sex is an essential attribute of the marriage contract, courts have repeatedly rejected private agreements about sex that the parties might have made.[64] In *Favrot v. Barnes*, the Louisiana Court of Appeal had occasion to consider a premarital agreement that, among other provisions, limited to once a week the sexual relations between husband and wife.[65] In the former husband's appeal from an alimony award, the court rejected his arguments based on the agreement, reasoning that the parties could not by contract alter the "nature of marital obligations," which require satisfying "the reasonable and normal sex desires of each other."[66] In fact, the "abiding sexual relationship" between a couple is what "characterizes a contract as marriage," as opposed to, say, one of "domestic employer-employee, or landlord-tenant."[67] Had the court upheld the agreement limiting the frequency of sex, it would have had to recognize the breach by the former wife, who sought more frequent sexual activity. It would also have prevented her from accessing property otherwise available to her based on the marriage.[68]

In *Mirizio v. Mirizio*, the court faced a mirror image problem: a wife who wanted no sex, at least temporarily.[69] The Court of Appeals of New York declined to enforce a private agreement in a separation action that would have allowed the wife to forego sexual relations until the parties had a religious ceremony in addition to their civil marriage.[70] The court, while sympathetic to the wife's concerns, observed that "recognizing modifications of the marriage contract by private agreement would lead to disruption of that contract and disaster in the attempt to enforce it."[71] That is, the wife was not free to forego sexual relations once civilly married given that the marriage contract required it. Indeed, "the refusal of husband or

63. In other words, marriage no longer serves as a defense to rape or sexual assault. *See, e.g.*, People v. Hillard, 260 Cal. Rptr. 625 (Ct. App. 1989); People v. Liberta, 474 N.E.2d 567 (N.Y. 1984). The requirement of consent, even in marriage, does not change the status of sex as an essential element or alter the availability of annulment when sex is absent.

64. Some scholars characterize the problem as the absence of consideration, based on a preexisting marital duty. *See, e.g.*, Silbaugh, *supra* note 16, at 79–80 ("Home labor, sex, and cohabitation are considered basic legal duties of marriage. A promise to perform them, then, is a promise to do something that the spouse is already obliged to do—it is a pre-existing legal duty, and there is no consideration for a return promise of money.").

65. Favrot v. Barnes, 332 So. 2d 873 (La. Ct. App.), *rev'd on other grounds*, 339 So. 2d 843 (La. 1976). The husband argued that the wife was in violation of the agreement because she "sought coitus thrice daily." *Favrot*, 332 So. 2d. at 875.

66. *Favrot*, 332 So. 2d. at 875 (internal quotation marks omitted).

67. *Id.*

68. *Id.* (allowing alimony award despite breach of premarital agreement).

69. Mirizio v. Mirizio, 150 N.E. 605 (N.Y. 1926).

70. *Id.* at 608–09.

71. *Id.*

wife without any adequate excuse to have ordinary marriage relations with the other party to the contract strikes at the basic obligations springing from the marriage contract . . . ."[72] Paramount to the court were public policy concerns, which it elevated over any "subversive private agreements and personal considerations."[73] The public interest in this case required sex to remain fundamental to the marriage contract, which meant that the court immunized it from any amendment by private agreement.[74]

Courts also prevent parties from agreeing to provisions concerning extramarital sex, based on the public legislative decision to remove fault from the dissolution of marriage. The reason is the same one raised in the prior cases: courts reject agreements that rewrite terms already set forth by the state. In *Diosdado v. Diosdado*, the court refused to enforce a written agreement entered by the parties after the husband had an affair.[75] The agreement imposed a penalty of fifty thousand dollars on the party who "breached the obligation of sexual fidelity . . . ."[76] Because the court understood the agreement to introduce questions of fault in the distribution of property at the end of the relationship, the court declined to enforce it.[77] It reasoned that it would clearly contravene the public policy of removing fault from the termination of a marriage.[78] The Supreme Court of Iowa followed a similar path in refusing to uphold an agreement signed by a philandering husband.[79] After admitting to having an affair and wishing to continue the relationship with his wife, he agreed to a number of conditions that would financially benefit her in the event that the marriage terminated, like paying her for monthly household expenses.[80] The court understood the agreement to have "as a condition precedent the sexual conduct of the parties within the marital relationship."[81] It declined to allow such "key variables" to be subject to private contract and therefore took "sexual

72. *Id.* at 607.

73. *Id.* at 609.

74. The courts in *Favrot* and *Mirizio* decline to recognize agreements that would limit sexual relations between a married couple.

75. Diosdado v. Diosdado, 118 Cal. Rptr. 2d 494, 494–95 (Ct. App. 2002).

76. *Id.* at 496.

77. *Id.*

78. *Id.* at 496–97. The Uniform Premarital and Marital Agreements Act discusses *Diosdado* in comments about "unenforceable terms." UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 10 cmt. (UNIF. LAW COMM'N 2012), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f5d36125-9433-c7d8-28ec-6244f4a316e6&forceDialog=0 [https://perma.cc/4JZA-NP5V]. Note that this section of the Act treats premarital and marital agreements alike, placing the focus on the content of the agreement, rather than its timing. *Id.* § 10.

79. *In re* Marriage of Cooper, 769 N.W.2d 582 (Iowa 2009).

80. *Id.* at 584. The contract specified that he "agreed to pay $2600 a month for household expenses, increased by a percentage of [his] annual raises, to maintain life insurance, retirement accounts, and family health insurance, to provide for the college expenses of their youngest daughter, and to pay one-half of all future retirement payments to [his wife]." *Id.*

81. *Id.* at 586.

fidelity" off the table.[82] In so doing it emphasized both the special and the specific nature of marriage, whose terms the state controls. The matter did not, after all, "involve[] the timely delivery of a crate of oranges."[83]

Both *Restatements of Contracts* similarly recognize marriage as a distinct category for purposes of contracting and prohibit the enforcement of a contract that "would change some essential incident of the marital relationship in a way detrimental to the public interest in the marriage relationship."[84] The *Restatement First* considered illegal any "bargain between married persons or persons contemplating marriage to change the essential incidents of marriage . . . ."[85] It explicitly identified sex as one such essential incident: the first Illustration following the rule explained that any bargain to forego sexual intercourse between "A and B who are about to marry," would be illegal.[86] The *Restatement Second* also states that changing an essential incident of marriage "in a way detrimental to the public interest" violates public policy.[87] It no longer identifies sex as a discrete barrier, however.[88]

Notably, while prostitution marks the outer limit of contract law for unmarried couples, marriage itself marks the outer limit for married couples. Courts do not prohibit the exchange of sex for property in the latter situation, but rather hold that the state-prescribed marriage contract alone can dictate the precise terms.

2. Sex Has Value Within Marriage

As we have seen, sex defines the marital relationship. As an "essential" of marriage, sex holds specific property-related consequences. First, marriage, which presupposes sex, produces economic consequences upon dissolution. Second, sex functions as the basis of a claim to property within marriage, made evident in the tort of loss of consortium. This cause of action allows one spouse to recover damages from a tortfeasor whose intentional or negligent conduct injured the other and thereby impaired the marital

82. *Id.*
83. *Id.*
84. RESTATEMENT (SECOND) OF CONTRACTS § 190 (AM. L. INST. 1981) ("Promise Detrimental to Marital Relationship").
85. RESTATEMENT (FIRST) OF CONTRACTS § 587 (AM. L. INST. 1932) ("Bargain to Change Essential Obligations of Marriage").
86. *Id.* (Illustrations).
87. RESTATEMENT (SECOND) OF CONTRACTS §190. It softens the rule for separation agreements, however. *Id.* cmt. b.
88. *Id.* cmt. a (identifying support and child custody as examples of incidents that cannot be modified).

relationship, including its sexual aspects.[89] Thus, sex is not only essential to the marital contract, but it also has quantifiable value when it takes place in that setting.

Loss of consortium claims illustrate the proposition that sex is both essential to marriage and has economic value—in short, that sex can lead to property. The origins of the claim are deeply gendered. At common law, only husbands used to be able to claim loss of consortium given that only wives had the duty to provide services.[90] As family law began to abandon its reliance on gender-based roles, the ability to raise a consortium claim became gender-neutral.[91] Rather than achieving equality by removing services, including sex, from tort claims altogether, courts expanded the class of individuals who could sue for loss of consortium, including wives in addition to husbands as proper plaintiffs.[92] In so doing, courts reaffirmed the economic value of sex, which individuals can assert only in marriage proper.[93]

As is evident from the history of the claim, loss of consortium encompasses more than sex and can cover other services, along with support, and society, the last of which is "broader than loss of sexual relations" and "includes . . . love, companionship, and affection . . . ."[94] Sex,

89. *See, e.g.*, Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669 (Cal. 1974) (in bank); *see also* RESTATEMENT (SECOND) OF TORTS § 693 (AM L. INST. 1977); RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48A (AM. L. INST., Tentative Draft No. 1, 2022).

90. John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 949 (2000) ("The husband/father, as legal and social ruler of the family, held the cause of action.").

91. *Id.* at 950.

92. Bernstein, *supra* note 62, at 96. This category should now include same-sex couples who are married. *See* Mueller v. Tepler, 95 A.3d 1011, 1023–24 (Conn. 2014) ("expand[ing] the common-law claim for loss of consortium to members of couples who were not married when the tortious conduct occurred, but who would have been married if the marriage had not been barred by state law" and noting that "society has come to accept the view that committed same sex couples who wish to marry are entitled to the same social and legal recognition as committed opposite sex couples who wish to marry" (footnotes omitted).

93. Culhane, *supra* note 90, at 918, 963 (describing the difficulty that "[u]nmarried opposite-sex couples have typically been unable to recover" in the relational torts of loss of consortium, negligent infliction of emotional distress, and wrongful death and noting that, at a time when same-sex marriage was not yet available in every state, "[no] loss of consortium cases involving same-sex couples have been found"). Same-sex couples have since brought loss of consortium claims, and the analysis continues to focus on marriage and whether they could have married when the tort occurred. *See, e.g.*, Ferry v. De Longhi America Inc., 276 F. Supp. 3d 940, 949 (N.D. Cal. 2017) (reasoning that "the choice to marry must have existed—not at the time a couple first would have wed—but at the time of the operative event giving rise to the legal claim or right being advanced" (citations omitted)). That said, there are some courts, very few, that have allowed unmarried couples to bring a loss of consortium claim. *See* Steven Schaus, Wrongs to Us 10 (Feb. 2022) (unpublished manuscript) (on file with author) (identifying two courts that have done so, one being the Supreme Court of New Mexico, the other a district court in California whose approach was later rejected, and arguing for a more general extension of loss of consortium to couples in marriage-like relationships).

94. Broussard v. Romero, 691 So. 2d 1265, 1273 (La. Ct. App. 1997) (quoting Rowe v. State

however, is a distinct basis for which a loss of consortium claim can be pled and damages awarded. The decisions addressing loss of consortium not only acknowledge the importance of sex as a part of the marital relation, but also consider the details of the couple's sexual interactions in order to determine their value.[95]

Courts consider the subjective importance of sex to married life in valuing a loss of consortium claim. In *Thill v. Modern Erecting Co.*, the court upheld an award of one hundred thousand dollars for the wife whose husband suffered paraplegia while working in construction.[96] The court recounted that, as a teenager, the wife had joined a convent in the hopes of becoming a nun, a calling she abandoned after a few years.[97] At the age of twenty-three, she married her husband and proceeded to have five children with him by the age of thirty.[98] The court understood these tandem decisions—the refusal of a monastic life paired with her decision to begin a family—as evidence that she was "a woman in whom the current of earthly and personal life rang too strong to permit her to lead a cloistered life of spirituality."[99] The court thus upheld the "liberal" award of damages, given that it would help redress the "very aspect of life" she had chosen but lost as a consequence of the defendant's tortious injury of her husband.[100]

The court in *Doe v. Raezer* went deeper into the couple's sexual relations and considered the specific ways in which the married couple could no longer be sexually intimate.[101] The husband had undergone a botched circumcision, causing him to experience pain and bleeding for over a year.[102] In upholding the award of damages, the court relied on testimony that recounted their sex life prior to the operation, the lack of mutual satisfaction since then, and the sexual positions they had attempted unsuccessfully in the process.[103] The court affirmed the initial jury award of seven hundred fifty thousand dollars to the wife for loss of consortium,

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Farm Mut. Auto. Ins. Co., 670 So. 2d 718, 732 (La. Ct. App. 1996)) (further defining services as "the uncompensated work around the house or educational help with the children" and support as "the lost family income that would go to support the uninjured spouse" (quoting *Rowe*, 670 So. 2d at 732)). This is not to say that all courts are able to properly value such services, only that it is an explicit aim of the doctrine to provide compensation for services, support, and sex.

95. *See* Thill v. Modern Erecting Co., 193 N.W.2d 298, 301 (Minn. 1971) (relying on trial judge's statements noting "the importance of the intimate aspects of married life to the plaintiff" in affirming the damages awarded by jury) (quotation marks omitted)).

96. *Id.* at 299.

97. *Id.* at 301.

98. *Id.*

99. *Id.* (quotation marks omitted).

100. *Id.* at 300–01 (quotation marks omitted).

101. Doe v. Raezer, 664 A.2d 102 (Pa. Super. Ct. 1995).

102. *Id.* at 103–04 (also noting that after the first surgery the husband's penis was four inches shorter than before and he could not ejaculate).

103. *Id.* at 106–07.

reasoning that it was not excessive in light of the extent of the operation's impact on their sex life.[104] Moreover, the opinion acknowledged the importance of sex to the relationship as a whole, explaining that the award recognized the "dreadful and traumatic impact on the life of the family of Mr. and Mrs. Doe."[105]

That sex is an "essential" of marriage and subject to a searching evaluation and valuation process helps reveal how law is not overly concerned with intermingling sex and property; its central focus instead is anchoring sex and property *to* marriage, as defined by the state.

II. THE CONVERGENCE OF SEX AND CONTRACT

The apparent blanket rule that private sexual agreements must fail because they either amount to illegal prostitution contracts or contravene the state marriage contract contrasts sharply with several recent legal developments depicting the convergence and compatibility of sex and contract. This Part first examines agreements that escape invalidation even though a court could plausibly invoke prostitution prohibitions or the marriage contract to reject them. It then turns to contemporary criminal prohibitions and related regulations of nonconsensual sex, where sex law and contract law increasingly intertwine.

A. Gestational Surrogacy: Sex-Adjacent Agreements

Parties to surrogacy arrangements collaborate in the production of a child. They do not agree to engage in sex as we usually use that term—but they come close. Such arrangements entail an exchange of payment for bodily services, specifically the use of the reproductive organs of the individual who will carry a pregnancy for the intended parent(s). In addition, surrogacy agreements often include clauses requiring the suspension of sexual activities for some period of time.

Despite the absence of sex between the parties, the parallels to prostitution once led some to place surrogacy agreements alongside nonmarital sexual agreements, with both viewed as outside the bounds of

104. *Id.* at 104, 109. For an analysis of cases in which female plaintiffs have recovered damages in tort for their own injuries that impaired sexual enjoyment, see Susan Frelich Appleton, *Sex-Positive Feminism's Values in Search of the Law of Pleasure*, *in* THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES (Deborah L. Brake, Martha Chamallas & Verna Williams, eds., forthcoming 2022) (section on tort and antidiscrimination law); *see also* Susan Frelich Appleton, *Toward a "Culturally Cliterate" Family Law*, 23 BERKELEY J. GENDER L. & JUST. 267, 324–25 (2008) (citing the few medical malpractice claims seeking to recover for obstetrical injuries that impaired sexual enjoyment).

105. *Raezer*, 664 A.2d at 108.

contract law.[106] Yet, rapid change has characterized surrogacy, with such arrangements now widely accepted as valid and largely enforceable contracts. Although surrogacy agreements might be only "sex adjacent," their trajectory from presumed illegality to legitimacy is telling.

