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## NONBINDING BONDAGE

To the shock of critics, *Fifty Shades of Grey* has become a cultural phenomenon, sweeping from fan-fiction websites to bestseller lists and garnering a multimillion-dollar movie deal. In the narrative that has spawned over a hundred million copies,<sup>1</sup> a naïve female coed sparks the interest of a handsome magnate who takes the heroine (and ideally the reader) on a journey of sexual awakening. The hero, a self-described “Dominant,” introduces the virginal heroine not only to sex but to the practice of BDSM, a compound acronym that connotes sexual interactions involving bondage/discipline, domination/submission, and sadism/masochism.<sup>2</sup> From his “Red Room of Pain,” filled with “ropes, chains, and glinting shackles,”<sup>3</sup> the hero shows the heroine how to be a “Submissive,” experiencing sexual pleasure by yielding to acts of domination and control within the bounds of a negotiated contract.

More than sex with some handcuffs thrown in, BDSM takes part in a broader project<sup>4</sup> that seeks to expose and investigate the ways in which sexual desire and experience reflect and construct systems of power. By performing sexual acts through scripts of subjugation, discipline, and punishment, participants recognize and revel in sex as a practice replete with inequality, ambiguity, and shame, blurring the lines society purports to maintain between pleasure and pain, fulfillment and frustration. BDSM’s seeming rejection of equality as a predicate to good sex has made the practice a particularly provocative one, attracting heavy criticism from many who see in BDSM a haven for sexual victimization and exploitation. More famously, the way in which this commitment to exploring power has been effected through physical punishment and nonconsent has historically rendered BDSM an object of controversy and scorn.

The rise of *Fifty Shades of Grey*, however, points to a sea change in attitudes toward BDSM. The erotic novel has not only exposed vast popular interest in “kinky sex” — so vast the adaptation is expected to

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<sup>1</sup> Julie Bosman, *For ‘Fifty Shades of Grey,’ More than 100 Million Sold*, N.Y. TIMES, Feb. 26, 2014, <http://www.nytimes.com/2014/02/27/business/media/for-fifty-shades-of-grey-more-than-100-million-sold.html> [<http://perma.cc/HJ9P-P2UM>].

<sup>2</sup> Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 116–17 (2014).

<sup>3</sup> E L JAMES, *FIFTY SHADES OF GREY* 98 (2011).

<sup>4</sup> Of course, like any movement or activity, BDSM is far from a homogeneous or unified practice and may comprise practitioners with varying motivations and beliefs. For simplicity’s sake, this Note will use “BDSM” to refer to the theoretical project commentators have identified underlying the practice. See, e.g., Anne McClintock, *Maid to Order: Commercial Fetishism and Gender Power*, 37 SOC. TEXT 87 (1993) (exploring the ideology of BDSM); see also Susan E. Cook, *Subversion Without Limits: From Secretary’s Transgressive S/M to Exquisite Corpse’s Subversive Sadomasochism*, 28 DISCOURSE 121, 121 (2006) (“To speak of [BDSM] is to evoke a subcultural practice that is both heavily commodified and politically self-aware.”).

become the biggest film of 2015<sup>5</sup> — but has raised the critical profile of BDSM, bringing commentators to look more closely at the practice and significance of such “transgressive” sex. Yet even as BDSM takes popular culture and criticism by storm, its relationship to the law remains surprisingly obscure. A mere handful of cases and articles address the legal questions posed by BDSM, and these generally confront the practice at its most extreme, asking whether “victims” can consent to violence. Acts, like those in *Fifty Shades of Grey*, involving sexual domination devoid of or barely tinged with pain seem to exist largely beyond investigation, the legal gaze averted until the locked playroom doors open to reveal an unwilling or oppressed participant.

If law has been slow to recognize mainstream BDSM, however, BDSM has not forgotten law. Far from locking law out of its bedrooms, mainstream BDSM has deliberately imported one unlikely legal form: contract. Lifestyle guides encourage the use of BDSM contracts, which employ contract forms to set limits and rules of play for BDSM sex. These contracts are negotiated, drafted, and framed in much the same manner as conventional contracts and have become an increasingly accepted part of BDSM practice.<sup>6</sup> Indeed, the contract’s popularity is evidenced by its very inclusion in *Fifty Shades of Grey*, as E L James not only references such an agreement but takes pages away from erotic play to depict the couple’s negotiations and to reprint in full the draft contract, complete with twenty-one different sets of terms,<sup>7</sup> and the parties’ enumerated objections and amendments.<sup>8</sup>

Though popular, these contracts represent functionally extralegal documents, as BDSM contractors have yet to bring a contractual dispute to court and, indeed, often expressly draft the contracts in the belief that they are legally unenforceable. However, this seeming “illegality” stands to make these contracts more, not less, interesting to the legal academic: the very existence of such contracts in the absence of expected enforcement suggests an interaction between law and BDSM that goes beyond the functional, providing unique access to the practice’s conceptual foundations.

Turning to these foundations, this Note explores why BDSM contracts persist in the absence of enforcement by investigating theoretical advantages contract offers the practice of BDSM. By raising the specter of contract, BDSM participants may be seeking to mitigate the

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<sup>5</sup> Ron Charles, *Fifty Shades of Grey on Today Show*, WASH. POST STYLE BLOG (July 24, 2014), <http://www.washingtonpost.com/blogs/style-blog/wp/2014/07/24/fifty-shades-of-grey-on-today-show> [http://perma.cc/7466-FY5F].

<sup>6</sup> See Devin Meepos, *50 Shades of Consent: Re-Defining the Law’s Treatment of Sado-masochism*, 43 SW. L. REV. 97, 113–15 (2013).

<sup>7</sup> JAMES, *supra* note 3, at 165–75.

<sup>8</sup> *Id.* at 203–05.

most criticized dynamics of their relationships as they become increasingly mainstream: the injection of contract law, with its emphasis on equality, consent, and consideration, works to quell concerns over BDSM's seeming commitment to inequality and one-sidedness, thereby rendering BDSM fairer, safer, and more understandable. Yet just as BDSM seeks to expose sex's dark depths, so too may it work to expose a dark underbelly to contract: a closer look at these theories and practices suggests their interaction may in fact heighten rather than dilute the aims of BDSM, operating through paradox and contradiction to further complicate our understanding of desire, power, and equality.

This Note proceeds in four parts. First, Part I provides a primer on BDSM and BDSM contracts. Part II considers the extrajudicial use of these contracts, examining areas of conceptual unease in BDSM that contract stands to mitigate: namely, contract law enables assumptions about fairness in exchange and the knowability of interests that BDSM may be seeking to incorporate. Part III then reconsiders this seemingly antagonistic relationship, suggesting ways in which contract principles may correspond to or even elevate those of BDSM, creating a critical dialectic. Part IV concludes by briefly exploring contractual BDSM's implications for regulation of sex and other "private" subjects, pointing to ways in which study of liminal legal spaces can help illuminate and problematize conceptions of sex, power, and law.

## I. SETTING THE SCENE

### A. *BDSM in Brief*

BDSM stands for a wide range of sexual acts and experiences, incorporating everything from light bondage to "edgeplay" involving fire or cutting.<sup>9</sup> As noted earlier,<sup>10</sup> the extensiveness and diversity of the practice make broad description difficult, but a few themes recur: BDSM relationships operate through constructed scenes, forms of role-play, and acts of control and discipline. Above all, BDSM acts, scenes, and relationships ask parties to inhabit positions of power imbalance.

