A LEGAL (AND OTHERWISE) REALIST RESPONSE TO "SEX AS CONTRACT"

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I. INTRODUCTION

The serious suggestion made in the article "Sex as Contract: Abortion and Expanded Choice"[1] that society use the legal coercion of "contract" to give definition to the social and emotional experience of "sex" provides evidence for the feminist assertion that there are often explicit but unconsidered gendered consequences attached to the implementation of so-called "neutral" legal concepts and doctrine.[2] "Contract" may be a neutral term, but, given the different social and cultural "realities" women and men experience in our society, sex and reproduction are very gendered acts.

The assertion that law all too typically has been oblivious to gendered consequences is related to the empirical observation that the law, both institutionally and doctrinally, systemically favors men and male experiences. Perhaps this bias is not surprising given the fact that women are relatively new to the legal profession and still are not found in large numbers among those who create and define policy and law.[3] However, one area where male bias has been at least restrained by limited but explicit considerations of gendered experience is in the area of reproductive

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[1] Peter D. Feaver et al., Sex as Contract: Abortion and Expanded Choice, Stan. L. & Pol'y Rev. 211 (1992--93).

[2] See Martha Albertson Fineman, Feminist Theory in Law, The Difference It Makes, 2 Colum. J. of Gender & L. 1, 9 (1992) [hereinafter Fineman, Feminist Theory in Law]. The idea of gender as an explicit consideration and analytic designation is based on the assertion that a supposedly "neutral" law or principle of decision may actually be harmfully biased against women as compared to men. The bias is not intentional, but results from the different material, social, and cultural existences lived by women and men in our society. For example, women function as "mothers" and men as "fathers"---each role traditionally encompassing different cultural expectations for behavior and, consequentially, resulting in unequal social and economic costs. The idea of gendered lives and the significance of making explicit previously hidden gender differences in legal analyses is explored more fully in Martha A. Fineman, Challenging Law, Establishing Difference: The Future of Feminist Legal Scholarship, 42 Fla. L. Rev. 25, 37--39 (1990); see also Fineman, Feminist Theory in Law, supra, at 2--5 (1992).

[3] Fineman, Feminist Theory in Law, supra note 2, at 1.

choices.[4] The Supreme Court in *Roe v. Wade* and *Danforth* recognized that pregnancy and the social consequences of reproduction are unequally gendered experiences and consequentially it allocated the abortion decision to women. As the *Danforth* court noted:

> Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between [the woman and her male partner], the balance weighs in her favor.[5]

These initial observations are relevant because the authors of "Sex as Contract" are particularly concerned with which partner to a reproductive event will ultimately control the abortion decision. The authors do not explicitly discuss gender as affecting either abortion or the "economics of contract law"---the method they designate as appropriate for allocation of decision-making. But a consideration of the gendered implications of a contract analysis is essential for an assessment of its fairness because ultimately this article seems little more than a thinly disguised attempt to reassert male-biased rules under the cloak of so-called "neutral" principles.

It is important, therefore, to assess this current proposal for the equation of sex with contract in the context of the historical application of the same formula. Sex and contract were originally paired in the creation of the common law marriage contract---an early jurisprudential regulation of gender relationships in which women's legal identities were merged with those of their husbands.[6] Reformers worked long and hard trying to eradicate this explicitly patriarchical view of marriage, considered inherently inequitable by contemporary standards.

The history of legally acceptable exploitation of women's sexual and reproductive capacities by their husbands in the names of both marriage and

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[4] In Roe v. Wade the majority opinion discussed the implications of pregnancy and child care as gendered experiences thus:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

410 U.S. 113, 153 (1973).

[5] Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1976).