Surrogacy as a modern practice of assisted reproduction made its formal debut in 1976, when Michigan attorney Noel Keane negotiated and drafted the first such agreement.[107] Touted as a complement to the longstanding use of donor insemination for married couples with an infertile husband, surrogacy promised the ability to create a family for couples with a reproductively challenged wife.[108] Consistent with this equivalence, surrogates would receive compensation for their contributions, just as sperm "donors" routinely did for theirs.

At this time, "surrogacy" meant what we call today "traditional surrogacy," "full surrogacy," or "genetic surrogacy"—an arrangement in which a woman is artificially inseminated with the sperm of a man who with his spouse intend to serve as the child's parents. Thus, the "surrogate" provides both gestation and genes—or is the child's mother, as some would argue. Accordingly, such arrangements contemplated that the surrogate would surrender parental rights and the intended mother would adopt the child, once born.

In its early days, the practice sparked vigorous debates, including sharp divisions among feminist theorists. The high-profile trial and subsequent appeal in *Matter of Baby M*[109] amplified and intensified the controversies. The litigation, which began in the mid-1980s, pitted William Stern, the genetic and intended father, and Elizabeth Stern, the intended mother, against Mary Beth Whitehead, the surrogate who refused to surrender the child, despite her prior agreement to do so. Although the Sterns prevailed in the trial court, which emphasized the similarity to donor insemination and made the issue a matter of gender equality, the New Jersey Supreme Court took a much more skeptical approach to "a contract that purports to provide a new way of bringing children into a family."[110] Specifically, the court held that the surrogacy contract, with its ten thousand dollar fee, conflicted with principles of adoption law, including the prohibition on the use of money in

106. CAROLE PATEMAN, THE SEXUAL CONTRACT 209–12 (1988). *See also, e.g.*, SOPHIE LEWIS, FULL SURROGACY NOW: FEMINISM AGAINST FAMILY 42 (2019) ("It seems clear that surrogates and their allies have much to learn from sex workers' struggle for recognition and decriminalization."); MARGARET JANE RADIN, CONTESTED COMMODITIES 148 (1996) (joining analyses of prostitution and surrogacy and observing that "paid surrogacy within the current gender structure may symbolize that women are fungible babymakers for men").

107. *See* Lawrence van Gelder, *Noel Keane, 58, Lawyer in Surrogate Mother Cases, Is Dead*, N.Y. TIMES, Jan. 28, 1997, at B8.

108. Of course, at the time heterosexual and married couples dominated the conversation.

109. 537 A.2d 1227 (N.J. 1988).

110. *Id.* at 1234.

adoptions.[111] The court also called out the agreement's inconsistency with public policies that attempt to keep together children with "both of their natural parents."[112] While leaving room for unpaid surrogacy by willing parties and recognizing William Stern as the child's father, the court voided the involuntary termination of Whitehead's parental rights, and it found that nonenforcement of the contract worked no violation of the Sterns' constitutional rights. In effect, the court held paid surrogacy to be illegal, and it rejected enforcement of surrogacy agreements. But, based on the testimony of eleven experts, the court determined that primary custody with the Sterns would serve the child's best interests.

Despite the court's focus on the child and on parental rights, the conversation that the case generated included much more. One prominent argument from the feminist antisurrogacy camp likened the practice to prostitution, inferring from the comparison that surrogacy should be banned. For example, writing before the state supreme court rendered its decision in *Baby M*, Carole Pateman criticized the practice by emphasizing the sale of bodily services performed by women:

> From the standpoint of contract, talk of baby-selling reveals that surrogacy is misunderstood in exactly the same way that prostitution is misunderstood. A prostitute does not sell her body, she sells sexual services. In the surrogacy contract, there is no question of a baby being sold, merely a service. . . . [T]he contract is for the use of the property a woman owns in her uterus.[113]

Whatever force the prostitution-surrogacy parallel had in the *Baby M* era, it becomes even more compelling today. Today, gestational surrogacy arrangements have eclipsed traditional or full surrogacy. In this variation, the surrogate serves solely as a "gestational carrier" who provides no genetic material but only pregnancy services. Ova come from the intended mother or a donor. Although the separation of genes and gestation requires use of in vitro fertilization (IVF), in turn increasing invasiveness for the individual supplying the ova and costs for the intended parents, these arrangements now account for most of the practice, largely because of the support they have received from courts and legislatures. Many courts enforce such agreements by applying a doctrine of intent-based parentage,

111. *Id.* at 1240.

112. *Id.* at 1247.

113. PATEMAN, *supra* note 106, at 212. *See also, e.g.*, Joan Heifetz Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REFORM 865, 893 (1985) ("The payments are not to purchase a child, but to compensate for personal services.").

even over the objection of a reneging surrogate.[114] That is, courts determine who is the child's parent based on the parties' intent at the time they entered the gestational surrogacy agreement. Further, twenty-two states now statutorily authorize gestational surrogacy, with nineteen of these states permitting compensation therefor.[115] Indeed, gestational surrogacy agreements constitute enforceable parentage contracts even where traditional surrogacy agreements do not. Yet, if prostitution parallels doom nonmarital contracts, why do surrogacy contracts produce such different legal responses?

Apart from the prostitution analogy, based on the sale of services and use of the body, one would expect surrogacy arrangements to raise legal problems for a second reason. Such agreements often include clauses in which the gestational carrier agrees to abstain from sexual intercourse, either at the initiation of the pregnancy or during the third trimester or at both times.[116] Not only do these clauses specify an exchange of sex (foregoing intercourse) for payment; for carriers with spouses, these clauses also necessarily conflict with the state-formulated marriage contract, which makes sex an essential element.[117]

Several reasons might explain the growing acceptance and legitimacy of paid gestational surrogacy as a form of reproductive assistance despite the prostitution analogy. Sexual autonomy, an aspect of bodily autonomy, has emerged as the central value in the modern regulation of sex,[118] and such autonomy necessarily raises questions whether antisurrogacy laws reflect unwarranted paternalism. (Of course, prohibitions on prostitution raise similar questions.[119]) Medicalization, necessarily entailed by gestational surrogacy's reliance on IVF, likely plays a role, presenting such arrangements as a treatment for the "disease" of infertility, with physicians

114. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); P.M. v. T.B., 907 N.W.2d 522 (Iowa 2018); *see also* Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIF. L. REV. 401, 474–82 (2021); Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV. 1591 (2020).

115. Joslin, *supra* note 114, at 464–73.

116. *Id.* at 464–82; Rebouché, *supra* note 114, at 1611–12; Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 LAW & SOC'Y REV. 143, 157 (2015) (table). Occasionally, inadvertent sexual conception with the surrogate's husband has prevented conception with the intended father's sperm. *See, e.g.*, Stiver v. Parker, 975 F.2d 261, 263 (6th Cir. 1992). Even if a no-sex clause for a married surrogate has not been challenged directly, its mere inclusion in the agreement has not invalidated the contract or required severance.

117. Here, a third party is requesting that the individuals forego sex, which differentiates this situation from the cases that involve the individuals in the marital relationship. Even in the case of extramarital sex, where a third party is implicated, the contract only reaches the conduct of the individuals to the marriage. That said, these agreements directly interfere with sex within marriage, which courts have said is nonnegotiable in no uncertain terms. *See supra* Section I.B.1.

118. *See infra* Section II.C.

119. *See generally* Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

and expert technicians as the principal actors.[120] Over time, once-experimental reproductive interventions that initially evoked fear and condemnation often eventually became routine practices.[121] In addition, surrogacy's very traditional goals might help explain its absorption into family law and mainstream culture. It allows the intended mother to fulfill her conventional gender role, and it serves patriarchy by facilitating genetic fatherhood.[122]

However, more recently, some of the most successful advocates for legalizing paid surrogacy have emphasized its potential to push beyond traditional roles by helping those once excluded from family law: gay male couples lobbying for full marriage equality, including having and parenting marital children.[123] Law reform in New York stands out as a case in point. LGBTQ activists had long pressed for such course correction, with support from then-Governor Andrew Cuomo, who launched the "Love Makes a Family" campaign to advocate for legalized gestational surrogacy.[124] Despite a surrogacy prohibition enacted in the wake of *Baby M*, in 2020 New York authorized paid gestational surrogacy, with a statutory scheme that became effective in February 2021.[125]

B. Contracts with Significant Sexual Components: Sex in Contracts

As surrogacy's evolving story demonstrates, moral opposition and legal rejection have given way to widespread legitimacy. Despite the compelling parallels to prohibited sex work, gestational surrogacy in particular now generates contracts not only recognized by law but also enforceable by specific performance.[126] Surrogacy is worth considering not only because

120. *See* Hollinger, *supra* note 113, at 893. One can find similar emphasis on physicians in the developing legitimacy of other reproductive interventions. *See, e.g.*, Susan Frelich Appleton, *Doctors, Patients, and the Constitution: A Theoretical Analysis of the Physician's Role in Private Reproductive Decisions*, 63 WASH. U. L.Q. 183 (1985) (abortion); Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1079–83 (2002) (donor insemination). Other intermediaries, including surrogacy attorneys and brokers, also play important parts. *See, e.g.*, Carol Sanger, *Developing Markets in Baby-Making:* In the Matter of Baby M, 30 HARV. J.L. & GENDER 67 (2007).

121. *See generally, e.g.*, Lifchez v. Hartigan, 735 F. Supp. 1361 (N.D. Ill. 1990).

122. *See* PATEMAN, *supra* note 106, at 214; RADIN, *supra* note 106, at 141; *see also* Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995).

123. *See generally* Symposium, *Compensated Surrogacy in the Age of* Windsor, 89 WASH. L. REV. 1069 (2014); *cf.* Michael Boucai*, Is Assisted Reproduction an LGBT Right?*, 2016 WIS. L. REV. 1065, 1070–71 (2016) (rejecting biogeneticism and "[e]xposing and opposing this ideology" in the context of assisted reproductive technology and discussions of LGBT parenthood).

124. *"Love Makes a Family" Campaign Advocates for Legalized Surrogacy in New York*, CNYCENTRAL (Feb. 11, 2020), https://cnycentral.com/news/local/love-makes-a-family-campaign-advocates-for-legalized-surrogacy-in-new-york [https://perma.cc/536G-8BC3]; *see also* David Kaufman, *The Right to a Baby?*, N.Y. TIMES, July 23, 2020, at D1.

125. N.Y. FAM. CT. ACT §§ 581–401, 581–402 (McKinney 2021).

126. *See supra* note 114 (citing examples).

of these parallels but also because it has rapidly become so well established in case law and statutes. Yet, if one is tempted to dismiss surrogacy's relevance because such agreements are merely "sex adjacent," then other agreements with significant sexual components become more salient. These include some parentage agreements, sexual partner therapy, and adult entertainment employment.

1. Parentage Agreements for Sexually Conceived Children

According to established doctrine, intent and agreement can determine the parentage of a child born of donor insemination, gestational surrogacy, and other forms of nonsexual reproduction,[127] but not one born of sexual reproduction. This binary, which turns on the means of conception, makes sex versus its absence the determinative variable in the validity of agreements departing from genetic parentage.[128] The Uniform Parentage Act explicitly embraces the binary, stating that its Article 7 on Assisted Reproduction, which allows parentage agreements and offers nonparentage for gamete donors, "does not apply to the birth of a child conceived by sexual intercourse."[129]

In contrast to the rules for nonsexual conception—which allow genetic contributors to contract out of parental duties although the resulting child will have only one parent instead of the normative pair and thus pose risks to family law's efforts to maintain dependency as a private responsibility[130]—for children conceived sexually, a principle of strict genetic liability has ordinarily governed. This is so even in cases in which the party seeking to avoid parentage was a victim of statutory rape,

127. *See, e.g.*, Frazier v. Goudschaal, 295 P.3d 542, 558 (Kan. 2013); S.B. v. A.C.C., 61 N.E.3d 488, 500–01 (N.Y. 2016); MARTHA M. ERTMAN, LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES 32 (2015).

128. *See generally* Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 FAM. L.Q. 93 (2015); Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617 (2016).

129. UNIF. PARENTAGE ACT § 701 (UNIF. L. COMM'N 2017), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e4a82c2a-f7cc-b33e-ed68-47ba88c36d92&forceDialog=0 [https://perma.cc/9USY-WXZE].

130. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 44, 108–109, 208 (2004); *see also* Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 370–76 (2012).

contraceptive fraud, or "purloined sperm."[131] As one court has put it, emphasizing the gendered context in which the issue typically arises[132]:

> Child support has long been a tax fathers have had to pay in Western civilization. For reasons of child welfare and social utility, if not for moral reasons, the biological relationship between a father and his offspring—even if unwanted and unacknowledged—remains constitutionally sufficient to support paternity tests and child support requirements.[133]

Or, as another wrote more succinctly, rejecting an argument for agreement-based nonparentage: "[T]here is no such thing as 'artificial insemination by intercourse' . . . ."[134] In effect, then, child support is a tax on sex. This traditional approach to parentage agreements parallels what we have seen elsewhere: As with nonmarital agreements, sex prevents recognition and enforcement. Alternatively, we might understand the rules for sexual procreation and its economic consequences as a "sexual contract" written by the state,[135] similar to the marriage contract written by the state.[136]

And yet, "reproductive binarism," as Courtney Cahill calls the contrasting rules for sexual and nonsexual procreation,[137] has become more vulnerable than ever before. Cahill not only challenges the underlying assumptions, for example, that sexual reproduction is intimate while nonsexual reproduction is not,[138] but she also contends that the Supreme Court's recognition of same-sex couples' right to marry has put sexual and nonsexual reproduction on a constitutional par meriting the same legal treatment.[139] She would ground parentage in intent, as formally

131. For example, in one case, the defendant alleged that the mother surreptitiously removed his ejaculate from a condom following oral sex and then inseminated herself, but the court nonetheless ordered him to pay child support for the resulting child. State v. Frisard, 694 So. 2d 1032 (La. Ct. App. 1997). *See, e.g.*, Michael J. Higdon, *Fatherhood by Conscription: Nonconsensual Insemination and the Duty of Child Support*, 46 GA. L. REV. 407 (2012); Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J.L. & PUB. POL'Y 29, 52, 55 (2003) (using the term "purloined sperm").

132. These suits seek child support from biological fathers. *See, e.g.*, Dubay v. Wells, 506 F.3d 422 (6th Cir. 2007) (unsuccessful challenge in case dubbed "Roe v. Wade for men"); Wallis v. Smith, 22 P.3d 682 (N.M. Ct. App. 2001).

133. N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004).

134. Straub v. B.M.T., 645 N.E.2d 597, 601 (Ind. 1994) (quoting Straub, the biological father).

135. *But see* PATEMAN, *supra* note 106, at 1 (using the term "sexual contract" to theorize about "political right as *patriarchal right* or sex-right, [reflecting] the power that men exercise over women").

136. *See, e.g.*, *In re* Paternity of M.F., 938 N.E.2d 1256 (Ind. Ct. App. 2010).

137. *See* Cahill, *supra* note 128, at 619.

138. *See also, e.g.*, Akhil Sharma, *Imagining Ziggy: A Passage to Parenthood*, NEW YORKER, Jan. 31, 2022, at 24, 26, https://www.newyorker.com/magazine/2022/01/31/a-passage-to-parenthood [https://perma.cc/4S9L-7DJ6] (reflecting, as a prospective father, on the attraction elicited by some egg donor profiles that he reviewed, "feel[ing] confused by [such] desire[,]" and describing the attraction as "creepy and vaguely incestuous").