A "subculture organized primarily around the symbolic exercise of social risk,"<sup>11</sup> BDSM has committed itself to the exploration and performance of power. BDSM recognizes that sex cannot be divorced from power or the risks that attend power dynamics; rather, accepting that "[i]t is precisely the proximity to danger, the lure of prohibition,

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<sup>9</sup> See Kaplan, *supra* note 2, at 116–17; Rachel Rabbit White, *Edgeplay Isn't Your Grandmother's BDSM Scene*, VICE (Sept. 20, 2012), <http://www.vice.com/read/edgeplay-isnt-your-grandmothers-bdsm-scene> [<http://perma.cc/DS86-EBHN>].

<sup>10</sup> See *supra* note 4.

<sup>11</sup> McClintock, *supra* note 4, at 90.

the seamy side of shame that creates the heat” of sexual desire,<sup>12</sup> BDSM seeks to cultivate pleasure by fostering sex overtly based on mastery and punishment. As one scholar has encapsulated, “there’s an element of domination or submission or pain involved in almost any sexual interaction. What [BDSM] does is take these elements of eroticism further toward their extreme” by explicitly casting (good) sex as staged scenes of power and control.<sup>13</sup> Devoted to openly acknowledging and appreciating sex as an act of domination and submission, BDSM engages in a radical honesty about sexual power.

This commitment to exposing and enjoying sex-as-power makes BDSM a useful centerpiece for broader debates about sex and sexuality. In legal literature, however, the debate over BDSM has primarily operated through the flashpoint of pain and consent. Reducing BDSM to “sodomasochism,” the cases of note analyzing BDSM assume the practice’s inherent harmfulness and ask to what extent law should therefore punish it, imposing criminal and civil penalties even in the face of consent.<sup>14</sup> Legal scholarship has generally followed suit, focusing on whether consensual but harm-inflicting sex should be criminal given legal acceptance of consent to harm in sports and body modification.<sup>15</sup> The law’s relationship to noncriminal or nonviolent sexual domination remains largely unexplored.<sup>16</sup>

### B. *BDSM Contracts*

This Note examines one particular — and particularly blatant — intersection of BDSM and law: BDSM contracts. These agreements between a “sub” (submissive) and “dom” (dominant) set terms on subjects such as the duration of the relationship or the hygienic or sartori-

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<sup>12</sup> Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 207 (2001).

<sup>13</sup> John Cloud/Clayton, *Behavior: Bondage Unbound*, TIME (Jan. 19, 2004), <http://www.time.com/time/magazine/article/0,9171,993154,00.html> [<http://perma.cc/MW5Z-Q44L>] (internal quotation marks omitted).

<sup>14</sup> See *Twyman v. Twyman*, 855 S.W.2d 619, 620 & n.1 (Tex. 1993) (allowing a woman whose then-husband induced her to try sexual bondage to sue him for intentional infliction of emotional distress); *R v. Brown*, [1994] 1 A.C. 212 (H.L.) (appeal taken from Eng.), *aff’d sub nom.* *Laskey v. United Kingdom*, 24 Eur. Ct. H.R. 39 (1997) (upholding criminal convictions and sentences of same-sex S/M practitioners, although no party had reported or suffered serious physical harm).

<sup>15</sup> See, e.g., Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165 (2007); Cheryl Hanna, *Sex Is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239 (2001); Kaplan, *supra* note 2, at 115–41; Kelly Egan, Comment, *Morality-Based Legislation Is Alive and Well: Why the Law Permits Consent to Body Modification but Not Sodomasochistic Sex*, 70 ALB. L. REV. 1615 (2007).

<sup>16</sup> To offer an analysis distinct from these questions of sexual violence, this Note addresses only those interactions denominated by “B/D/S” — the shifting of sexual control without infliction of pain for its own sake. Although B/D/S sex often incorporates forms of violence or pain, this piece focuses on sexual interactions posing dignitary, rather than physical, harms.

al requirements of the parties.<sup>17</sup> Most importantly, the contracts set “limits” concribing acceptable types of play and “safe words” to release participants from the sexual scene. In their efforts to foster exploration of pleasure, promote safety, and emphasize the mutual nature of the sex, BDSM contracts form an emblematic part of the BDSM community’s central commitment to “safe, sane and consensual” sex<sup>18</sup> — so much so that many lifestyle guides recommend them, even providing mock contracts that can be personalized for easy use.<sup>19</sup>

These contracts import not only contract’s title but also its legal norms, as they are framed to mirror standard contracts and (at least superficially) conform to basic principles of contract law. For instance, they contain sections for both dom and sub to underscore that, despite the seeming one-sidedness of the relationship, each party receives benefits and suffers restrictions, affording the consideration necessary for legal contract formation.<sup>20</sup> Some contracts discuss dispute resolution, specifying forms of redress in case of breach.<sup>21</sup> And, of course, most contractors use “legalese,” some even witnessing and notarizing the documents,<sup>22</sup> to give the contract the full imprimatur of legality.

Nevertheless, as many BDSM sites note, these contracts are not expected to be enforced in a court of law.<sup>23</sup> Perhaps absorbing the law’s longstanding unwillingness to mix matters of the bedroom with matters of the court and its broad prohibition of contracts involving sex,<sup>24</sup>

<sup>17</sup> See, e.g., *BDSM Session Contract*, [http://www.angelfire.com/sc3/photored/docs/BDSM\\_Session\\_Contract.pdf](http://www.angelfire.com/sc3/photored/docs/BDSM_Session_Contract.pdf) (last visited Oct. 26, 2014) [<http://perma.cc/C5N5-T9YV>]; *Sample Slave Contract*, BDSM LEARNING CENTER, [http://www.geocities.ws/bdsmlearningcenter/basics/sample\\_slave\\_contract.html](http://www.geocities.ws/bdsmlearningcenter/basics/sample_slave_contract.html) (last visited Oct. 26, 2014) [<http://perma.cc/4S8H-F4B2>].

<sup>18</sup> Meepos, *supra* note 6, at 112 (internal quotation marks omitted) (quoting SAFE, SANE AND CONSENSUAL: CONTEMPORARY PERSPECTIVES ON SADOMASOCHISM 10 (Darren Langdrige & Meg Barkers eds., 2007)).

<sup>19</sup> See, e.g., *id.* at 114; lunaKM, *Using Contracts to Negotiate a Relationship*, SUBMISSIVE-GUIDE (Nov. 6, 2009), <http://www.submissiveguide.com/2009/11/contracts-negotiate-relationship> [<http://perma.cc/4HTF-4LZJ>].

<sup>20</sup> See, e.g., *Sample Consensual “Slavery” Contract*, AMBROSIO’S BDSM SITE, <http://www.evilmunk.org/a/contracto1.cfm> (last updated Oct. 3, 2014) [<http://perma.cc/SH88-PT3J>].

<sup>21</sup> Cf. *Contract of Ownership*, SATINSPANKINGS, <http://satinspankings.wordpress.com/contract-of-ownership> (last visited Oct. 26, 2014) [<http://perma.cc/EL2X-KVP7>] (detailing “Termination Procedures” like “binding” arbitration and that dom and sub “agree to jointly pay for the cost of the mediation and arbitration”).

<sup>22</sup> See Ambrosio, *Some Criteria for Consensual D/s Contracts*, AMBROSIO’S BDSM SITE, <http://www.evilmunk.org/a/contractoo.cfm> (last updated Oct. 3, 2014) [<http://perma.cc/UKV7-G8SQ>] (recounting a couple’s arrest after they accidentally filed a “notarized five-page” “sex-slave contract” (internal quotation marks omitted)).

