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## The Pleasure of the Contract: Legal Role Play from Leopold von Sacher-Masoch Through Noodles & Beef

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COMMENT

THE PLEASURE OF THE CONTRACT:  
LEGAL ROLE PLAY FROM LEOPOLD  
VON SACHER-MASOCH THROUGH  
NOODLES & BEEF

MICHAEL ANGELO TATA\*

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## INTRODUCTION

Not all contracts are enforceable: in fact, many are penned with other values in mind. One cluster of contracts that any court outside perhaps Nevada would not touch is sex contracts.<sup>1</sup> These agreements are the nontraditional examples of the contractual “offer and acceptance” structure found in the arrangements of sadomasochism (S&M), or BDSM (Bondage, Discipline, Sadism, Masochism).<sup>2</sup> Though these contracts are only “enforceable” on a television program like *Sex Court*,<sup>3</sup> one would not have to be a lawyer, jurist or even law student to understand how far afield these documents stand from actual legal remedy. However, recent judicial enforcement of arbitration clauses in Scientology contracts is promising for the undeveloped field of sexual arbitration, raising the possibility that the inclusion of an arbitration clause in an S&M contract might be enforceable.<sup>4</sup> If there can be binding “ecclesiastical arbitration” in a religious contract,<sup>5</sup> then why not offer binding sexual arbitration for

<sup>1</sup> This Comment does not look to the Nevada paradigm, by which a sexual contract off the Vegas Strip might very well be enforceable. *See, e.g.*, Michelle Rindels, *Indy Explains: How Legal Prostitution Works in Nevada*, THE NEVADA INDEPENDENT (May 27, 2018), <https://thenevadaindependent.com/article/the-indy-explains-how-legal-prostitution-works-in-nevada> (examining how licensed brothels like Pahrump’s Chicken Ranch work in Nevada). Optimism for these brothels cuts both ways. *See* Julie Bindel, ‘It’s Like You Sign a Contract to be Raped,’ THE GUARDIAN (Sept. 7, 2007), <https://www.theguardian.com/world/2007/sep/07/usa.gender> (documenting contractual suffocation among female Nevada sex workers). *But see* *Cathouse: The Series*, HBO (2005-14) (playfully documenting the lives of sex workers at the Moonlite BunnyRanch and other popular legal Nevada brothels).

<sup>2</sup> *See Nonbinding Bondage: Exploring the (Extra)legal Complexity of BDSM Contracts*, 128 HARV. L. REV. 713, 713 (2014) (deciphering the acronym BDSM).

<sup>3</sup> *Sex Court* (Playboy TV, 1998-2002) (presenting various sexual disputes over which a scantily clad Judge Julie presides, offering judgments and remedies).

<sup>4</sup> *See* Eriq Gardner, *Leah Remini Assistant Headed to Scientology’s “Religious Arbitration” Despite Gun Accusation* HOLLYWOOD REPORTER (Jan. 31, 2020), <https://www.hollywoodreporter.com/thr-esq/leah-remini-assistant-headed-scientologys-religious-arbitration-gun-accusation-1275288> (discussing Los Angeles Superior Court’s order that ex-Scientologist Valerie Haney partake in “ecclesiastical justice procedures” in her defamation suit against Scientology, based on contract theory); Eriq Gardner, *The Church of Scientology Says Danny Masterson Stalking Suit Must go to “Religious Arbitration,”* HOLLYWOOD REPORTER (Jan. 8, 2020), <https://www.hollywoodreporter.com/thr-esq/church-scientology-says-danny-masterson-stalking-suit-go-religious-arbitration-1268021> (examining the decision that three female accusers of Danny Masterson attend Scientology arbitration as per contracts they previously signed with the church). *But see* Mike Rinder, *Concerning Scientology “Religious Arbitration,”* MIKE RINDER’S BLOG (Jan. 30, 2020), <https://www.mikerindersblog.org/concerning-scientology-religious-arbitration/> (“[T]here is no such thing as ‘Scientology arbitration.’ It was a term invented by Scientology’s in-house counsel to include in agreements to prevent civil litigation. Arbitration is not mentioned in any Hubbard policy letter anywhere”).

<sup>5</sup> *See* Eriq Gardner, *Leah Remini Assistant Headed to Scientology’s “Religious Arbitration” Despite Gun Accusation* HOLLYWOOD REPORTER (Jan. 31, 2020), <https://www.hollywoodreporter.com/thr-esq/leah-remini-assistant-headed-scientologys-religious-arbitration-gun-accusation-1275288>.

a sexual contract when both parties agree to abide by this strategy of alternate dispute resolution?

The general field of unenforceable contracts lays a foundation for what this Comment names the “Trans-enforceability Thesis”: the idea that, in general, contracts transcend mere enforcement. This contractual transcendence within sex contracts is particularly “uncanny,” a fissure that often emerges in daily life and which appears with the provisions of sex contracts.<sup>6</sup> This Comment coins the term *trans-enforceability* to indicate that sometimes contracts go beyond the legal obligation to perform. *trans-enforceability* includes everything that transcends the traditional enforceability of the contract, from self-enforcement to social enforcement, good conscience to fears of starving to death (if we posit a primal “Hunter-Gatherer” contract) or getting beaten to a pulp by an angry Mob boss (as in an informal Mafia contract).<sup>7</sup> *Trans-enforceability* is an intentionally metaphysical concept, raising the notion that there is a phenomenology, even a psychoanalysis, to contracting.<sup>8</sup> This Comment focuses on one particular trans-enforceable value of the sex contract: its aesthetic power, a performative force.<sup>9</sup> This Comment thus imports the definition of performance as an aesthetic expression from Gender Theory, in particular the early work of Judith Butler.<sup>10</sup>

*Trans-enforceability* also includes the notion that one is helping society stay together by preserving one’s word, along with the idea that the promise is itself an act of *logos*.<sup>11</sup> When examined via 18th-century phi-

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<sup>6</sup> For Sigmund Freud, the “uncanny” is the *unheimlich*. It relates to the workings of the id, where pleasure resides, but is masked, its secrets bubbling up into reality via slips of the tongue and humor. See SIGMUND FREUD, *THE UNCANNY* (David McLintock trans., Penguin Books 2003); see also SIGMUND FREUD, *JOKES AND THEIR RELATION TO THE UNCONSCIOUS* (W.W. Norton & Co. 1990) (examining humor as a gateway to the *unheimlich*).

<sup>7</sup> The social enforcement of contracts, which involves less the Law and more social mores and anxieties about inclusion and exclusion within a social group, has even led to the advent of Social Capital, as currently seen in China. Through Social Capital, one is given a number that reflects how trustworthy the individual is, based on how he or she has treated promises and obligations. This rating is public and affects which opportunities and benefits society will extend to the individual. See Ken Jackson, *Contract Enforceability and the Evolution of Social Capital*, 29:1 J. OF L., ECON. & ORG. 60 (2011).

<sup>8</sup> See, e.g., NICHOLAS RUIZ III, *THE METAPHYSICS OF CAPITAL* (Intertheory Press 2006) (arguing that there is a metaphysics to the workings of capital, which would necessarily include its many contracts).

<sup>9</sup> Within Gender Studies, one persistent thesis has been that gender is more performative than biological. See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (Routledge 2006).

<sup>10</sup> See, e.g., JUDITH BUTLER, *supra* note 9; see also Martha Merrill Umphrey, *Law in Drag: Trials and Legal Performativity*, 21 COLUM. J. GENDER & L. 114 (2012) (applying Butler’s aesthetic theories to legal performance).

<sup>11</sup> See JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Spivak trans., Johns Hopkins Univ. Press, 4th ed. 2016) (defining “phallogocentrism” as the fantasy of word made incarnate).

osopher Jean-Jacques Rousseau’s idea of a primordial Social Contract, what surfaces is an ancient promise that is less about its external enforcement than it is about symbology—a compliance that is its own transcendent reward.<sup>12</sup> Within a sexual setting, this symbology relies heavily upon the aesthetic in that it engages the contract at the level of its surface, miming its structure as an act of empowerment.<sup>13</sup>

Still, according to this Comment’s Trans-Enforceability Thesis, the least interesting facet of contracts is whether or not they are legally enforceable, despite what common legal common sense might dictate.<sup>14</sup> Individuals draft and execute legally unenforceable contracts with the look and feel of “real” contracts all the time: everything from driving contracts between a parent and teenage minor to familial agreements about who takes out the trash and who does the dishes. Perhaps our sex lives should be no exception. As the ensuing case discussion demonstrates regarding meretricious exchanges, the lack of legal enforceability shown by sex contracts in a bondage setting simply does not make them evaporate.<sup>15</sup> Lack of enforceability might intensify the drive to follow these “pseudo”-contracts to the letter, all in the name of *mimesis*, or copying/simulating.<sup>16</sup> These “simulated” contracts open the discussion to self-enforcing mechanisms like peer pressure, sexual reputation, group cohesion and anxieties about ostracism: all realities borne up by the aesthetic fiction of contractuality.<sup>17</sup>

The recent article *Nonbinding Bondage: Exploring the (Extra)legal Complexity of BDSM Contracts* encapsulates the aesthetic legacy of the

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<sup>12</sup> See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* (Victor Gourevitch trans., Cambridge University Press 2007).

<sup>13</sup> “Aesthetic” derives from the branch of philosophy called Aesthetics, which deals with Art and is typically opposed to the field of knowledge production, or Epistemology, and social mores, or Ethics. Immanuel Kant has famously differentiated Aesthetics from these other fields in his tripartite structure of knowledge. See, e.g., IMMANUEL KANT, *CRITIQUE OF JUDGMENT* (James Creed Meredith trans., Oxford Univ. Press 2009).

<sup>14</sup> For example, Stuart Macaulay steers developing economies away from a strict enforceability model in his work on contractual organicism, while the focus on winning legal cases that sexual historians studying gay marriage include in their analysis ignores important unenforceable cases that technically lose in court but succeed in impacting the *zeitgeist*. See generally Stewart Macaulay, *Organic Transactions: Contract, Frank Lloyd Wright and the Johnson Building*, 1996 WIS. L. REV. 75 (1996) (arguing for a “living” model of contractuality which incorporates variation and change); Chris Geidner, *The Court Cases That Changed L.G.B.T.Q. Rights*, N. Y. TIMES (June 19, 2019).

<sup>15</sup> See *Marvin v Marvin*, 18 Cal. 3d 660 (1976); *Jones v. Daly*, 122 Cal. App. 3d 500 (1981).

<sup>16</sup> See, e.g., ARISTOTLE, *POETICS* (Anthony Kenny trans., Oxford Univ. Press 2013) (looking at how mimesis works within a poetic and theatrical framework); JACQUES DERRIDA, *DISSEMINATION* (Barbara Johnson trans., Univ. of Chicago Press 1981) (examining in detail the full power of mimesis via the work of French Symbolist poet Stéphane Mallarmé).