[6] See, e.g., 1 William Blackstone, Commentaries on the Laws of England (William Draper Lewis ed., George T. Bisel Co. 1922) (1897).

contract belies the authors' portrayal of contract theory as "protecting the women's interest" by being "sufficiently flexible to changing social mores."[7] They resort to contract theory as an allegedly "neutral" method to allocate the decision, but what is really accomplished is a transfer of hard-won reproductive decision-making power from women to men.[8] Any concerned policy-maker cannot ignore the possibility that under such a scheme women would lose far more than they would gain. For married women, far from representing the "Pareto optimal" solution the authors assert, the use of contract theory would in fact cast them legally back to an era where their rights as individuals were eclipsed by their marital status.

II. CREATION AND SOLUTION OF A DILEMMA

A. Defining the "Life-giving Act"

The foundation premise of "Sex as Contract" is the authors' contention that "the Court treats the fetus as if it were not a person until it passes the point at which a state's interest becomes compelling,"[9] and "child support laws treat the coitus as if it were the legal life-giving act for which the father can be held responsible."[10] *Roe* and *Danforth* are characterized as

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[7] Feaver et al., supra note 1, at 217.

[8] The following constitute my criticisms of the authors' main premise and derivative conclusions.

It does not take long for the reader to confront the authors' biases and poorly hidden agenda. We are reminded several times that a man "*merely transfers his seed during coitus.*" Feaver et al., supra note 1, at 212 (emphasis added). Furthermore, "the double standard clearly *elevates women*, with regard to this issue, to a position of greater autonomy and freedom than men." Id. at 213 (emphasis added). I guess the initial claim to impartiality is required when the authors plan to slap us with loaded text like "[B]ecause we 'know' that abortion ought to be allowed, we must make whatever changes are necessary in other laws to bring them into alignment with the established 'truth.'" Id. (emphasis in original). According to the three male authors, women "lose nothing" if we just trim from the abortion right its inalienability. Id. at 214.

The authors plunge an "idiosyncratic pair of individuals," id. at 215, into a series of "plausible scenario[s]" in which, because she "strongly desires sexual satisfaction from a particular man, who finds his desire tempered by a compelling interest in avoiding possible child support obligations," id., she finally gives up all her claims to control over the abortion decision and surrenders any future claims to child support (which, the authors fail to comprehend, are not hers to surrender) for the pleasure of this man's affections. See id. Finally, while the authors realize that "partisans in the national debate on abortion will raise other objections," id. at 216, they stress that the "pro-choice critique inaccurately interprets *Roe* and fails to address the contradictions evident in abortion law." Id.

[9] Id. at 212.

[10] Id. at 213.

establishing that men have no role in the "creation of life."[11] The authors reach this rather remarkable conclusion by defining the "life-giving act" *not* as conception, but rather as the decision not to abort.[12] Life thereby becomes a *legally* rather than a biologically defined act. Since in the authors' terms under current Supreme Court doctrine, a pregnant woman is granted "total autonomy" in deciding whether or not to have an abortion, men therefore have a non-life-creating role.[13]

By contrast, the authors assert that child support laws assume a different act as the relevant, life-giving one, thereby creating "inconsistency."[14] In this analysis of child support the child never emerges as an independent (or even a dependent) aspect of the calculation of obligation. The authors erroneously treat *child* support as a *maternal* entitlement. They do not address the obviously significant event of birth as a potential link between father and child laying the foundation for a legal duty to support on the part of father that runs *to the child*.[15] Instead, the authors, concerned only with the contract-capable adults, arbitrarily designate sexual intercourse[16] as the legal life giving act for which men are held responsible.[17] There is no legal authority cited for this designation,

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[11] Id.

[12] The notion that there is a single decision not to abort or to abort is not consistent with most women's experiences. Abortion as an option is present during much of the pregnancy and so the decision is not an isolated event, but rather a process of consideration and balancing that is coterminous with the pregnancy itself. Many unanticipated factors may influence the course of any pregnancy.

[13] See Feaver et al., supra note 1, at 212.

[14] Id. at 213.

[15] The authors never consider the child as a "life" in the context of their discussion of support. They focus exclusively on the biological parents, a constriction of focus necessary for the application of their contract metaphor.

