

# BDSM, KINK, AND CONSENT: WHAT THE LAW CAN LEARN FROM CONSENT-DRIVEN COMMUNITIES

Mika Galilee-Belfer\*

*Millions of Americans participate in consensual, mutually agreed-upon activities such as bondage, dominance, and submission—collectively referred to as BDSM or kink—yet the relationship between individual consent to such participation and consent as legally understood and defined is imperfect at best. Because the law has not proven adept at adjudicating disputes that arise in BDSM situations, communities that practice BDSM have adopted self-policing mechanisms (formal and informal) aimed at replicating and even advancing the goals and protections of conventional law enforcement. This self-policing is particularly important because many jurisdictions hold there can be no consent to the kind of experiences often associated with BDSM; this is true in practice irrespective of the existence of statutory language regarding consent. In this Note, I compare legal communities and BDSM communities across three variables: how consent is defined, how violations are comparably adjudicated, and the types of remedies available by domain. In the process, I examine what norm-setting and rule adjudication look like when alternative communities choose to define, and then operate within, norms and controls that must be extra-legal by both necessity and design.*

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\* J.D. Candidate, University of Arizona James E. Rogers College of Law, Class of 2020. This Note is written with thanks to those communities and individuals who are changing consent culture, both in our everyday lives and behind closed doors. I am also thankful to my professors at the University of Arizona, whose thoughtful suggestions helped shape this work; to my colleagues on the *Arizona Law Review*, whose expert edits helped sharpen it; and to my family, broadly defined, whose perennial support and encouragement have made all the difference.

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## INTRODUCTION

The percentage of people worldwide who are involved with alternative lifestyles that involve consensual physical, sexual, emotional, psychological, or other subservience to another individual or individuals is an open question, with estimates ranging from 1% to 60%.<sup>1</sup> Some people’s forays into alternative lifestyles are not-too-distant from the conventions of “vanilla”<sup>2</sup>—light spanking, say—while other people have entire relationships rooted in the exercise of Bondage/Discipline/Sadomasochism (“BDSM”) and the power differentials that anchor it.<sup>3</sup> For some in this latter group, BDSM can be an identity, with a staggering number

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1. Brad Sagarin, *The Surprising Psychology of BDSM*, PSYCHOL. TODAY (Feb. 25, 2015), <https://www.psychologytoday.com/us/blog/the-wide-wide-world-psychology/201502/the-surprising-psychology-bdsm>; Rose Eveleth, *Americans Are More Into BDSM Than the Rest of the World*, SMITHSONIAN MAG.: SMARTNEWS (Feb. 10, 2014), <https://www.smithsonianmag.com/smart-news/americans-are-more-bdsm-rest-world-180949703> (citing a 2005 Durex survey finding that 36% of U.S. adults reported using BDSM implements like “masks, blindfolds and bondage tools . . .”).

2. *Vanilla Sex*, URB. DICTIONARY (Feb. 9, 2004), <https://www.urbandictionary.com/define.php?term=Vanilla%20Sex> (defining vanilla as “Sex that involves no twists or kinkiness, and no S&M. Basically plain regular sex. Typically sweet and happy and very lovey-dovey.”).

3. Emily Prior, *Women’s Perspectives of BDSM Power Exchange*, 16 ELECTRONIC J. OF HUM. SEXUALITY (Feb. 28, 2013). See in particular RESULTS AND ANALYSIS: Power Exchange.

of available titles from which to choose a representation of self.<sup>4</sup> The table below includes a few common BDSM titles and dynamics:<sup>5</sup>

<b>Dominant</b> A person who consensually takes power, authority, or control in a relationship, scene, or activity.	<b>submissive<sup>6</sup></b> A person who agrees to submit or give up control in a relationship, scene, or activity.
<b>Master/Mistress</b> A person who consensually takes ownership over someone with whom they are in a relationship.	<b>slave</b> A person who agrees to give total control to someone with whom they are in a relationship.
<b>Top</b> A person who is consensually in control of the action during kinky activities.	<b>Bottom</b> A person who agrees to give up control or receives the stimulation during kinky activities that may or may not include submission.