<sup>23</sup> See, e.g., lunaKM, *supra* note 19.

<sup>24</sup> See, e.g., Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 622–24 (1983) (using Shakespeare’s distinction between Venice and Belmont to illustrate law’s rigid segregation of contract and family/sex); Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 353–56 (2014) (describing “sex exceptionalism in contract,” *id.* at 356); Andrew Gilden, Note, *Sexual (Re)consideration: Adult Entertainment Contracts and the Problem of En-*

practitioners seemingly either do not intend or do not ask for contractual enforcement. Notably, one finds no litigation of BDSM contracts, even though breaches with no direct link to sex — such as, say, a violated obligation to keep the relationship in a physical location or to provide specified food and clothing — could well warrant legal redress, and, indeed, many contractors expressly declare the contract's unenforceability while drafting or proposing it.<sup>25</sup> Where the contracts do show up in court documents, it is generally not because the state is enforcing their promises but because the state is punishing the promisors under the aegis of criminal or tortious wrongdoing.<sup>26</sup> Thus, practitioners' efforts to create legal terms for their relationships will likely never be judicially sanctioned or assessed.

## II. KEEPING BDSM BOUND(ED)

Given that a contract is traditionally defined by and valued for its enforcement interests,<sup>27</sup> BDSM contracts would not seem to be worth much. The persistence of such agreements, with their diligent adherence to legal doctrine and pointed legal styling, then raises a thought-provoking implication: the relationship between contract and BDSM must go deeper than the promise of liability. It is possible that practitioners are simply seeking as close an approximation of the enforcement interests underlying contract as they can find outside the courts: by importing the sense of moral obligation attached to contracts,<sup>28</sup> practitioners may hope that, even without the state to compel observance, mutual understanding of the promise as a “contract” will

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*forceability*, 95 GEO. L.J. 541, 557–59 (2007) (exploring the “deep roots” and wide range of judicial “invalidation of contracts based on sexual consideration,” *id.* at 557).

<sup>25</sup> See, e.g., JAMES, *supra* note 3, at 216 (stating “[y]ou know this contract is legally unenforceable” before negotiating its terms); cf. *BDSM Contracts and the Law*, BDSM CONTRACTS, <http://bdsmincontracts.org/the-law> (last visited Oct. 26, 2014) [<http://perma.cc/U48N-S5X3>] (“[T]he terms of such contracts will be unenforceable . . . [s]o where does this leave you? If you are entering into a BDSM relationship, you should still have some kind of agreement. A formal agreement, although not binding, [is] best . . .”).

<sup>26</sup> See Ambrosio, *supra* note 22 (“A man and woman who signed a document characterized as a ‘sex-slave contract’ were arrested . . . [when it was] filed by mistake at the courthouse.”); Anders Walker, *Strange Traffic: Sex, Slavery, and the Freedom Principle*, 46 CONN. L. REV. 561, 569 (2013) (describing use of a “sex slavery contract” to support indictment for sex trafficking); cf. *R v. Brown*, [1994] 1 A.C. 212 (H.L.) [20]–[21] (finding evidence of S/M activities sufficient for criminal prosecution without complaint or allegation of nonconsent by participants).

<sup>27</sup> See, e.g., *Contract Definition*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/contract> (last visited Oct. 26, 2014) [<http://perma.cc/PT34-DDS3>] (“Contracts are promises that the law will enforce.”).

<sup>28</sup> See Eric A. Zacks, *Shame, Regret, and Contract Design*, 97 MARQ. L. REV. 695, 711–18 (2014); cf. *id.* at 720 (“[I]ndividuals may accept . . . illegal contractual provisions because they do not want to feel the shame associated with challenging the social norms.”).

promote self-regulation and compliance.<sup>29</sup> Yet this purely symbolic aim would render the contracts' conscientious doctrinal conformity unnecessary. Especially given the presumably limited number of BDSM practitioners out to identify legal defenses in a contract, importing the label of "contract" alone seems sufficient to impart a sense of formality to the transaction. Rather, by gratuitously self-imposing contract rules and tenets, BDSM "contracts" seem to evince a desire to truly *become* contracts, governed by or at least incorporating the principles and theories that underlie contract law.

This observation, in turn, raises a more foundational question: why should BDSM incorporate contract theory? In answer, this Note turns to the motivating principles of BDSM and contract law, exploring areas in which contract offers BDSM tools to mitigate theoretical "liabilities" in BDSM. First, contract law matches BDSM's investment in systems of exchange but adds a concern for fairness, affording BDSM its presumption of equality and its notion of consideration in order to differentiate between the inequality within the scene and the equality without. Second, contract's practice of bargain and negotiation lessens BDSM's problematic of wantedness, suggesting what is desired and valued to alleviate BDSM's definitional uncertainty and ambiguity.

#### A. Making Power Transfers Fair

It is not merely BDSM's recognition — or even its exaltation — of the inextricability of sex and power that renders BDSM a radical sex practice; a large part of its transgressive message lies in its dissociation of sexual hierarchy from other entrenched power dynamics like gender or class. In the words of Professor Anne McClintock, "[t]he scandal of [BDSM is] the provocative confession that the edicts of power are reversible."<sup>30</sup> As "[m]en touch each other for pleasure and women wreak well-paid vengeance," all while flaunting the traditional symbols, tools, and costumes of power, BDSM "publicly exposes the possibility that manhood is not naturally synonymous with mastery, nor femininity with passivity. Social identity becomes commutable, and the boundaries of gender and class open to invention and transfiguration."<sup>31</sup> In essence, BDSM acts as a theater of conversion, ostentatiously reenacting roles from the everyday culture of power in order to expose, parody, and challenge the seemingly "natural" hierarchies they represent. Indeed, it is meaningful that the central metaphor for BDSM is one of theater: assuming "roles" in "scenes" using "costumes" and "props,"

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<sup>29</sup> Cf. B.J. DEMPSEY, THE MANY SHADES OF BDSM 59 (2012) ("[A] written contract for BDSM purposes is purely a symbolic gesture, albeit a serious and important one.").

<sup>30</sup> McClintock, *supra* note 4, at 87.

<sup>31</sup> *Id.* at 106.

participants consciously perform sex-as-power-play to simultaneously “hold, as ’twere, the mirror up to nature”<sup>32</sup> and illustrate the artificiality of the real-world scenario. Working to complicate and transmute the social meanings it borrows, BDSM represents the “perform[ance of] social power as scripted and hence, permanently subject to change.”<sup>33</sup>

It is this foundational principle that power is subject to change that provides the basis for BDSM’s association with contract. For, in holding that sexual power is unfixed and changeable, BDSM also assumes that power is *transferable* — that it can be deliberately allocated or exchanged between parties. Because BDSM is definitionally performative, to be a “dom” is to play a role, to actively *take on* a mantle of power for purposes of the scene. If a dom must assume this mantle, it follows both that she did not already carry it and that she must have actively acquired it from somewhere — namely, from the sub, who temporarily assigns her power to create the dom. The sub in turn can only inhabit the role of “sub” by so relinquishing her control to one who will master her. The fundamental dynamic of BDSM is then one of a temporary or performed power exchange.

Of course, contract law is likewise founded on the paradigm of exchange between parties. Contract, however, adds an important element to this premise: it assumes parties can engage in *fair* exchanges. As opposed to its sister fields of restitution or tort, in which law intervenes to correct unjust enrichment or diminishment, contract law exists precisely to allow individuals to transfer interests affirmatively with the sanction of the state. The limited judicial restrictions placed on the “freedom to contract” underscore that a presumption of equity attaches to the parties who create valid contracts and to the parties who have consummated a transaction. In taking up contract law, then, BDSM practitioners appear to be grasping for this element of fairness in their performance of inequity, suggesting that the commodity transferred in BDSM — power — can be transferred fairly and justly. In particular, contractual BDSM seeks to divorce the sexual scene from external reality by establishing equality between the parties both before and after the contract for sexual domination.