[16] Sexual intercourse should be considered as the potential "life-giving act" in both analyses if the authors are interested in consistency. Intercourse MAY lead to pregnancy---pregnancy may result in a miscarriage, a birth, or an abortion---birth may result in a live child. There are many possible outcomes from the act of intercourse; reproduction of a live child is only one potential event. Reproduction, like intercourse, is also an event over which men potentially have as much control as women. See infra part III.C.

[17] On a mundane level, there are many other conceptual problems with "Sex as Contract," some complicated by assertions about law and policy that are just plain wrong. In fact, the variety and pervasiveness of distortions renders any single essay only a partial response. Both as an idea and (perhaps consequentially) as an article, "Sex as Contract" is riddled with inconsistencies and flawed logic. From a purely legal perspective, for example, the authors sloppily fabricate a "straw court"---piling up twisted, recast, or invented doctrine and commentary---then huff and puff to blow that very structure down in a frenzy of economic conceptual excess. Since I felt it important to address the ideological implications of the contract metaphor, I have neither a sufficient residue of space nor patience with which to address all of the many

but it forms the basis for their further assertion that to be "fair" and "consistent," either abortion rules must be reworked or child support obligations must be removed.[18]

Given the authors' disciplinary biases, it is no surprise that they offer contract theory as the ideal rationalization tool. In view of the way they have constructed the "dilemma," contract seems uniquely designed to fashion rules in regard to the allocation of the abortion decision that will render it consistent with the asserted premises of the laws of child support.[19] The messy, potentially complicating factor in regard to "fairness" represented by the after-birth existence of the child is conveniently removed by the focus on adults and intercourse. The prerequisites of bargaining and negotiation typical in contract doctrine are assumed or ignored, although the authors concede that in the absence of an agreement, the abortion decision would revert to the woman. This is stated as reflecting a "default" position consistent with current constitutional doctrine. The authors, referring to consistency and fairness, express concern that "idiosyncratic" couples be allowed to alter this position.

B. Resolution of the Constructed Dilemma---the Imperial Contract

It is important initially to address the manipulation of the contract metaphor as an asserted "neutral" methodology with which to assess sex and reproductive decision--making that is made in "Sex as Contract." These characterizations of human intimacy as contract and reproductive decision-making ability as a market commodity subject to bargaining are ominous for reasons that extend well beyond the narrow borders of this

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glaring and malevolent distortions of law and theory contained in the article.

The authors' insistence on the need to resort to contract imagery for the regulation of sex is dependent upon their characterization of the rules that are in operation in the two other areas, particularly those establishing obligations for child support. The assertion of inconsistency is central, yet the discussion of the rules is cluttered with inaccuracies, and there is no attempt to look beyond gross statements of doctrine to consider implementation of black-letter rules. The mischaracterization of doctrine is typical when commentators are not well-versed in law. I note that the authors repeatedly refer to treatises such as American Law Reports (ALR) for their authoritative renditions of what the law requires. Quite tellingly, the authors, over and over again, rely on a long-discredited, Lochnerian-era notion of a fundamental right to contract grounded in the Constitution. The authors do not even ground their "freedom to contract" beliefs in the Constitution's contract clause, U.S. Const. art. I, § 10, cl. 1, but somehow "infer" it from the takings clause of the Fifth Amendment.

[18] Feaver et al., supra note 1, at 212--13.

[19] See id. at 213.

particular piece. It seems to me we should read this article for what it represents about the field of law in general---what it tells us about the contemporary tendency to simplistically categorize all endeavors as contractual occasions and all relationships as bargaining.[20] This article is a powerful warning about the pervasiveness and depth of the legal system's acceptance of narrow, one-dimensional economic models with so-called "rationality" as their justification.[21]

Such modeling simplistically reduces complex human interactions and diverse motivations to the metaphor of contract and places the most central and important aspects of our lives in the context of market analogies. More than merely poetic imagery or rhetorical flourish, metaphors are simplified ways of expressing complex ideology and are unexamined elements of the conceptual systems that govern responses to day-to-day life.[22] Resort to legalistic language in regard to such an intimate human activity operates as an initial conceptual constraint on the issues addressed and the problems defined. This generates serious problems and mandates an inquiry into the ideological tasks performed by the language and metaphor of contract when it is converged with sex.