<sup>17</sup> See Daniel Villarreal, *Death of a Kinkster*, THE STRANGER (Nov. 5, 2018), <https://www.thestranger.com/features/2018/11/07/35073826/death-of-a-kinkster> (detailing various techniques of social enforcement instantiated through social media).

sex contract and its embodiment in what this Comment calls “legal role play,” or how individuals perform contractual play-acting for sexual gratification.<sup>18</sup> In Part I, this Comment challenges *Nonbinding Bondage*’s historical arc, using this writing as a launchpad for a more extensive discussion of the sex contract’s aesthetic interpretation.<sup>19</sup> Employing a vocabulary of parody, play and performance (all aesthetics terms), *Nonbinding Bondage* presents the most popular reading of subcultural BDSM contracts: that they mime aspects of traditional contracts to unearth truths about power relations.<sup>20</sup> Through the contractual mimesis of legal role play, BDSM practitioners experience with pleasure and gusto distorted versions of traditional societal power exchanges.<sup>21</sup>

What emerges when contracts are deconstructed aesthetically is one prevalent root narrative: the simulation of sexual contracting as *stimulation* in itself. This tale is the story of 19th-Century Austro-Hungarian novelist Leopold von Sacher-Masoch, whose novel *Venus in Furs* contains the first serious formulation of a master-slave contract.<sup>22</sup> It is also the contemporary story of Dylan Hafertepen (“Noodles & Beef”) and Jack Chapman (“Tank”), two gay men, arguably trans-species, bound by a contractual arrangement that would prove deadly.<sup>23</sup> Curiously, *Nonbinding Bondage* ignores Masoch’s foundational work completely. Masoch, from whose name the term *masochism* was derived, used his novel to detail the extraordinary steps one takes to make a contract *feel* enforceable, although it is technically not.<sup>24</sup> Hence, Masoch unearths a pleasurable core to contracting that persists within sexual contracting to this day, and this Comment salvages his important contribution.<sup>25</sup>

This examination of the literary and narrative roots of sexual contracting leads to an argument supporting the thesis that contracts are *trans-enforceable* entities with other value: here, the sexual allure of mimetic role play. In Part II, this Comment examines how mimesis and desire intertwined for two Washington State Pups—gay men whose fetish entailed dressing up as dogs—Noodles & Beef and Tank.<sup>26</sup> Pups

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<sup>18</sup> See generally *Nonbinding Bondage*, *supra* note 2.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

<sup>21</sup> *Id.*

<sup>22</sup> LEOPOLD VON SACHER-MASOCH, *Venus in Furs*, in MASOCHISM 143, 220 (Jean McNeil trans., Zone Books 1991).

<sup>23</sup> See Villarreal, *supra* note 17 (analyzing the contractual morass of Pups Noodles & Beef and Tank).

<sup>24</sup> See RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS* (FQ Legacy Books, 2010) (naming masochism after Masoch in his litany of sexological disturbances); MASOCH, *supra* note 22.

<sup>25</sup> MASOCH, *supra* note 22, at 220.

<sup>26</sup> The author of this Comment has attended Pup parties in Miami, Fort Lauderdale and San Francisco between 2016 and 2021, and is in part deriving his sexual anthropology from these exper-

engage in a range of practices: they variously display symbolic contracts (doggie collars, chains), draft and sign consequential written agreements, and may even agree to have tracking software installed subcutaneously (“chipping”).<sup>27</sup> This Comment looks to the notorious sex contract that Tank posted to his Tumblr page on December 20, 2012 in its social and legal context.<sup>28</sup> Though legally unenforceable, Tank performed the terms of this document to the letter, and it became a fatal fetish.<sup>29</sup> This fatality derived from the fact that the contract contained an implied provision mandating testicular silicone injections by the submissive Pup.<sup>30</sup> These injections killed Tank, but they did not have to. What exactly made them enforceable in the first place? The pleasure of the contract may be the best answer.

Next, Part II turns to the meretricious contract, or contract involving sexual exchange, as analogue to a BDSM contract like Noodles & Beef’s. Though legally unenforceable, the meretricious contract can itself become the site of social and political liberation and empowerment, as critical California cases *Marvin v Marvin* and *Jones v. Daly* have demonstrated.<sup>31</sup> Such a contract will typically lose in court, as it did in both cases. Still, its loss can trigger the birth of new rights for genders and sexualities typically excluded from the protection afforded by constitutionally derived fundamental rights, like the right to marry.<sup>32</sup> Contracts that are meretricious in nature can also create new rights for victims of detrimental reliance<sup>33</sup>—whose non-monetary contributions to a non-marital arrangement have come to amount to nothing after the arrangement disintegrates—helping to equalize a gender imbalance. Because the unenforceable meretricious contract can increase sexual freedom and equality through notoriety, the performative aesthetics of Noodles & Beef’s sex contract might contain a silver lining after all, adding to its legal and cultural importance.

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iences. These events serve as oases for men whose fetish is to don canine regalia and are reflective of the culture to which Noodles & Beef and Tank Chapman belong.

<sup>27</sup> See Interview with Handler Jack, via email (Oct. 1, 2019) (detailing the mechanics of chipping).

<sup>28</sup> See Villarreal, *supra* note 17 (detailing the “Pup” lifestyle, whose participants are typically gay men clothed in canine regalia).

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> *Marvin*, 18 Cal. 3d at 665 (holding that although implied contracts for unmarried cohabitators are not necessarily meretricious, they produce complicated severability issues); *Jones*, 122 Cal. App. 3d at 507 (holding that the provision of romantic services constitutes a meretricious contract).

<sup>32</sup> See *Jones*, 122 Cal. App. 3d at 507.

<sup>33</sup> Within Contract Theory, detrimental reliance is the idea that one should not be penalized for relying on a contract into which one has presumably entered. See L.L. Fuller & William R. Purdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L. J. 52, 373 (1936) (theorizing reliance interest and distinguishing it from expectation interest); *Marvin*, 18 Cal. 3d 660.

## I. THE PRACTICE OF SEXUAL CONTRACTING: THREE CENTURIES OF LEGAL PERFORMATIVITY

Sexual contracting has been around for centuries, or at least since Leopold von Sacher-Masoch penned his salacious novel *Venus in Furs* in 1870.<sup>34</sup> How strange it is that a theory of contracting should trace its origins back to a literary work: perhaps strange for the Law and Economics approach, but certainly not so for Law and Literature.<sup>35</sup> As the father of masochism, Masoch is an optimal place to begin any exposition of the background of sexual contracting.<sup>36</sup> From Masoch, the culture of sadomasochism flows, passing into the present, where the sex contract signed by Noodles & Beef and Tank has created a legal maelstrom in Washington.<sup>37</sup> Though separated by centuries, these contracts are of a piece, and help trace out a continuous arc of sexual aesthetics open to the future.

### A. LEGAL AESTHETICS REVEAL THEMSELVES IN A BDSM SETTING

Since sadomasochism, sexual subculture and paraphilia are not something attorneys are expected to know as part of their training, it makes sense to delve further into the definition of BDSM and its history before the argument progresses further.<sup>38</sup> While S&M is a synonym for BDSM, the acronyms are not identical. BDSM represents a somewhat larger field, encompassing “a wide range of sexual acts and experiences, incorporating from light bondage to ‘edgeplay’ involving fire or cutting.”<sup>39</sup> The acronym breaks down into four practices: Bondage, Discipline, Sadism and Masochism.<sup>40</sup> S&M refers only to the poles of sadism

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<sup>34</sup> GILLES DELEUZE, *Coldness and Cruelty*, in MASOCHISM 9, 20 (Jean McNeil trans., Zone Books 1991).

<sup>35</sup> RICHARD POSNER, LAW AND LITERATURE (Harvard Univ. Press, 3d ed. 2009) (discussing the salient differences between Law and Economics and Law and Literature: in particular, as each views “desire”).

<sup>36</sup> See RICHARD VON KRAFFT-EBING, *supra* note 24.

<sup>37</sup> Villarreal, *supra* note 17.

<sup>38</sup> Dick Hebdige examines subculture as a site of semiotic subversion also presenting the dynamics of parodic play. See DICK HEBDIGE, *SUBCULTURE: THE MEANING OF STYLE* (Routledge 1979). A “paraphilia” is basically a fetish: this equation is common knowledge for psychoanalysis and sexology, yet not for Law. See Mark Moran, *DSM to Distinguish Paraphilias from Paraphilic Disorders*, PSYCHIATRIC NEWS (May 3, 2013), <https://psychnews.psychiatryonline.org/doi/10.1176/appi.pn.2013.5a19> (defining paraphilias like sexual masochism or cross-dressing as fetish-like “atypical sexual practices” that cause pleasure but not distress); see also SIGMUND FREUD, *THREE ESSAYS ON THE THEORY OF SEXUALITY (THE 1905 EDITION)* (Ulrike Kistner trans., Verso 2016) (defining the fetish as the next object the young male child sees after realizing, traumatically, that his mother has been “castrated” and lacks the phallus).

<sup>39</sup> *Nonbinding Bondage*, *supra* note 2, at 715.

<sup>40</sup> *Id.* at 713.

and masochism.<sup>41</sup> As such, BDSM has a more “spectral” or inclusive structure.<sup>42</sup> On a practical level, “BDSM relationships operate through constructed scenes, forms of roleplay, and acts of control and discipline. Above, all, BDSM acts, scenes, and relationships ask parties to inhabit positions of power imbalance.”<sup>43</sup> There is consequently a “radical honesty” about BDSM, which overtly tackles issues of sexual power and its relation to other forms of domination, subservience and subjugation.<sup>44</sup> Thus, while its contractual provisions are not enforceable, they serve an important function of social enforceability within the subculture itself, giving members the chance to exhibit values like loyalty, honor and dignity through the aesthetics of performance.<sup>45</sup> Furthermore, the contracts serve as perfect artifacts of how exactly power works outside the subculture, in settings far beyond the cloistered sanctity of the *boudoir*.<sup>46</sup>

Articles about sadomasochism and its uncanny contractuality are rare, and so it bears quoting *Nonbinding Bondage* further.<sup>47</sup> As its author correctly notes, the ultimate form of the BDSM relationship is the contract, an agreement that “set[s] ‘limits’ concribing acceptable types of play and ‘safe words’ to release participants from the sexual scene.”<sup>48</sup> Sex contracts reflect the monolithic presence of the law via a tactical mimesis.<sup>49</sup> Though legally unenforceable, these contracts possess an inherent symbolic value.<sup>50</sup> For practitioners within the culture, “BDSM contracts form an emblematic part of the BDSM’s community’s commitment to ‘safe, sane and consensual sex’ — so much so that many lifestyle guides recommend them, even providing mock contracts that can be personalized for easy use.”<sup>51</sup> Such agreements are at the core mimetic

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<sup>41</sup> *Id.*

<sup>42</sup> See FREUD, *supra* note 38; SIGMUND FREUD, ON NARCISSISM: AN INTRODUCTION (Peter Fonagy et al. eds., Routledge 2012).

<sup>43</sup> *Nonbinding Bondage*, *supra* note 2, at 715.

<sup>44</sup> *Id.* at 716.

<sup>45</sup> See *Nonbinding Bondage*, *supra* note 2.

<sup>46</sup> NEIL SCHAEFFER, THE MARQUIS DE SADE: A LIFE, 91 (Harvard Univ. Press 1999) (detailing the sacrilegious dimension of Rose Keller’s humiliations in her 1768 Easter Sunday assault by Sade and all that they reveal about the power dynamics of pre-Revolutionary France).

<sup>47</sup> See generally *Nonbinding Bondage*, *supra* note 2.

<sup>48</sup> *Id.* at 717.

<sup>49</sup> See ERIC AUERBACH, MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE (Willard R. Trask trans., Princeton U. Press 2013); ARTHUR DANTO, THE TRANSFIGURATION OF THE COMMONPLACE: A PHILOSOPHY OF ART (Harvard Univ. Press 1983).

<sup>50</sup> See *Nonbinding Bondage*, *supra* note 2; Interviews with Beaux Jangles, via Facebook Messenger (Oct. 1, 2019, Oct. 13, 2019, Oct. 16, 2019, May 24, 2020); Interview with Handler Jack, via email (Oct. 1, 2019) (discussing the symbolic value of everything from a doggie collar to implanted NFC chips).