1. *Presupposition of Equality.* — Central to contract law is its presumption that valid contracts are created between functionally equal parties. Founded on a principle of nonintervention, with courts eschewing determination of whether an agreement constitutes a “fair bargain,” contract law has developed a limited set of defenses to contract formation; these defenses in turn expose, and work to eliminate,

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<sup>32</sup> WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2, ll. 20–21 (George Richard Hibbard ed., Oxford Univ. Press 1987) (1603).

<sup>33</sup> Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex*, 11 *TEX. J. WOMEN & L.* 51, 90 (2001) (emphasis omitted).

the lingering anxiety that contracts can exploit inequality and thereby destroy the presumption of equality key to contract's sustainability. For instance, duress and nondisclosure, which permit courts to void transactions when the parties have asymmetrical will or knowledge at contracting, expressly declare some documents too "unfair" or one-sided to bear the name of contract.<sup>34</sup> Further illuminating this concern is contract nullification through unilateral mistake, which arises when the advantaged party had reason to know of the mistake or himself caused it — again avoiding contracts where one party has exploited an existing (informational) inequality.<sup>35</sup> Above all, this concern is manifest in unconscionability, which voids contracts because they have been created out of substantive inequality and cites "gross inequality of bargaining power" as a consideration.<sup>36</sup> The existence of these defenses then conversely implies that any contract still standing has been created between two parties with sufficiently commensurate will and knowledge.

In sharp contrast, BDSM seeks to dissociate itself from normative concerns for substantive equality. Instead, its scenes announce that, while a particular hierarchical makeup may be subject to reversal, structures of inequality are endemic and inexorable — and, moreover, can lead to pleasure and growth. Indeed, BDSM should celebrate the "gross inequality of bargaining power" derided by contract as the catalyzing force behind erotic conquest and fulfillment. Nevertheless, as BDSM has become popular, discomfort with the implication that its practice exploits existing inequalities to the detriment of participants has grown. Proponents highlight the practice's nontraditional pairings (female-dom/male-sub and same-sex couples) in an effort to differentiate the power-play of the scene from recognized societal hierarchies,<sup>37</sup> and they emphasize the extent to which the sub rather than the dom holds the power in plotting the scene, again attempting to differentiate the parties' power dynamics *in* the scene from those *before* it.<sup>38</sup>

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<sup>34</sup> RESTATEMENT (SECOND) OF CONTRACTS ch. 7, topic 2, intro. note (1981); *id.* ch. 7, topic 1, intro. note.

<sup>35</sup> *See id.* § 153. By contrast, if the mistaken party's ignorance stems from his own bad faith or failure to meet "reasonable standards of fair dealing" — if the inequality is not compelled but self-imposed — he can be held to the contract. *Id.* § 154 cmt. a.

<sup>36</sup> *Id.* § 208 cmt. d.

<sup>37</sup> *See, e.g.,* Patrick D. Hopkins, *Rethinking Sadomasochism: Feminism, Interpretation, and Simulation*, 9 HYPATIA 116, 124 (1994) ("SM communities, in their diversity — lesbian, gay, bisexual, heterosexual — have . . . their own senses of identity [which] make[] the charge of replicating patriarchal activity contestable."); McClintock, *supra* note 4, at 108 (appreciating the "even greater effrontery [of] lesbian and gay S/Mers").

<sup>38</sup> *See* DEMPSEY, *supra* note 29, at 59 ("You and your partner should both have an equal and active say in drafting the contract. Regardless of who will be the dominant, nobody is the boss at this stage in the relationship."); Maneesha Deckha, *Pain, Pleasure, and Consenting Women: Exploring Feminist Responses to S/M and Its Legal Regulation in Canada Through Jelinek's The Piano Teacher*, 30 HARV. J.L. & GENDER 425, 437 (2007) (noting "the proclivity among maso-

Contract offers BDSM a key instrument with which to carve out this distinction. Namely, BDSM applies the temporal dimension of contract law's concern for equality to its own temporally tinged vision of performance: it injects contract's presumption of equality *at time of contracting* to separate the sexual scene from the outside world, rendering the scene's inequality more purely performative and thus less problematic. Even as participants agree to be mastered, their will ignored and their freedom overridden, that they have contracted to do so suggests that they "really" have will and freedom. Accordingly, the scene's staged inequality represents either complete "pretending," like a play, or, at most, a freely chosen loan of control between equals. As such, the scene is walled off from the parties' relationship both before *and after* the scene: the contract assumes that *A* and *B* each start with an equal measure of power, +1, and that, for the scene, they only temporarily (seem to) transfer that power to give the dom +2 and sub 0; hence, when the contract ends, both *go back to* having +1, unharmed by the transaction. Contractual BDSM thus suggests that it parodies, but does not traffic in or perpetuate, existing power imbalances.

2. *Consideration.* — Contract not only imports a presumption of starting equality between the parties, but it suggests that both parties win out from the transaction — or at least that neither is totally disadvantaged. One of the major complaints levied against BDSM is that it seems, definitionally, the opposite of *quid pro quo*: power is expropriated, taken from one and given to another, resulting in a (seemingly clear) winner and loser of the exchange.<sup>39</sup> Proponents of course dispute this vision, arguing that erotic pleasure is obtained from sexual submission<sup>40</sup> and that an exchange of sexual satisfaction for sexual control thus represents a fair trade.<sup>41</sup> It is for this reason that many BDSM contracts contain explicit sections detailing what each party is to gain from the relationship — generally, objectives like sexual satis-

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chists . . . to design and thus control S/M encounters through a written contract" such that "proponents argue that it is the masochists who are really in control of an S/M situation").

<sup>39</sup> Professor Catharine MacKinnon, who has likened all sex to a process of domination and submission akin to BDSM, *see* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 7 (1987) ("Dominance, principally by men, and submission, principally by women, [is currently] the ruling code through which sexual pleasure is experienced."), gets at this critique in her assertion that "sexuality is to feminism what work is to marxism[:]. . . that which is most one's own, yet most taken away," *id.* at 48. Professor Robin West suggests a similar critique when she explains that because, like subs, "women are *definitionally* the disempowered group," Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 180 (2000), they are those "from whom sex is taken," *id.* at 181.

<sup>40</sup> Even West acknowledges that "sexual submission has erotic *appeal* and *value*," though she limits that phenomenon to "when it is an expression of *trust*." West, *supra* note 39, at 199.

<sup>41</sup> As will be discussed below, these disputes assume that a dom acquiring sexual control — also figured as the loss of sexual surrender — has profited from the arrangement, and thus do not ask whether he too has made a "fair trade," an omission itself open to critique.

faction, emotional connection, and personal growth.<sup>42</sup> Nevertheless, BDSM's conception of pleasure-in-subordination is difficult for many to grasp, especially in light of the liberal order's emphasis on consumption and dominance as benchmarks of success and happiness.<sup>43</sup> Indeed, the idea that one can desire masochism or that profit can be found in expropriation is inherently paradoxical and meant to chafe, to sit uneasily with both participant and observer.