Originally confined to obviously market and regulatory subjects, the appeal of economic analysis has grown well beyond the traditional public or market arena. As an ideological system, the grasp on the legal mind and imagination of the rhetoric and methodology of the law and economics movement has been extended into the "private" realm. The authors of "Sex as Contract" are not the only proponents of this perspective, postulating that it provides solutions to problems in areas of sexual and family intimacy, morality, and emotion.[23]

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[20] According to the authors,

> Courts often engage in the difficult and frequently unsatisfying task of drawing lines to define the limits of liberty. . . . In emotionally charged debates, courts often fail to distinguish between . . . types of protection. This is true of the sloppy debate surrounding abortion.

See id. at 211. Apparently, these economists have found in their economic bag of tricks the superior line-drawing tools that the emotionally charged courts have heretofore lacked.

[21] Law and economics grand guru, Richard Posner, has recently completed a book dealing with intimate relations with a title that parallels, in an even more imperialistic fashion, that of the present article. See Richard Posner, Sex and Reason (1992).

[22] See George Lakoff and Mark Johnson, Metaphors We Live By 3--4 (1980).

[23] The imperial aims of law and economics expressed in Richard Posner's new book include:

> First, to bring to the attention of the legal profession the rich multidisciplinary literature on sexuality---and to shame my colleagues in the profession for ignoring it. Second, to demonstrate the feasibility and fruitfulness of an

The search for neat, easy solutions that reinforce existing power relationships is not surprising, given that these are areas where increased social tensions are generated as ever larger numbers of people refuse to conform their behavior to legal and social norms established by hierarchical, sexist institutions. Family law, for example, is in the process of being reconceptualized and rewritten as a result of changing patterns of intimate behavior in and outside of traditional marriage and the recognition that adherence to nonfunctional idealized forms of family has resulted in rules that have left many women and children in poverty. Areas of intimacy are sites of ideological and social conflict in our contemporary culture.

Law and economics is an ideology that generates concrete, simplistic solutions that do not require much (if anything) in the way of up-front expenditures of public resources. In fact, its ideological reference point in the intimate as well as the economic is the [free] market---the asserted ideal allocation and decision-making institution. The imperialism of law and economics ideology and some resulting concerns are captured in the very articulation of "Sex as Contract."

As the pervasiveness of the approach is revealed, initial questions arise---what are the implications of equating the most intimate of adult physical relationships---sex---with the most detached and calculated of legal interactions---contract, for example? The term "contract" has significance because the categorization of behavior as constituting a "contract" carries with it certain legal consequences. By contracting, parties to a negotiation subject themselves to the potential intervention of the State and its judicial

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economic approach to the subject---more broadly of a functional approach in which insights are borrowed from a variety of fields but in which economics, the science of rational human behavior, provides the organizing perspective. The effort may seem quixotic, for it is commonplace that sexual passion belongs to the domain of the irrational; but it is a false commonplace. One does not will sexual appetite---but one does not will hunger either. The former fact no more excludes the possibility of an economics of sexuality than the latter excludes the possibility of an economics of agriculture.

My third aim is to expound a specific economic theory of sexuality, and as part of that project to derive hypotheses from the theory and confront them with data both quantitative and qualitative. All theories are tentative, a theory as novel as the economic theory of sexuality especially so. Nevertheless, I believe that much of the variance among different eras, cultures, social classes, races, and the sexes themselves in behavior, attitudes, customs, and laws concerning such aspects of sexuality as premarital sex, homosexuality, polygamy, prostitution, rape, contraception, abortion, infanticide, pornography, public nudity, and child sexual abuse can be explained, and changes in them predicted, by reference to the handful of variables that the theory identifies as likely to be significant.