<sup>51</sup> *Nonbinding Bondage*, *supra* note 2, at 717 (quoting *Safe, Sane and Consensual Contemporary Perspectives on Sadomasochism* 10 (Darren Langdrige & Meg Barkers eds., 2007)); see also LAMAR VAN DYKE, in THE SECOND COMING: A LEATHERDYKE READER 205, 218 (Pat Cailifa &

(possibly parodic), “as they are framed to mirror standard contracts and (at least superficially) conform to basic principles of contract law.”<sup>52</sup>

Some contracts “discuss dispute resolution, specifying norms of redress in case of breach,” and most involve “‘legalese,’ some even witnessing and notarizing the documents, to give the contract the full imprimatur of legality.”<sup>53</sup> In general, these contracts never wind their way into court for enforcement: an “obvious” truth, yet one that merits articulation.<sup>54</sup> Though specific performance could never be enforced in American law for these parodies of enforceable contracts, that fact does not preclude such agreements from transcending the threat of legal enforcement while capitalizing upon the aphrodisiacal value of the hammer of justice, which all parties pretend is poised to swing.<sup>55</sup>

#### B. LEOPOLD VON SACHER-MASOCH GROUNDS SEXUAL CONTRACTING IN LITERATURE AND SEXOLOGY

As illuminating as *Nonbinding Bondage* is regarding BDSM contracts, it bypasses Masoch’s *Venus in Furs*—a foundational text for sexual contracting.<sup>56</sup> Because the sexual contract in *Venus in Furs* closely reflects the actual contracts Masoch drafted and employed in his colorful sex life, Masoch is critical to the historical analysis of sexual contracting: particularly within an aesthetic approach such as the one this Comment offers.<sup>57</sup>

A novel built around a *written* sexual contract replete with its own parol evidence,<sup>58</sup> *Venus in Furs* is the story of what this Comment calls

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Robin Sweeny eds., Alyson Books 2000) (presenting various sexual contracts used in the lesbian community, along with instructions on how to create one).

<sup>52</sup> Parody is one possible mode of mimesis, but there are others. See *Nonbinding Bondage*, *supra* note 2, at 717 (looking at the multifarious forms contractual mimesis can take); ARISTOTLE, *supra* note 16, at 18 (examining the full range of aesthetic forms mimesis may take, including but not limited to parody, which operates via the ridiculous).

<sup>53</sup> *Nonbinding Bondage*, *supra* note 2.

<sup>54</sup> Andrea E. White, *The Nature of Taboo Contracts: A Legal Analysis of BDSM Contracts and Specific Performance*, 84 UMKC L. REV. 1163 (2016).

<sup>55</sup> Specific performance is an equitable remedy that mandates one perform the duties one has promised to perform. See *generally id.* (foreclosing specific performance as a remedy for sex contracts).

<sup>56</sup> Compare *Nonbinding Bondage*, *supra* note 2, with MASOCH, *supra* note 22.

<sup>57</sup> See MASOCH, *supra* note 22, 143 app. at 273-79 (presenting contracts from Masoch’s actual sex life).

<sup>58</sup> According to the Parol Evidence Rule, evidence of prior negotiations (parol evidence, from the French for “spoken”) is inadmissible for invalidating a written contract, although there are exceptions (for example, contradiction). As such, parol evidence is the revenge of orality: that is, a deconstructive resurgence of the oral negotiations that precede the written contract. *Parol Evidence Rule*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/parol\\_evidence\\_rule](https://www.law.cornell.edu/wex/parol_evidence_rule). See, e.g., *Pacific Gas & Electric Co. v. G.W. Thomas Drayage etc. Co.*, 69 Cal.

le *plaisir du contrat*, or “the pleasure of the contract.”<sup>59</sup> *Venus in Furs* tells the tale of aristocratic protagonist Severin Kuziemski, who browbeats a woman, Wanda von Dunajew, into entering into a sexual contract that would make him her slave.<sup>60</sup> Though never legally enforceable, the contract dominates Severin’s obsessions, and it quickly becomes clear that the fantasy of the contract’s enforcement is the true object of his desire.<sup>61</sup> For example, though Severin is prepared to sign the document Wanda initially drafts, the two wait to sign it until they have left their home country, Austria-Hungary, for another land, where he will be without money and dependent upon her entirely: one substitute for enforcement.<sup>62</sup> They choose Florence over Constantinople because Wanda realizes how banal it would be to possess a slave in a country where possession of such chattel was legal.<sup>63</sup> The edited final contract in Florence specifies Severin’s name change to Gregor, that he become Wanda’s “absolute property,” and most importantly that she have the right to kill him if she so desires.<sup>64</sup> To this end, Wanda even has him write out a suicide note in advance in his own handwriting.<sup>65</sup>

Though *Agreement Between Mrs. Wanda von Dunajew and Mr. Severin von Kuziemski* is purely literary, it has at least two analogues from the actual life of Masoch: *Contract Between Miss Fanny von Pistor and Leopold von Sacher-Masoch* and *Contract Between Wanda and Sacher-Masoch*.<sup>66</sup> Provisions of the first include that Masoch “be the slave of Mrs. Fanny von Pistor, and to carry out all her wishes for a period of six months.”<sup>67</sup> These six months “need not run consecutively; they may be subject to interruptions beginning and ending according to the whims of the sovereign lady.”<sup>68</sup> Masoch is to be given six hours of free time per day, and Fanny, who agrees to wear furs “as often as possible, especially

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2d 33, 37 (1968) (privileging the contract over its oral roots can be proof of “a remnant of a primitive faith in the inherent potency and inherent meaning of words” on the part of judges).

<sup>59</sup> See MASOCH, *supra* note 22. (incorporating the text of the conversations leading up to the final contract and its “integrated” terms, which become a form of sexual parol evidence); ROLAND BARTHES, *THE PLEASURE OF THE TEXT* (Richard Miller trans., Hill and Wang 1975) (examining the pleasures of textuality).

<sup>60</sup> MASOCH, *supra* note 22.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 197 (Wanda musing, “What is the point of having a slave in a country where slavery is common practice? I want to be the only one to own a slave. If we live in a cultivated, sensible, Philistine society, then you will belong to me not by law, right or power, but purely on account of my beauty and my whole being”).

<sup>64</sup> *Id.* at 220.

<sup>65</sup> *Id.* at 222.

<sup>66</sup> *Id.*, 143 app. at 273-79.

<sup>67</sup> *Id.* at 277.

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

when she is behaving cruelly,” may punish him either when he misbehaves, or at her whim.<sup>69</sup> It even includes a non-disclosure agreement (“NDA”): “this period of enslavement shall be considered by both parties as having not occurred, and they shall make no serious allusion to it.”<sup>70</sup>

The contract with “Wanda,” who was most likely Masoch’s wife at the time, is even more “hardcore” than his contract with Fanny. It specifies no time frame.<sup>71</sup> As in the contract in *Venus in Furs*, here, in real life, he must “renounce his identity entirely.”<sup>72</sup> He is to become “a blind instrument” who carries out all her orders without ever questioning them: “You shall carry out everything I ask of you, whether it is good or evil, and if I demand of you that you commit a crime, you shall turn criminal to obey my will.”<sup>73</sup> Severin also agrees to give her the ultimate power over his life, which can be ended, should she determine such an act is necessary.<sup>74</sup> Further, she is free to harm and maim him on a whim: “I shall be allowed to exercise the greatest cruelty, and if I should mutilate you, you shall bear it without complaint.”<sup>75</sup> As with *Venus in Furs*, only suicide can relieve the real-life Masoch of his duties.<sup>76</sup>

According to psychoanalytic philosopher Gilles Deleuze, “[T]he masochist draws up contracts while the sadist abominates and destroys them.”<sup>77</sup> The importance of this point cannot be over-emphasized within the context of unenforceable sexual contracts, but also raises issues about the pleasure of contracting in general, which might secretly infuse something like standard business contracts with a twisted joy yet to be countenanced.<sup>78</sup> However, the contracts in *Venus in Furs* and those culled from the life of Masoch himself have no analogue within sadism, which takes no interest in consensuality, as the colorful sex life and literary creations of the Marquis de Sade prove (for example, his 1785 novel *The 120 Days of Sodom*).<sup>79</sup> Thus, BDSM might not be not an accurate representation of

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 278.

<sup>73</sup> *Id.* at 278-79.

<sup>74</sup> *Id.* at 277.

<sup>75</sup> *Id.* at 278.

<sup>76</sup> *Id.* at 279 (“Should you ever find my domination unendurable and should your chains ever become too heavy, you will be obliged to kill yourself, for I will never set you free”).

<sup>77</sup> DELEUZE, *supra* note 34, at 20.

<sup>78</sup> It is Freud who misleads us. For in his seminal *Three Essays on the Theory of Sexuality*, “sadism” and “masochism” comprise one total complex, a “component instinct.” What this means is that there is fluid interchangeability between the two poles, as a sadist may become a masochist, and vice versa. For Deleuze, this transformation is unthinkable, and best represented by the attitude each type has to the contract itself. Compare e.g., FREUD, *supra* note 38, with DELEUZE, *supra* note 34.

<sup>79</sup> The psychoanalytic rationale behind this observation is that the sadist has no ego and is all superego, while the masochist is all ego and no superego: and the contract is but a vestige of the

how desire actually works within these subcultures and the desires of its practitioners to contract, a point demanding future scrutiny.<sup>80</sup>

C. SEXUAL CONTRACTING REACHES A CRISIS POINT WITH  
*CHAPMAN V. HAFERTEPEN*

Pups Noodles & Beef and Tank entered what can be viewed as an eminent post-Masochian contractual simulacrum with a meretricious edge.<sup>81</sup> In their relationship, Noodles & Beef was the dominant Pup (“Dom”), and Tank the submissive Pup (“Sub”).<sup>82</sup> The contract was international: Tank was from Melbourne, Australia and Noodles & Beef, Seattle.<sup>83</sup> The pair met online, through dating site OkCupid, and soon rendezvoused in Seattle.<sup>84</sup> Tank returned to Melbourne, while Noodles & Beef commenced work drafting a contract.<sup>85</sup> Noodles & Beef then sent Tank a training collar.<sup>86</sup> Later, they revised the draft and Noodles & Beef gave him a “full collar.”<sup>87</sup> Soon after, Tank moved to Seattle, where they would effectuate the contract.<sup>88</sup>

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superego, or crystallization of social power that one internalizes post-*Oedipus*. DELEUZE, *supra* note 34, at 123-34; *see also* THE MARQUIS DE SADE, *THE 120 DAYS OF SODOM* (Will Morran and Thomas Wynn trans., Penguin Classics 2016).

<sup>80</sup> Sade’s victims tell a different story than Severin. The historical record of displaced 18th-century German beggar and prostitute Rose Keller provides two lurid depositions which, because the details pertain to the Marquis de Sade, are squarely positioned at the opposite pole of contracting. Keller’s depositions in what historians refer to as the “Arcueil Affair” highlight the discontinuity between both law and literature when it comes to crimes like sexual assault. Via the Sadean logic, these events are inherently a-contractual because the regulation of sex is purely a masochistic concern. For example: “He made Keller lie facedown on [his] bed and tied down her hands and legs. Then he took a fistful of switches and caned her—something he learned about as a disciplinary measure in school. Keller claimed that he had made several incisions in her buttocks with a knife. In her second deposition, she also said that he had struck and bruised her back with a stick.” SCHAEFFER, *supra* note 46.

<sup>81</sup> *See* JEAN BAUDRILLARD, *THE ECSTASY OF COMMUNICATION* (Bernard and Carolyn Schütze trans., Semiotext(e) 2012) (exploring the semiotic force of the simulacrum within Communication Theory and the mass media). The “author” of masochism also dabbled in trans-species sex: “Masoch’s taste in matters of love are well known: he enjoyed pretending to be a bear or a bandit or having himself pursued, tied up and subjected to punishments, and even acute physical pain by an opulent fur-clad woman with a whip. . . .” DELEUZE, *supra* note 34, at 10. That the father of masochism shares a sexual proclivity with the Pup community knits the present together with the past across both law and literature.