Contract's central requirement of consideration stands to ease this anxiety. By declaring that there has been a bargained-for exchange, the contract reassures us that each party has in fact gained something from the transaction — even if that gain takes the outward shape of a loss. This notion of mutuality in turn aids contractual BDSM's attempt to distance itself from the subjugation of its role-play: while the staged scene asserts that sex is eroticized danger and domination, the contract asserts that the scene itself is not dangerous or dominating but mutually beneficial. The contract thus assures us not only that both parties were equal to start and will be equal again once the scene is over, but also that they remain equal even when *in* the scene in their reciprocal exchange of pleasure, self-knowledge, or growth.

### B. Solving the Problematic of Wantedness

Intricately related to BDSM's investment in power is its commitment to what Professor Janet Halley has termed “the problematic of wantedness”<sup>44</sup>: the notion that sexual desire depends on uncertainty, contradiction, and paradox, and that one may want, above all, to not know what one wants. As Halley makes clear, however, this conception of desire is deeply “problematic”: it creates inevitable risk, as “acting on it places one in the way of having some unwanted sex,”<sup>45</sup> and more conceptually troubling, it never yields clear affirmation, for “if things go right, the wantedness of the sex that happens will [remain] unknowable.”<sup>46</sup> It is largely because of BDSM's commitment to the problematic of wantedness, allowing one party to perform sexual acts that may or may not be wanted and insisting that neither party consider its wantedness,<sup>47</sup>

<sup>42</sup> See, e.g., JAMES, *supra* note 3, at 165 (“The fundamental purpose of this contract is to allow the Submissive to explore her sensuality . . . .”); *id.* at 218 (“Agreed. This is for the benefit of us both. I shall redraft.”); *Contract of Ownership*, *supra* note 21 (proffering contract “in recognition of the deep connection which Mistress and slave share”).

<sup>43</sup> Cf. Franke, *supra* note 12, at 188–90 (discussing how consumption structures society and operates “as an essential part of [our] identity as Americans,” *id.* at 189).

<sup>44</sup> JANET HALLEY, *SPLIT DECISIONS* 301 (2006).

<sup>45</sup> *Id.* at 300.

<sup>46</sup> *Id.* at 300–01.

<sup>47</sup> (Un)wantedness may still be recognized through use of a safe word or contractual revision; however, the baseline dynamic of BDSM sex, contractual or not, is that the dom controls and sub responds, without regard to (if not necessarily in contravention of) the sub's desires.

that BDSM has been criticized as dangerous or anti-consent. In response, practitioners point to BDSM's elaborate rituals of consent — the safe words, predetermined limits, and even the contracts themselves — as proof of their commitment to safety and to “wanted” sex.<sup>48</sup>

Contract not only contributes to, and helps formalize, these rituals of consent, but brings its own arsenal of tools of certainty to bear on the sexual scene. In particular, contract law is premised on the ascertainability of interests, the conviction that “benefits” and “detriments” can be identified by contractors and, if necessary, by courts. This conviction is manifest in the principle of consideration and its presumption that parties not only recognize their interests but contract in order to further them. Hence, a contract is valid only if each party's interest is in some way compensated and will be invalidated if a party has contracted for terms grossly contradictory to his interests. The existence of “frustration” as a defense to contract enforcement, for instance, reveals contract's dependence on this assumption, as the justification holds that a contract no longer in the parties' interests is not worth enforcing and thus will be discharged.<sup>49</sup> To have a contract, then, is to have identified, advocated for, and furthered one's own interests.

In addition to asserting, on a theoretical level, that interests are knowable, contract law promotes on-the-ground investigation into and discussion of interests. For one, it punishes nondisclosure and failure to investigate, encouraging parties to communicate fully about their desires and insecurities.<sup>50</sup> It also privileges specificity, using the specter of enforceable but undesirable judicial interpretations of ambiguous clauses to impel precision and comprehensiveness in drafting.<sup>51</sup> Finally, the requirement of bargain and its counterpart negotiation suggests that any contract will be preceded by meaningful examination and weighing of desires and benefits by parties, both independently and jointly. Given their inherently information-forcing nature, contracts appear to represent the reasoned culmination of self- and mutual exploration of what is wanted and unwanted.

By interposing contract, BDSM then suggests that its commitment to the problematic of wantedness is not so problematic: as in contract law, whatever is contracted for is presumed to be wanted, and whatever

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<sup>48</sup> Cf. GLORIA G. BRAME, WILLIAM D. BRAME & JON JACOBS, *DIFFERENT LOVING* 5 (1993) (“Partners emphasize equal and honest communication, negotiation, and consent [so that a partner's limits and preferences are respected. De Sade would be disgusted.]”).

<sup>49</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

<sup>50</sup> Cf. *id.* §§ 159, 161, 164 (nondisclosure can create mistake justifying avoidance); *id.* §§ 153, 154 (failure to investigate can make a party bear risk of mistake and be held to unintended terms).

<sup>51</sup> Cf. Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 371 (2004) (describing the use of “default rules for gaps in contracts” as a means of “encourag[ing] parties to share information [and] to negotiate over their preferences . . . because there is a penalty to declining to do so”).

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er is excluded is not. By requiring negotiation and drafting, contractual BDSM insists that its participants are aware and protective of their interests. Indeed, contractual BDSM often holds out this norm of negotiation as a trump card, asserting that BDSM is “safer” or less likely to produce unwanted sex than traditional sex because BDSM requires desires and limits to be acknowledged, exposed, and acceded to.<sup>52</sup> Moreover, because BDSM contracts ask parties to consider and communicate limits before committing to the relationship, they enable the assumption that a contractual scene is the product of specific informed consent — that whatever happens, even if that is loss of certainty as to wantedness, has been anticipated, weighed, and affirmatively wanted. BDSM thus uses contract to suggest that the threat of unwantedness is, again, merely performative: though featuring ambiguity, obscurity, and nonconsent, the scene is derived from the certainty, openness, and consent inherent to contract.

Alternatively, even if one accepts that there may be genuinely unwanted acts within the wanted scene, contract allows their dismissal as a mere hitch on the road to wantedness — much as one would dismiss the possibility that parts of a roller coaster ride may be unpleasant and thereby unwanted when accepting someone’s agreement to go on the ride. In particular, that internal unwantedness is rendered *de minimis* by overt unwantedness outside the contract: the limits inherent in contract allow one to find any unwantedness inside the contract’s limits nevertheless “wanted” in comparison to that outside them, which is clearly and knowingly unwanted. This contractual framing in turn provides the element of certainty that noncontractual BDSM eschews, the clear line without which BDSM (and sex itself) seems dangerous, helping to ease anxiety about the composition it contains even if no change has been made to that composition.

### III. PUSHING CONTRACT’S LIMITS

Taken at face value, these contracts thus seem to run counter to, or at least dilute, the ostensible aims or tenets of BDSM. Deploying the principles underlying contract to render the inequality and uncertainty definitional to the BDSM scene purely performative, BDSM contracts seem to meld contract and BDSM theory to assure observers that the parties are equal, self-aware, and self-promoting even as they engage in acts of domination, disadvantage, and asymmetrical control. Such a vision, however, assumes that BDSM and contract are countervailing

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<sup>52</sup> See, e.g., Hopkins, *supra* note 37, at 124 (“SM scenes gut the behaviors they simulate of their violent, patriarchal, defining features . . . [because] in SM there is . . . negotiation . . .”); Pa, *supra* note 33, at 90 (comparing “S/M’s highly negotiated assumption of particular roles” with “traditional . . . relationships that are often blind to [their] structural power dynamics”).

forces, with BDSM calling on contract to deliberately weaken its radical aims or tendencies. This Part challenges that assumption by suggesting ways in which BDSM and contract may in fact work in tandem to sustain and heighten BDSM's original project. Namely, rather than bound and order BDSM sex, contracts may afford BDSM practitioners more opportunities for subversion that in turn enable and enhance BDSM's investment in inequality and ambiguity.