For others, BDSM involvement is less tied to an identity and experienced more as an avocation—a pastime or proclivity that no more defines them than does their preferred brand of cereal. For such people, a bit of added sexual spice may be the full extent of their engagement with the “lifestyle.”<sup>7</sup>

Here are a few additional terms for the uninitiated, important for context moving forward: in the vanilla world, play is defined as “exercise or activity for

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4. For a 70+ definitions list of possible “Roles,” see *Kinktionary*, FETLIFE, <https://fetlife.com/glossary> (last visited Oct. 21, 2018). These include, among others, sensualist (someone interested in sensual experiences); rigger (someone who enjoys rope play); and Leatherman or Leatherwoman (someone who practices specific protocols associated with the Leather community). FetLife is a social network for BDSM, fetish, and kink communities. *Id.*

5. *Id.*

6. The use of lower case is deliberate. See, e.g., Tiffany Diane Tso, *What it Really Means to Be in a Dominant/Submissive Relationship*, DAILY DOT: IRL (Aug. 26, 2018, 1:11 AM), <https://www.dailydot.com/irl/dom-sub-relationship/> (The dominant/submissive dynamic “is made obvious even in the capitalization of the letters, as members of the BDSM community intentionally leave the ‘s’ in D/s lowercase to easily denote the lower hierarchical position.”); see also Ambrosio, *Some Criteria for Consensual D/s Contracts*, AMBROSIO’S BDSM SITE (Apr. 22, 2020), <https://www.evilmonk.org/a/contract00.cfm> (“Slave is often written in all lower case.”); *Dominance and Submission*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Dominance\\_and\\_submission](https://en.wikipedia.org/wiki/Dominance_and_submission) (last visited Apr. 24, 2020) (“It is common for writers to capitalise the ‘D’ in Dominant but leave the ‘s’ in lowercase for the submissive.”).

7. Kenny Thapoung, *A Beginner’s Guide to Kink*, WOMEN’S HEALTH (June 18, 2014), <https://www.womenshealthmag.com/sex-and-love/a19984802/kinky-sex-moves/>.

amusement or recreation”;<sup>8</sup> in BDSM, “play” is used to describe the interactions between kinksters during a “scene,” where “scene” is defined as “[a] specific period of BDSM activity . . . .”<sup>9</sup> Scenes are often heavily negotiated; there are multiple instruments available online to increase self-awareness (focusing on how people want to feel or what they are hoping to accomplish within a scene) or to facilitate communication (what kinds of play activities are on the table; acceptable and unacceptable tools and implements; parts of the body on- and off-limits, etc.).<sup>10</sup> The implements used in scenes—floggers, whips, crops, etc.—are typically called “toys.”<sup>11</sup> Rope and other means of bondage are often utilized.<sup>12</sup>

The public spaces in which scenes occur are often called “Dungeons” or “Clubs,” and it is worth clarifying up front that *not* all of these spaces are sex or swingers clubs.<sup>13</sup> This is important because, as will become clear later in this Note, most consent-based laws and statutes focus on consent to sexual contact;<sup>14</sup> as such, these may be of limited utility in situations where consent is expected for a far greater range of contacts than sexual.<sup>15</sup> At Clubs, “safewords”—words that tell

8. *Play*, DICTIONARY.COM, <https://www.dictionary.com/browse/play> (last visited Oct. 21, 2018) (definition listed under nouns).

9. Franklin Veaux, *BDSM Play Parties?*, BDSM? (Mar. 26, 2013), <https://www.xeromag.com/fvbdplayparty.html> (Play parties are defined as “a gathering of people who are interested in BDSM for the purpose of engaging in BDSM activities.”); Franklin Veaux, *Dictionary of BDSM Terms*, BDSM? (Sept. 18, 2018), <https://www.xeromag.com/fvbdglossary.html>.

10. *See, e.g., Negotiation Checklist*, KINK WEEKLY, <http://www.kinkweekly.com/wp-content/uploads/2016/03/BDSM-negotiation-checklist.pdf> (last visited Oct. 21, 2018); *Our Favorite Yes/No/Maybe Lists Available Online*, SELF SERVE, <http://selfservetoys.com/resourcecenter/favorite-yesnomaybe-lists-available-online/> (last visited Oct. 21, 2018); Ambrosio, *supra* note 6 (discussing legality of slave contracts, slavery or submission, plus suggestions for contracts); *Guide to Planning a BDSM Scene*, REKINK, <https://rekink.com/guides/guide-to-planning-a-bdsm-scene/> (last visited Dec. 30, 2018).