<sup>82</sup> Villarreal, *supra* note 17.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (detailing the digital history of Noodle’s & Beef’s relationship with Tank Chapman, including their having met on OkCupid).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

Tank initially posted the contract to his Tumblr feed on December 20, 2012; it contained several unusual provisions.<sup>89</sup> For example, it forbade Tank from wearing deodorant, masturbating, watching TV or even speaking, unless first addressed by his “Master.”<sup>90</sup> The contract specified social and financial transparency, and Tank agreed to hand his salary over to Noodles & Beef.<sup>91</sup> It also contract specified, “Master has explicit body goals for his pup regarding their weight, their muscle mass, their measurements, and their proportions.”<sup>92</sup> In the case of Tank, this last requirement would impliedly mean that he receive genital silicone injections to satisfy Noodles & Beef’s “explicit body goals.”<sup>93</sup> Such injections led directly to his death by respiratory embolism.<sup>94</sup> Tank would die satisfying Noodles & Beef’s platitude that ends the contract as last line, hovering over it: “There is always additional room for a pup to push their physical limits.”<sup>95</sup> Was Noodles & Beef encouraging Tank to overdo it? The “there is” syntax reads like an imperative and a Sub would certainly have interpreted it as such: Tank obeyed it.<sup>96</sup>

Noodles & Beef was also a “Pumper”—he preferred monstrously enlarged testicles.<sup>97</sup> He wished for his Sub Pup to enlarge his genitals to unnatural proportions.<sup>98</sup> The mechanics of pumping involve injections of both silicone and collagen, such that “[w]hen injected, the body surrounds liquid silicone with collagen, permanently providing a rounder and fuller appearance, smoothing wrinkles and reshaping sagging butts and breasts.”<sup>99</sup> Tank’s Tumblr and the pages of his fellow Pups “contained numerous images of their engorged scrotums, dramatically increased in size due to liquid silicone injections.”<sup>100</sup> In one picture, “Tank’s testicles dangle outside his basketball shorts, his nuts roughly the size of two dodgeballs.”<sup>101</sup> Tank died on October 15, 2018, from a respiratory embolism, after he had arranged for his scrotum to be injected

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (explaining that silicone injections can send a blood clot traveling to the lungs, as occurred with Tank). See also *What is a Pulmonary Embolism*, WEBMD (reviewed Dec. 7, 2020), <https://www.webmd.com/lung/what-is-a-pulmonary-embolism> (defining a respiratory or pulmonary embolism specifically as a blood clot traveling via pulmonary artery from the heart to the lungs).

<sup>95</sup> Villarreal, *supra* note 17.

<sup>96</sup> See JACQUES DERRIDA, *GIVEN TIME I: COUNTERFEIT MONEY* (Peggy Kamuf trans., Univ. of Chicago Press, 2017) (exploring the many meanings of the “there is” construction, semantically).

<sup>97</sup> See Villarreal, *supra* note 17.

<sup>98</sup> See *id.*

<sup>99</sup> *Id.* (detailing the popularity of “back alley” or “dirty” pumping since WWII).

<sup>100</sup> *Id.* (detailing the history of Tank’s Tumblr).

<sup>101</sup> *Id.*

with illegally obtained liquid silicone in order to please his Master, in keeping with his contractual “explicit body goals.”<sup>102</sup>

The legal quagmire that resulted from this contract and its implied provision is significant,<sup>103</sup> recalling other contracts and quagmires in the meretricious tradition.<sup>104</sup> Although there was a criminal investigation following Tank’s death, there was no criminal indictment.<sup>105</sup> Tank’s mother Linda Chapman has since sued for wrongful death and coercion in Washington District court, while also posing a probate challenge.<sup>106</sup> This case represents a contractual milestone, as it is arguably the first time that the subculture of the Pups will arrive in court to defend its practices.<sup>107</sup> What the situation between Noodles & Beef and Tank demonstrates is that, indeed, the unenforceability of something like an implied pumping provision does not drain the contract of value and energy: it might even be the *fantasy* of its enforcement that underwrites the document, a desire meaningful outside the law.

Such legal titillation becomes more evident once the history of the sex contract is traced back to its historical and sexological roots in Masoch.<sup>108</sup> The enforceability-based pleasure of Masoch’s literary and real-life sex contracts recurs brilliantly in the linguistic texture of current sadomasochistic contracts, such as the ones provided by Lamar Van Dyke in sexual activist Pat Califia’s *The Second Coming: A Leatherdyke Reader*.<sup>109</sup> There is nothing in the legal literature examining anything

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<sup>102</sup> One might consider the Florida criminal case of Oneall Ron Morris, convicted of using materials like Fix-a-Flat to reshape faces and *derrières* across South Florida, to get the gist of Pumping. See Carli Teproff, “Toxic Tush” Doctor Sentenced to Ten Years in Prison, MIAMI HERALD (Mar. 27, 2017), <https://www.miamiherald.com/news/local/community/broward/article141148113.html>.

<sup>103</sup> Chapman v. Hafertepen, No. 19-2-24066-1 (Wash. Super. Ct. King Cnty. 2019) (Lexis CourtLink). Washington Superior Court has sealed the *Chapman* case since the initial draft of this Comment. See also Villarreal, *supra* note 17.

<sup>104</sup> See *Marvin*, 18 Cal. 3d 660; *Jones*, 122 Cal. App. 3d 500.

<sup>105</sup> Villarreal, *supra* note 17 (specifying the Pup community’s outcry for a criminal investigation, the ensuing investigation, and the resulting lack of criminal charges).

<sup>106</sup> See *Chapman*, No. 19-2-24066-1 (Wash. Super. Ct. King Cnty. 2019) (Lexis CourtLink) (sealed); see also Villarreal, *supra* note 17; *Mother Whose Son Died of Silicone Injections to His Genitals Sues His ‘Master’ and Posse for Wrongful Death*, TOWEL ROAD (Oct. 8, 2019), <https://www.towleroad.com/2019/10/dylan-hafertepen/>; Lauren Fruen, *Mother of Man, 28, Who Died After Injecting His Scrotum with Silicone Sues His Five Boyfriends After They ‘Forced Her Son to Inflate His Testicles to the Size of a Basketball’*, DAILYMAIL.COM (updated Oct. 15, 2019), <https://www.dailymail.co.uk/news/article-7571227/Mother-man-28-died-injecting-scrotum-silicone-sues-five-boyfriends.html>.

<sup>107</sup> See Villarreal, *supra* note 17.

<sup>108</sup> MASOCH, *supra* note 22.

<sup>109</sup> See LAMAR VAN DYKE, *Contracts and Contract Negotiating*, in THE SECOND COMING: A LEATHERDYKE READER 218 (Pat Califia & Robin Sweeny eds., Alyson Books 2000) (presenting various sexual contracts used in the lesbian community, along with instructions on how to create one).

like the “pleasure of the contract” (this Comment’s deliberate play on semiologist Roland Barthes’ *plaisir du texte*), but the sexual contract might actually reveal a pleasurable kernel to the traditional enforceable contract after all, especially if one invokes the Law and Literature movement and its inclusion of psychoanalytic inquiry.<sup>110</sup> This reading of sexual contracting is actually a logical one, given what Masoch has to say about the specter of enforcement, or how Deleuze identifies contracting as an inherently masochistic enterprise.<sup>111</sup> This Comment thus looks to the history of sexual contracting and its revelation that enforcement is the *coup de grâs* of the contracting fantasy. Such a reading makes sense of the drama unfolding around Noodles & Beef, all to examine the thesis that contracts are trans-enforceable creations that do not simply disappear in the absence of legal enforcement. What remains might be pleasure itself, embodied in a promise that brushes up against enforcement in a kind of legal *frottage*, exposing a quintessential voyeuristic structure.<sup>112</sup>

## II. THE POWER OF LEGAL AESTHETICS

Participants in a contract that is now headed to court, Noodles & Beef and Tank<sup>113</sup> are part of a larger tradition of sexual contracting stretching back nearly two centuries. For the most part, these agreements remain informal and oral, but as this Comment has indicated, enforcement can be an aphrodisiac, and so some are properly memorialized in print.<sup>114</sup> Tank’s story is one of many, though most sex contracts do not culminate in such extreme results. When legal scholars decipher such a contract, one way that it can be read is aesthetically: that is, in terms of its textual surface. Such a reading exposes the power of mimesis, which copies aspects of the law in order to achieve, paradoxically, sexual liberation.<sup>115</sup>

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<sup>110</sup> See BARTHES, *supra* note 59; POSNER, *supra* 35.

<sup>111</sup> See MASOCH, *supra* note 22, at 196; DELEUZE, *supra* note 34, at 20.

<sup>112</sup> “Frottage” is essentially pleasure derived from rubbing, described as a “frotteuristic disorder” within sexology. See KRAFFT-EBING, *supra* note 24, at 395.

<sup>113</sup> Villarreal, *supra* note 17.

<sup>114</sup> Regarding written contracts, both men have been crystal-clear in their insistence that sexual accords are typically oral or symbolic only (e.g., represented by a doggie collar). Interviews with Beaux Jangles, via Facebook Messenger (Oct. 1, 2019, Oct. 13, 2019, Oct. 16, 2019, May 24, 2020); Interview with Handler Jack, via email (Oct. 1, 2019).

<sup>115</sup> *Nonbinding Bondage*, *supra* note 2, at 723.

A. *CHAPMAN V. HAFERTEPEN* EXPOSES THE DARK SIDE OF THE CONTRACTUAL FETISH

Tank's initial publication of his contract with Noodles & Beef to his Tumblr page was an act of exhibitionism speaking to the contract's value as sexual fetish. However, it would not last long, as he soon removed the post.<sup>116</sup> This agreement included the abovementioned implied "bodily modification" provision that Tank surely interpreted as "pumping."<sup>117</sup> One reason why Tank took the contract down was possibly because the combination of the contract's shocking text and his public submissiveness turned many Pups against Noodles & Beef.<sup>118</sup> In particular, many within the Pup community "worried that [Noodles & Beef's] massive social following would give outsiders an incorrect view of healthy Dom/sub relationships."<sup>119</sup>

Outside the erased Tumblr posting, there was other tangible proof of the contractual bond between Noodles & Beef and Tank and the sexual value of its "enforcement."<sup>120</sup> There was an "aesthetic" contract in the form of an art object, Tank's tattoo, which read "Property of Master Dylan," along with Noodles & Beef's Tumblr posts explaining, "A pup will identify as any name that his Master bestows upon him. If the name sticks, the pup will be encouraged to change the name legally."<sup>121</sup> Tank duly performed this feat of symbolism, legally changing his name from Jack to Tank Chapman: a relatively common move among the members of this subculture.<sup>122</sup>

As further evidence of sexual contracting, Noodles & Beef had, during a breakup, sued Tank for the cost of that silicone in a failed small claims action largely concerning outstanding rent Tank owed him, leaving a record of his involvement in the fatal process.<sup>123</sup> This move would come back to haunt Noodles & Beef after Tank's death.<sup>124</sup> For when the mimetic, a simulation *par excellence*, calls out to the real for support,

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<sup>116</sup> Villarreal, *supra* note 17.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*; see also MASOCH, *supra* note 22, at 205, 220 (documenting name change as part of the contractual fetish).

<sup>122</sup> Although Beaux Jangles has not yet legally altered his name, he plans to do so in the future. According to him there is a 65-70% chance a Pup will change his name. Interview with Beaux Jangles, via Facebook Messenger (May 24, 2019).

<sup>123</sup> Villarreal, *supra* note 17; *Mother Whose Son Died of Silicone Injections to His Genitals Sues his 'Master' and Posse for Wrongful Death*, *supra* note 106.