139. Cahill, *supra* note 128, at 671–76.

documented, regardless of the means of conception.[140] In other words, she would explicitly look to contract law.[141]

In addition to the scholarly pushback like Cahill's, a few judicial decisions have started to depart from the binary, treating the parentage of sexually conceived children just as they would treat parentage of children conceived with medical assistance. *Dawn M. v. Michael M.*,[142] a recent case from the New York Supreme Court for Suffolk County, provides a vivid illustration, defying family law's traditional principles and norms and perhaps revealing a leading edge in the field's continuing evolution. Dawn and Michael, a married different-sex couple, encountered fertility problems that alternative insemination failed to address.[143] Dawn developed a friendship with another woman, Audria, who moved into an apartment downstairs.[144] After Audria and her boyfriend broke up, Dawn, Michael, and Audria became a polyamorous "throuple," "engag[ing] in intimate relations" and ultimately deciding to start a family together.[145] As the opinion explains,

> Thereafter, the parties and Audria decided they would try to conceive a child naturally by [Michael] and Audria engaging in unprotected sexual relations. The credible evidence establishes that it was agreed, before a child was conceived, that [Dawn], Audria and [Michael] would all raise the child together as parents.[146]

Almost two years after the child, J.M., was born from this arrangement, Dawn, Audria, and J.M. moved elsewhere together, and Dawn filed a petition to dissolve her marriage to Michael.[147] In the "tri-custody"[148] case that followed, the court honored the parentage agreement, invoking estoppel and emphasizing the bond that J.M. had developed with all three adults as a result of the agreement.[149] It therefore assigned each of the three adults time with the child.[150]

The opinion challenges family law norms and assumptions in several pertinent ways. First, the child's conception via sex did not prompt the court

140. *Id.* at 685–90.
141. *Id.* at 690 ("If the law permits paternity waivers in the alternative reproductive context, then it ought to permit them as well in the sexual reproductive context, at least where the parties have a duly executed contract to that effect.").
142. Dawn M. v. Michael M., 47 N.Y.S.3d 898 (Sup. Ct. 2017).
143. *Id.* at 900.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 899.
149. *Id.* at 903.
150. *Id.*

to question—much less to invalidate—the underlying parentage agreement.[151] Second, the polyamorous nature of the sexual relationship gave the court no apparent pause, for public policy or other reasons.

No doubt, the court's assessment of J.M.'s best interests, including his bond with all three adults, figured prominently in the court's analysis. Yet, even if such considerations proved determinative, the case shows that policy considerations centered on children can override policy considerations centered on sex—in turn reminding us that courts routinely balance and prioritize one public policy over another. Accordingly, *Dawn M.* provides one glimpse of how agreements in which sex (here, in a nonnormative sexual relationship) is a nonseverable element might lead to enforceable legal claims.[152]

A Colorado case comes close to reaching a similar result, holding that the biological father is not the legal father of a sexually conceived child when the mother's partner held herself out as the child's second parent.[153] Although the partner's parentage rested on the "holding out" provision of the state statute, rather than the agreement that the biological parents had made,[154] the court stated unequivocally that the child's "method of conception does not limit" the court's ability to determine that the genetic father is not a parent and that the mother's partner is the child's presumptive mother.[155] In effect, this is a case of "artificial insemination by intercourse."[156]

In contrast to the situation in the United States, where courts implementing parentage agreements for sexually conceived children have had to work with ill-fitting statutes and unsupportive precedent, Ontario, Canada, has enacted legislation explicitly disavowing the relevance of the means of conception. The 2016 statutory reforms, designed to eliminate discrimination against LGBTQ individuals, recognize "parents as equal

151. *See supra* text accompanying note 146 (quoting court's language about the parties' agreement).

152. *See infra* Part IV (expanding on this point and analyzing how sexual contracts can be interpreted and enforced).

153. *In re* Parental Resps. of A.R.L., 318 P.3d 581, 586 (Colo. App. 2013).

154. The court's findings stated that after two women, Havens and Limberis, agreed to have a child to rear together and alternative insemination of Havens did not succeed in creating a pregnancy, "Marc Bolt . . . agreed to inseminate her through sexual intercourse. Neither Havens nor Bolt revealed their sexual encounter to Limberis. Havens later conceived." *Id.* at 582.

155. *Id.* at 588.

156. *See supra* note 134 and accompanying text. Similarly, a recent Massachusetts case invokes the state's precedents on surrogacy, guardianship, and termination of parental rights to analyze an informal arrangement in which one couple agreed to conceive a child sexually for another couple to parent and rear. Guardianship of Keanu, 174 N.E.3d 1228, 1237–39 (Mass. App. Ct. 2021), *appeal denied*, 182 N.E.3d 947 (Mass. 2022) (Table).

under Ontario law, regardless of identity or *means of conception*."[157] Indeed, statutory parentage provisions are "deemed not to apply to a person whose sperm is used to conceive a child through sexual intercourse if, before the child is conceived, the person and the intended birth parent agree in writing that the person does not intend to be a parent of the child."[158] Relying on the statutes, a recent case upheld a preconception agreement that the donor-by-intercourse would not be recognized as a legal parent, rejecting the mother's claim for child support from him.[159]

Investigating on the ground practices, we find reports asserting the frequent use of "natural insemination"[160] and touting "sex with strangers" as "the new artificial insemination."[161] Coverage in the popular press explicitly compares the practice to prostitution, noting that as a descriptive matter both entail transactional sex with strangers, yet only one is "free and legal."[162]

In sum, cracks are emerging in the regime in which the validity of a parentage agreement must turn on the means of the child's conception, with sexual conception necessarily dooming claims for recognition or enforcement. Law's longstanding rhetoric about protecting children's interests helps explain some of these developments. Even so, these developments show that sex and contract are not invariably incompatible.

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157. Bill Shanks, *Sperm Donor Conceives a Child by Sexual Intercourse*, CHEADLES LLP, https://cheadles.com/family-law/sperm-donor-conceives-child-sexual-intercourse/ [https://perma.cc/A83L-3DKZ] (emphasis added).

158. Children's Law Reform Act, R.S.O. 1990, c. C.12 (Can.) (quoted in E.K. v. N.B., 2018 ONCJ 634 (2018)).

159. R. (M.R.) v. M. (J.), [2017] ONSC 2655 (Can. Ont. Sup. Ct. J.). The parties entered an oral preconception agreement, which they reduced to writing after the child's birth.

160. *See, e.g.*, Elizabeth Picciuto, *Have Sperm, Will Travel: The 'Natural Inseminators' Helping Women Avoid the Sperm Bank*, DAILY BEAST (Apr. 14, 2017, 2:23 PM), https://www.thedailybeast.com/have-sperm-will-travel-the-natural-inseminators-helping-women-avoid-the-sperm-bank [https://perma.cc/3FFM-FAYS]; Jeff Schneider, Muriel Pearson & Alexa Valiente, *Meet the Men Having Sex With Strangers to Help Them Have Babies*, ABC NEWS (Nov. 13, 2014, 8:53 AM), https://abcnews.go.com/Lifestyle/meet-men-sex-strangers-babies/story?id=26870643 [https://perma.cc/YTC4-2YFX].

161. *See, e.g.*, Carson Griffith, *Sex with Strangers Is the New Artificial Insemination*, COSMOPOLITAN (May 1, 2013), https://www.cosmopolitan.com/sex-love/news/a12685/natural-insemination-single-women-sex-strangers/ [https://perma.cc/9R6Q-QYVQ]. The subtitle says: "It's cheaper with a higher success rate: 'Natural' insemination is becoming increasingly popular amongst single ladies looking to bank a baby." *Id. See also* Nellie Bowles, *The Sperm Kings Have a Problem: Too Much Demand*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2021/01/08/business/sperm-donors-facebook-groups.html?searchResultPosition=1 [https://perma.cc/Z75A-ZM9B] (recounting demand for sperm to create "pandemic babies" and describing those who donate informally for A.I. (artificial insemination) or N.I. (natural insemination or sex)).

162. Picciuto, *supra* note 160.

2. Surrogate Partner Therapy

Popular culture has introduced many members of the public to the practice of surrogate partner therapy, in which an individual experiencing sexual dysfunction or physical disabilities engages a professional "sex surrogate" in an effort to overcome the dysfunction or to experience sexual pleasure not readily available through purely social connections.[163] The late poet Mark O'Brien, paralyzed from polio, published a classic nonfiction piece in 1990 entitled *On Seeing a Sex Surrogate*.[164] The essay inspired a well-received Hollywood film starring Helen Hunt and John Hawkes and depicting O'Brien's successful sessions with a practitioner whose rates began at seventy dollars per hour.[165] Another award-winning documentary tells the story of a different young man with severe physical disabilities who worked with a sex surrogate.[166]

Pioneering sex researchers William Masters and Virginia Johnson used sex surrogates in their development of therapeutic interventions.[167] To be clear, sex surrogates—or "surrogate partner therapists," as the American Association of Sexual Educators, Counselors, and Therapists now calls them[168]—engage in sexual activities with their clients and receive compensation therefor.[169]

Although the practice is controversial[170] and its legal status is "murky,"[171] there is no evidence that law enforcement authorities or courts have deployed prostitution prohibitions to interfere with the work of sex

163. In a similar vein, the scholarly literature discusses "facilitating the purchase of sexual services" as a means of increasing access to sex and sexual pleasure for individuals with disabilities. *See e.g.*, JOSEPH J. FISCHEL, SCREW CONSENT: A BETTER POLITICS OF SEXUAL JUSTICE 163–64 (2019).

164. Mark O'Brien, *On Seeing a Sex Surrogate*, SUN (May 1990), https://www.thesunmagazine.org/issues/174/on-seeing-a-sex-surrogate [https://perma.cc/64FV-MG2Z].

165. *Id.*; THE SESSIONS (Fox Searchlight Pictures 2012). *See also The Sessions*, ROTTEN TOMATOES, https://www.rottentomatoes.com/m/the_sessions [https://perma.cc/7Z43-739K] (noting a 91% critics' score and 80% audience score).

166. GABE (Restless Productions 2017); *see also* Doug Moore, *Gabe Weil Builds a Future He Thought He Did Not Have*, ST. LOUIS POST-DISPATCH (May 30, 2016), https://www.stltoday.com/news/local/metro/gabe-weil-builds-a-future-he-thought-he-did-not-have/article_4a15135d-bb51-541d-bb6f-130e0f25633c.html [https://perma.cc/YYT4-9FXJ]; Tom Stockman, *SLFC Interview—Luke Terrell: Director of GABE*, WE ARE MOVIE GEEKS (July 17, 2017, http://www.wearemoviegeeks.com/2017/07/slfc-interview-luke-terrell-director-gabe/ [https://perma.cc/GP8Y-PY3K].

167. WILLIAM H. MASTERS & VIRGINIA E. JOHNSON, HUMAN SEXUAL INADEQUACY 148 (1970); *see also* THOMAS MAIER, MASTERS OF SEX: THE LIFE AND TIMES OF WILLIAM MASTERS AND VIRGINIA JOHNSON, THE COUPLE WHO TAUGHT AMERICA HOW TO LOVE 196–202 (2009).

168. *Sexual Surrogacy Revisited*, 47 CONTEMP. SEXUALITY, Feb. 2013, at 1, 1, https://www.aasect.org/sites/default/files/Contemporary%20Sexuality%20-FEB2013-Final.pdf [https://perma.cc/X4XJ-YJ3V].

169. *See id.*

170. *Id.*

171. *Id.* at 4.

surrogates.[172] In one of the few reported cases referring to surrogate partner therapy, the court rejected the defendant's argument that his conviction for aggravated promotion of prostitution should be overturned on the ground that the statute defining his crime is unconstitutionally vague and overbroad because it could cover "legitimate" operations, specifically sexual dysfunction clinics that employ sex surrogates.[173] Calling the reference an "ingenious hypothetical," the court stated "that if the Legislature intended medical therapy to be an affirmative defense in offenses of this nature, it would have so provided."[174] Indeed, while Texas statutes include no such affirmative defense, no legislation unequivocally covers surrogate partner therapy in the prohibition of prostitution.

Although we have no reported litigation in which a sex surrogate, the clinic employing the surrogate, or the client has attempted to enforce an agreement for services or to recover damages for a breach, surrogate partner therapy is a form of sex work that has escaped criminalization to date. Its purposes, while therapeutic, include sexual arousal and/or gratification, which have sometimes proved determinative in the application of antiprostitution laws.[175] This state of affairs suggests at least that even actual payment for sex might not invariably violate public policy.[176]

3. Adult Entertainment

The adult entertainment industry makes and sells sexual content for popular viewing and enjoyment. The "industry"—if we can even refer to it as a single entity today—has experienced a transformative growth spurt recently, thanks to new technologies that not only expand the number of those who can produce content, say, by using recording devices on personal phones, but also facilitate new ways of engaging in sexual interactions

172. The International Professional Surrogates Association, founded in 1973, has never faced a lawsuit. *See* Gabrielle Kassel, *A Beginner's Guide to Surrogate Partner Therapy*, HEALTHLINE (Feb. 27, 2020), https://www.healthline.com/health/healthy-sex/sex-surrogate [https://perma.cc/4RCA-PQ7F]. This nonprofit educational organization established a code of ethics in the absence of law on the topic. *See Surrogate Partner Therapy, Legal and Ethical Status*, INT'L PRO. SURROGATES ASS'N, https://www.surrogatetherapy.org/legal-status [https://perma.cc/3DVR-NHXS].

173. Floyd v. State, 575 S.W.2d 21, 24 (Tex. Crim. App. 1978).

174. *Id.*

175. *See* Andrew Gilden, Note, *Sexual (Re)consideration: Adult Entertainment Contracts and the Problem of Enforceability*, 95 GEO. L.J. 541, 550 (2007) (citing California cases in examining contracts in that state's adult entertainment industry). For elaboration, *see infra* Section II.B.3.

176. *See also Sex Surrogate Says Her Mission Is to Help the Dysfunctional*, WILMINGTON MORNING STAR, Oct. 4, 1997, at 7A, https://news.google.com/newspapers?id=lLIsAAAAIBAJ&sjid=VxUEAAAAIBAJ&pg=6947%2C1133380 [https://perma.cc/3JK8-6V9G] (quoting Kamala Harris, then in the office of the Alameda County District Attorney: "If it's between consensual adults and referred by licensed therapists and doesn't involve minors, then it's not illegal").

themselves, for example, "virtually."[177] Consider OnlyFans, a popular social media platform on which users can sell and purchase subscriptions to sexually explicit content. The platform facilitates payment to the content creators[178] by allowing them and "fans" (subscribers) to interact via direct messaging and through tipping in response to the provision of particular kinds of videos.[179]

However configured, commerce in adult entertainment operates in the shadow of prostitution bans. Yet, the case law, all from California, shows how courts have developed various ways to "legalize[] the creation of porn"[180] by insulating these activities from the application of prostitution and pandering prohibitions. First, the producer's payment of acting fees falls outside such prohibitions because "in order to constitute prostitution, the money or other consideration must be paid *for the purpose of sexual arousal or gratification*[,]" requiring the prosecution to prove that the actors' or producer's sexual arousal or gratification constituted the purpose of actors' compensation.[181] Second, films that are not obscene merit First Amendment protection.[182] Finally, the crime of prostitution applies only when the purchaser and the sex worker have sexual contact. Thus, when the customer purchases the opportunity to view or film others engaging in sexual contact, no offense of prostitution under California law has occurred, nor have the derivative crimes of pandering and pimping.[183]

In short, in this context, sex does not foil an agreement. California courts have signaled that contracts under which porn producers pay actors for sexual performances are valid and enforceable.[184] Of course, as with all personal service contracts, enforcement would not entail specific performance but presumably a remedy in damages.[185]

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177. *See, e.g.*, HEATHER BERG, PORN WORK: SEX, LABOR, AND LATE CAPITALISM 18 (2021) (rejecting the existence of a single industry); I. India Thusi, *Reality Porn*, 96 N.Y.U. L. REV. 738, 742–43, 774 (2021) (showing how new technologies blur the line between prostitution and pornography). For an extended analysis of "the erotic webcam industry," colloquially known as "camming," and its relationship to sex work more generally, see ANGELA JONES, CAMMING: MONEY, POWER, AND PLEASURE IN THE SEX WORK INDUSTRY 1 (2020).

178. Thusi, *supra* note 177, at 782–85.

179. *See* Jacob Bernstein, *OnlyFans Reverses Its Decision to Ban Explicit Content*, N.Y. TIMES, Aug. 26, 2021, at D4; Jacob Bernstein, *How OnlyFans Changed Sex Work Forever*, N.Y. TIMES (Feb. 9, 2019), https://www.nytimes.com/2019/02/09/style/onlyfans-porn-stars.html [https://perma.cc/BX4Z-EJHZ].