*A. Contract as Dom, BDSM as Sub*

One option is to reconceive of BDSM in light of its now-demonstrated interest in contract's concerns for fairness, wantedness, and certainty. The contradiction between the principles of BDSM's scene and its contract could be read to reveal BDSM as deeply aspirational: by exposing sex's inequality and ambiguity through its performances and parodies, perhaps BDSM seeks to indict those qualities and thereby promote the normative values of equality, certainty, and consent. The language used in writings on BDSM adds some credence to this idea that BDSM is concerned with social change, as writers emphasize BDSM's potential to "expose," "challenge," and "subvert" norms<sup>53</sup> in order to "open [them] to invention and transformation."<sup>54</sup>

Yet to so portray BDSM — to paint it as "carrying a brief"<sup>55</sup> for normative values of equality or consent — is notably to characterize BDSM as championing precisely the values it seems to be challenging. Like queer theory, BDSM is committed to disrupting cultural paradigms not on behalf of the currently undervalued paradigm but on behalf of the act of disruption; for taboo regardless of what that taboo might constitute, pro-subversion rather than pro- or anti-equality.<sup>56</sup> Professor Martha McCluskey has challenged this seeming anti-moralism, arguing that such claims to moral neutrality are merely veiled arguments "in favor of a new version of public moral purity defined as not knowing and not caring about pain, suffering, and subordination."<sup>57</sup> Regardless of which vision is accurate — whether BDSM champions amorality or immorality — it seems clear that BDSM opposes the liberal ethos and the concern for equality and safety that currently dominates the rhetoric of sexual morality. Consequently, if

<sup>53</sup> See, e.g., McClintock, *supra* note 4, at 106, 108.

<sup>54</sup> Pa, *supra* note 33, at 91.

<sup>55</sup> HALLEY, *supra* note 44, at 5.

<sup>56</sup> See, e.g., Robin Bauer, *Transgressive and Transformative Gendered Sexual Practices and White Privileges: The Case of the Dyke/Trans BDSM Communities*, 36 WOMEN'S STUD. Q. 233, 233 (2008) (describing BDSM as concerned with "transgressing social hierarchies and norms, cultural taboos, and personal boundaries").

<sup>57</sup> Martha T. McCluskey, *How Queer Theory Makes Neoliberalism Sexy*, in FEMINIST AND QUEER LEGAL THEORY 115, 127 (Martha Albertson Fineman et al. eds., 2009).

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BDSM contracts expose BDSM as ultimately serving the normative values of knowing and caring about pain and subordination, they reveal BDSM as Janus-faced, claiming one master and serving another.

Rather than render BDSM servant to the ethics of contract, this revelation might then place contract back in conflict with or service to BDSM. For, in characterizing BDSM as insincere, delusive, or contradictory, such an analysis suggests that BDSM may nevertheless be maintaining its theoretical commitment to “the complex, uncertain, irrational, and paradoxical.”<sup>58</sup> To claim that BDSM serves equality and certainty by espousing sex based on inequality and uncertainty would be to claim not only that BDSM operates through performance, but that it itself is a performance — that its practices, principles, and messages are instrumental fictions. This in turn renders BDSM an embodiment of paradox and problematic wantedness not merely in its practices but at its theoretical core, affording it a subversive or queer subtext even when placed in support of conventional aims.

### B. *BDSM as Dom, Contract as Sub*

Conversely, then, BDSM contracts may call for reconception of contract given its association with BDSM. On a basic level, contract’s alliance with BDSM may serve to radicalize contract rather than regulate BDSM: by appearing to render BDSM less extreme, these contracts have likely contributed to the popularization of BDSM. By providing novice practitioners with a rubric for constructing scenes, these contracts provide practical, on-the-ground support that further facilitates the practice. Contract has thus been co-opted by a transgressive sex practice from which it otherwise seeks to detach itself, used to actively empower and advance that transgressive sex. BDSM’s appropriation of contract then implies that legal-liberal usages and their principles of equality and informed consent may nevertheless constitute tools for the performance of inequality and domination.

This premise can be taken yet further. Namely, in addition to enabling BDSM and thereby its dangers, contract may in fact increase those dangers, creating new power imbalances and uncertainties for the sexual participants. In other words, contract may not merely be a neutral tool open to (mis)appropriation by BDSM, but may itself operate through and produce inequality, opacity, and contradiction.

1. *Keeping Wantedness Problematic.* — For instance, contract may deepen BDSM’s investment in the problematic of wantedness. As part of its commitment to bargain and consideration, contract forces parties to choose and commit to interests upfront, often far in advance of con-

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<sup>58</sup> *Id.* at 124.

tractual fulfillment, thereby treating such interests and desires as essentially static. In promoting such predetermination, contract further penalizes a converse failure to identify and specify desires. Professor Elizabeth Emens underscores the importance of such a penalty to contract regimes in her proposal that adultery laws be formulated as default contractual rules: she notes that “contract law principles . . . encourage [anticipatory] conversations” and “affirmative choices” because they allow for “information-forcing default rules” that “create a penalty for parties who are not explicit about what . . . they want.”<sup>59</sup> No mere speculative consequence, penalty forms a central component of a legal system that expects its subjects to transgress, feel the bite of punishment, and mend their ways.

In contractual BDSM, where contract circumvents a default of complete sexual control and compliance, failure to contract or to do so with adequate specificity likewise results in a penalty: unwanted sex. As Emens’s analysis suggests, this “sexual penalty” is an outcome that is expected in, and perhaps even desirable or necessary to, the functioning of a contractual sexual regime. This insight alone should give those who see BDSM contracts as devices of safety and fairness some pause, as it suggests that the wantedness of some participants’ sex is dependent on the unwantedness of others’, or at least on the ominous specter of others’ unwanted sex. The nature of sexual desire makes its incorporation into a contractual regime yet more problematic. If, as BDSM itself recognizes, sexual desire — unlike contractual interest — is messy, fluid, and fluctuating, it is near impossible to pin down at any given moment, no less in a negotiation pointedly set aside from the sexual scene itself.<sup>60</sup> To hold any person to contractual terms of sexual desire is then to all but assure that he will at some point face the penalty of unwanted sex. Indeed, it is just this notion of preset consent that renders BDSM so objectionable to many who worry that it renders the submissive partner a slave to her words rather than her desires. In essence, then, BDSM contracts endorse consent at the expense of pure wantedness, encouraging parties to have sex based on affirmative choices and “punishing” them when their transient feelings stray from those decisions. At the same time, however, contract’s principle of bargain suggests that all contractual sex is nevertheless “wanted,” affirmatively chosen precisely because it furthers the party’s interests or desires (if perhaps not the sexual desires of the moment).

<sup>59</sup> Emens, *supra* note 51, at 364.

<sup>60</sup> Of course, this is not to say that all negotiations are “cold”; indeed, negotiation itself could serve as foreplay as parties elaborate desires and anticipate their culmination. Still, BDSM contracts presume that negotiation is distinguished from, and occurs before, the scene, and subsequent drafting often requires a gap between contracting and sex.

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In so doing, BDSM contracts allow sex to be simultaneously wanted and unwanted — the very phenomenon recognized by BDSM.