11. *See, e.g., Kinky Toys*, THE PLEASURE CHEST, <https://thepleasurechest.com/kink-bondage-bdsm> (last visited Jan. 3, 2019) (retailers of adult products, including kink and BDSM toys); *Bondage*, ADAM & EVE, <https://www.adameve.com/adult-sex-toys/kinky-bondage-ch-1007.aspx> (last visited Jan. 3, 2019); and *Popular Items for BDSM Toys*, ETSY, [https://www.etsy.com/market/bdsm\\_toys](https://www.etsy.com/market/bdsm_toys) (last visited Jan. 3, 2019).

12. *See, e.g., Pete Riggs, Bondage Rope: What Kind Of Rope Is Best For Bondage?*, ROPE CONNECTIONS (July 24, 2015), <https://www.ropeconnections.com/kind-bondage-rope-best-bondage/>; *Beginner Rope Bondage*, BDSM WIKI (Apr. 7, 2016, 6:14 PM), [http://www.bdsmwiki.info/Beginner\\_Rope\\_Bondage](http://www.bdsmwiki.info/Beginner_Rope_Bondage); THE TWISTED MONK, <https://www.twistedmonk.com/> (last visited Mar. 2, 2019).

13. Kayla Lords, *An Insider’s Look at the Mysterious World of BDSM Dungeons*, KINKLY (Apr. 15, 2016), <https://www.kinkly.com/2/10078/sex-tips/bdsm/an-insiders-look-at-the-mysterious-world-of-bdsm-dungeons>.

14. *See* discussion *infra* Section II.A.1.

15. *See* discussion *infra* Section II.A.2; *see also* lunaKM, *What Is Non-Sexual Play?*, SUBMISSIVE GUIDE, <https://submissiveguide.com/unassigned/articles/what-is-non-sexual-play> (last visited Oct. 20, 2018) (“Non-sexual play is negotiated or regulated play between partners that does not include areas of the body or styles of play that would be interpreted as sexual in nature.”); Casey Gueren, *25 Facts About BDSM That You Won’t Learn in “Fifty Shades Of Grey,”* BUZZFEED (Feb. 12, 2015, 1:51 PM), <https://>

scene partners to keep going, slow down, or stop altogether—are essential.<sup>16</sup> Many Clubs have Dungeon Monitors to supervise play spaces, ensure compliance with Club rules, and see to it that safewords are honored.<sup>17</sup>

While some scenes can be gentle, others can be quite brutal.<sup>18</sup> What distinguishes BDSM and related lifestyles from domestic violence or sexual and other assault is the element of *consent*—freely, knowingly, and intelligently given by all participants (all of whom must be of majority age).<sup>19</sup> This consent can come in both oral and written forms and may include the use of negotiation instruments and contracts.<sup>20</sup> Both major philosophical models within BDSM—Safe, Sane, and Consensual (“SSC”)<sup>21</sup> and Risk Aware Consensual Kink (“RACK”)<sup>22</sup>—hold as *sine qua non* the importance of consent, particularly given the physical, mental, and emotional risks associated with the lifestyle.<sup>23</sup>

Part I of this Note examines current issues at the intersections of BDSM and the law, including the fact that consent is not an affirmative defense for much of what occurs in BDSM contexts. This produces two distinct points of dissonance: one, the possibility of unwanted and unwarranted legal intervention in activities between consenting adults (with particular legal consequences for “tops,” or those who tend to produce the action); and two, a failure to truly protect victims (or “bottoms,” those who typically receive the action) for lack of understanding of BDSM culture.<sup>24</sup>

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[www.buzzfeed.com/caseygueren/ultimate-guide-to-bdsm](http://www.buzzfeed.com/caseygueren/ultimate-guide-to-bdsm) (“Most people think BDSM is always tied to sex, and while it can be for some people, others draw a hard line between the two.”); Pegasus, *Non-Sexual BDSM*, BEYOND THE RAINBOW (Jan. 3, 2015), <https://beyondtherainbowblog.wordpress.com/2015/01/03/non-sexual-bdsm/>.

16. Gabrielle Fonrouge, *This Vital Part of BDSM Is a Lot Less Sexy Than You’d Think*, N.Y. POST (Mar. 22, 2018, 10:50 PM), <https://nypost.com/2018/03/22/this-vital-part-of-bdsm-is-a-lot-less-sexy-than-you-d-think/>.