Posner, supra note 21, at 4--5.

and legislative branches. Contract connotes more than just agreements or promises, it means the coercive power of the State is brought into the bargain should agreements prove illusory or promises be broken.

Are whispered, passionate nuances of the language of love to be given legal content and consequences when individual expectations are frustrated? What would it mean for society to define heterosexual interactions as inherently possessing the potential for legally enforceable expressed or implied exchanges of promises? Would there be a state contract that governs such interactions unless explicitly altered by the parties?[24] How many of us would be comfortable with the "scripts" legislators and judges write for the circumstances in which promises are not explicit but only to be implied from the surrounding circumstances? To state some of the questions which flow from the initial premise that sex is an occasion for contract is to reveal the underlying absurdity and inherent danger of that concept.

If the authors of "Sex as Contract" are successful in imposing their vision of reality on the legal system, the experience of sex will become legalized. The definition of sex as a legal act will increase the susceptibility of sexual expression to the imposition of legal consequences as a routine matter. Sex as an experience, refashioned as a legal event, will take place in the long shadow of contract law---contract will become its meaning in all too many instances.

The jurisprudential implications of this conceptual shift would be significant. These preliminary actions, designated as those that give legal meaning to people's sexual activity (render it coherent with the metaphor of contract), would be emphasized because they have legal significance. Certainly if we consider sex as an occasion for contract, the opportunity for state intervention and regulation are monumentally increased. As a legalized act, will sex be susceptible to court enforcement of specific terms or the imposition of sanctions for breaches and failures to perform? Will state and federal legislatures be free to define and confine the contractual terms, regulating not only consequences, but the sexual act itself?

Furthermore, on a philosophical level, the use of contract obscures from societal and political consideration some important factors about reproduction. Contract assumes independent individuals capable of negotiation and bargaining.[25] Dependency and unequal circumstances,

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[24] The authors suggest there would be a default position in regard to the abortion decision---it would reside with the woman absent contracting. See Feaver et al., supra note 1, at 218.

[25] Perhaps this explains why the child never becomes a focus of the authors' argument. Children are dependent and create dependency because they must be cared for by adults, necessitating sacrifices in unencumbered market activity and individual

although they may exist and need "special" consideration, are considered deviant in contract analyses. Yet, reproduction inevitably produces dependency in the form of a child who needs care and nurture, and whose existence also creates gender inequality in terms of the social expectations associated with the *acts* of mothering as contrasted with the *act* of fathering a child.[26]

One further question we should certainly ask in considering "Sex as Contract" is whether there would be any limit to the contract paradigm. By the fact of its application to sexual interactions, do not the authors also implicitly assert that we as a society are (or should be) prepared to view *all* human interactions as contract---as having ultimate legal consequences? The authors are intrigued with contract as a concept---a metaphor which can simplify and reduce complex human interactions for formulaic expression.

III. SEX AND BARGAINING

A. Pre-coitus Bargaining?

In order to apply the contract metaphor to sexual relations, the authors must make major unsupported (and I would argue, insupportable) assumptions about intimate behavior and human sexuality. A vision that sex is contract asserts that the cultural or societal norm in such encounters is, or should be, that of explicit (though perhaps not formalized) pre-coitus bargaining between men and women over potential consequences attendant to the act that occupies their immediate attention. Such an image of pre-

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self-maximization.

[26] I differentiate the act of reproductive fatherhood, a one-time event, from the acts of reproductive motherhood. Motherhood, constituting a significant commitment of time, energy, and bodily investment for women, is a very different reproductive commitment than reproductive fatherhood. For discussions of the ways that unequal commitment and investment in a child continue well after pregnancy and birth, see generally Martha Albertson Fineman, The Illusion of Equality: The Rhetoric and Reality of Divorce Reform (1991) and Victor R. Fuchs, Women's Quest for Economic Equality (1988).