180. *See* Elizabeth Lin, Note, *Adult Entertainment Film Contracts: To Enforce or Not to Enforce?*, 22 CARDOZO J.L. & GENDER 367, 379 (2016).

181. People v. Freeman, 758 P.2d 1128, 1131 (Cal. 1988) (in bank).

182. *Id.* at 1131–35.

183. Wooten v. Super. Ct., 113 Cal. Rptr. 2d 195, 203–05 (Ct. App. 2001) (contrasting California law with Wisconsin law and Arizona law, which would prohibit such actions by third parties).

184. This approach differs from the one California courts take in interpreting sex in nonmarital contracts. *See supra* Section I.A.

185. *See infra* Section IV.D.

C. The Contractual Turn in the Regulation of Sex

These sites where sex and contract coexist[186] provide but one basis for challenging the assumptions and casual invocation of prostitution in the cases. A second basis emerges from the contemporary understanding of the difference between lawful and unlawful sex, which turns on ideas borrowed from contract law. Put simply, under this contemporary understanding, licit sex should remind us of a contract.

It was not always so. At one time, the law of rape centered on nonmarriage, gender, force, and resistance.[187] Moreover, sex in marriage (an essential element, as we have seen[188]) was always legal because a husband's prerogatives included sexual access, regardless of his wife's objections, thus making marital rape a legal impossibility.[189] Outside the marital setting, rape required proof of the accused's use of force and the complainant's utmost resistance. In fact, defendants could often successfully argue that they believed that a protesting complainant was simply conforming to social mores, saying "no" while actually desiring the sexual encounter.[190]

The current law of sexual assault (generally favored over the term "rape") emphasizes sexual autonomy.[191] Accordingly, consent and its absence have become the pivotal considerations. Indeed, Melissa Murray and Karen Tani describe "consent as the new marriage"[192]—the new line distinguishing licit from illicit sex.[193]

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186. There are others. Sex also does not foil the copyright claims of an author. *See, e.g.*, John Tehranian, *Copyright's Male Gaze: Authorship and Inequality in a Panoptic World*, 41 HARV. J.L. & GENDER 343 (2018).

187. *See* II MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.1 (AM. L. INST. 1962) ("A male who has sexual intercourse with a female not his wife is guilty of rape if . . . he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone . . . .").

188. *See supra* Section I.B.1.

189. *See, e.g.*, People v. Liberta, 474 N.E.2d 567, 572–75 (N.Y. 1984) (recounting history of marital exemption in rape law and holding it unconstitutional).

190. *See, e.g.*, George C. Thomas III & David Edelman, *Consent to Have Sex: Empirical Evidence About "No"*, 61 U. PITT. L. REV. 579 (2000).

191. *See, e.g.*, Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 360–62 (1993) (summarizing different accounts of rape as violations of sexual autonomy). *But see* Deborah Tuerkheimer, *Sexual Agency and the Unfinished Work of Rape Law Reform*, *in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 166, 168–69 (Robin West & Cynthia Grant Bowman eds., 2019) (explaining why some feminists use "sexual agency" instead of "sexual autonomy").

192. Melissa Murray & Karen Tani, *Something Old, Something New: Reflections on the Sex Bureaucracy*, 7 CALIF. L. REV. ONLINE 122, 146 (2016). Some scholars, however, challenge the newfound centrality of consent. *See generally, e.g.*, FISCHEL, *supra* note 163.

193. *See id.* at 126; Katharine K. Baker & Michelle Oberman, *Consent, Rape, and the Criminal Law, in* THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES, *supra* note 104, (manuscript at 3) (asserting that the law in most states uses "a definition of rape that relies exclusively

This focus on consent, in turn, evokes the values and language of contract law. For example, some authorities differentiate unlawful from lawful sex by referring to the distinction between "coercion and bargain,"[194] terms often used when analyzing contractual arrangements.[195] The American Law Institute's (ALI's) draft of the revised *Model Penal Code* article on sex crimes defines consent to mean "willingness,"[196] recalling an early theory of contract law centered on "will"[197] and suggesting that consent means that the parties to a licit sexual encounter have achieved the "meeting of the minds"[198] or the "mutual assent"[199] salient in contract law.[200] Efforts to dissect consent to sex reveal an interplay of moves resembling offer and acceptance, with the expected payoff (whether the pleasure of the experience or some other benefit sought by each party[201]) serving in a role akin to consideration.

Similarly, some reformers of rape and sexual assault laws would center process over consent/nonconsent, proposing a "Negotiation Model."[202]

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on the notion of consent to delineate the difference between criminal and noncriminal sexual activity"); Robin West, *Consent, Legitimation, and Dysphoria*, 83 MOD. L. REV. 1, 7, 18 (2020). Indeed, West's view of the new approach to sex looks beyond criminal law. *See id.* at 1–2.

194. II MODEL PENAL CODE AND COMMENTARIES 312 (AM. L. INST., Official Draft and Revised Comments 1982) (discussing § 213.1(2)(a) of 1962 Code's treatment of "rape and related offenses").

195. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. LAW INST. 1981) ("Requirement of a Bargain"); *id.* §§ 174–175 (duress); Dalton, *supra* note 16, at 1067, 1069 (analyzing modern "bargain theory").

196. This revision effort remains a work in progress, as this Article goes to press. The definition of "consent" that received approval at the Annual Meeting of the American Law Institute on May 17, 2022, emerged from a revised motion to amend and did not appear in any previous tentative draft. Revised Motion to Amend § 213.0(2)(e), MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. L. INST., May 16, 2022) (on file with authors). Like earlier versions, this definition centers on "willingness." *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(2)(e) (AM. L. INST., Tentative Draft No. 5, 2021); MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(2)(e) (AM. L. INST., Tentative Draft No. 6, 2022). Approval by the membership always comes subject to the discussion at the meeting and the usual editorial prerogatives. Further, the new definition must receive approval by the ALI's Council to become final. The variations in the definitions do not affect our analysis. For purposes of references, we cite the most recent document containing the relevant information, be it the revised motion to amend, Tentative Draft No. 6, Tentative Draft No. 5 (which, unlike the other documents, contains extensive comments and Reporters' Notes), or a still earlier draft.

197. *See* Dalton, *supra* note 16, at 1012, 1042; *see also* Kronman, *supra* note 119, at 797 (stating in 1983 that "will-based theories of obligation . . . dominate the intellectual scene today").

198. RESTATEMENT (SECOND) OF CONTRACTS, § 17 cmt. c.

199. *Id.* § 17(1) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").

200. Accordingly, the *Model Penal Code* deems consent ineffective when it is obtained by "prohibited deception," narrowly defined to include only false claims that the sexual activity has medical benefits or that the actor is a particular person known to the other person. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.5 cmts. 1–2 (AM. L. INST., Tentative Draft No. 5, 2021).

201. *Cf.* West, *supra* note 193.

202. Michelle J. Anderson, *Negotiating Sex*, 78 S. CALIF. L. REV. 1401, 1407 (2005); *see also* Lorelei Lee, *Cash/Consent: The War on Sex Work*, N+1, Fall 2009, at 26,

Despite disclaimers of any "verbal contract" requirement, the Negotiation Model envisions a "communicative exchange, before penetration occurs, about whether [the parties] want to engage in sexual intercourse"[203] and "open discussion in which partners come to a free and autonomous agreement about the act of penetration."[204] So, the model contemplates certain contractual features, even if not a contract as such.

The "contractualization" of our understanding of licit sex becomes even more conspicuous in the affirmative consent requirements that many colleges and universities have instituted in response to Title IX.[205] "Affirmative consent" policies oblige each party to ask for and receive acquiescence (by words or conduct) from the other in order to proceed with the next steps in the sexual encounter, with schools often encouraging students to aim higher—for "'enthusiastic' consent."[206] Affirmative consent makes "no" the default. It requires acceptance of an offer, not just the absence of a refusal to a sexual advance, and it underscores that one has a right to control access to one's own body[207]—evoking comparisons to the preferences for private ordering and party autonomy reflected in contract law.

Whether affirmative-consent requirements are a positive development[208] and whether they should migrate from campus conduct codes to criminal law's definitions of rape and sexual assault remain subjects of vigorous debate in both scholarship and law reform efforts,[209] with the ALI's membership rejecting an affirmative consent requirement for the revised *Model Penal Code* after considerable debate.[210] Even so, the *Model Penal*

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https://www.nplusonemag.com/issue-35/essays/cashconsent/ [https://perma.cc/TA6F-QYSS] ("What we were doing, of course, was negotiating consent.").

203. Anderson, *supra* note 202, at 1407.

204. *Id.*

205. *See, e.g.*, Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1 (2015).

206. *See* Susan Frelich Appleton & Susan Ekberg Stiritz, *The Joy of Sex Bureaucracy*, 7 CALIF. L. REV. ONLINE 49, 61 (2016).

207. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.6 reps.' note 2 (AM. L. INST., Tentative Draft No. 5, 2021) ("Basing liability on lack of consent . . . is consistent with the social recognition that the criminal law must protect individuals against violations of their sexual autonomy, not merely against sex obtained by physical force or coercion.").

208. *Compare, e.g.*, Janet Halley, *The Move to Affirmative Consent*, SIGNS (Nov. 10, 2015), http://signsjournal.org/currents-affirmative-consent/halley/ (criticizing the move to affirmative consent and predicting that they "will do a lot more than distribute bargaining power to women operating in contexts of male domination and male privilege" and "will foster a new, randomly applied moral order that will often be intensely repressive and sex-negative"), *with e.g.*, Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335, 341 (2017) ("For practical and theoretical reasons, willingness should never be assumed.").

209. *See* Tuerkheimer, *supra* note 205.

210. *See, e.g.*, MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0 cmt. 1 (AM. L. INST., Tentative Draft No. 6, 2022); MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED

Code's draft revisions contains a provision that makes penetration and oral sex "in the absence of consent" a felony.[211] Although this approach accords with existing law in many jurisdictions, a number of them (twenty-one, according to the *Model Penal Code* Reporters' Notes) do not define "consent,"[212] which in turn invites analogical reasoning, including references to contract jurisprudence, to fill the gap. In addition, just as incapacity, duress, and undue influence can prevent the formation of a valid contract,[213] so too do such factors prevent "effective consent" to sex, according to the *Model Penal Code* draft revisions.[214]

In this same vein, the advance agreements that characterize BDSM[215] practices and that the kink community widely accepts—in which participants negotiate and come to terms on permissible activities, impermissible activities, and safe words[216]—have been touted as models that might assure willingness and promote the underlying value of autonomy in *all* sexual interactions.[217] In other words, perhaps instead of envisioning lawful sex as requiring a series of individually consented-to interactions, it would be more practical to have consent with clearly defined limits occur up front.[218]

OFFENSES § 213.1 cmt. 3 & § 213.2 cmt. 7 (AM. L. INST., Tentative Draft No. 5, 2021); *see also* Judith Shulevitz, Opinion, *Regulating Sex*, N.Y. TIMES, June 28, 2015, at SR1 (opinion column noting ALI controversy). Nonetheless, some states currently require affirmative consent. Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 451 (2016) (identifying Wisconsin, Vermont, and New Jersey as "pure affirmative consent jurisdictions").

211. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.6 (AM. L. INST., Tentative Draft No. 6, 2022).

212. *Id.* § 213.6 cmt. 2 n.6; *see* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES §§ 213.0(3) & 213.2 reps.' notes (AM. L. INST., Tentative Draft No. 2, 2016).

213. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 173 (abuse of a fiduciary relationship); 175 (duress by threat); 177 (undue influence) (AM. LAW INST. 1981).

214. *See, e.g.*, MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.3(4) (AM. L. INST., Tentative Draft No. 5, 2021) (absence of effective consent for an incapacitated, vulnerable, or legally restricted person); *id.* reps.' note 2. Some authorities recognize that psychological force can render consent to sex ineffective, thus establishing the elements of forcible rape or sexual assault. *See, e.g.*, Boykai v. Young, 83 A.3d 1043 (Pa. Super. Ct. 2014).

215. The acronym is short for sexual practices that might include "bondage and discipline, domination and submission, and sadism and masochism." Ali Hébert & Angela Weaver, *An Examination of Personality Characteristics Associated with BDSM Orientations*, 23 CANADIAN J. HUM. SEXUALITY 106, 106 (2014).

216. *See* Appleton, *Sex-Positive Feminism's Values in Search of the Law of Pleasure*, *supra* note 104, at 10–11; Note, *Nonbinding Bondage*, 128 HARV. L. REV. 713, 717 (2014). *Cf.* Anderson, *supra* note 202.

217. *See, e.g.*, Theodore Bennett, *"Unorthodox Rules": The Instructive Potential of BDSM Consent for Law*, 4 J. POSITIVE SEXUALITY 4 (2018); Adrienne D. Davis, Combatting Campus Sexual Assault Through a Jurisprudence of BDSM (July 28, 2021) (unpublished manuscript) (on file with authors); Kaplan, *supra* note 6, at 155. *See also* Mika Galilee-Belfer, *BDSM, Kink, and Consent: What the Law Can Learn from Consent-Driven Communities*, 62 ARIZ. L. REV. 507 (2020) (examining extralegal remedies). *But see* FISCHEL, *supra* note 163, at 31–63 (critiquing BDSM model of consent).

218. This up-front consent would be subject to withdrawal. *See infra* notes 321–322 and

Such advance agreements for BDSM encounters have gained a legal foothold in the draft revisions to Model Penal Code's article on sex crimes, thanks to successful lobbying by the National Coalition for Sexual Freedom.[219] Section 213.10 creates an affirmative defense for a sexual-assault defendant who has received "explicit prior permission to use or threaten to use physical force or restraint . . . or to ignore the absence of consent . . . ."[220] Of course, the provision does not suggest an enforceable contract, but at minimum it does indicate that agreements centered on sex can have a legal effect.

An important caveat merits note: unlike the old test based on marriage, in which the consent to wed served as a license to ongoing sexual access, the modern consent test requires contemporaneous mutual consent for a particular sexual episode and allows withdrawal of such consent by an individual at any time. By extension, these limitations apply regardless of the parties' relationship, whether marriage, cohabitation, steady dating, or a paid sexual transaction.[221] As a result, of course, nonconsensual or criminal sex can take place within a larger consensual relationship—even if the relationship provides context for determining the existence of consent or its absence.[222] The affirmative defense for BDSM departs from this approach, in that it allows consent to certain activities in advance. Nonetheless, a party can withdraw consent by invoking the agreed-upon safe words, so the agreement contemplated by the affirmative defense does not operate as an irrevocable precommitment. Thus, even when it is kinky, lawful sex is

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accompanying text. And, of course, placing the time of consent too far in advance might echo the now-rejected marital exemption, which treated marrying as tantamount to consent sex as a husband's prerogative regardless of the wife's wishes at any particular time. *See supra* note 189 and accompanying text.

219. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.10 cmt. 1 n.7 (AM. L. INST., Tentative Draft No. 5, 2021).

220. *Id.* § 213.10(1).

221. Obviously, sex workers can be victims of rape or sexual assault. *See, e.g.*, Ridley v. State, 725 S.E.2d 223 (Ga. 2012); *See also, e.g.*, Rackley v. Anglea, No. 28-cv-0448, 2019 WL 804006, at *16 (E.D. Cal. Feb. 20, 2019) ("prostitutes can be raped").

222. The *Model Penal Code*'s revised Article on sex offenses defines "consent" as willingness that may be express or inferred—"in the context of all the circumstances." This is so under both the revised motion approved in 2022 and the earlier version previously approved in 2016. *See supra* note 196; MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(2)(e)(i), (ii) (AM. L. INST., Tentative Draft No. 5, 2021). Commentary refers to this approach as "contextual consent." *See, e.g.*, MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0 cmt. 1 (AM. L. INST., Tentative Draft No. 6, 2022) ("[C]ontextual consent requires the trier of fact to examine the parties' observable behavior together with testimony about the complainant's subjective willingness or unwillingness, in the context of all the circumstances leading up to and during the sexual act, as the best way to determine whether a party consented to that act or whether the defendant exceeded lawful limits with a culpable mens rea. In making these judgments, the factfinder's examination of the totality of the circumstances may include the nature, duration, and quality of the parties' relationship, any history of sexual activity between them, the defendant's awareness of any limits on the other's capacity to consent, and other relevant circumstances.").

supposed to reflect a meeting of the minds at the time of the sexual engagement.