17. Chris M., *A Practical Handbook for Dungeon Monitoring*, THE GARDEN, <http://thebdsmgarden.com/efiction/viewstory.php?sid=653&chapter=1> (last visited Oct. 21, 2018).

18. See, e.g., *Category: EdgePlay*, BDSMWIKI (Sept. 3, 2014, 9:11 PM), [http://www.bdsmwiki.info/Category:Edge\\_Play](http://www.bdsmwiki.info/Category:Edge_Play) (defining edgeplay as those activities that present “risk of serious or permanent damage or even death . . . an increased risk of spreading disease . . . (and/or) significant psychological danger.”) [hereinafter EdgePlay].

19. See consent language *infra* Section II.A.2; see also Caroline Fergusson, *What BDSM Can Teach Us All About Consent*, MTV:LIFE (July 19, 2018, 3:31 PM), <http://www.mtv.co.uk/life/news/what-bdsm-can-teach-us-all-about-consent> (consent can be given and withdrawn at any time).

20. See sources cited *supra* note 10.

21. SSC, BDSMWIKI (Jan. 22, 2015, 12:29 AM), <http://bdsmwiki.info/SSC>.

22. RACK, BDSMWIKI (Sept. 3, 2014, 9:12 PM), <http://bdsmwiki.info/RACK>.

23. William Saletan, *Spank You Very Much*, SLATE (July 10, 2013, 10:50 AM), [http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2013/07/bondage\\_s\\_m\\_dominance\\_and\\_submission\\_are\\_they\\_dangerous\\_let\\_s\\_look\\_at\\_the.html](http://www.slate.com/articles/health_and_science/human_nature/2013/07/bondage_s_m_dominance_and_submission_are_they_dangerous_let_s_look_at_the.html).

24. Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 570 (2004) (arguing that “[a] failure to recognize consent as a defense amounts to a violation of the prima facie victim’s fundamental right to autonomy. It also

Part II is a comparative analysis of ways in which BDSM and legal communities define acceptable standards of behavior, how each adjudicates deviations from the standard, and how each resolves deviations, such as through remediation or rehabilitation. This examination contrasts the rules and bylaws of BDSM Dungeons and Clubs across the country with state laws around consent, and the attendant comparative adjudications and remedies within each. The goal, as with any qualitative research, is not to produce generalizable findings but rather to give a sense of how the language of consent aligns, or does not align, across these two domains. Part II also includes a brief examination of the complications that ensue when an extra-legal framework is layered on an ever-present legal one.

This Note concludes with an evaluation of what law-and-order principles that are (currently) tone-deaf to BDSM mean for privacy, sexuality, and freedom of kinky expression for those who partake in BDSM activities. It also examines the implications for the further evolution of consent—how it is defined, and how it is implicated as an affirmative defense—both to BDSM and to broader arenas, and in and outside of conventional spaces of law and order.

## I. CURRENT ISSUES AT THE INTERSECTION OF BDSM AND THE LAW

In most jurisdictions, consent is a problematic defense to assault or battery,<sup>25</sup> and is even more problematic in the BDSM context.<sup>26</sup> This is because “consensual sexual expression” is largely governed by antiquated laws that put people in consent-based alternative lifestyles at risk of having their privacy interests

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violates the apparent *offender's* right to autonomy, assuming his facially criminal conduct manifested an agreement between the offender and the apparent victim . . . Punishing the apparent offender therefore would do nothing to vindicate autonomy. On the contrary, it would deny the autonomy of offender and victim alike.” (emphasis added).

25. W. E. Shipley, Annotation, *Consent as Defense to Charge of Criminal Assault and Battery*, 58 A.L.R.3d 662, § 2[a] (Originally published in 1974) (“Although the cases are replete with broad general statements that consent is a defense in a prosecution for assault, most of these statements are drawn from cases involving sexual assaults of one kind or another, and in the few cases which have involved an actual battery, without sexual overtones, the courts have usually taken the view that since the offense in question involved a breach of the public peace as well as an invasion of the victim’s physical security, the victim’s consent would not be recognized as a defense, at least where the battery is a severe one.”).

26. Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 177 (2007) (making the case that, save for under a few limited circumstances defined by historical practice, the consent of the victim is not a defense to bodily harm); Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 91 (2014) (focusing on the sexual components of BDSM and the attendant implications of the “unspoken assumption that sexual pleasure has negligible or negative value” and concluding that this foundation “has created First Amendment law founded on a dubious sexual-nonsexual dichotomy; criminal law that inconsistently respects consent and autonomy in a way that marginalizes sexual pleasure; and a constitutional jurisprudence that premises the protection of sexual activity solely on its contribution to other goals deemed more acceptable”).

invaded, jobs and families threatened, and liberty taken through prosecution or other legal action.<sup>27</sup>

#### A. Limits on “Consentable” Actions

Criminal laws are built, at least in some part, on the proposition that criminal violations deserve society’s moral condemnation.<sup>28</sup> Expanding criminal law to incorporate consent as defined in BDSM contexts compels us to consider both the moral acceptability of these acts and, on a more fundamental level, invites us to (re)examine the question of what is a crime.<sup>29</sup>

Model Penal Code (“MPC”) § 2.11 states that “[t]he consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.”<sup>30</sup> Despite this language, consent as a defense to assault or battery, even when permissible as an

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27. *NCSF Incident Reporting & Response*, NAT’L COALITION FOR SEXUAL FREEDOM, <https://ncsfreedom.org/incident-reporting-response/> (last visited Jan. 16, 2020); see also *Know the Social Rules – Discretion Policy – Etiquette*, CAPEX, <http://capex.info/events/rules/> (last visited Sept. 16, 2018) (noting that “[d]iscretion is absolutely necessary. Some members’ family, friends and/or jobs may be threatened if their lifestyle were known. We expect people’s privacy and identities to be protected.”) [hereinafter *CAPEX Policy*]; *Party Rules*, NEW ORLEANS BONDAGE & LEATHER ENTHUSIASTS, <http://www.lanoble.org/NobleCMS/Rules> (last visited Sept. 16, 2018) (noting that “misconceptions about BDSM remain widespread and may be personally and/or professionally damaging.”) [hereinafter *NOBLE Rules*]; Applicant for Security Clearance, ISCR Case No. 08-06969, at 5, 17 (U.S. Dep’t of Def. Apr. 13, 2010), <https://ogc.osd.mil/doha/industrial/08-06969.h1.pdf> (in which a man was denied security clearance because his wife had had a previous BDSM relationship and content from that relationship was still featured on the Internet); Peter Schmidt, *In Professor-Dominatrix Scandal, U. of New Mexico Feels the Pain*, CHRON. OF HIGHER EDUC. (Sept. 12, 2010), <https://www.chronicle.com/article/In-Professor-Dominatrix/124369/>.

28. Hyman Gross, *Are Crimes Morally Wrong?*, OUPBLOG (Aug. 22, 2012), <https://blog.oup.com/2012/08/are-crimes-morally-wrong/>.

29. *Id.* “Literature and history abound with examples of indisputable legal guilt and equally indisputable moral innocence welded together” and “many crimes designated as morals offenses are not morally wrong. These crimes, which typically are related to sexual taboos . . . are often expressions of policies who [sic] soundness is questionable, as evidenced by their rapid disappearance with changes in social attitudes.” *Id.*

30. MODEL PENAL CODE § 2.11(1) (AM. LAW INST. 1985); see also Dubber, *supra* note 24, at 569 (arguing that the goal of the MPC is to prevent harm produced by “the interference with the victim’s basic human right, to be free from interference with her autonomy. That interference is absent in the presence of consent. One therefore would expect consent to be a defense to, or non-consent an implicit element of, every offense. It is not, however, not even in the Model Code. The Code instead preserves the traditional, and traditionally ill-supported, exception for ‘serious bodily harm.’”).

affirmative defense, has been narrowly construed as a matter of public policy.<sup>31</sup> Only athletics have carved out a categorical toehold for consent to bodily harm.<sup>32</sup>

Save for athletics, though, courts are reluctant to accept the proposition that anyone would willingly suffer infliction of harm.<sup>33</sup> In *State v. Mackrill*, the Montana Supreme Court concluded that a fight between two bar patrons could not have been consensual, holding that “as a matter of public policy, consent of the victim is not a defense to the charge of aggravated assault . . . .”<sup>34</sup> In *Taylor v. State*, a case about sexual contact with a minor, the Maryland Supreme Court held that “criminal assault which tends to bring about a breach of the public peace is treated as a crime against the public generally, and therefore the consent of the victim is no defense.”<sup>35</sup> In *Commonwealth v. Farrell*, a case about sexual assault, the Massachusetts Supreme Judicial Court concluded that “to commit a battery upon a person with such violence that bodily harm is likely to result is unlawful and consent thereto is immaterial.”<sup>36</sup> So too in *People v. Jovanovic*, where the issue was one of consent to “sodomasochism,” the Supreme Court of New York’s Appellate Division held that “as a matter of public policy, a person cannot avoid criminal responsibility for an assault that causes injury or carries a risk of serious harm, even if the victim asked for or consented to the act.”<sup>37</sup> While the facts of these various cases elicit important questions about whether consent was freely given—and in fact, the courts concluded in all of these cases it was not—the dispositive piece here is the unequivocal rejection, as a matter of public policy, of even the *possibility* of consent.