Fuchs, an economist, writes:

> Motherhood and fatherhood are not symmetrical, are not simply opposite sides of the same coin. Both are strongly influenced by socialization---but in the case of fathers, socialization is practically the whole story. Motherhood is different. Women make a huge investment in pregnancy, childbearing, and nursing---an investment that is crucial to the perpetuation of the species. The father's investment, in terms of time and energy, is usually much smaller.

Id. at 141.

intercourse interaction does not reflect the reality of most such encounters. In fact, a more phenomenological appreciation of sexual activity would call into question the very ideas of rational bargaining and negotiation, as well as the assumed confidence that such encounters will typically be conducted with the requisite independence, autonomy, and conditions of "consent" doctrinally required for a "contract" to be concluded.

Because the classification as "contract" triggers the potential for State coercion in enforcement, contract doctrine typically limits the designation to that category of bargaining encounters undertaken after arm's length negotiations and premised upon a degree of emotional and psychological detachment.[27] As an initial matter, one might speculate that sexual passions run too hot to allow cool consideration of any allocation of legal rights and obligations relating to the potential of reproduction inherent in such encounters. In fact, since in most sexual encounters passion is presumed to be flowing, would not this experiential fact alone undermine society's confidence in the whole notion of contract as a way to understand heterosexual behavior?

Perhaps the authors of "Sex as Contract" anticipate that the pre-coitus negotiations will occur in a more sterile and sanitized context than other foreplay---prior to any potentially passionate interactions. They just do not say how, when, or why they envision the necessary negotiations taking place. As is true of all too many who seek to corral all realms of human endeavor and experience into an asserted rational economic model, the authors' explicitly stated position makes them appear more enamored with the concept of contract than with detailing the context in which it will be applied or the possible form and content it might take. The authors even recognize that explicit contracting in sexual circumstances is likely to be a rare event. Why then, one might ask, even suggest contract---what does it add?

B. The Hidden Agenda---Giving Husbands Control

I suspect that the authors urge the contract construct for ideological reasons beyond the desires for consistency and protection of idiosyncratic preferences mentioned in their article. In fact, I believe that the authors had a pernicious hidden agenda in writing the article. The real implication of the proposed "Sex as Contract" scheme is revealed in the authors' discussion of the possibility of enforcement of *implied* contracts. They state

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[27] The authors themselves concede that sexual encounters are not typically detached and disinterested occasions with the statement that "there is an inherently irrational aspect to sex . . . ." See Feaver et al., supra note 1, at 216.

several times that contracts to transfer the abortion decision from women (the default position) may be inferred absent explicit contracting in certain circumstances. There are only two circumstances mentioned, however: those where the woman is married and those where she is a minor.[28] The woman's status alters the default position; her minority or her marriage means she has lost the ability to decide whether to terminate a pregnancy.

In regard to married women, the use of contract to curtail freedoms associated with the non-marital state would surely be a step backward. In allowing for the possibility that courts may *imply* contract even absent specific negotiation and that a transfer might be inferred from such things as the existence of marriage, the authors would by sleight of hand vest husbands with control over their wives' reproductive choices.

Equating sex with contract reverberates in the pre-feminist legal consciousness with the common law view that for a woman, "consent" to the *marital* "contract" doctrinally removes her ability to refuse sexual demands by her husband. The authors, by use of the contract metaphor, revitalize the patriarchal assumption that a woman (and her reproductive capacities) is the sexual property of her husband and that the extensive nature of his possession is manifest in the marital contract whereby the wife relinquishes her very self---physical, legal, contractual---to her husband. No longer will each sexual act be an occasion for contracting; consent to the marriage contract is loss of control.

This common law notion of the all-inclusive nature of the surrender by marital contract of a woman's right to control her body also legitimated a husband's physical brutality towards his wife in the name of (and because of the need for) "discipline," and his economic exploitation of her in the form of "coverture." The conclusion that marriage was defined by contract provided the justification for legally recognized and enforced abdication of psychological and bodily integrity when a woman consented to marriage.