III. PROSTITUTION AS PROXY

Given developments demonstrating how sex and contract coexist and converge, the law governing nonmarriage and marriage is deceptively straightforward in announcing its refusal to enforce contracts for sex. In nonmarriage, the limits imposed by prostitution prohibitions do not provide a clear metric for anticipating which contracts will fail and which will not. Instead, courts make judgments about the types of relationships at issue, comparing them to marriage, either implicitly or explicitly. Nonmarital cohabitation resembles marriage in ways that gestational surrogacy and sex surrogacy, for example, do not. And, these and the other exceptions surveyed resemble prostitution in ways that nonmarital cohabitation does not. Within marriage proper, contracts for sex are recognized, and indeed, effectively required. The real conflict that emerges in those cases is between two different agreements before the court—the state prescribed marital contract versus any other contract entered by the parties.

Marriage—not sex—also foils the contracts in the nonmarital cases. Once marriage is identified as the culprit in this context too, we can analyze the merits of this approach. Moreover, as we have shown, the implicit marriage-based rationale clashes with recent developments in criminal law and related areas, where contract-like principles and values have displaced marriage in drawing the line between licit and illicit sex.

A. Marriage is Doing the Work that Courts Ascribe to Prostitution Bans

The way sex figures into contracts is more complicated than the cases refusing to enforce nonmarital agreements suggest. Courts routinely invalidate agreements in relationships that are not, and do not resemble, prostitution. They do so by reading sex into agreements that either do not mention sex, or whose many terms can be severed from sex.[223] Indeed, considering these cases more closely reveals that sex is not the true culprit—marriage is. When an agreement approximates the bargain that marriage entails, courts invalidate it. The specific bargain courts identify as marital is the traditional one in which the wife has the duty to provide her husband

223. *See* Antognini, *Nonmarital Contracts*, *supra* note 15, at 104–10 (discussing how courts interpret sex to invalidate agreements where domestic services are at stake, or where sex is not even mentioned).

with domestic services.[224] Marriage thus functions as the sorting mechanism between agreements that can account for the presence of sex and agreements that cannot. Doing so preserves the gendered quality of sex, lumped together with services, as duties that only a "wife" can provide.[225] And, marriage is the only vehicle that will make property available in that context, which requires invalidating all agreements to the contrary.

While courts present the limit established by prostitution as obvious, they struggle in determining what in fact constitutes an exchange of sex for property that foils a contract. In *Jones v. Daly*, for example, a relationship that the court itself did not describe as one of prostitution nonetheless invalidated the contract between the partners.[226] The California Court of Appeal in *Jones* followed *Marvin* in acknowledging the ability of unmarried couples both to have sex and to contract; but the court declined to uphold the cohabitors' agreement before it because it "rest[ed] upon illicit meretricious consideration."[227] The court noted that "the agreement provided that the parties would share equally the earnings and property accumulated as a result of their efforts while they lived together and that [defendant] would support plaintiff for the rest of his life."[228] The problem, according to the court, was that it could not distinguish plaintiff's acting as his "traveling companion, housekeeper or cook" from "acting as his lover."[229] It concluded therefore that the agreement's "terms can pertain only to plaintiff's rendition of sexual services . . . ."[230] Remember, though, that in the case of *Whorton v. Dillingham*, the court easily upheld an agreement that explicitly involved sex; there, it was able to distinguish cleanly acting as a bodyguard and chauffeur from acting as a lover.[231]

In *Jones*, the court mentioned prostitution in passing,[232] and—like the other cases addressing nonmarital contracts—it did not consult any definition of the term, which criminal law in California defines to include

224. *See* Antognini, *supra* note 42, at 2151 (describing the duties imposed by coverture on husbands and wives, the latter of which "was to provide services and labor"). Courts mostly focus on the services provided by the "wife" to mark the relationship as marital, rather than on any support provided by the "husband."

225. *See id.* at 2144–45, 2151.

226. Jones v. Daly, 176 Cal. Rptr. 130, 132–35 (Ct. App. 1981). *See also* Rabinowitz v. Suvillaga, No. 17 CVS 244, 2019 WL 386853, at *7, *13 (N.C. Super. Ct. Jan. 28, 2019) (distinguishing cases that concluded that contracts were not based on "illicit intercourse" but invalidating a contract between an unmarried couple who had been in a relationship for ten years).

227. *Jones*, 176 Cal. Rptr. at 133.

228. *Id.* at 134.

229. *Id.*

230. *Id.* at 133; *see also* Taylor v. Fields, 224 Cal. Rptr. 186 (Ct. App. 1986); *supra* notes 38–42.

231. *See supra* notes 35–37.

232. *Jones*, 176 Cal. Rptr. at 133 (quoting Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (in bank)). While referring to the illegality of prostitution generally, the nonmarital contract cases do not expressly include or rely on the criminal definition of prostitution.

"any lewd act between persons for money or other consideration."[233] Even if it had, this language would not by itself provide more guidance, nor would it justify the distinctions that courts make given that this definition could encompass, or exclude, the situation in *Jones* or *Whorton*.[234] Further, prostitution's illegality need not be determinative. At a time when several states criminalized unmarried cohabitation generally, some still upheld contracts between cohabiting couples.[235]

These decisions thus cannot be explained based on the (sexual) nature of the relationship or on the (sexual) terms of the contract. Instead, marriage and the discrete roles it sets out explain why courts decline to uphold contracts even when the relationship is clearly distinct from prostitution and the agreement includes terms beyond a strict sex-for-property exchange.[236] Indeed, cases invalidate contracts designed to govern relationships that, according to the courts' own characterization, resembled those of "'husband and wife.'"[237] That is, the closer the agreement approximates the terms of the exchange that underlies *marriage*, the more likely it is to not be enforced on account of *sex*.[238] The relationship's similarity to a traditional marriage marks the contracts that will fail, even if the reason proffered is prostitution. Marriage also emerges as the protagonist in another significant way: it is the status that courts ultimately promote. While *Marvin* presents prostitution as

233. CAL. PENAL CODE § 647(b)(4) (West 2021) (Disorderly Conduct). We found no evidence that the parties in these cases were prosecuted for the crime of prostitution. We suspected as much, given the casual way the cohabitation cases refer to this crime. To test our intuition, even while recognizing our reliance on incomplete data, we searched Westlaw for the name of each party in the relevant jurisdiction, along with "AND prostitution OR sex! OR meretricious"—which produced zero results.

234. The rationales that courts have articulated to justify prostitution bans are inapposite in the nonmarriage context. *See* Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon, 880 F.3d 450, 457 (9th Cir.) (identifying the "legitimate purpose" of the prostitution bans to "include discouraging human trafficking and violence against women, discouraging illegal drug use, and preventing contagious and infectious diseases"), *amended by* 881 F.3d 792 (9th Cir. 2018).

235. J. Thomas Oldham & David S. Caudill, *A Reconnaissance of Public Policy Restrictions Upon Enforcement of Contracts Between Cohabitants*, 18 FAM. L.Q. 93, 128 (1984) ("Although fornication or cohabitation still violates the criminal law of a number of states, this has not caused contemporary courts to consider cohabitation contracts unenforceable."). Of course, *Lawrence v. Texas* undermines the constitutionality of such prohibitions. 539 U.S. 558 (2003).

236. This is not to imply that prostitution is a simple or a straightforward exchange. *See, e.g.*, Prabha Kotiswaran, *Wives and Whores: Prospects for a Feminist Theory of Redistribution, in* SEXUALITY AND THE LAW: FEMINIST ENGAGEMENTS 283, 284 (Vanessa E. Munro & Carl F. Stychin eds., 2007) ("[S]ex workers in their relationships with male lovers both conform to, and routinely challenge the boundaries of heterosexual monogamous marriage. Specifically, their affective relationships with men, not unlike marriage often involve a complex combination of affective and material considerations.").

237. *Marvin*, 557 P.2d at 113–14 (discussing the reasoning used by *Hill* and *Updeck* cases, which preceded *Marvin*). *See also* Antognini, *supra* note 42, at 2175 (describing the *Hill* case, which involved a sixteen-year-long relationship that resulted in two children).

238. *See* Antognini, *supra* note 15, at 78 ("Courts hold that individuals cannot contract for exchanges that inhere in the relationship itself, such as services rendered, and generally decline to uphold contracts where the relationship could have been marital.").

the outer limit to contract, it ends by invoking marriage: "[N]othing we have said in this opinion should be taken to derogate from that institution."[239]

To be sure, a few courts faced with claims sounding in contract appeal to marriage explicitly when denying remedies at the end of a nonmarital cohabitation. For example, in 1979 the Supreme Court of Illinois rejected the plaintiff's asserted oral agreement and her reliance on *Marvin*, pointing to public policy and insisting that the issue turned on more than "pure contract theory."[240] The court instead based its ruling on the legislature's abolition of common law marriage and its rejection of no-fault divorce.[241] Almost forty years later, the same court reaffirmed this approach, expressly centering marriage in its reasoning.[242] These cases relying on marriage and those citing the illegality of prostitution share a fundamental similarity—in that marriage provides the linchpin in both.

Importantly, marriage, rather than sex, also emerges as "kryptonite" for contracts in the decisions addressing married parties. Courts, in considering private contracts between spouses, nowhere deny that sex can be subject to contract; instead, they hold that sex is essential to the contract that defines marriage. Rather than deny the importance of sex to contract, this principle cements it. It is also entirely consistent with state efforts to channel sex into marriage—often cited as evidence of law's sex negativity.[243]

The conclusion that sex alone is not the real stumbling block in enforcing these agreements gains strength from developing law in areas beyond the nonmarriage/marriage cases. If resemblance to prostitution, rather than resemblance to marriage, were truly determinative, we would expect to see other contracts with sexual components declared invalid or required to have the sexual component severed.

Gestational surrogacy provides one example. Despite striking parallels to prostitution, in that both entail the sale of services centered in the sexual-reproductive anatomy of another, surrogacy has flourished, with such arrangements now widely accepted as valid and largely enforceable contracts, often legitimated by statute. In contrast to cohabitation agreements, however, surrogacy agreements do not compete with marriage. Indeed, surrogacy often serves marriage and marital roles, helping

239. *Marvin*, 557 P.2d at 122.

240. Hewitt v. Hewitt, 394 N.E.2d 1204, 1207 (Ill. 1979).

241. *Id.* at 1209–11.

242. Blumenthal v. Brewer, 69 N.E.3d 834 (Ill. 2016). Although *Blumenthal* adheres to *Hewitt* in rejecting "marriage-like rights [for] those outside of marriage[,]" *id.* at 857, contract claims were less salient than they had been in the earlier case. Some commentators have also described "contractual cohabitation" as a potential "replacement of marriage . . . ." *See, e.g.*, RICHARD A. POSNER, SEX AND REASON 264 (1st ed.1992).

243. *See* Appleton, *Sex-Positive Feminism's Values in Search of the Law of Pleasure*, *supra* note 104, at 6. *See generally, e.g.*, Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012); Rosenbury & Rothman, *supra* note 6.

couples—even "nontraditional" couples, such as those with two husbands[244]—realize the "constellation of benefits that the States have linked to marriage."[245]

Although the dearth of legal authority on surrogate partner therapy frustrates direct comparisons with the doctrine applied in the nonmarriage/marriage cases, this practice still offers valuable insights. This is especially so because sex surrogacy transactions resemble prostitution far more closely than the domestic-sexual arrangements that cohabiting couples (married or not) make. One hypothesis is that sex surrogacy can be justified in the public policy arena as supporting marriage—a therapeutic intervention that might overcome spouses' sexual dysfunction[246] or enable individuals like Mark O'Brien later to develop romantic partnerships that might lead to marriage.[247] The therapists who originated this practice certainly saw it this way.[248] From this perspective, we can understand sex surrogacy as "promarriage," just as we might see gestational surrogacy as operationalizing marriage for intended parents.

When it comes to adult entertainment employment, the developing case law purports to respect the criminal prohibitions on prostitution and pandering, but finds creative ways to allow porn production and its economic foundations to thrive.[249] This judicial solicitude for sexual transactions stands at odds with the nonmarriage/marriage cases. Moreover, a closer look reveals vulnerabilities in the ongoing reliance on the reasoning in the porn cases. For example, the absence of proof of the paying producer's sexual arousal or gratification in one criminal prosecution in California has generated an assumption that only those participating in the sexual performances themselves experience such arousal or gratification, in turn immunizing producers in general from criminal liability.[250] Yet, of course, producers might find sexual pleasure in making and sharing films,[251] just as many individuals may experience pleasure in a wide range of everyday activities.[252] Such vulnerabilities underscore the willingness to

244. *See supra* notes 123–124 and accompanying text.

245. Obergefell v. Hodges, 576 U.S. 644, 670 (2015); Pavan v. Smith, 137 S. Ct. 2075 (2017).

246. The therapeutic techniques developed by Masters and Johnson, *supra* note 167, promised to stabilize marriage and reduce divorce. *See* Stiritz & Appleton, *supra* note 3, at 396.

247. *See* Tim Gilmer, *Sex Surrogacy and Disability on the Silver Screen*, NEW MOBILITY (Nov. 1, 2012), https://www.newmobility.com/2012/11/sex-surrogacy-and-disability-in-the-silver-screen/ [https://perma.cc/2YA9-RJ7F] (including interview with Susan Fernbach, the partner with whom O'Brien developed a relationship after his sex surrogacy sessions).

248. *See supra* note 167 and accompanying text.

249. *See supra* notes 180–182 and accompanying text.

250. *See supra* notes 180–182 and accompanying text.

251. *See* Thusi, *supra* note 177, at 767.

252. As Laura Rosenbury and Jennifer Rothman have observed:

push legal limits when no marriage-like relationship is on the table, in contrast to tenacious and constraining doctrine when marriage might be implicated.

Finally, some of these developments escape legal disapproval even when the exchange of sex threatens traditional marital doctrine and norms, signaling that the analysis can make room for multiple values. For example, the use of a no-sex clause in a surrogacy contract interferes with an "essential" element of the surrogate's marriage, but the procreative interests of the intended parents (married or not) prevail—or at least prevent voiding the agreement or requiring severance of the particular clause. Likewise, the emerging treatment of parentage agreements for sexually conceived children presents a conspicuous contrast to the nonmarriage/marriage cases. Here, consideration explicitly includes parental status, economic obligations, and sex. Despite the longstanding invalidity of such agreements (as distinguished from agreements for children conceived without sex), the legal environment has become more hospitable, as illustrated by *Dawn M. v. Michael M.*, the "tri-custody" case from New York.[253] Such rulings, like surrogacy's growing legitimacy, highlight how opposition to sexual agreements can give way to other values and can soften to advance a child's interests, to recognize additional sources of child support, or to expand procreative opportunities. In short, outside the cases about nonmarital and marital agreements, sex can be subject to an enforceable contract—even one that challenges the conventional vision of marriage.

B. Exposing Connections Between Prostitution and Marriage

Marriage and prostitution appear to mark out opposite legal poles.[254] Marriage remains at the top of sexual hierarchy, the center of "the charmed

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> Some individuals already experience fluid understandings of sex and intimacy, finding forms of sexual expression not simply through sex acts but also through acts of care or other everyday activities with friends, loved ones, or even strangers. Individuals can experience sexual sensation and pleasure, including but not limited to orgasm, when engaging in the stimulating exchange of ideas, driving, horseback riding, listening to or playing music, mastering a new skill, gardening, discovering the answer to a knotty problem, looking at or creating art, or eating ice cream or chocolate. Some women even experience the eroticization of care when pregnant or breastfeeding, at times experiencing orgasms.

Rosenbury & Rothman, *supra* note 6, at 855 (footnotes omitted). *See also* Audre Lorde, *Uses of the Erotic: The Erotic as Power*, *in* BLACK FEMINIST CULTURAL CRITICISM 285, 285 (Jacqueline Bobo ed., 2001).