Even if courts were inclined to consider consent as an affirmative defense, the types of harm which are statutorily feasible are limited to those harms that are not “serious”<sup>38</sup>—problematic from a BDSM context because the activities to which

31. See *supra* text accompanying note 25.

32. *Consent*, JUSTIA, <https://www.justia.com/criminal/defenses/consent/> (last visited Nov. 18, 2018) (“Participants in a sports game are deemed to have consented to the physical contact and possible bodily harm that is an essential element of their sport. In order to establish consent in these circumstances, three requirements must be present. First, an individual cannot consent to circumstances that involve the possibility of serious bodily injury. Second, the harm must be a reasonably foreseeable aspect of the conduct and a risk that would reasonably be accepted. Third, the individual must receive some sort of benefit from the conduct such that the consent was justified.”); see also *State v. Shelley*, 929 P.2d 489, 491 (Wash. Ct. App. 1997) (“[C]onsent is a defense to an assault occurring during an athletic contest.”); Karen Goldberg Goff & John N. Mitchell, *Should Courts Referee Violence in Sports?*, INSIGHT ON THE NEWS (Mar. 29, 1999) (noting that “[t]hree times since 1972, Congress has failed to enact a law on sports violence, suggesting that legislators believe such activity falls outside the realm of public policy”).

33. *Supra* notes 24, 25.

34. *State v. Mackrill*, 191 P.3d 451, 460 (Mont. 2008).

35. *Taylor v. State*, 133 A.2d 414, 415 (Md. 1957). In this case, sexual contact with a minor is clearly a violation of the law; the holding, however, also addresses the issue of permissible consent to harm as an independent issue—and it is here that the Court raises the public policy argument against consent. *Id.* at 417.

36. *Commonwealth v. Farrell*, 78 N.E.2d 697, 705 (Mass. 1948).

37. *People v. Jovanovic*, 700 N.Y.S.2d 156, 168 n.5 (1999).

38. MODEL PENAL CODE § 2.11(2)(a) (AM. LAW INST. 1985).



one can consent in BDSM are *not* limited to nonserious harm.<sup>39</sup> The consentable activity on the books, in other words, is insufficient to cover the scope of consentable activities in BDSM contexts.

Additionally, there is misalignment in consent language vis-à-vis BDSM-related activities because statutory language around consent focuses almost entirely on sexual contact or expression.<sup>40</sup> BDSM activities, however, are not thus restricted; there are many people who participate in BDSM for nonsexual reasons.<sup>41</sup> Here too the statutory landscape is suboptimal for affirmative defenses of consent in the BDSM context.

Writ large, the pattern is clear: courts have repeatedly held that although consent may be an affirmative defense statutorily, it is not one the legal system is inclined to accept generally across various scenarios.<sup>42</sup> Clearly then, multiple structural problems emerge in the lay of the jurisprudential land in the context of BDSM: first, courts look with suspicion on the notion of consent to bodily harm generally; second, by statute, consent to harm is limited to harm which is not serious; and third, existing and emerging consent statutes are limited to sexual contact, whereas BDSM activities are not.

It is also worth noting that lay understandings of BDSM may be more informed by (inaccurate, arguably injurious) pop-culture and sociopolitical representations<sup>43</sup> than a good understanding of the informal but clear consent rules that undergird informed participation in BDSM.<sup>44</sup> Although BDSM Dungeons and Clubs make it a priority to educate their members about expected behaviors,<sup>45</sup>