Historically, there were some problems with this view of things which have significance for our consideration of contract and marriage terms today. First of all, in the context of a world where a woman had few political or legal rights, a fact which profoundly affected the viability of any economic and social alternatives to marriage, the common law's use of a concept like contract was disingenuous. Contract is a legal concept that is based on notions of choice and uncoerced consent. However, if marriage is the abdication of legal personhood in the context of the marriage contract, then women have no "choice" outside of the initial "consent" to

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[28] I am only going to address the issues involved with married women since I believe this to be the real point of the entire exercise undertaken in "Sex as Contract." It is not clear from the article to whom the abortion decision would be transferred if the pregnant woman were a minor---her father, her sexual partner, or the State.

enter the relationship. "Consent" ends their legal capacity to "consent." Surely the use of the term consent in this context was nothing more than a charade for the structural domination of women by their husbands.

The terms of the common law marriage contract were not even susceptible to negotiation, but were set by the very state which merged a married woman to the legal identity of her husband.[29] Marriage was an institution in which the State had an active interest and it was protected by doctrines such as that of family privacy. Most ominous is the history of abuse and violence that has been built upon the notion of a marriage contract and total, universal consent by wives to husbands' control over their bodies. Men seem to favor rules fashioned to deny women the ability to say "no," or at least to enforce "no."[30] Women have struggled long and hard to rescind the state-enforced terms of the marital contract that meant their husbands had an automatic defense to charges of rape or abuse.

Women of today may have more economic choices, but we should not be misled by that fact into assuming that marriage as an institution is any more voluntary than it was for our foremothers. Cultural and social forces still coerce heterosexual pairing and civil and criminal laws still favor marriage over other intimate sexual associations. Furthermore, these same cultural and social forces underscore the inappropriateness of contract as a universal paradigm. There are significant differences among individual women in regard to such things as education, health, class, religion, economic circumstances, and/or cultural expectations that profoundly affect the "choices" and "consent" one makes in regard to marriage.

Even were legal reforms undertaken that accommodated the concerns generated by the history of marriage contracts, they would not be enough. The residue of the common law marriage contract haunts the system in the form of social norms built upon and fostered by the law. Such cultural norms may be more resistant to change than the law itself, and have resulted in juries condoning shockingly abusive behavior even where the formal law condemned it.[31] Society should resist any attempt to formally

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[29] Blackstone, supra note 6, at 442. "[T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . under whose wing, she performs everything."

[30] In its latest version, the Model Penal Code continued to exempt men who have forcible sex with their wives from the penalties of its model rape statute. See Model Penal Code § 213.1 (1983).

[31] For an example, see the extensive media coverage of the controversial jury acquittal of a defendant charged with raping his wife in one of the first prosecutions under South Carolina's new marital rape law. The alleged rape was videotaped by the husband and the videotape was presented as evidence by the prosecution. "No, I didn't rape my wife. How can you rape your own wife?" the husband reportedly testified, and evidently the jurors agreed. The judge blocked the State's attempt to call the husband's

reinstate anything potentially reminiscent of the oppressive marital contract paradigm that defined common law spousal rights and obligations.

C. A Proposal for Parity

We should resist returning to contract as control by men over "their" wives in any form. If modern men, married or not, really want reproductive parity, why must they get it in an ideologically antiquated manner---by exerting control over women's bodies? In making the abortion decision, women take responsibility for their own bodies and their own reproductive decisions. Analogous to this female exercise of responsibility, men could exercise control *over their own bodies*, by abstaining from sex or using birth control themselves if they did not want to reproduce.

Even more controlling measures would be available for those men concerned about reproduction, but not willing to take responsibility on an act-by-act basis. They could simply have a vasectomy after placing what they consider to be a sufficient amount of "seed"[32] in a sperm bank should they desire to father a child in the future. These men could really experience reproduction as a contractual event---negotiating for the terms under which the bank would open its vaults and their sperm be disgorged. Sex for them would not be complicated by the possibility of reproduction---that would be reserved, preserved in vials under their complete control, awaiting the perfect contractual moment.