253. *See supra* notes 142–52 and accompanying text.

254. The dichotomy echoes the frequently cited virgin/whore contrast. *See, e.g.*, Mary Joe Frug, Commentary, *A Postmodern Feminist Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1055–56 (1992); Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1474 (2014).

circle" of sex, as Gayle Rubin calls it,[255] or "the sun around which all other relationships and relations orbit," as Katherine Franke describes it[256]—while sex work and prostitution have no legitimate place at all. All states privilege marriage,[257] just as all criminalize prostitution.[258] Supreme Court analyses centered on sexual autonomy reflect this divide, glorifying marriage as an enduring liberty while exempting sex work from constitutional protection.[259]

Nonetheless, feminist theorists have exposed significant connections between marriage and prostitution. The connections they posit help contextualize the cases and explain how marriage and prostitution collide in opinions about contracts involving sex, even as courts claim to keep them apart. Although these theorists mostly write about "wives" and generalize that sex workers are women, today we would expand their analyses to apply to any subordinated or marginalized person in a relationship.[260]

Prahba Kotiswaran considers marriage central to her discussion of sex work, highlighting the multiple ways that "wives and whores" interact.[261] Not only is sex work similar to marriage in that it "involve[s] a complex combination of affective and material considerations," but the same individual might by turn be a sex worker or a wife.[262] More fundamentally, if prostitution is understood as an arrangement "which include[s] exchanging sex for food, luxury items, or favours in business and promotions at work," then the traditional housewife who relies on her husband's support is also "a prostitute."[263] In both marriage and prostitution, sex is a means to economic ends.[264] These noted similarities between

255. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 281 (Carole S. Vance ed., 1984).

256. Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2686 (2008).

257. *See* Obergefell v. Hodges, 576 U.S. 644, 669–70 (2015) (describing marriage as "a keystone of our social order" and citing material benefits by which states reward those who marry).

258. Nevada, the lone exception, has certain counties that have legalized prostitution in licensed brothels. Danielle Augustson & Alyssa George eds., *Prostitution and Sex Work*, 16 GEO. J. GENDER & L. 229, 232–33 (2015).

259. *Compare Obergefell*, 576 U.S. at 665–70 (explaining why constitutional liberty protects same-sex marriage), *with* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (stating limits of the holding).

260. *Cf.* HIRSHMAN & LARSON, *supra* note 16, at 287 ("[A]ny useful analysis of prostitution must deal with it as a social practice with an enduring division of roles based on gender, age, race, and ethnicity.").

261. *See* Kotiswaran, *supra* note 236, at 284–85.

262. *See id.* at 284.

263. *See id.* at 287. *See also* PATEMAN, *supra* note 106, at 190 (noting how Mary Wollstonecraft called marriage "legal prostitution").

264. Emma Goldman made this very point in her critique of marriage over a century ago. EMMA GOLDMAN, MARRIAGE (1897), https://theanarchistlibrary.org/library/emma-goldman-marriage.lt.pdf [https://perma.cc/FY3R-T22M]. *See also* KRISTEN R. GHODSEE, WHY WOMEN HAVE BETTER SEX UNDER SOCIALISM 28 (2018) ("Capitalism acts on women as a continual bribe to enter into sex relations

marriage and prostitution help explain just how thoroughly prostitution functions as a proxy for marriage in the nonmarital agreement cases. Kotiswaran's conceptualization of the overlaps between marriage and sex work confirms that courts' stated concern about prostitution is quite literally a concern about marriage. While courts invoke the presence of sex, it is the exchange of sex for property in a relationship that mimics marriage that ultimately invalidates the contract.

Because, as Kotiswaran notes, marriage and prostitution share so many similarities, keeping them distinct requires careful maintenance of their boundaries. For this reason, at one time legal authorities had a specific name for nonmarital but marriage-like arrangements, "concubinage," which they sought to punish or otherwise disfavor. The phrase derives from the pejorative and gendered term, "concubine," which dictionaries define as a woman who cohabits with a man to whom she is not married or, based on Roman practices, an inferior wife upon whom the husband did not confer his rank or status.[265] In this country, Arkansas enacted criminal statutes that used "concubinage" to mean a miscegenetic relationship,[266] Ohio courts have invoked concubinage as a basis for terminating postdivorce alimony,[267] and Louisiana's statutory and case law has frequently used the term, principally to impose limitations on rights that only spouses may enjoy.[268] "Concubinage" and "prostitution" have often appeared in tandem, as twin evils in the eyes of the law.[269]

The word "concubine" surfaces in *Marvin*, when the court quotes the earlier case of *Hill v. Westbrook's Estate*, which stated: "The law does not award compensation for living with a man as a concubine and bearing him children."[270] *Marvin* and the cases following its lead jettison the term,

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for money, whether in or out of marriage . . . ." (quoting George Bernard Shaw)); Zatz, *supra* note 7, at 288 (describing how radical feminists "assimilate prostitution to marriage and the appropriation of female sexuality by a man in exchange for some kind of economic stability").

265. *Concubine*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See* Kathryn Venturatos Lorio, *Concubinage and Its Alternatives: A Proposal for a More Perfect Union*, 26 LOY. L. REV. 1, 5–6 (1980).

266. *See* Poland v. State, 339 S.W.2d 421 (Ark. 1960).

267. *See* Gajovski v. Gajovski, 610 N.E.2d 431, 432–33 (Ohio Ct. App. 1991) (rejecting argument that "a homosexual relationship between parties living together in the same household constitutes concubinage as contemplated by a dissolution decree" because same-sex couples cannot marry and thus cannot "be concubines to one another," relying on Louisiana case law).

268. *See, e.g.*, Schwegmann v. Schwegmann, 441 So. 2d 316, 320, 322 (La. Ct. App. 1983) (classifying the contract as "meretricious" and rejecting claims based on "concubinage"); Lorio, *supra* note 265, at 7–8.

269. *See, e.g.*, Brooks v. United States, 267 U.S. 432, 437 (1925); State v. Clark, 266 P. 37 (Kan. 1928); People v. Jelke, 135 N.E.2d 213, 216 (N.Y. 1956). They are, however, understood as distinct practices. *See* HIRSHMAN & LARSON, *supra* note 16, at 282 (noting "the ancient distinction between prostitutes, who have sex with anyone who offers the price, and concubines, who ally with one person for an extended period").

270. 557 P.2d 106, 114 (Cal. 1976) (quoting Hill v. Westbrook's Est., 213 P.2d 727, 730 (Cal. Ct. App. 1950).

replacing it with the more modern and less offensive "cohabitation." And yet, by insisting on the severance of a cohabitation agreement's sexual terms for the asserted objective of avoiding prostitution bans, *Marvin* and its progeny merely update the concept of concubinage; they do not fully refute it.[271] Cohabitants may enter enforceable contracts only to the extent that they allow the courts to ignore a significant facet of their relationship and the promised exchange. The severed piece would constitute prostitution, say the courts, but failure to sever it would effectively validate "concubinage" and hence remove marriage from its uniquely favored position. Put differently, despite the fading use of "concubinage," courts' appeals to prostitution allow them to continue to characterize all sexual relationships outside of marriage as meretricious, thereby ensuring that marriage remains the preeminent legal site where sex and property distribution can coexist.

Beyond these institutional links, Linda Hirshman and Jane Larson find a more pragmatic and instrumental connection between the legal privileging of marriage on the one hand, and the continuing prohibition of prostitution on the other. They observe that "prostitution is a standing offer to violate the marriage contract of sexual fidelity, and thus particularly injures the interests of wives."[272] Hirshman and Larson conclude from this conflict that banning prostitution enhances wives' interests: "Where prostitution is curtailed, wives are better situated to force their husbands to bargain with them for sexual access."[273] Under Hirshman and Larson's reading, wives and prostitutes provide, primarily, sex, and they use it to exact material concessions from husbands and customers (who might be the husbands of others). If prohibiting prostitution makes sex a scarcer commodity, then wives have more leverage and can exact more economically from husbands who, primarily, control the family finances.[274]

The nonmarital case law puts this principle into practice: courts rely on prostitution as a reason to invalidate contracts between unmarried couples, or to sever sex from the agreement, and thereby maintain wives' unique legal ability to exchange sex for property. Courts understand the availability of sex outside of marriage as fundamentally a zero-sum proposition. If all sexual relationships compete against marriage, however, the question is not

271. Indeed, *Marvin* expressly affirms previous courts' reasoning. *See Marvin*, 557 P.2d at 114.

272. HIRSHMAN & LARSON, *supra* note 16, at 287.

273. *Id.* ("These conflicts of interest explain the persistent failure of the two groups of women to ally, despite repeated attempts in history.").

274. *See id.* at 293 ("[W]e explain the historic anti-prostitution stance of organized women in America as predictable cartel behavior. Through collective action—typically, campaigns to criminalize or eradicate the prostitution trade—women as a political group founded on common sexual interests seek to limit the competition."). Of course, prostitution prohibitions fall well short of eradicating the practice. *See, e.g.*, PATEMAN, *supra* note 106, at 189–90 (noting substantial demand and stating (in 1988): "One estimate is that $40 million per day is spent on prostitution in the United States." (footnote omitted)).

whether sex ought to be subject to enforceable agreement, as the cases suggest, but rather who can provide sex and at what cost, which is the question the cases actually answer. That said, allowing payment for sex need not be detrimental to wives; accounting for a world in which prostitution is accepted and available might have the effect of increasing, rather than decreasing, the price of sexual access for the benefit of *all* women.[275] In any event, the basic point—that the regulation of sex work implicates the regulation of marriage and vice-versa—stands out in courts' attempts to protect marriage by relying on prohibitions against prostitution in interpreting contracts between unmarried couples.[276]

To be clear, refusing to enforce nonmarital contracts on account of prostitution does not insulate sex from exchange; it just limits such exchanges to certain relationships. Courts' appeals to prostitution, though, have the effect of obscuring the fact that sex and money can be, and routinely are, traded. As Noah Zatz explains with reference to criminal prohibitions, "by denying prostitution the status of legitimate work, criminalization helps patrol the boundary between the sex/affective labor routinely assigned to and expected of women and practices deserving of the financial and status rewards of 'work.'"[277] Invoking the crime of prostitution in the nonmarital cases not only removes sex from the market, but it also conceals the value accorded to sex in other contexts, like marriage.[278]

The courts' approach appears to remove sex from the public realm of the market and relegate it to the private realm of the family. The family is far from private, however, as the state's public terms for the marriage contract make evident.[279] Yet, regardless how one might apply "public" and

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275. Kotiswaran makes a version of this argument:

> [E]ven assuming that sex workers reduce the bargaining power of all women, amendments to the rape law, requiring a contract of concubinage . . . , or using the strategies of organized labour could substantially increase the rights of the weaker workers so that interests of both the stronger workers (wives) and the weaker workers (sex workers) are protected.

Kotiswaran, *supra* note 236, at 296. Hirshman and Larson also suggest that legalizing sex work could help bring about changes to marriage that would benefit women. *See supra* note 16 (quoting Hirshman and Larson). And Noah Zatz explains how some sex workers consider prostitution as a means of correcting the one-way, gendered provision of goods: "[M]any sex workers echo the radical sentiment that women are generally expected to cater to men's sexual desires, but instead of seeing prostitution as an extension of that tendency, they see it as a reversal." Zatz, *supra* note 7, at 291.

276. This is so even if courts' attempts are ultimately ineffective. Kotiswaran seeks to map the distributional consequences of different legal arrangements, which is an important and often missing part of analyses addressing the legalization of sex work. *See* Kotiswaran, *supra* note 236, at 299–302.

277. Zatz, *supra* note 7, at 287. *See also* SRINIVASAN, *supra* note 1, at 156 (noting how the "demand for wages [for housework] disrupts the illusion that domestic labor is the natural task of women—an expression of their innate femininity . . . .").

278. *See supra* notes 56–88 and accompanying text.

279. For more encompassing critiques of the would-be split between public and private, especially with respect to the family, see, for example, Frances E. Olsen, *The Myth of State Intervention in the*

"private" labels,[280] the bottom line is that law denies sex any monetary value in intimate relationships outside of marriage. As Clare Dalton explains in examining *Marvin* and similar cases:

> When courts refuse to enforce contracts based on the exchange of sexual services for money, they are, for long-standing policy reasons, declining to recognize sexual services as having the *kind* of value that they will honor . . . . [C]ourts disregard intention [of the parties] in the name of a policy that depends upon societal recognition of certain sorts of values and delegitimation of others.[281]

Such societal judgments, expressed by courts, reflect and reinforce deep-seated assumptions about gender and gender roles.[282] The illegality of prostitution forms one part of a much larger message about gender and value generation which attributes "money, commerce, and contract to the public realm of work and intimacy, desire, and pleasure to the private realm of familial and other affective relationships."[283] In other words, the illegality of prostitution shapes and is shaped by the understanding of labor associated with women,[284] and feminist disagreement over how to regulate prostitution tracks feminist disagreement over how to regulate services provided by women generally.[285] Sex, discounted because it is a service a woman provides, is in this way profoundly unexceptional.

It should now come as no surprise that prostitution plays such a prominent role in the case law about nonmarital agreements. Yet,

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Family, 18 U. MICH. J.L. REFORM 835, 836–37 (1985); Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1187 (1994); *see also* PATEMAN, *supra* note 106, at 11 (addressing the tension between the private and public in the context of the family and gender relations, and noting that "[t]he private, womanly sphere (natural) and the public, masculine sphere (civil) are opposed but gain their meaning from each other, and the meaning of the civil freedom of public life is thrown into relief when counterposed to the natural subjection that characterizes the private realm").

280. Under one view, the state's public terms for the marriage contract trump private agreements between the spouses. Under another view, denying enforcement to agreements between the spouses or partners keeps their relationship private, requiring them to resolve their own disputes without the aid of the state through its courts. *See* Jane Rutherford, *Beyond Individual Privacy: A New Theory of Family Rights*, 39 U. FLA. L. REV. 627 (1987) (criticizing turn toward privacy in family law because keeping the state out means that the stronger family member will prevail over weaker members). And, of course, law's designation of the family realm as "private" itself represents state intervention or a public act. *See* Olsen, *supra* note 279.

281. Dalton, *supra* note 16, 1105 (citations omitted).

282. This is so even when reread in today's era of marriage equality.

283. *See* Zatz, *supra* note 7, at 294; *see also supra* note 277 and accompanying text (quoting Zatz). Indeed, some feminists describe prostitution as the epitome of women's inequality under patriarchy. *See* SRINIVASAN, *supra* note 1, at 151 ("At the level of symbol, prostitution is seen as a distillation of women's condition under patriarchy.").

284. *See supra* note 277 and accompanying text (quoting Zatz).

285. SRINIVASAN, *supra* note 1, at 156–58 (linking feminist discussions of prostitution to discussions of housework). *See also* LEWIS, *supra* 106, at 59 (noting how "a feminized person's body is typically . . . working very, very hard at having the appearance of not working at all").

prostitution nonetheless remains singular for how complete a reason it provides. Courts offer no elaboration beyond the fact that prostitution is illegal, while scholars for the most part offer no trenchant critiques of courts' brevity, accepting as givens the exceptional nature of sex and the network of legal rules that make it so.[286] Although the status of sex is presented as axiomatic, it is, fundamentally, a question of institutional design.[287] This point becomes clear when considering our proposal. Subjecting sex to contract would make its value more visible across relationships, both in and out of marriage. It would also unyoke the kinds of exchanges that are recognized from marriage and from the specific gender relations that marriage has traditionally represented, thereby expanding the "legal and social contexts, [in which] women can bargain for male-female sex in ways that ameliorate their inferior gender status."[288]

This is not to say that contract, whether for sex or other bargains, is capable of tidily resolving the problem of inequality. Indeed, Carole Pateman understands contract to be an inherently faulty vehicle: "The feminist dream is continuously subverted by entanglement with contract."[289] Contract enshrines relations of subordination, be it employer-employee or husband-wife,[290] such that, according to Pateman, it can never lead to equality between the sexes.[291] A related argument criticizes bringing these activities into the market and compensating sex and domestic services for merely reinscribing the gendered quality of the work already performed by women.[292] That is, while some feminists favor "forcing the recognition that

286. *But see* HIRSHMAN & LARSON, *supra* note 16; Dalton, *supra* note 16.