Contract's tendency to complicate rather than clarify wantedness is heightened in light of the kind of actors involved in BDSM. One expects that BDSM contractors have chosen to engage in BDSM precisely because they desire the problematized wantedness BDSM claims to espouse, seeking loss of certainty as to wanted sex as well as the intermingling of shame, indignation, and satisfaction that comes of this lack of certainty. As such, they are unlikely to use contract to filter out all ambiguity — after all, BDSM contracts make little sense if they so exhaustively curtail possibilities that they essentially promise “we can have predictable sex when I want it.”<sup>61</sup> Rather, participants will almost certainly keep taking risks through and with the medium of contract, pointedly leaving terms open to interpretation and sex open to surprise. Enabling parties to both set terms and blur them, these contracts keep sex surprising and unanticipated, as manipulable contractual limits breed expectations and hypotheses that can then be subverted — perhaps the very phenomenon desired and hence “contracted for.”<sup>62</sup> Contract thus enhances the problematic of wantedness precisely because it *doesn't* get players closer to having only wanted sex, instead helping embed opportunities for unwanted sex in “wanted” scenes.

BDSM contracts may also problematize wantedness in their simultaneous reinforcement and subversion of trust. Trust is a key term for BDSM, with its promise of commitment to, and confidence in, partners' identification of and respect for each other's desires and limits operating as a mollifying alternative to specific consent.<sup>63</sup> On the surface, contracts certainly seem to promote trust, encouraging parties to candidly communicate and to create a “safe space” for mutual understanding and supportive reliance.<sup>64</sup> And, of course, in light of its extrajudicial use, it is only through trust that a BDSM contract operates at all, suggesting that its realization is directly tied to that of trust.

At the same time, as seen in the ubiquitous fiction of the fiancée incensed at the suggestion of a prenup, contract by its nature tends to diminish or strip away trust. By implying that parties will be unsafe

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<sup>61</sup> Cf. lunaKM, *supra* note 19 (“[T]he contract is not for every small measure of control . . . . If you feel you need to write up a long list of rules at the get go, don't.”).

<sup>62</sup> It is worth noting that in choosing a guiding structure, BDSM was not bound to contract; rather, its appropriation of theater analogies would seem to call for narrative scenes. A scene, however, contains an end as well as a beginning, setting out the shape of the entire interaction, with no provision for breach, efficient or inefficient. Contract, by contrast, retains a susceptibility to deviation that better suits BDSM's commitment to ambiguity and apprehension.

<sup>63</sup> See, e.g., Meepos, *supra* note 6, at 113; cf. West, *supra* note 39, at 199 (“[S]exual submission has erotic *appeal* and *value* when it is an expression of *trust* . . .”).

<sup>64</sup> Emens's article also supports this notion that contracting serves trust, as it turns to contract as a means of reducing romantic suspicion and betrayal. Emens, *supra* note 51, at 321–25.

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or unhappy without a formal, coercive agreement, contract is in fact deeply limiting and skeptical of human trust. In particular, as they encourage parties to rely on preordained limits in potential contravention of present desires, BDSM contracts discourage the dom and sub from engaging in precisely the organic deciphering and respecting of wants and fears that BDSM lauds as its elevating “trust.” BDSM contracts, however, could be used to foster such organic trust — if they are used in a manner contradictory to and subversive of that ostensibly intended by contract. Namely, a party could deliberately set the bounds of play beyond that which she is genuinely willing to accept or include within the contract’s limits acts she knowingly does not desire in order to give her partner the liberty to subject her to unwanted sex. Such a contract increases sexual dread and/or excitement not only because it creates apprehension of the unwanted act, but also because it tries trust, as one partner waits with bated breath to see if the other can correctly intuit her current fear or desire and act in accordance with those feelings rather than with the contract’s terms. Or, even more subversively, a practitioner might make the contract underinclusive of the acts he wants or is willing to accept because it is in fact the violation of a contractual provision *that is nevertheless in line with felt desire* — an act displaying both intimate knowledge and care and willful disregard for professed will — that is ultimately wanted and courted.<sup>65</sup> In each situation, the problematic of wantedness returns in full force, as the contract helps cloud participants’ ongoing understandings of what is sexually desired and sexually objectionable, creating an uncertainty that may in fact be that which is most wanted.

2. *Undermining Assumed Equality.* — This possibility that BDSM contracts embrace and increase uncertainty suggests, in turn, the possibility that they enhance inequity or power imbalances in the relationship. First and foremost, problematizing wantedness problematizes the knowability of interests and their ability to be fairly advanced. If participants want loss of certainty and use the contract to achieve this aim, they can never be sure what they will get or that they will get what they want: a scene could go entirely according to “plan” (or within expectations) and therefore never result in the questionable wantedness that is most wanted. Such disappointment at contractual compliance or pleasure at breach confounds the basic notion that contract encapsulates and promotes the parties’ interests. And if it becomes unclear whether the contract is identifying and advancing interests, it becomes unclear whether parties’ interests are commensurate or

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<sup>65</sup> Indeed, this scenario might well be termed an “efficient breach” of the sort embraced by contract law, in which the sundering of the contract produces more benefits than compliance. It might even be more “efficient” than the average efficient breach, as it may result not in one party’s gain exceeding the other’s loss but in both parties profiting.

sufficient for consideration, meaning that any negotiated BDSM contract may represent a bargain or an expropriation, depending on the turns the sex takes. Further, to expose the contract's limits as illusory or manipulable is to allow for informational imbalances that raise the specter of sustained inequality: those new or particularly credulous may be entering the agreement on false terms, taking the contract's appearance of definiteness at face value while their partners use that appearance to create even more uncertainty and unanticipated sex. In seeking to keep their side of an open-ended bargain, such participants may find themselves out of control in the scene in a way that is not merely performative and that, as such, transgresses the ostensible allocations of power in the scene and relationship.

In line with this insight that BDSM contracts might create power imbalances that do not correlate to those expected or contracted for, it is worth noting that commentators have implicitly treated the contract as a tool of the sub to be deployed against the dom.<sup>66</sup> Although this vision of BDSM contracts makes sense in light of both the way the contracts themselves are formulated (with an emphasis on limits to protect the sub) and the way sex is popularly perceived (as natural aggression controlled by civilized restraints),<sup>67</sup> it need not be, nor indeed is it most often, the case. By contrast, a dom may implement the contract as a means of mitigating the rapist paradigm wrought into risky sexual interactions: if love means never having to say you're sorry, sex contracts, doms may hope, mean never having to say "but you wanted it." What's more, a dom may wish to be freed from the sub's own aggression: once the contract has granted her full power (subject to the sub's hard limits), the dom will never be asked to do something she does not desire. Being a dom, then, is to have the power to choose what not to do, a significant power given the way affirmative desire and altruistic compliance are so confused in and by sex.

While this *Bartleby*-like vision of power-as-choosing-not-to runs counter to the traditional model of sexual dominance, it accords with the way modern society has constructed socially acceptable power.<sup>68</sup> In a world in which individuals are taught to deplore sexual aggres-

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<sup>66</sup> See, e.g., Deckha, *supra* note 38, at 437.

<sup>67</sup> Cf. Franke, *supra* note 12, at 206 (noting "the project of using law to tame sexual danger"); *id.* at 199 ("In . . . legal feminism, . . . [s]exuality is something that threatens from without.").