<sup>124</sup> See *Mother Whose Son Died of Silicone Injections to His Genitals Sues his 'Master' and Posse for Wrongful Death*, *supra* note 106 (quoting Blake Montgomery, *Lethal Dose: Boyfriends Sued over Man's Death from Silicone Genital Injections*, THE DAILY BEAST (Oct. 8, 2019), <https://>

there is always trouble, as the real and the simulated ultimately occupy separate orders.<sup>125</sup> After Tank died, the legal mess soon spawned other legal messes.<sup>126</sup> For example, Noodles & Beef slapped *Daily Beast* journalist Blake Montgomery with a restraining order, which Montgomery was soon arrested for violating.<sup>127</sup>

The arrangement between Noodles & Beef and Tank did not sit well with local Pups, who encouraged the Orange County police to investigate, as they had done with another pumping fatality, Peter Dovak.<sup>128</sup> In this instance, Washington police declined.<sup>129</sup> Among the putative “co-conspirators” themselves, both Dovak’s and Tank’s silicone supplier Joe Quader committed suicide in Orange County, California, on learning that an investigation loomed.<sup>130</sup> In general, members of the larger Pup subculture view the contract as little more than a screen for domestic violence, something revealed to the author of this Comment by interviews with members of the Pup community, including New Orleans Pup Beaux Jangles and Berkeley Pup trainer Handler Jack.<sup>131</sup>

Washington state chose not to indict Dylan, but it would not take an eternity for the specter of the law to appear.<sup>132</sup> It arrived in September 2019, when Tank’s mother Linda Chapman decided to sue members of the Pup Den clustered around Noodles & Beef in King County District Court for wrongful death and probate issues verging on “brain-

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[www.thedailybeast.com/mom-of-tank-hafertepen-killed-by-silicone-genital-injections-files-wrongful-death-claim-against-boyfriends](http://www.thedailybeast.com/mom-of-tank-hafertepen-killed-by-silicone-genital-injections-files-wrongful-death-claim-against-boyfriends)).

<sup>125</sup> See generally JEAN BAUDRILLARD, *AMERICA* (Chris Turner trans., Verso 2010) (examining the intertwining of the real and the simulated in postmodern American culture).

<sup>126</sup> Villarreal, *supra* note 17.

<sup>127</sup> Eli Sanders, *BuzzFeed Slapped with “Outrageous” Restraining Order for Reporting on Noodles and Beef*, *THE STRANGER* (Nov. 15, 2018), <https://www.thestranger.com/slog/2018/11/15/35582039/buzzfeed-slapped-with-outrageous-restraining-order-and-a-night-in-jail-for-reporting-on-noodles-and-beef>; Blake Montgomery, *Lethal Dose: Boyfriends Sued over Man’s Death from Silicone Genital Injections*, *THE DAILY BEAST* (Oct. 8, 2019), <https://www.thedailybeast.com/mom-of-tank-hafertepen-killed-by-silicone-genital-injections-files-wrongful-death-claim-against-boyfriends>.

<sup>128</sup> Villarreal, *supra* note 17.

<sup>129</sup> Villarreal, *supra* note 17.

<sup>130</sup> *Id.*

<sup>131</sup> There exists a communal belief that the accord between Noodles & Beef and Tank violated the social norms of this jubilant subculture, which is more about Puppy Play and the pleasures of the pack than violence, disfigurement or undue influence. The words of Beaux Jangles are characteristically fiery: “Fuck Dylan fuck everything about him. He is a murderer and a thief.” The memes identifying him as a murderer have since abounded, even one face-swapping him with Tiger King’s *femme fatale* Carole Baskin. Interview with Beaux Jangles, via Facebook Messenger (Oct. 9, 2019); see also Interview with Handler Jack, via email (Oct. 1, 2020).

<sup>132</sup> *Mother Whose Son Died of Silicone Injections to His Genitals Sues His ‘Master’ and Posse for Wrongful Death*, *supra* note 106.

washing.”<sup>133</sup> Of particular concern was the fact that Noodles & Beef was the sole beneficiary of Tank’s will, signed less than a month before his death, and a second Pup had been designated that will’s Executor.<sup>134</sup> Furthermore, the original contract had contained an explicit financial provision making Noodles & Beef master of Tank’s finances.<sup>135</sup> Ultimately, Linda Chapman sued for five causes of action: wrongful death, loss of consortium, intentional infliction of emotional duress, civil conspiracy, and negligence.<sup>136</sup> Her Complaint did not mention the Slayer Rule.<sup>137</sup> At the core, it alleged that under her son’s contract, “Dylan [Noodles & Beef] obtained power over Jack’s [Tank’s] body in extreme ways,” being able “to order Jack to obtain body piercings and tattoos, command steroid use,” and “command that Jack submit to silicon [*sic*] and saline injections into his scrotum and penis to increase the size of both.”<sup>138</sup> Noodles & Beef also fired off a volley, filing a defamation suit against Australian television show *The Project*, which aired an episode focused on Linda Chapman.<sup>139</sup> The host’s claim that “Dylan had introduced Jack to dangerous body modification and master servant role-play” formed the core of Noodles & Beef’s claim that the show had mischaracterized him.<sup>140</sup>

Social disequilibrium then came into play, as it would in an analysis of a potentially unconscionable contract: for example, Arthur Leff’s quintessential analysis of *Williams v. Walker-Thomas Furniture Co.* in

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<sup>133</sup> See *Chapman*, No. 19-2-24066-1 at 11 (Wash. Super. Ct. King Cnty. 2019) (Lexis CourtLink) (sealed), (citing “brainwashing” as the essence of a civil conspiracy cause of action); Villarreal, *supra* note 17.

<sup>134</sup> *Mother Whose Son Died of Silicone Injections to His Genitals Sues His ‘Master’ and Posse for Wrongful Death*, *supra* note 106.

<sup>135</sup> Villarreal, *supra* note 17.

<sup>136</sup> See, e.g., *Chapman*, No. 19-2-24066-1 (Wash. Super. Ct. King Cnty. 2019) (Lexis CourtLink) (sealed) (listing these five causes of action and hence clarifying their definitions); see also Villarreal, *supra* note 17. According to the court’s docket, the Washington court dismissed the case with prejudice on June 2, 2020 and reconsidered on July 16, 2020. The court then sealed the records on August 7, 2020. Though the court set the trial date for September 14, 2020, the docket suggests that the parties may have settled. See also *Mother Whose Son Died of Silicone Injections to His Genitals Sues His ‘Master’ and Posse for Wrongful Death*, *supra* note 106; Fruen, *supra* note 106.

<sup>137</sup> The Slayer Rule disqualifies murderers from inheriting property (real and personal) from those they feloniously and intentionally “slay.” See *Slayer Rule*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/slayer\\_rule](https://www.law.cornell.edu/wex/slayer_rule).

<sup>138</sup> *Chapman*, No. 19-2-24066-1 at 4 (Wash. Super. Ct. King Cnty. 2019) (Lexis CourtLink) (sealed); see also Villarreal, *supra* note 17.

<sup>139</sup> Defamation is a “speaking tort” that results when an individual sustains actionable injury to reputation. See Lane Saintry, *A Blogger Whose Boyfriend Died from Genital Silicone Injections Is Suing for Defamation*, BUZZFEED NEWS (Nov. 24, 2019), <https://www.buzzfeed.com/lanesaintry/dylan-hafertepen-jack-chapman-silicone-death-defamation> (detailing the origin of Noodles & Beef’s defamation claim).

<sup>140</sup> *Id.*

his essay *Unconscionability and the Code: The Emperor's New Clause*.<sup>141</sup> Leff focused on gross bargaining disparities faced by the poor, arguing that the unconscionable home furnishing contracts to which they consented in *Walker-Thomas* were so flagrantly unbalanced that they shocked the conscience.<sup>142</sup> Such a contract causes tension to arise between a legal desire to protect the innocent and the capitalist imperative to safeguard freedom of contract.<sup>143</sup> The contract at the center of the multiple international legal controversies plaguing Noodles & Beef speaks to this notion of unconscionability, as it involved peer pressure, digital duress and the threat of excommunication, a fetish gone hideously awry.<sup>144</sup>

Although S&M contracts are notoriously imbalanced, this disequilibrium is typically no more than the playful performance of disempowerment, an agreement that one act out a fantasy of powerlessness or omnipotence.<sup>145</sup> The most notable example of how this playful disparity can become toxic would be the ways Noodles & Beef used his popular online newsletter to jab at Tank, whose social media was not as robust, during a breakup:

Hafertepen introduced his newsletter readers to his new pup, Pup Angus, a bearded ginger muscle cub who could've passed for Tank's cousin. Hafertepen included a picture of Angus' enlarged cock, a puncture mark bleeding through a piece of medical tape on its shaft, possibly from a silicone injection.<sup>146</sup>

Noodles & Beef had already cemented his fame in a 2016 interview on the topic of "bigorexia" on ABC news, which interrogated his body dysmorphia as it took the form of an addiction to muscle.<sup>147</sup> Arguably, Noo-

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<sup>141</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

<sup>142</sup> See Arthur Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115:4 U. PA L. REV. 485, 555 (1967) (delineating two types of unconscionability: one procedural, the other substantive).

<sup>143</sup> See *Williams*, 350 F.2d 445 (ruling that a contract specifying replevin for all items purchased on credit, including those paid for, was unconscionable); Leff, *supra* note 142, at 555 (arguing that the unenforceability of a contract like the one in *Walker-Thomas* robs the indigent of their contractual freedom, for "all we would have is a holding that one cannot enforce a contract pursuant to which one has sold luxuries to a poor person").

<sup>144</sup> See Villarreal, *supra* note 17.

<sup>145</sup> *Nonbinding Bondage*, *supra* note 2.

<sup>146</sup> Villarreal, *supra* note 17.

<sup>147</sup> In Noodles & Beef's words: "I would get very upset about how small my arms seemed in proportion to my waist. . .my shoulders to my neck. . .You don't see any average-looking superheroes. Everyone was this hypermasculine or superior male." Villarreal, *supra* note 17 (exploring how body dysmorphia, or the perception of one's body image in grotesquely exaggerated form, occurs among extreme body builders).

dles & Beef weaponized his fame, using it to manipulate Tank via public Internet postings making it clear he was easily replaced.<sup>148</sup>

Unconscionability appears in the context of BDSM contracts such as the one linking Noodles & Beef and Tank under the guise of extreme imbalance and lopsidedness.<sup>149</sup> While some “presupposition of equality” is required for any contract to maintain its legal value, the appearance of unconscionability can spell trouble, for this quality “voids contracts because they have been created out of substantive inequality due to gross bargaining disparity.”<sup>150</sup> But BDSM contracts such as Tank’s seek to rectify the unconscionable both through their replication of inequality via parody and through provisions which empower the one giving up power.<sup>151</sup> The social and sexual magic of role play is that it paradoxically celebrates “the ‘gross inequality of bargaining power’ derided by contract law as the catalyzing force between erotic conquest and fulfillment” — a planned unconscionability that resists simple martyrology.<sup>152</sup>

The victim of a BDSM contract like Tank Chapman seems to be at home with the cast of characters Leff identifies as belonging to the case law typology:

In these cases one runs continually into the old, the young, the ignorant, the necessitous, the illiterate, the improvident, the drunken, the naïve and the sick, all on one side of the transaction with the sharp and hard on the other . . . Certain whole classes of presumptive sillies like sailors and heirs and farmers and women continually wander on and off stage.<sup>153</sup>

While Leff suggests that such contracts should be addressed by policy,<sup>154</sup> it seems that policy would be the worst place to govern sexual contracting. The inherent fragmentation of the community would almost instantly threaten to derail any uniform policy right out of the gate: “[F]eminist attempts to regulate sex may in fact undercut their regulatory goals by making sex less clear, consensual or safe.”<sup>155</sup> In response to feminism, queer theory has responded with “queer anti-statism,” defined

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<sup>148</sup> *Id.*

<sup>149</sup> *Nonbinding Bondage*, *supra* note 2.

<sup>150</sup> *Id.* at 721 (examining the sexual contract via a theory of unconscionability).

<sup>151</sup> *Id.* (“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”).

<sup>152</sup> *Id.*

<sup>153</sup> Leff, *supra* note 142, at 532-33.

<sup>154</sup> *Id.* at 532-35.