287. *See* Zatz, *supra* note 7, at 294 ("How prostitution is articulated, then, is not simply a process of description but a productive process that helps shape the cultural landscape and involves inescapably political questions about how, for instance, to organize sexuality, labor, and commerce.").

288. HIRSHMAN & LARSON, *supra* note 16, at 279. Again, we would apply this principle in a way that reflects today's increased gender pluralism. *See supra* note 282.

289. PATEMAN, *supra* note 106, at 188. *See also id.* at 227 ("[F]or feminists to demand a re-evaluation of the (private) tasks undertaken by women when, in modern patriarchy, what counts as 'citizenship' and 'work' takes place in the civil masculine world, is to ask for something that cannot be granted.").

290. Pateman explains: "The reason why the wage embodies protection is that the employment contract (like the marriage contract) is not an exchange; both contracts create social relations that endure over time—social relations of subordination." *Id.* at 148. In this way, marriage might in fact be like "the timely delivery of a crate of oranges." *See supra* Section I.B. At the same time, contract can "give voice to those people or things which, by virtue of their object relation to the contract, historically had no voice." Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L.L. REV. 401, 425–26 (1987).

291. *See* PATEMAN, *supra* note 106, at 5–6 ("Men make the original contract. . . . Women are not party to the original contract through which men transform their natural freedom into the security of civil freedom. Women are the subject of contract."); *see also* SANDEL, *supra* note 17, at 111–12 (summarizing this objection to sex work).

292. SRINIVASAN, *supra* note 1, at 157 (describing the critique of recompensing services that "by making the oppressive life of the housewife slightly more bearable[;] . . . paying her a wage would

women's unwaged reproductive labor is a necessary precondition for capitalist production" as a way to ameliorate current conditions of inequality, others fear that compensation would only solidify the longstanding gendered provision of such labor.[293] Even more perniciously, turning to contract might conceal the conditions that create such inequitable exchanges and in turn validate them as if they were "freely" chosen.[294]

IV. SUBJECTING SEX TO CONTRACT: COMPLICATIONS AND CONSEQUENCES

Contract, for many reasons, is not a perfect lens for examining sex. Beyond the critiques we have already outlined, the limitations of contract jurisprudence track well known shortcomings of consent and standard objections to commodification. Yet, given the current state of the law, we think this approach holds sufficient promise that we should consider what it would entail. A contractual approach avoids the inequities of the status quo, in which sex foils some agreements but not others. It also has the potential to break from the gendered ways that law still recognizes and values sex. We explore the ramifications of making sex subject to contract in this Part, concluding that—on balance—the benefits outweigh any disadvantages. We end by sketching out how enforcement of such contracts could play out.

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buttress both sexism and capitalism"). *See also* Nancy Jo Sales, *Daddies, "Dates," and the Girlfriend Experience: Welcome to the New Prostitution Economy*, VANITY FAIR (July 7, 2016), https://www.vanityfair.com/style/2016/07/welcome-to-the-new-prostitution-economy [https://perma.cc/8W3Q-LDQK] (describing "classy" sex workers for those seeking more than sex and who apply their earnings to pay student loans and other expenses associated with societal privilege and asking whether this practice is "just an unorthodox way to make ends meet or a new kind of exploitation," implying that it is the latter).

Margaret Radin engages in a broader critique, arguing that contract results in commodification, which fails to "capture—and may debase—the way humans value things important to human personhood." RADIN, *supra* note 106, at 9. *See also* SANDEL, *supra* note 17, at 8 (positing that "a society in which everything is up for sale" risks exacerbating inequality and corruption).

293. SRINIVASAN, *supra* note 1, at 156–57 (addressing in particular the arguments raised by Silvia Federici and Angela Davis).

294. Srinivasan worries that subjecting sex to "the norms of capitalist free exchange" shifts the conversation so that "[w]hat matters is not what conditions give rise to the dynamics of supply and demand . . . but only that both buyer and seller have agreed to the transfer." SRINIVASAN, *supra* note 1, at 82. As Srinivasan explains, "to understand what sort of work sex work is . . . and why it is overwhelmingly women who do it, and overwhelmingly men who pay for it—surely we have to say something about the political formation of male desire." *Id.* at 83. *See generally* GHODSEE, *supra* note 264 (explaining "why women have better sex under socialism"). Feminist analyses of the centrality of consent in the contemporary regulation of sexual conduct in criminal law and related domains also track these feminist divergences. *See supra* notes 189–89 and accompanying text.

A. Consent's Limits and Sexual Trades

Consent is the minimum requirement for lawful sex with another, just as it is for valid contractual commitments, absent a showing of duress or incapacity that would render an expression of consent ineffective.[295] Yet, in the context of sex, the consent test has invited criticisms because it oversimplifies, functioning as an on-off switch and obscuring other factors that law should appreciate.[296] On the one hand, as Alexander Boni-Saenz has illuminated, a consent requirement thwarts the important sexual interests of individuals whom law deems incapable of consent.[297] On the other, as Robin West has trenchantly developed, consensual sex is not necessarily wanted or pleasurable sex or sex agreed-to by parties whom background conditions place on a level playing field.[298] To some extent, West's critique echoes concerns voiced about contractual regimes in other areas, such as consumer transactions and labor agreements,[299] although she goes further by spinning out distinctive harms likely to follow in the sexual domain.[300]

Another set of reservations about the consent test arises because consent does not necessarily entail unconstrained choice, even in the absence of duress or other factors that would render consent ineffective.[301] In advocating for reform of prostitution laws, some sex workers propose the alternative term "'deliberate' sex work" to convey an element that consent overlooks when it signals "choice."[302] Others propose a spectrum that includes "choice, coercion, [and] circumstance" to describe the varied situations in which they have engaged in sex work.[303] Still additional criticisms of consent as the litmus test for legitimate sex point out that it

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295. For example, the *Model Penal Code* revision draft deems consent ineffective when it is expressed in response to violence. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES §§ 213.1(3), 213.2(3) (AM. L. INST., Tentative Draft No. 5, 2021). Likewise, consent is ineffective when the individual expressing consent is incapacitated or "legally restricted," that is, in custody or subject to the actor's actual or apparent authority. *Id.* § 213.3(3).

296. *See, e.g.*, FISCHEL, *supra* note 163, at 18–19.

297. Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201 (2015); *see also* Alexander A. Boni-Saenz, *Sexual Advance Directives*, 68 ALA. L. REV. 1 (2016).

298. *See* West, *supra* note 193. She sets out seven situations in which the "ethic of consent" legitimates unwanted (albeit consensual) sex. *Id*. at 18–22 (describing "coerced sex, commodified sex, dutiful sex, hierarchic sex, culturally mandated sex, maintenance sex, and reckless uncontracepted sex"). *See also* CHRISTINE EMBA, RETHINKING SEX: A PROVOCATION 17 (2022) (criticizing consent for being "a legal criterion, not an ethical one," which allows us to "pass on the [following] hard but meaningful questions: whether that consent was fairly gotten, what our partners actually want, whether we even should be doing what we've gotten consent to do").

299. *Id.* at 9–10. *See supra* notes 289–292 and accompanying text.

300. *See* West, *supra* note 193, at 26–28; Appleton & Stiritz, *supra* note 206, at 60, 64–65.

301. Tuerkheimer, *supra* note 191; Lee, *supra* note 202, at 28.

302. Lee, *supra* note 202, at 28.

303. *Id.*

ignores the systemic harms that even consensual sex can cause in particular settings, such as educational institutions.[304]

Consent just might also paint with too broad a brush, functioning as a wholesale rationalization. The scholarship on "sexual trades" (not to mention common experience) highlights how individuals consent to sex for myriad reasons, not all of which might rest on the same footing. Again, Robin West articulates the point:

> [S]ex is now widely insulated from criticism, so long as it is consensual, regardless of the motive that triggered the consent, including motives that trigger exchanges of sex for goods, commodities, money or services that have nothing whatsoever to do with sexual pleasure . . . . So, not only sex for pleasure but also sex in exchange for tips on electric blankets, sex for survival, sex for exercise, sex for money, sex for diversion, sex for release from stress, sex as entertainment, sex as an expression of friendship, or sex as expressive of any other impulse is all equally insulated from critique so long as it is consensual. That motive doesn't matter, in fact, is a part of the essence of the ethic of consent; it is at that ethic's heart, not periphery. Consent might be given to sex for any reason or no reason.[305]

Other authorities have made similar observations about routine sexual trades, although without West's accompanying critique.[306] Consent, not motive, still provides a minimum standard—in sex law and in contract law—even if we might prefer a more demanding test or a more nuanced approach. And, upon closer inspection, West's lament turns out to suggest a solution for another problem: current doctrine's required severance of an agreement's sexual terms.

B. Severing Sex

The *Marvin* court notably wrote that prostitution bans require a court to sever a nonmarital agreement's sexual terms before the remaining terms can be recognized and enforced. As we have seen, however, some cases, such

304. *See* SRINIVASAN, *supra* note 1, at 147.

305. West, *supra* note 193, at 19 (emphasis and footnote omitted).

306. *See, e.g.*, BERG, *supra* note 177, at 60 ("Sex can be instrumental, tedious, and even physically uncomfortable and still consensual."); FISCHEL, *supra* note 163, at 15–16; *see also* Aya Gruber, *Sex Wars as Proxy Wars*, 6 CRITICAL ANALYSIS L. 102, 122 (2019) ("When I look into the world, I see a lot of sex that is beneficial, but not pleasurable: sex to preserve a relationship; to feel adult; to make another person happy; to have a family; to survive in socioeconomic marginality." (citations omitted)). *Cf.* Robin L. West, *Legitimating the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 1442 (1993) (criticizing acceptance by legal authorities of many sexual trades); Sales, *supra* note 292.

as *Jones v. Daly*, find severance impossible, compelling—under *Marvin*'s rule—a refusal to recognize the entire agreement.[307] In fact, *Jones*'s reasoning resembles the analysis in cases disallowing sexual agreements in marriage on the ground that sex must be an essential aspect of the arrangement, a thread that cannot be pulled without unraveling the entire fabric.[308]

But the relationship in *Jones* reflects how intimate and relational agreements typically operate. People consent to sex in exchange for all manner of things, as sex workers, dates, hook-ups, lovers, nonmarital cohabitants, and as spouses, just as the literature on sexual trades postulates.[309] Even once we abandon the prostitution rationale, severing sexual terms, and only sexual terms, in nonmarital agreements still misleadingly suggests that each party always exchanges sex for sex—or that perhaps law should see sex as its own reward for each party. Rather, sex is often one integral piece of such nonmarital relationships and the various agreements that underlie them.

This understanding of sex becomes especially important today. As we have noted, traditional family law conceptualized heterosexual penetration as a husband's prerogative, regardless of the wife's wishes. It was nothing short of her wifely duty. Her consent to marry operated as blanket consent to his sexual access. Damages for loss of consortium, originally the remedy for a cause of action available only to husbands but not wives, underscored the understanding of sex as a husband's entitlement. Moreover, the conceptualization of "respectable" women as passive recipients of sex for the enjoyment of their husbands precluded any consideration of the possibility of women's own sexual pleasure. Indeed, "sex" long referred exclusively to penile-vaginal penetration, which data show produces a persistent orgasm gap—with female-bodied individuals on the losing end.[310] Viewed from this traditional perspective, sex constitutes a service that wives, and women generally, provide to husbands, and men generally.

The emergence of sex-positive feminism and the expansion of standard notions of "sex" to include a range of pleasure-making activities for persons of various anatomies unsettle this conventional approach.[311] Yet, even if we

307. *See supra* notes 226–233 and accompanying text.

308. *See* Antognini, *supra* note 15, at 107 (arguing that in these cases "'sex' becomes a proxy for the more encompassing exchanges present in any romantic relationship, if that relationship is understood though the duties that underlie marriage").

309. *See supra* notes 305–306 and accompanying text.

310. ELISABETH A. LLOYD, THE CASE OF THE FEMALE ORGASM: BIAS IN THE SCIENCE OF EVOLUTION 21–43 (2006).

311. *See, e.g.*, Appleton, *supra* note 243; Mary Katharine Tramontana, '*There's Not Just One Type of Porn:' Erika Lust's Alternative Porn Vision*, N.Y. TIMES (Jan. 14, 2022),

were to assume that consensual sex is always mutually enjoyable,[312] we still cannot assume that it can be excised from the context in which the parties agreed it would take place. In fact, perhaps the phenomenon in which sex most closely approximates an isolated activity, disconnected from a transaction or relationship, as the severance requirement seems to contemplate, is sex in the hook-up culture prevalent on many residential college campuses (at least before the coronavirus pandemic that began in 2020). Yet, according to the literature, even here influential contextual considerations beyond the sex itself are at work, including the alcohol that often accompanies the sexual activities, the peer pressure and quest for popularity, and the wish by many for a relationship or commitment.[313] Likewise, some adult queer sex might appear to take place in isolation, but a deeper analysis shows how it actually functions to build community and shape one's identity.[314]

Allowing sex as a valid subject of contract would eliminate the need for *Marvin*'s artificial delinking of contract terms. Doing so would situate the agreements in cases like *Marvin* and *Jones v. Daly* in the parties' larger relationships, more accurately reflecting the parties' intent and understanding of the bargain. It would also echo at least part of the logic of the treatment of sex in marriage, where courts say that sex is integral to the relationship, inseparable from all the other incidents of marriage, but not a reason to deny a property distribution. Finally, this approach to the nonmarriage/marriage cases is reinforced by the *Model Penal Code* revision's reliance on "contextual consent," which determines the presence or absence of consent to sex "in the context of all the circumstances," including "the nature, duration, and quality of the parties' relationship."[315]

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https://www.nytimes.com/2022/01/14/movies/erika-lust.html [https://perma.cc/AZP4-WSJF] (describing the work of filmmaker Erika Lust, who aims to show female sexual pleasure and "include people of 'different sexualities, skin colors and body shapes'" (quoting Erika Lust)).

312. Clare Dalton hypothesizes that mutually enjoyable sex would justify severing the sexual part of the parties' agreement from its remaining provisions. *See* Dalton, *supra* note 16, at 1111. We disagree because we would look to the context (the setting and/or the other provisions of the agreement) to determine the terms of the exchange; *see also supra* note 222 (explaining the revised *Model Penal Code*'s reliance on "contextual consent").

313. *See, e.g.*, LAURA SESSIONS STEPP, UNHOOKED: HOW YOUNG WOMEN PURSUE SEX, DELAY LOVE AND LOSE AT BOTH (2007); LISA WADE, AMERICAN HOOKUP: THE NEW CULTURE OF SEX ON CAMPUS (2017); Paula England, Emily Fitzgibbons Shafer & Alison C.K. Fogarty, *Hooking Up and Forming Romantic Relationships on Today's College Campuses*, *in* THE GENDERED SOCIETY READER 578 (Michael Kimmel & Amy Aronson eds., 4th ed. 2011).

314. *See, e.g.*, TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING (2009); Lauren Berlant & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547 (1998).

315. *See supra* note 222 and accompanying text.

C. Mistaken or Withdrawn Consent

Potential complications in viewing lawful sex through a contractual lens arise when we consider the question of mistake and the recognized freedom to withdraw consent even once a sexual encounter has begun. We examine each in turn, concluding that the problems constitute more of a molehill than a mountain and, in fact, can add valuable insights to the analysis.