IV. CONCLUSION

A. Economics and Ridicule

When I first read a draft of "Sex as Contract," I was tempted to respond with humor. I initially believed this tone to be the only appropriate one in which to address an article that conceptualized each and every heterosexual encounter as a contractual occasion; it was certainly not an idea deserving of a serious and scholarly reply. In the spirit of ridicule, I was delighted by the fertile possibility for jokes suggested by such standard doctrinal terms as "specific performance" or "unjust enrichment."

More mischievously, I speculated about the innumerable possibilities for "failure of consideration" defenses based on the authors' assertion that

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former wife to testify that she also had been tied up and raped by the man. See, e.g., Man Cleared of Marital Rape, Wash. Post, Apr. 18, 1992, at A2.

[32] See Feaver et al., supra note 1, at 214.

the consideration for such contracts would be the "*mutual* sexual gratification" each party received. While such satisfaction might be easily inferred for men (particularly if ejaculation occurred, as it would in most instances where pregnancy resulted), sexual climax would be a statistically questionable generalization in regard to an individual woman's response to any specific "completed" heterosexual encounter.[33]

This initial reverie was eclipsed, however, by the cold specter cast by the dawning realization that this very article had already been accepted for publication by the *Stanford Journal on Policy and Law*. This context necessitated taking the article seriously no matter how abstractly farfetched the idea of "Sex as Contract" may be. Contract may be too seductive a metaphor for those unsettled by the gendered complexities generated as by-products of the recasting of intimate relationships that our society has been undergoing for the past several decades.

B. Economics as Ideology

Perhaps the law and economics analysis represented in this article is attractive precisely because it offers pat, formulaic answers to the chaos generated by the critical questions increasingly raised about American politics and society by vocal and diverse groups, such as women, who have historically been excluded from institutions of power. This attraction (and the ultimate utility of the simplistic, formalistic answers) is enhanced by the fact that law and economics is cast as merely a "methodology," allowing it to aloofly masquerade as something neutral and susceptible to universal application.

Any claim to neutrality and universality should give pause to any modern student of rhetoric and cultural metaphor. The claim to neutral method, the asserted rationality of the approach, obscures the function of law and economics which is maintenance or reinforcement of the status quo in regard to existing distributions of power in society. The "economics" informing law and economics is typically inherently conservative. It presents an ideologically confined and, in this sense, coherent set of principles proposed in pursuit of the ultimate goals such as "choice" and "rationalization." Law is brought into service of the conservative economic ideology as a way to coercively secure the [re]institutionalization of historically repressive social practices such as patriarchical control over women's reproductive lives.

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[33] See Shere Hite, The Hite Report: A Nationwide Study of Female Sexuality (new rev. ed. 1981) (reporting that most women---up to 70%---did not experience orgasm as a result of intercourse but did as a result of self-stimulation).

Of course, law and economics is about much more than method. Like all discourse to which law is central, law and economics manifestly concerns the allocation and perpetuation of power in our society. Unlike some of the other interdisciplinary discourses about law, however, law and economics rhetoric provides an ideological justification for continued acceptance of the increasingly visible imbalances of power. As in "Sex as Contract," law and economics facilitates the perpetuation of existing inequities by freezing them into place as essential parts of the analysis.

Social beliefs, stereotypes, and status quo-serving assertions emerge in the form of "assumptions" in law and economics literature. These assumptions are structurally necessary in order to facilitate the application of an economic model to law. They obviate the need to delve too deeply into the underlying social practices---practices of inequality that quite often should be explicitly examined and challenged. The asserted neutrality of the method is based on its abstractness---a rhetorical device that confines inquiry and therefore limits the universe of potential conclusions. In the process, law and economics dismisses as irrational or inferior considerations that are based on different world views or rhetorical orders. Law and economics, in other words, on the level of discourse and ideology is as hegemonic as the patriarchy, classism, and racism for which it provides apologies and "rational" justifications.