<sup>155</sup> *Nonbinding Bondage* *supra* note 2, at 733.

as a quasi-political urge “that sex be left to the private where it can flourish apart from the state’s restraining hand.”<sup>156</sup> The instant problem of regulating BDSM contracts becomes 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 for the queer project.”<sup>157</sup> Unconscionability in its procedural and substantive guises thus potentially disrupts the hegemony of the BDSM contract, revealing the sexual accord it represents to be the unbalanced yet desirable effects of bargaining disparity and inequality.<sup>158</sup>

It is unclear how common pseudo-legal contracts are among the Pup community: something that speaks to its potential unconscionability for Noodles & Beef and Tank. What stands out is that Tank had an active role in writing up the terms of the contract that would eventually doom him.<sup>159</sup> According to Beaux Jangles, it is certainly odd for Pups to compose or sign such a contract.<sup>160</sup> In his opinion, the Pup contract is generally more symbolic, and takes the form of a “lock and chain” doggie collar indicating some combination of Alpha (the dominant Pup in a pack) and Handler (the person who trains all Pups, including the Alpha).<sup>161</sup> For Handler Jack, this jewelry is the equivalent of a “wedding band in kink.”<sup>162</sup> As Handler Jack further explains, though written contracts are rare, the symbolic contract has evolved to a qualitatively new stage among the Pups: “chipping.”<sup>163</sup> In a chipping situation, a sub Pup has a Near Field Communication (NFC) chip inserted into its “paw” so that the name of the Handler appears in a handheld electronic device in the vicinity. In Handler Jack’s words:

I have chipped a pup before. . . This falls under the realm of body modification. In this case, I inserted a small NFC chip into the hand of a previous pup of mine. Upon putting a phone to his hand, it would read ‘Owned by Handler Jack’ as well as my phone number.<sup>164</sup>

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<sup>156</sup> *Id.* at 734.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 721.

<sup>159</sup> Villarreal, *supra* note 17.

<sup>160</sup> Interview with Beaux Jangles, via Facebook Messenger (Oct. 10, 2019).

<sup>161</sup> Beaux Jangles does not wear a lock at all, but a Batman collar inscribed with the words “Owners Daddy Mike & Sir Ryan.” Interview with Beaux Jangles, via Facebook Messenger (Oct. 12, 2019).

<sup>162</sup> Interview with Handler Jack, via email (Oct. 1, 2019).

<sup>163</sup> Interview with Handler Jack, via email (Oct. 1, 2019).

<sup>164</sup> When asked about “chipping,” Beaux Jangles was taken aback; for him, “chipping” meant something closer to biting, an essential component of Puppy Play, not a symbolic form flashing ownership for a lost Pup. As he explains, “[c]hipping to me is something that you have to have

For Handler Jack, the rarity of written contracts, even when compared with chipping and other symbolic contracts, casts doubt on the intent behind Noodles & Beef's contract with Tank, which to both Handler Jack and Beaux Jangles employed performativity to mask domestic abuse.<sup>165</sup>

Beaux Jangles and Handler Jack believe that the contractual mimesis and fetishism at work with Tank obscured a core of psychological violence behind the ruse of play, and this fact continues to shock their respective consciences.<sup>166</sup> While Noodles & Beef did not “chip” Tank, the ways in which their contractual arrangement reinforced the idea of ownership appears to transcend the playful aesthetics of sexual contracting and the benign value of the contractual fetish in BDSM culture.<sup>167</sup> Such a legal device is normally a sexual prop, not a death sentence.<sup>168</sup>

#### B. THOUGH AESTHETIC, LEGAL MIMESIS MAY GENERATE SUBSTANTIAL SOCIO-POLITICAL EFFECTS

At Masoch's pole—where masochism and contracting unite via mimesis—one core legal issue has been sexual exchange: typically, sex for money.<sup>169</sup> Cases involving meretricious arrangements have reached American courts but have never succeeded.<sup>170</sup> Noodles & Beef and Tank did have a relationship that combined money and sexual subjugation as regards both Tank's relinquishment of his wages and his will, placing its contracts under the umbrella of meretriciousness.<sup>171</sup>

Though unenforceable, such agreements have served the important function of calling attention to rights involving gender and sexuality and the people to whom they have been denied.<sup>172</sup> Consequently, meretri-

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extreme trust and 110% faith in someone to be able to do that. I personally could never do it. The most I'm tracked is my owners have my location on their iPhone. . .I may be a pup but I'm also a human first.” Interview with Beaux Jangles, via Facebook Messenger (Oct. 30, 2019); Interview with Handler Jack, via email (Oct. 1, 2019).

<sup>165</sup> Interview with Beaux Jangles, via Facebook Messenger (Oct. 10, 2019); Interview with Handler Jack, via email (Oct. 1, 2019).

<sup>166</sup> Interview with Beaux Jangles, via Facebook Messenger (Oct. 10, 2019); Interview with Handler Jack, via email (Oct. 1, 2019).

<sup>167</sup> Interview with Handler Jack, via email (Oct. 1, 2019).

<sup>168</sup> See *Nonbinding Bondage*, *supra* note 2 (exploring the fetish-value of the sex contract); see also Raja Mishra, *Dominatrix Acquitted of Manslaughter*, THE BOSTON GLOBE (Jan. 31, 2006), [http://archive.boston.com/news/local/articles/2006/01/31/dominatrix\\_acquitted\\_of\\_manslaughter/](http://archive.boston.com/news/local/articles/2006/01/31/dominatrix_acquitted_of_manslaughter/) (analyzing a BDSM scenario in which an agreement turned deadly when the individual being tortured died on the rack).

<sup>169</sup> See *Marvin*, 18 Cal. 3d at 665; *Jones*, 122 Cal. App. 3d at 507.

<sup>170</sup> See *Marvin*, 18 Cal. 3d at 665; *Jones*, 122 Cal. App. 3d at 507.

<sup>171</sup> Villarreal, *supra* note 17.

<sup>172</sup> See *Marvin*, 18 Cal. 3d at 665; *Jones*, 122 Cal. App. 3d at 507.

cious arrangements are paragons of *trans-enforceability*, as their value exceeds their legal enforcement.<sup>173</sup> In this Zodiac, they are mimetic and fall under the sign of the aesthetic, as they involve subcultural copies of enforceable contracts from aboveground.<sup>174</sup> Suits centered on these cases have bravely faced the changing nature of the heterosexual marriage unit head on, becoming vanguard cases where the evolution of law's marital "heterocomplicity" has been symbolically challenged.<sup>175</sup> As such, the meretricious case, involving unenforceable contracts, has taken the need to change society upon itself. This type of case has helped to point out how out of tune marital law has been with regard to changing gender and sexual roles in a nation whose pluralism would extend to both nontraditional heterosexual living arrangements and the LGBTQ community.<sup>176</sup>

1. *The Marital Analogue: Marvin v. Marvin, Jones v. Daly*

Two influential cases testing meretriciousness have taken place in California: common-law marriage case *Marvin v. Marvin* and gay marriage case *Jones v. Daly*.<sup>177</sup> Both cases have helped clarify the revolutionary value of the meretricious contract, with applications to the BDSM contract that ripple beyond California.<sup>178</sup> *Marvin v. Marvin* presented a common law Hollywood "divorce" case combusting among celebrities.<sup>179</sup> The common-law wife of famous actor Lee Marvin, Michelle Marvin, filed suit when their long-term, live-in relationship dissolved.<sup>180</sup> While the two had never signed any agreement regarding who would contribute what either financially or in terms of services, Michelle argued that the two were bound by an oral agreement.<sup>181</sup> As an example, she offered the fact that she had given up her career as an "entertainer [and] singer" in order to help his career along.<sup>182</sup> In her own words, they had agreed to "hold themselves out to the general public as husband and wife" and she would render "services as a companion, homemaker,

<sup>173</sup> See *Marvin*, 18 Cal. 3d at 665; *Jones*, 122 Cal. App. 3d at 507.

<sup>174</sup> *Nonbinding Bondage*, *supra* note 2.

<sup>175</sup> See generally Judith Butler, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX* (Routledge 2011) (examining "queer" and radically democratic terrains that fall outside "heterocomplicity," defined as compulsory heterosexuality).

<sup>176</sup> See *Marvin*, 18 Cal. 3d at 665; *Jones*, 122 Cal. App. 3d at 507.

<sup>177</sup> *Marvin*, 18 Cal. 3d 660; *Jones*, 122 Cal. App. 3d 500.

<sup>178</sup> See *Marvin*, 18 Cal. 3d at 665; *Jones*, 122 Cal. App. 3d at 507.

<sup>179</sup> *Marvin*, 18 Cal. 3d 660.

<sup>180</sup> *Id.*

<sup>181</sup> *Marvin*, 18 Cal. 3d at 666 ("Plaintiff avers that in October of 1964 she and defendant 'entered into an oral agreement' that while 'the parties lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result if their efforts whether individual or combined'").

<sup>182</sup> *Id.*

housekeeper, and cook.”<sup>183</sup> She alleged that in return for her sacrifices, Mr. Marvin agreed to “provide. . . financial support and needs for the rest of her life.”<sup>184</sup> To protect her interest, she requested an equitable remedy: that a constructive trust be placed over 50% of the assets they acquired during their relationship.<sup>185</sup>

In *Jones v. Daly*, a plaintiff lodging an early gay marriage claim found it doomed to failure by the necessary meretriciousness of its central cause of action—a claim that must nonetheless be lodged if others in the community are to one day benefit from its failure.<sup>186</sup> Here, the surviving partner in a gay relationship that verged on “marriage” sought declaratory relief as to his interest in the estate of his deceased lover.<sup>187</sup> He faced a very different problem from Michelle Marvin, since it was impossible for him to make his claim without emphasizing the fact that the two had also been sexual partners.<sup>188</sup> Thus Jones had to argue for a physical basis to his relationship with Daly, contending that the two “met on frequent occasions, dated, engaged in sexual activities and, in general, acted towards one another as two people do who had discovered a love, one for the other.”<sup>189</sup> Michelle Marvin had never been forced to make such a claim because her relationship mimed heterosexual marriage, and any sexual intercourse would have been presumed.<sup>190</sup> Faced with a society hostile to gay marriage, Jones could not rely on tacit cultural assump-

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* A constructive trust is an equitable remedy in which the court converts a *res* (Latin for “thing”) into a trust to avoid unjust enrichment. The Restatement weaves Justice Cardozo’s explanation into the fabric of the definition: “A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (AM. LAW. INST. 2021) (quoting *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386 (2019)) (internal quotes omitted); see, e.g., *Ruffin v. Ruffin*, 2000 Va. App. LEXIS 128 (holding that a lottery win does not constitute a *res* and thus cannot create a constructive trust over it).

<sup>186</sup> *Jones*, 122 Cal. App. 3d at 507.

<sup>187</sup> *Id.* at 505. Declaratory relief is a remedy that defines the relationship among parties as regards their rights in a matter before the court. *Declaratory Judgment*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/declaratory\\_judgment](https://www.law.cornell.edu/wex/declaratory_judgment).

<sup>188</sup> *Id.* at 507 (the Court’s restating Jones’ claim as prostitution).

<sup>189</sup> *Id.* at 505. In addition, the poetic texture of the statement, which veers from the simplicity of direct legal language, is an important syntactical decision: the clause “one for the other” emphasizes with redundancy the reciprocity of their love and is one of the poetic nodes that legal language so often disavows. See Michael Angelo Tata, *The Submerged Metaphoricality of Legal Language*, GGU LAW REVIEW BLOG (Feb. 25, 2020), <https://ggulawreview.com/2020/02/25/the-submerged-metaphoricality-of-legal-language/> (using Paul de Man’s literary analysis of geometrician Blaise Pascal to unearth figurative language from case opinions).

<sup>190</sup> *Marvin*, 18 Cal. 3d at 666; see *PARIS IS BURNING* (Lionsgate 1990) (deconstructing heterosexual marriage through a transsexual perspective).

tions about marriage, and would have to spell out the elements of his relationship for the Court.<sup>191</sup>

Both cases are important analogues for overtly sexual contracts because they, too, have proven to be *trans-enforceable* and to rely upon contractual aesthetics.<sup>192</sup> They illuminate another rationale as to why the contract signed by Noodles & Beef and Tank would be internally honored but never externally enforced while also opening a new window on the effect bringing such a contract to light may have on a contemporary, “post-gender” society.<sup>193</sup> Although meretricious claims typically fail, they are often introduced to succeed on another level; the most important example is promoting enhancing fundamental constitutional rights like the right to marry.<sup>194</sup> It is hard to imagine what will change in light of Linda Chapman’s case, but it seems likely that the situation will generate ramifications extending beyond the Pup subculture to other non-traditional groups.