<sup>68</sup> As Professor Katherine Franke has incisively observed, "for many feminist legal theorists, saying no to sex has been understood as one of the principal ways of saying yes to power." *Id.* at 197. In particular, if women are defined by their self-defeating submission (as MacKinnon might suggest) or their self-defeating altruism (as West might suggest), saying no becomes the primary mechanism of self-assertion and therefore the "feminist" means of power. As feminism then "exerts itself in the culture wars" and "convince[s] lots of men that . . . [they] must defer to feminism," HALLEY, *supra* note 44, at 22, the acquisitive notion of power (saying yes) takes on a negative connotation and falls out of favor.

sion and to see sex as comprising tenderness and verbal assent, the prospect of enacting forcible sexual compulsion may appear frightening or inhibiting — a hard limit the dom seeks to preserve through a contract. Yet again, however, the prophylactics promised by the contract may well prove illusory. For one, as noted earlier, the idea that a BDSM contract could safeguard against cries of nonconsent is not only illusory but hazardous, as the mere existence of the contract can be taken as proof of the dom's criminal sexual aggression. More importantly, the contract may actively subvert the dom's choices and limits: a sub desiring fuller domination can force the dom's hand, either by threatening to break the contract and leave unless more drastic measures are taken or by placing the dom in situations where a failure to punish or dominate would essentially "burst the bubble" of the persona. The contract may thus paradoxically place the dom "in control" before the scene and "out of control" during it. In so doing, the contract is further revealed as a tool of both contradiction and mutability and thereby as an instrument capable of serving BDSM's aims.

Above all, throughout these possibilities, one element remains constant: paradox. By seeking to meld two such disparate fields, BDSM contracts seem to bring themselves repeatedly to the edge of theoretical incoherence or circularity. They suggest that acts of agency may enable subjugation and acts of subjugation agency; that performances of equality may produce inequality and performances of inequality equality; that limits and terms may increase both certainty and ambiguity; and that contracts for sexual pleasure may simultaneously enhance, obstruct, and obscure wanted sex. BDSM thus seems to play again its trump card and subordinate contract to its purposes.

#### IV. CONCLUSION: BONDAGE IN THE SHADOW OF THE LAW

As the prior Parts show, BDSM contracts' functionally extralegal legislating paints a provocative picture. On the one hand, BDSM may be interposing contract to colonize and sanitize, dampening its radical tendencies and making its sex more overtly consensual, safe, and equal. On the other hand, BDSM may be co-opting contract's rules and expectations to provide new fodder for subversion, domination, and uncertainty. The coexistence of these readings, allowing contract and BDSM to simultaneously complement and counteract the other, places BDSM at the heart of a complex interchange of theoretical principles that offers new insights into both practices.

It is precisely this pointed self-positioning at the junction of a critical dialectic that reveals contractual BDSM's value to broader legal study. Namely, BDSM contracts provide a heightened distillation of law's conflicted interaction not only with BDSM but also with sex more generally and with other areas legally deemed "private," kept behind bedroom doors and beyond the scope of governmental inter-

vention. Like BDSM contracts, this private realm finds itself caught in a tangled web of regulatory and antiregulatory impulses, defined as a “natural” space outside law yet inexorably shaped by legal choices. BDSM contracts may then provide a new lens through which to confront one of legal scholarship’s most pressing questions: the role that law does, can, and should play in constructing a structural private.

Consider, for instance, current legal theoretical debate on sex. In contract’s attempt to mitigate BDSM, we can see reflected much of the feminist project on sex: contending that for sex to be supportable it must be between equals, clearly wanted, and safe, feminists believe that law should make sex the product of protocontractual information gathering and bargaining, requiring thorough and candid investigation of desires and fears, open communication between partners as to those desires and fears, and clear delineation of boundaries. However, just as contract’s attempt to civilize BDSM may in fact render BDSM more dangerous, so may feminism’s attempts to sanitize or clarify sex prove potentially self-subversive. For instance, by insisting both that good sex requires desires to be decided upfront and that good sex must account for ever-changing, last-minute feelings, feminists’ focus on legal consent may help women become parties to their own victimization: women may attempt predetermined consent only to find themselves facing some unwanted but consented-to sex acts as their desires shift, leaving them uncertain as to whether they have had empowering or violative sex. This in turn may help cement the ties between sex and feelings of shame, uncertainty, and problematized wantedness that feminists decry and that queer theorists find “beautiful [and] brave [and] complicated and fleeting and elaborate and human.”<sup>69</sup> Similarly, by figuring that which is sexually acquisitive (saying yes) as the realm of male power, feminists may not only be consigning women to “saying no”;<sup>70</sup> they may also be implicitly driving some women to assume a stance of sexual aggression — whether as a means of asserting equality by demanding access to that which was men’s<sup>71</sup> or as a means of filling a role still central to much sex that men have been shamed out of fulfilling — while simultaneously condemning such aggression, again helping construct a female sexuality that is conflicted and confused, beset by warring feelings of empowerment and mortification. In essence, feminist attempts to regulate sex may in fact undercut their regulatory goals by making sex less clear, consensual, or safe.

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<sup>69</sup> HALLEY, *supra* note 44, at 301.

<sup>70</sup> Franke, *supra* note 12, at 197–98.

<sup>71</sup> Cf. Leslie Larkin Cooney, *Lawyer, Heal Thyself: Bringing Rational Expectations to the Law Firm Environment*, 22 WHITTIER L. REV. 967, 968–69 (2001) (noting that “[t]he main goal of the [“formal equality” theory has been] to open access to male-dominated domains for females”).

If BDSM contracts suggest that regulation of sex may be self-defeating, however, they also suggest the dangers or futility of nonregulation. Queer theory has responded to the feminist drive for regulation with what McCluskey has called “queer anti-statism,” which “impl[ies] that some safer — or more exciting — space free from regulatory effects awaits those who reject state support” and urges that sex be left to the private where it can flourish apart from the state’s restraining hand.<sup>72</sup> The very existence of BDSM contracts undercuts the vitality of this antiregulatory stance, lending support to the feminist critique that these entreaties follow from a delusive vision of social capability for lawlessness and ignore the inexorable reach of, and grasping toward, state oversight.<sup>73</sup> By importing law — as doctrinal and lifelike as possible — into a seeming oasis of lawlessness, BDSM contracts suggest that efforts to privatize may prove as self-subversive as efforts to regulate: removing strictures may, for instance, remove critical triggers for social destabilization and instead turn individuals’ creative efforts away from questioning and toward construction of vigilante lawmaking, an outcome less than cheering to the queer project.

Contractual BDSM thus reveals the deep tension that defines the law’s long shadow and, positioning itself at the apex of this conflict, offers a promising beacon to help us navigate the murky waters between the Scylla of counterproductive regulation and Charybdis of regulatory nonregulation. In so doing, it also suggests the value of seeking out and working with other liminal legal spaces, seemingly lawless areas where systems like contract or adjudication have been imported to order private activity. Caught directly in the crossfire between regulatory and antiregulatory impulses, these quasi-legal outposts may provide the keenest insights into law’s construction of and interaction with social behavior and morality, offering new opportunities for insights into the problematic legal space occupied by issues like sex, gender, and equality. Analysis of the ways in which competing tendencies to embrace and subvert law play out in BDSM contracts thus provides a critical tool through which to evaluate attempts to occupy or isolate sex, sexuality, and the structural private.

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<sup>72</sup> McCluskey, *supra* note 57, at 123; *cf.* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The State cannot demean . . . [individuals] by [intruding on] their private sexual conduct . . .”).

<sup>73</sup> *Cf.* Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1094 (2004) (criticizing the privatizing impulse of cases like *Lawrence* as merely “insulating . . . gender-stratified economic, reproductive, social, cultural, sexual, and aggressive organization from public scrutiny and state rectification”).