The longstanding essentiality of mens rea or culpability in criminal law already means that a mistake asserted in that context can prevent nonconsensual sex from constituting a punishable offense. In other words, a mistaken belief that the nonconsenting other party is consenting can save the defendant from conviction for what appears to be a sexual assault; although we might feel hard pressed to call that "licit" or "lawful" sex because it is not consensual, it would not be criminal or punishable if the mistake negated the requisite mens rea.[316] The contractual lens does not disrupt this consequence. On the contrary, a mistake made in the formation of a contract can make it voidable by the mistaken party.[317]

On closer inspection, these apparently different consequences share noteworthy similarities. First, in both contexts mistake yields a "gray

316. For example, the crime of "sexual assault in the absence of consent" in the *Model Penal Code* draft revisions uses the mens rea of "recklessly," which requires that the actor consciously disregard a substantial and unjustifiable risk that the other party does not consent. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.6 (AM. L. INST., Tentative Draft No. 5, 2021). *See id.* § 213.0 cmt. 1(c)(ii) (discussing use of 1962 *Model Penal Code*'s "four signature mental states"). A defendant prosecuted for this offense might assert that the other party consented or, even if not, the defendant mistakenly believed that the other party was willing and thus the encounter was consensual. If this claimed mistake raises a reasonable doubt for the factfinder that the defendant consciously appreciated a substantial and unjustifiable risk of the absence of consent but proceeded anyhow, the defendant cannot be convicted. For an offense that requires a mens rea of "knowingly," the analysis would unfold the same way, but the prosecutor would need to prove beyond a reasonable doubt the defendant's awareness of the attendant circumstance of nonconsent (not just awareness of the risk). *See id.*

317. According to the *Restatement*:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in §154, and
>
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake.

RESTATEMENT (SECOND) OF CONTRACTS § 153 (AM. L. INST. 1981). Regarding the risk of mistake, the *Restatement* explains:

> A party bears the risk of a mistake when
>
> (a) the risk is allocated to him by agreement of the parties, or
>
> (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
>
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

Id. § 154.

area"—in criminal law one where sexual conduct is neither fully licit nor fully illicit[318] and in contract law where an agreement might not be a binding obligation but might still be performed according to its terms, despite the mistake.[319] Second, to the extent a mistaken defendant is guilty of sexual assault if the defendant nonetheless satisfies the required mens rea, say, "recklessly" (because the defendant appreciated the uncertainty of the other party's consent but proceeded anyway), the defendant bears the risk of that mistake—just as a party to a contract does, when that party "is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient."[320] Turning to contract thus need not conflict with mens rea requirements for sex crimes.

The second possible difficulty in envisioning lawful sex as contract emerges because the consent-to-sex framework allows participants to change their minds at any time, making evanescent any promised future performance. As the *Model Penal Code* revision draft states in the definition of consent:

> Consent may be revoked or withdrawn any time before or during the act of sexual penetration, oral sex, or sexual contact. A clear verbal refusal—such as "No," "Stop," or "Don't"—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent given prior to the act of sexual penetration, oral sex, or sexual contact.[321]

Similarly, the affirmative defense for the use of force with prior permission is not available when:

> the act of sexual penetration, oral sex, or sexual contact occurs after explicit permission was withdrawn, and the actor is aware of, yet

318. Although we use the adjective "gray" in a different way, the vocabulary on sexual assault now includes the controversial term "gray rape" for "sex that falls somewhere between consent and denial." Laura Sessions Stepp, *A New Kind of Date Rape,* COSMOPOLITAN (Sept. 11, 2007), https://www.cosmopolitan.com/sex-love/advice/a1912/new-kind-of-date-rape/ [https://perma.cc/MV5R-BCL9]; *see also* Adrienne Baldwin-White & Brooke Bazemore, *The Gray Area of Defining Sexual Assault: An Exploratory Study of College Students' Perceptions*, 65 SOCIAL WORK 257 (2020), https://doi.org/10.1093/sw/swaa017 [https://perma.cc/9J2E-H86C].

319. Put differently, the contract is voidable, but not void. *See supra* note 317.

320. *See id.*

321. This language appears in all of the versions that might become the final definition—including the revised motion to amend, which won approval in 2022, and the version approved in 2016. *See supra* notes 196 and 222.

> recklessly disregards, the risk that the permission was withdrawn . . . .[322]

Although the repeated opportunities to withdraw consent or permission complicate the contemporary framing of lawful sex as a relationship akin to contract, they do not doom the analogy. One might conceptualize each step in an escalating series of intimacies as the product of offers for separate unilateral contracts that, once accepted by reciprocating performance, become complete; withdrawal of consent or permission simply means that, going forward, no offer can mature into a meeting of the minds.[323] Of course, this conceptualization merely provides a bare-bones heuristic device, leaving little room for the experimentation and spontaneity that often accompanies rewarding sex, but it nonetheless helps show why the opportunity to withdraw consent, an important part of modern sex regulation, need not upend the contract analogy.[324] Alternatively, if one prefers to see a breach in such circumstances,[325] then the question becomes one of remedies.

D. Remedies

Appealing to contract in an effort to define lawful sex and making sex subject to contract both prompt questions about enforcement and remedies. Certainly, a contract clause promising sex—like any agreement for personal services—would never invoke specific performance in an enforcement action, though one could imagine an award of money damages.[326] Specific

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322. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.10(3)(a) (AM. L. INST., Tentative Draft No. 5, 2021).

323. Given the legal protection for withdrawal of consent, even if one party expected performance of an agreed-to course of sexual conduct, it would not make sense to consider contract doctrines such as anticipatory repudiation when the other party withdrew consent before the course of conduct was complete. *Cf.* Thomas H. Jackson, *"Anticipatory Repudiation" and the Temporal Element of Contract Law: An Economic Inquiry into Contract Damages in Cases of Prospective Nonperformance*, 31 STAN. L. REV. 69 (1978). *See generally* Peter Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second* Restatement, 81 COLUM. L. REV. 111 (1981); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982).

324. In fact, contract law itself has a number of ways to find an agreement other than through a formal series of exchanges. *See* Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 15–16 (2010) ("There is a whole range of equitable 'saves' that infuse contract law with public-law-like commitments to fairness. Courts may require writing or explicitness as basic procedural fairness, test for unconscionability, and require good faith; hold contracts void for force, fraud, or duress; hold them void for the presence of consideration that violates public policy; enforce the doctrines of promissory estoppel, equitable estoppel, unclean hands, etc.").

325. *Cf., e.g.*, RESTATEMENT (SECOND) OF CONTRACTS, § 45 (AM. L. INST. 1981) ("Option Contract Created by Part Performance or Tender").

326. *Id.* § 367(1) ("A promise to render personal service will not be specifically enforced."). The

performance would be unavailable for a second reason: this remedy would violate public policy,[327] not because sex qua sex is immoral or "meretricious," but because specific performance would require sex *without consent*. Subjecting sex to contract is not tantamount to creating a right to sex.[328]

Even so, broken promises to engage in sex are a red herring. In the nonmarital agreement cases, the sex is over; the relationship has ended and plaintiff seeks to recover on promises for property made in exchange for sex, among various other past contributions to the partnership.[329] Importantly, contract law generally recognizes an agreement "[w]here a bargain has been fully performed on one side," which describes the standard situation in the nonmarital cases.[330] Under such circumstances, enforcing a sexual agreement requires simply the transfer of property, pursuant to the earlier promises.[331] In the loss-of-consortium context, for example, courts

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general enforceability of surrogacy contracts, *see supra* Section II.A, does not contradict this point. Courts will require the surrogate to surrender the baby. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); P.M. v. T.B., 907 N.W.2d 522 (Iowa 2018). Nonetheless, most authorities agree that the surrogate retains the right to terminate the pregnancy despite a contract provision to the contrary or to continue the pregnancy despite an agreement to terminate upon the intended parents' request. *See* Rebouché, *supra* note 114, at 1615–23.

327. RESTATEMENT (SECOND) OF CONTRACTS § 365 ("Specific performance or an injunction will not be granted if the act or forbearance that would be compelled or the use of compulsion is contrary to public policy.").

328. As Srinivasan declares: "[N]o one is under an obligation to have sex with anyone else." SRINIVASAN, *supra* note 1, at 86.

329. Courts are reluctant to intervene in an ongoing relationship. The classic case cited for this proposition is *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953), which refused the wife's equitable claim to suitable maintenance and support money, reasoning "[t]he living standards of a family are a matter of concern to the household, and not for the courts to determine . . . ." Even if this approach were somehow inapplicable in the nonmarital sphere, we would not necessarily oppose intervention, given the general prohibition on enforcing contracts for personal services. *See* RESTATEMENT (SECOND) OF CONTRACTS § 367(1) ("A promise to render personal service will not be specifically enforced.").

330. RESTATEMENT (SECOND) OF CONTRACTS § 18 cmt. b. In all the cases that have made it to court, the sex or the domestic services have already been performed. Given our proposal, however, a situation might arise in which the financial obligation has been performed but the sex has not. In this situation, the remedy would again not be specific performance, but rather economic in nature. We understand that the threat of economic sanctions might in some circumstances become coercive. But we still stand by our proposal. First, the agreement itself must be found valid under contract law (and not the product of duress or coercion). And, while we admittedly have concerns that enforcing a contract might possibly lead to unwanted sex, the literature on sexual trades shows how negotiations are constantly occurring, and so subjecting sex to contract might actually improve the conditions under which these bargains are taking place. *See* discussion *supra* Section IV.A.

331. *See supra* note 18. As we emphasize throughout, we set our sights on contract law, with our specific target the enforcement of promises to transfer property. Thus, the question whether or not to revive the tort of seduction or to recognize a tort of sexual fraud lies outside our analysis. *See* Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993). *Cf.* Murray, *supra* note 243 (examining the history of the *crime* of seduction, for which marriage provided a way to avoid penal sanctions); MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.5 reps.' notes (AM. L. INST., Tentative Draft No. 5,

seek to compensate plaintiffs for the sexual enjoyment that they lost, and do not require anyone to engage in unwanted sex going forward. Further, courts in the marriage cases distribute property, notwithstanding judicial reluctance to consider the private agreements of the parties. Indeed, any such reluctance to examine sex is belied by their searching inquiries in deciding loss-of-consortium claims.

While the problem of refusing to enforce contracts is especially acute in nonmarital relationships given that courts in these cases prevent a distribution of property outright, subjecting sex to private agreement would also have a salutary effect within marriage. Spouses would be able to seek enforcement of agreements that are responsive to their individual needs and idiosyncrasies, limited only by the generic requirements of contract law, rather than by any specific terms imposed by the state.[332] Allowing spousal contracts to address sex would also advance the project of pluralizing the kinds of relationships recognized by law.[333] Doing so would, again, not require specific performance, but only a finding that a party breached the agreement.[334] Moreover, enabling spouses to tailor their contracts and thereby accept the various ways sex might matter to a couple (which courts go some way towards appreciating in the loss-of-consortium cases), further unmoors sex from marriage and the latter's traditional, gendered, and mostly one-way provision. Refusing to consider any diversity in terms means that, at a very basic level, sex is still controlled by the state rather than by the parties.

This final point is also true of the nonmarital cases. Although *Marvin* insisted on severing sexual components of nonmarital agreements, a more general point about enforcement made by the court bears recalling here: denial of relief does not represent a neutral position. Instead, it amounts to

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2021) (explaining narrow scope of criminal "[s]exual [a]ssault by [p]rohibited [d]eception," which excludes many types of misrepresentation). Perhaps making sex subject to contract would eliminate any perceived need for a tort of sexual fraud, or perhaps a cause of action sounding in tort would complement one sounding in contract, advancing similar goals. Likewise, our proposal differs significantly from the now-obsolete cause of action for breach of promise to marry. In fact, *Marvin* itself made this distinction clear in rejecting an asserted defense based on the statutory abolition of such suits. Marvin v. Marvin, 557 P.2d 106, 115–16 (Cal. 1976) (in bank).

332. Courts would, of course, still be able to consider duress or undue influence in the creation of the contract. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 174–75 (duress); § 177 (undue influence). They would also be able to consider whether such contracts result in a penalty. *See id.* § 356(1) ("A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.").

333. This move would also be consistent with the trend toward private ordering in family law. *See, e.g.*, Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. LAW. 249, 251–53 (2010) (noting how private ordering in family law defers to individuals' knowledge of their own best interests, respects autonomy, and increases efficiency).

334. Courts invalidate agreements that both limit sex and demand sex within marriage. *See supra* Part I.B.1. In neither situation would the court now have to order sex; it would instead find a breach and interpret the terms the contract set out.

a decision in favor of one of the two contracting parties, who *Marvin* said could both be considered equally "guilty"—although we reject that particular adjective. In the court's words:

> [W]e note that the cases denying relief do not rest their refusal upon any theory of 'punishing' a 'guilty' partner. Indeed, to the extent that denial of relief 'punishes' one partner, it necessarily rewards the other by permitting him to retain a disproportionate amount of the property. Concepts of 'guilt' thus cannot justify an unequal division of property between two equally 'guilty' persons.[335]

The logic applies to the sexual components of agreements as well. Denying relief to a plaintiff who agreed to engage in a sexual relationship amounts to a decision in favor of a defendant who also agreed to engage in a sexual relationship.[336] A judicial "hands off" approach to sex is illusory in such cases.

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As this survey of complications and consequences has shown, contract law and sex law share a number of common features even if the fit is not always perfect. Attempting to align all the details of the two domains goes well beyond the scope of the argument. The point is not to cast sex itself or each consensual sexual episode as a contract, taking place in the context of a larger agreed-upon relationship, but rather to highlight conceptual overlaps that challenge the traditional views of sex and contract as utterly incompatible and as intersecting only in illicit spaces, typified by prostitution. In short, contract law could easily allow for sexual agreements, such as those presented in the nonmarriage/marriage cases.

CONCLUSION

Sex and contract are not incompatible, even though courts confidently assert that prostitution bans compel that result. As we have shown, marriage, understood as a gendered relationship sanctioning the exchange of property for sex, is doing the work that courts attribute to prostitution in the case law. Courts have long viewed marriage as a sexual contract for valuable services and support, and emerging law on gestational surrogacy, parentage, sex therapy, and adult entertainment reveals how—notwithstanding prostitution

335. *Marvin*, 557 P.2d at 121 (footnote omitted).

336. *See* Linzer, *supra* note 323, at 111–13 (criticizing contract law's parsimonious use of remedies and urging a "moral approach to contracts" that "stands for the idea that it is both fair and appropriate to hold people to promises that they freely made").

bans—contract law can make room for agreements with significant sex-adjacent or sexual elements. Moreover, contemporary criminal law and related efforts to distinguish illicit from licit sex increasingly rely on contract law's vocabulary, concepts, and values in place of marriage, gender, force, and resistance.

Bringing sex into the realm of contract would not stop with reforming the doctrine in the nonmarriage/marriage cases. But they are certainly one promising place to start. Changing the law as we suggest would address some conspicuously gendered disparities that arise when intimate relationships dissolve. Our focus on agreements, however, means that our intervention does not directly address those without agreements or without resources to distribute. Nor does our analysis expressly engage in the conversation about race, class, and the retreat from marriage.[337] Yet, recognizing sex and valuing it apart from marriage would cut across questions of gender, race, and class, thereby allowing sex to take its proper place as part of life's ordinary exchanges. Such reforms would unsettle dominant scripts,[338] invite new ones, and further the project of challenging sex exceptionalism.

337. *See* RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINES AFFECTS EVERYONE (2011); JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014); ISABEL V. SAWHILL, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE (2014); Shelly Lundberg & Robert A. Pollak, *Cohabitation and the Uneven Retreat from Marriage in the United States, 1950–2010*, *in* HUMAN CAPITAL IN HISTORY: THE AMERICAN RECORD 241 (Leah Platt Boustan, Carola Frydman & Robert A. Margo eds., 2014). For a more positive view of nonmarriage, see R.A. Lenhardt, *Black Citizenship Through Marriage? Reflections on the Moynihan Report at Fifty*, 25 S. CAL. INTERDISC. L.J. 347, 359 (2016) (advancing a proposal that "imagines situating nonmarriage alongside marriage as a framework for loving black relationships" in order "to ensure the 'flourishing' of all black families, rather than pathologizing those that never enter traditional marriage either by choice or because of the structural inequality they confront").

338. *See* Appleton, *Sex-Positive Feminism's Values in Search of the Law of Pleasure*, *supra* note 104, at 4.