Applying the mimetic perspective of *Nonbinding Bondage* to *Marvin v. Marvin* and *Jones v. Daly* reveals that the strategy of parody and play borrowed from aesthetics can produce contractual arrangements that mime those of heterosexual culture in an important way.<sup>195</sup> In the end, such mimesis can produce an effect of liberation, despite its legal failure. Specifically, *Marvin v. Marvin* introduced a new word into the legal vocabulary, “palimony,” and a new class of rights: so-called Marvin Rights.<sup>196</sup> These rights pertain to non-marital cohabitation situations in

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<sup>191</sup> *Jones*, 122 Cal. App. 3d at 507; see *PARIS IS BURNING* (Lionsgate 1990).

<sup>192</sup> See generally *Nonbinding Bondage*, *supra* note 2 (unearthing aesthetic strategies of parody and play common among sexual contracts).

<sup>193</sup> Two examples of post-gender society include the Latinx movement as well as a recent decision in Berkeley to cease using the word “manhole.” See Luis Noe-Bustamante, Lauren Mora, and Mark Hugo Lopez, *About One-in-Four U.S. Hispanics Have Heard of Latinx, But Just 3% Use It*, PEW RESEARCH CENTER (Aug. 11, 2020), [https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it/#:~:text=the%20emergence%20of%20Latinx%20coincides,more%20than%20a%20decade%20ago](https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it/#:~:text=the%20emergence%20of%20Latinx%20coincides,more%20than%20a%20decade%20ago;); Nina Aron, *Attention Everyone: That Manhole Is Now a Maintenance Hole*, CALIFORNIA MAGAZINE (Aug. 9, 2019), <https://alumni.berkeley.edu/california-magazine/just-in/2019-08-09/attention-everyone-manhole-now-maintenance-hole>.

<sup>194</sup> *Jones*, 122 Cal. App. 3d at 507. See generally *Loving v. Virginia*, 388 U.S. 1 (1967) (ruling that freedom to marry cannot be racially restricted); *Obergefell v. Hodges*, 577 U.S. 644 (2015) (ruling that the fundamental right to marry extends to same-sex couples).

<sup>195</sup> Compare *Marvin*, 18 Cal. 3d at 665 with *Jones*, 122 Cal. App. 3d at 507.

<sup>196</sup> An online advertisement for Pride Legal says it all: “Marvin does not limit non-marital cohabitant remedies to opposite-sex partners. Accordingly, express (written or oral) are as equally enforceable as those between Marvin action claimants of the opposite sex. The focus is on whether they in fact had an agreement supported by lawful consideration. . . .” *Marvin Actions & Palimony Rights in California*, PRIDE LEGAL (Feb. 3, 2019), <https://pridelegal.com/marvin-actions-california/>.

which something like “divorce” occurs and the question of a distribution of property or assets is necessary to avoid injustice.<sup>197</sup>

In addition, it is impossible to imagine the Defense of Marriage Act’s (“DOMA”) 2011 repeal in the absence of cases like *Jones v. Daly*, which helped redefine marriage as larger in scope than an arrangement between “one man and one woman,” as it had been codified under DOMA.<sup>198</sup> Though Jones, too, lost his suit, his loss was critical. When a new right is being articulated, the process often begins with cases that cannot be victorious because society is not yet ready to expand its jurisprudence beyond the current horizon of intelligibility.<sup>199</sup> *Jones v. Daly* is situated somewhere between *Lawrence v. Texas*, which decriminalized sodomy, and *Kerrigan v. Commissioner of Public Health*, which permanently legalized gay marriage in Connecticut.<sup>200</sup> Along with *Marvin v. Marvin*, it is a case that helped redefine marriage as a more plastic entity capable of expansion beyond the heterosexual milieu.

Though meretriciousness is without legal merit, this “convention” does not prevent it from abounding in other types of merit. These sources of value can include symbolic value, social enforceability, or the types of illicit exchange that solidify other valid contracts, like a marriage contract, which can also be read as meretricious.<sup>201</sup> Though she is no contract attorney, transsexual performer Venus Xtravaganza from the iconic documentary film *Paris Is Burning* makes such a claim.<sup>202</sup> This critical LGBTQ film took as its subject matter the lives of transsexuals and drag queens who comprised the Ballroom Culture of 1980s New York City,

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<sup>197</sup> *Id.*

<sup>198</sup> Defense of Marriage Act, 1 U.S.C. § 7 (1996) (“defending” marriage by relegating it to a relationship between two genders only), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

<sup>199</sup> Think of the unenforceable contract in early surrogacy case *Baby M*: its unenforceability certainly did not affect its importance for the future of parental rights under more exotic circumstances. See *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988) (invalidating a surrogacy contract because it clashed with public policy at the time: specifically, that a surrogacy payment to a birth mother is “illegal, perhaps criminal, and potentially degrading to women”).

<sup>200</sup> Geidner, *supra* note 14. While the article does not mention *Jones v. Daly*, as it focuses on wins, it is fledgling cases like *Jones v. Daly* which paved the way for the legalization of gay marriage: the losses they incur are an essential ingredient to the dialectical process of change. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (Conn. 2007); *In re Marriage Cases*, 43 Cal. 4th 757 (2008). *Jones* is allied with *Kerrigan* and not *In re Marriage Cases* because the California Supreme Court presented only a brief window of opportunity during which gay marriage would be legal, while the Connecticut ruling was permanent and unchallenged.

<sup>201</sup> See PARIS IS BURNING (Lionsgate 1990) (exposing a meretricious core to the marriage contract).

<sup>202</sup> See *id.*

and Venus was its fatal star, dead by the time the film ends.<sup>203</sup> She explains the inherent meretriciousness of marriage in response to a question from filmmaker Jenny Livingston about her behavior as a prostitute.<sup>204</sup> Venus' words almost speak directly to Judge Lillie in *Jones v. Daly*:

If you're married, a woman in the suburbs, a regular woman, married to her husband, and she wants him to buy her a washer and dryer set, in order for him to buy that, I'm sure she'd have to go to bed with him anyway to give him what he wants for her to get what she wants, so, in the long run, it all ends up the same way."<sup>205</sup>

However contract theorists receive Venus' words, they speak to the truth of marital contracts as containing a secret meretriciousness, a reality that perhaps could only be revealed by a transsexual or drag queen operating on the fringes of society. Venus' sheer outsiderliness reveals silent yet potent presumptions against a backdrop of deprivation and exclusion, revelations that can only be made from a position of dispossession and otherness.<sup>206</sup> As philosopher Jacques Derrida opines, it is perhaps only from the periphery that the center might be correctly observed.<sup>207</sup> This Comment agrees with Venus and with Derrida. BDSM contracts and marital contracts are built around similar sexual exchanges, speaking to how meretriciousness has appeared in American jurisprudence through the back door, so to speak.<sup>208</sup>

## 2. *Why the Meretricious Contract Mimes Marriage*

As Judge Tobriner explains in his opinion in *Marvin v. Marvin*, express contracts between nonmarital partners should be enforced unless they are "explicitly founded on the consideration of meretricious sexual services."<sup>209</sup> Specifically, "a contract between nonmarital partners is unenforceable only *to the extent* that it *explicitly* rests upon the immoral and illicit consideration of meretricious sexual services."<sup>210</sup> Tobriner avers that "[t]he law does not award compensation for living with a man

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<sup>203</sup> See *id.*; see also BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* (South End Press, 1992) (asking the question, "Is Paris Burning?" from a black feminist perspective in response to the class structure of voguing culture).

<sup>204</sup> *PARIS IS BURNING* (Lionsgate 1990).

<sup>205</sup> *Id.*

<sup>206</sup> See Judith Butler, *supra* note 175 (examining the "realness" of the Ballroom scene and its paradoxical relevance for queer liberation).

<sup>207</sup> In the deconstructive method, rule and exception switch places so that each may unravel the other's script. See, e.g., DERRIDA, *supra* note 11.

<sup>208</sup> See *id.*

<sup>209</sup> *Marvin*, 18 Cal. 3d at 665.

<sup>210</sup> *Id.* at 669.

as a concubine,’” if only because no court could “sever the contract and place an independent value upon the legitimate services provided,” as these are fatally intermingled with sexual services.<sup>211</sup> Financially, “[s]o long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose,” a fact which worked to Michelle Marvin’s favor, as her claim for marital compensation was able to withstand the defense claim of meretriciousness.<sup>212</sup>

Overturing a trial court ruling for the defendant, Judge Tobriner displayed a modern outlook on marriage, one which speaks to participants in future sex contracts.<sup>213</sup> His relaxed stance toward sexual morals is best showcased by his clarification that the court has only taken issue with conduct that “pertained to and encompassed prostitution.”<sup>214</sup> Thus, the combination of sex and money is the issue for these types of contracts, most of which are implied in fact and not written down, as with many BDSM contracts.<sup>215</sup> Operating on the far side of power, meretricious contracts mime aspects of traditional marital contracts as a strategy of empowerment.<sup>216</sup>

*Jones v. Daly* provides further insight into contractual meretriciousness and the fate of sexual contracts in general when these culminate in a prayer for relief, this time within a homosexual arena and the clash for the gay right to marriage.<sup>217</sup> As with *Marvin v. Marvin*, and in keeping with Venus Xtravaganza, the powerlessness of the individual in a relationship not traditionally defined as marriage is at stake in an arrangement that, like marriage, involves reciprocal exchanges of duties and responsibilities.<sup>218</sup> Here, the substance of the Daly’s claim was an oral “cohabitators agreement” that he and his deceased lover had entered into specifying the joint combination of resources and assets.<sup>219</sup> The cohabitators agreement also contained the provision that the two “would hold themselves out to the public at large as cohabiting mates.”<sup>220</sup> At the same time, the plaintiff “would render his services as a lover, companion,

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<sup>211</sup> *Id.* at 671 (quoting *Hill v. Estate of Westbrook*, 95 Cal. App. 2d 599, 603 (1950)) (internal quotation marks omitted).

<sup>212</sup> *Marvin*, 18 Cal. 3d at 674.

<sup>213</sup> *See id.* at 684.

<sup>214</sup> *Id.* at 683.

<sup>215</sup> Interview with Beaux Jangles, via Facebook Messenger (Oct. 10, 2019) (expressing the rarity of written Pup sex contracts (on file with author); Interview with Handler Jack, via email (Oct. 1, 2019) (“Most contracts I’ve encountered are either verbal or symbolic”).

<sup>216</sup> *See, e.g.*, DERRIDA, *supra* note 16 (examining in detail the full power of mimesis via the work of French Symbolist poet Stéphane Mallarmé).

<sup>217</sup> *Jones*, 122 Cal. App. 3d at 507.

<sup>218</sup> PARIS IS BURNING (Lionsgate 1990).

<sup>219</sup> *Jones*, 122 Cal. App. 3d at 507.

<sup>220</sup> *Id.* at 505.

homemaker, traveling companion, housekeeper and cook.”<sup>221</sup> As with Ms. Marvin, Jones gave up his job, a modeling career, in exchange for financial security that was backed by an oral promise, a parallel countenanced by Judge Lillie, who cites to its commentary on meretriciousness:

[T]hey may agree to pool their earnings and to hold all property acquired ruling the relationship in accord with the law governing community property; conversely they may agree that each partner’s earnings and the property acquired from those earnings remains the separate property of the earning property. So long as the agreement does not rest upon illegal meretricious considerations, the parties may order their economic affairs as they choose.<sup>222</sup>

No matter how the relationship materializes, “services as a paramour” cannot be the basis for economic consideration.<sup>223</sup> Because Jones and Daly “dated, engaged in sexual activities, and, in general, acted toward the other as two people who have discovered a love, one for the other,” their contract encouraged an expansion of marriage to include groups traditionally denied its benefits.<sup>224</sup> To circumvent claims of prostitution stemming from the oral contract’s language, *Jones* relies heavily upon the ordinary usage of the term “cohabit,” which is “the mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but *not necessarily dependent upon sexual relations*.”<sup>225</sup> Jones continues his linguistic argument through an act of synonymy or substitution: that is, citing the definition of “lover” in Merriam-Webster and its relation to “paramour.” Thus “while one meaning of the word ‘lover’ is paramour, it may also mean a person in love or an affectionate or benevolent friend.”<sup>226</sup> Judge Lillie is unpersuaded by this construction:

Pleadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears. . . . Viewed in the context of the complaint as a whole, and the words ‘cohabiting’ and ‘lover’ do not have

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 507.

<sup>223</sup> *Id.* (quoting *Marvin*, 18 Cal. 3d at 672 (1976)).

<sup>224</sup> *Id.* at 505.

<sup>225</sup> *Id.* at 508 (quoting *Boyd v. Boyd*, 228 Cal. App. 2d 374, 381 (Cal. Ct. App. 1964)) (emphasis in *Jones*).

<sup>226</sup> *Id.* (quoting Merriam-Webster, WEBSTER’S THIRD NEW INT’L DICT. 1340 (Phillip B. Grove et. al. eds., 3rd ed. 1966)).

the innocuous meanings which plaintiff ascribed to them. These terms can only pertain to plaintiff's rendition of sexual services to Daly."<sup>227</sup>

Further, unlike *Marvin v. Marvin*, there is no severability, as it is impossible to assign independent value to each of the responsibilities listed in the oral agreement.<sup>228</sup> These included Daly's roles as "traveling companion, housekeeper or cook as distinguished from acting as his lover."<sup>229</sup>

Contracts that court meretriciousness, like the "cohabitators agreement" in *Jones v. Daly*, are simply not enforceable based on what this Comment, rooted in sexology, deems a primal legal taboo against prostitution.<sup>230</sup> The potential meretriciousness of these situations speaks to the blatant sexual content of BDSM contracts, which are nothing but a series of sexual barterers.<sup>231</sup> Because they are blatantly meretricious, these contracts would never be enforceable on their face, but his lack of legal recourse regarding the various provisions they contain does not make them devoid of meaning.<sup>232</sup> For though the "cohabitators agreement" in *Jones v. Daly* was not something the court was inclined to uphold, the symbolic import of this oral contract has made an important contribution to the right to marriage sought by gay, lesbian, trans- and queer communities.<sup>233</sup> Such excluded groups could only couch their arguments in support of a marriage decoupled from heterosexuality by invoking the broader sense of terms like "cohabitation" and "lover." This crucial maneuver exposed the tacit assumptions that inform and structure heterosexual marriage, known all too well by someone like Venus Xtravaganza.<sup>234</sup>

### 3. *Legal Mimesis as a Path to Liberation*

Thus, with regard to the sexual S&M contract, though it is designed to be unenforceable legally, when it does appear within the legal arena, it can and has been used to achieve far greater ends than individual Plaintiff triumph. Contrary to what contract theorists might believe, doomed cases like those involving sexual contracts that are "experimental" are

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<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 509.

<sup>230</sup> See generally MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY VOL. 1: AN INTRODUCTION* (Robert Hurley trans., Vintage 1980) (exploring how the Repressive Hypothesis has influenced European culture).

<sup>231</sup> See generally *Nonbinding Bondage*, *supra* note 2.

<sup>232</sup> See PAT CALIFIA, *THE SECOND COMING: A LEATHERDYKE READER* (Pat Califia & Robin Sweeny eds., Alyson Books 2000).

<sup>233</sup> *Jones*, 122 Cal. App. 3d at 508.

<sup>234</sup> *PARIS IS BURNING* (Lionsgate 1990).

thus capable—albeit paradoxically—of transforming society through the spectacle of their failure. Consequently, the Trans-Enforceability Thesis takes a turn, revealing that contractual success or failure are not the true indicia of these documents' value. The Masochian root narrative and its reliance upon aesthetic strategies is an important source driving the engine of empowerment.<sup>235</sup> What mimetic cases like *Marvin v. Marvin* and *Jones v. Daly* reveal for the Noodles & Beef situation is precisely that though unenforceable contracts involving sexual exchanges could never be subjected to something like an order for specific performance, they still may jump-start the crystallization of social change, which proceeds from but a single seed.<sup>236</sup>

Tank Chapman provides a cautionary tale about the challenges of performative power transfers within a sexual scenario.<sup>237</sup> These tender but loaded “mimetic” exchanges can easily spill over into over concrete areas of the law, like probate, criminal or contract law itself, as seen with Tank's unfolding legal miasma.<sup>238</sup> His case follows the legacy of the meretriciousness cases, which are largely spectacular failures of unenforceability, but which trigger important social changes regarding gender, sexuality and fundamental constitutional rights like marriage.<sup>239</sup> It is thus possible that Tank's case, too, can exert a liberational effect that enhances the lives of the Pups or other participants in paraphiliac subcultures.<sup>240</sup>

Hopefully, the media attention Tank's case generates will cause people to be more humane in their sexual contracting without chilling the

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<sup>235</sup> Even within philosophy, aesthetics is often considered inferior to epistemology (the philosophy of knowledge production) or ethics (the philosophy of right and wrong): yet the social force of mimesis, an aesthetic practice, is still a powerful one. *See generally* AVITAL RONELL, STUPIDITY (Univ. of Ill. Press, 2002) (identifying the destabilizing power of aesthetics, which in a classic thinker like Immanuel Kant corrodes both pure and practical reason, despite its apparent powerlessness).

<sup>236</sup> *See* DONNA HARAWAY, CRYSTALS, FABRICS AND FIELDS: METAPHORS OF ORGANICISM IN TWENTIETH-CENTURY DEVELOPMENTAL BIOLOGY (Yale Univ. Press 1976) (examining the creation of elaborate crystals from seeds and the metaphorical value such a process has held over the Western scientific imagination).

<sup>237</sup> *See generally* *Nonbinding Bondage*, *supra* note 2 (examining the power dynamics of S&M relationships); Villarreal, *supra* note 17.

<sup>238</sup> *See* Villarreal, *supra* note 17; *Mother Whose Son Died of Silicone Injections to His Genitals Sues His 'Master' and Posse for Wrongful Death*, *supra* note 106.

<sup>239</sup> *Jones*, 122 Cal. App. 3d at 507 (1981).

<sup>240</sup> Two such subcultures are the Furies and Adult Baby communities. The Furies are people who dress up and sometimes live as giant stuffed animals; the Adult Babies are people who dress up and sometimes live as infants. *See, e.g.*, Thom Patterson, *Inside the Misunderstood Culture of Furies*, CNN (updated Nov. 14, 2018), <https://www.cnn.com/2018/11/14/us/furies-culture/index.html> (exploring the Plushie phenomenon and its history as a fetish); *Adult Babies*, SEXINFO ONLINE (updated Feb. 21, 2018), <https://sexinfoonline.com/adult-babies/>.

freedom of expression these agreements embody. Hopefully, it will also make parties to sex contracting more attentive to the fact that the appearance of unconscionability might one day cause the law to be summoned by someone whom, beyond the *boudoir*, their contract impacts (like Tank's brother).<sup>241</sup> One positive outcome would be if this legal morass inspires contracting parties to invoke sexual arbitration at the formation stage and work it into their agreements as a "binding" provision. Those entering into such agreements should at minimum learn from Noodles & Beef's small claims filing, that fateful and fatal calling to the Law from within the mimetic, that such a bad-faith move can only lead to a legal disaster worthy of Aeschylus.<sup>242</sup> For though the goddess Athena's services come free in his *Oresteia*, the Greek drama that replaces the extra-legal blood feud with the judicial process, the same cannot be said of the American legal machinery, which always exacts a toll.<sup>243</sup>

#### CONCLUSION

For three centuries, trans-enforceable sexual contracts have exposed a fetishistic value to the contract itself, raising the possibility that *le plaisir du contract* extends even to non-sexual contracts: an area yet to be explored in either contract theory or psychoanalysis, an area of future inquiry this Comment hopes to precipitate. Through aesthetic tactics based upon concepts of role play, performance and parody, BDSM contracts have presented the possibility that the contract engages legal enforceability for the sexual charge it creates.<sup>244</sup> Such agreements are generally the product of consent and should be left untouched by the Law, which should only intervene when these contracts have simply gone too far, "edging" too close to the nefarious or the unconscionable. Tank Chapman's case almost certainly arrived there once it crossed over into probate bequests, but possibly not with regard to bodily modification, which is a matter of personal taste and fantasy.

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<sup>241</sup> Alexandria Klausner, *Man Dies After Injecting Silicone in Genitals, Mom Blames Sex 'Cult' Master*, N. Y. POST (Nov. 7, 2018), <https://nypost.com/2018/11/07/man-dies-after-injecting-silicone-in-genitals-mom-blames-sex-cult-master/> (identifying Tank's autistic brother Ben as the one to whom his estate was originally promised).

<sup>242</sup> Athena appears in the *Oresteia* trilogy's conclusion, the *Eumenides*. Her role is to interrupt the blood feud through the implementation of a proper trial-and-verdict structure. Within this Comment, she stands for both the Law's dominance and its otherness. See Aeschylus, *THE ORESTEIA: AGAMEMNON, THE LIBATION BEARERS, THE EUMENIDES* (Robert Fagles trans., Penguin Classics 1984).

<sup>243</sup> *Id.*

<sup>244</sup> See *Nonbinding Bondage*, *supra* note 2 (exploring strategies of powerlessness within BDSM contracting).

Following the meretricious cases, the legacy of *le plaisir du contrat* might indeed be an expansion of societal norms regarding companionship and marriage beyond the binary. Members of the LGBTQ+ community have come a long, long way from Krafft-Ebing and his pathologization of sexual difference for Victorian criminology.<sup>245</sup> The worst reading of the Noodles & Beef fiasco would be that subcultural sexual contractors need to be stripped of their freedom of contract and returned to the asylum, metaphorically.<sup>246</sup> However, as Beaux Jangles and Handler Jack have expressed, sexual contracting should never be used to mask abuse through the parody of consent.<sup>247</sup> In such situations, we are beyond the freedom of contract that Arthur Leff feels is due everyone, *especially* the outcasts of our society.<sup>248</sup>

For here, the performativity of disempowerment that is central to BDSM play might have slipped unconscionably into the actual disempowerment of physical and psychological abuse.<sup>249</sup> Given that simulation is a game of mirrors, it might be as easy to become disoriented in the *boudoir* as it was in the famous *Galerie des Glaces* at Versailles.<sup>250</sup> The Noodles & Beef situation should encourage the BDSM community to be more cautious in its contracting, especially when dangerous bodily modifications are involved, for the Law lurks just outside the four corners of their agreements.

Finally, as regards sexual contracting itself, a system of sexual mediation would be ideal to help dissatisfied parties reap the pleasures of their BDSM accords. Contracting parties might willingly opt for such arbitration, in particular as it would likely amplify the uncanny sexual charge inherent to enforcement. Pushing role play and mimesis even closer to the legal realities they simulate is one way to amplify the pleasure of the contract and might even help reveal a surprising hedonistic core to contractuality in general.

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<sup>245</sup> See KRAFFT-EBING, *supra* note 24.

<sup>246</sup> See *id.*

<sup>247</sup> Interview with Beaux Jangles, via Facebook Messenger (Apr. 12, 2020) (identifying Noodles & Beef with *Tiger King*'s potentially murderous anti-heroine Carole Baskin).

<sup>248</sup> Leff, *supra* note 142, at 555.

<sup>249</sup> *Nonbinding Bondage*, *supra* note 2, at 721 (exploring strategies of powerlessness within BDSM contracting).

<sup>250</sup> DERRIDA, *supra* note 16 (attempting to get beyond the mirror's reflecting "tain," in an effort to interrupt the dangerous but alluring infinite regress of mimesis).