39. See *EdgePlay*, *supra* note 18.

40. See discussion *infra* Section II.A.1.

41. See sources cited *supra* note 15.

42. See Daniel Haley, Note, *Bound by Law: A Roadmap for the Practical Legalization of BDSM*, 21 CARDOZO J.L. & GENDER 631, 632 (2015) (arguing that current conceptions of consent fail to protect the legal interests of those in BDSM communities); see also, e.g., *State v. Brown*, 381 A.2d 1231, 1232 (N.J. Super. Ct. App. Div. 1977) (holding that “a victim cannot consent to the infliction of an atrocious assault and battery on his person and thus effectively bar the prosecution of his attacker.”); *California v. Gray*, 36 Cal. Rptr. 263, 265 (1964) (holding that “it is no defense to assert that the victim consented to an assault upon her by force likely to produce great bodily harm.”); *Lyons v. Florida*, 437 So. 2d 711, 713 (Fla. Dist. Ct. App. 1983) (“[C]onsent is not a valid defense to criminal aggravated battery.”); *People v. Samuels*, 58 Cal. Rptr. 439, 447 (1967) (“[C]onsent of the victim was not generally a defense to assault or battery, except in a situation involving ordinary physical contact or blows incident to sports such as football, boxing or wrestling.”).

43. Emma Green, *Consent Isn't Enough: The Troubling Sex of Fifty Shades*, ATLANTIC (Feb. 10, 2015), <https://www.theatlantic.com/entertainment/archive/2015/02/consent-isnt-enough-in-fifty-shades-of-grey/385267/>; Valeriya Safronova & Katie Van Syckle, *The Boundary Between Abuse and B.D.S.M.*, N.Y. TIMES (May 23, 2018), <https://www.nytimes.com/2018/05/23/style/bdsm-kink-consent.html>.

44. See, e.g., Meg-John Baker, *BDSM 101: Consent, Consent, Consent*, REWRITING THE RULES (Feb. 13, 2015), <https://www.rewriting-the-rules.com/sex/bdsm-101-consent-consent-consent/>; *15 Unwritten Rules for Masters When Dealing with Slave*, BDSM CONTRACTS, <https://bdsmcontracts.org/15-unwritten-rules-for-masters-when-dealing-with-slave/> (last visited Dec. 30, 2018); Safronova & Van Syckle, *supra* note 43.

45. *Infra* Section II.A.2.

insufficient understandings of consent—both lay and legal—may make it difficult for our judicial system to find the right entrance point for dealing with the adjudication of BDSM-rooted consent violations.

### ***B. A Further Complicating Factor: “No Drop” Policies***

Compounding the challenges of adjudicating consent issues are no-drop policies, which were instituted in the 1990s to address the very real societal and individual harms caused by domestic violence.<sup>46</sup> No-drop policies produced changes at both arrest and prosecution levels,<sup>47</sup> and, while the policy goal was to enable more support for domestic-violence victims,<sup>48</sup> data as to the effectiveness of such policies have produced mixed results.<sup>49</sup> In any event, among the consequences of no-drop policies is that the decision to pursue a case is removed from the victim’s discretion.<sup>50</sup> Relative to BDSM, then, not only is consent to assault (sexual or otherwise) problematic, the charges against the person *committing* the assault—assault to which one consented—may not be droppable at the consenter’s direction.<sup>51</sup>

### ***C. Extra-Legal by Necessity***

The current legal environment makes some of the mainstays of BDSM—bondage, discipline, punishment—very poor bedfellows to current laws.<sup>52</sup> People in consent-based alternative lifestyles (kink, BDSM, M/s) participate in activities that

46. Barbara E. Smith & Robert C. Davis, *An Evaluation of Efforts to Implement No-Drop Policies: Two Central Values in Conflict*, NAT’L INST. OF JUSTICE at III-4-3 (2004), <https://www.ncjrs.gov/pdffiles1/nij/199719.pdf>; Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee To Action or Dangerous Solution?*, 63 *FORDHAM L. REV.* 853, 856 (1994).

47. Corsilles, *supra* note 46, at 856 (no-drop policies were designed to deny victims of domestic violence “the option of freely withdrawing a complaint once formal charges have been filed” and concomitantly constrained the prosecutorial options for dropping cases “solely because the victim is unwilling to cooperate”).

48. *Id.* at 865, 873–75.

49. For a good overview of the pros and cons of no-drop policies, see Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 *B.C. THIRD WORLD L.J.* 159, 181 (2003); see also Robert C. Davis et al., *Effects of No-Drop Prosecution of Domestic Violence Upon Conviction Rates*, 3 *JUST. RES. & POL’Y* 1, 7 (2002) (finding that no-drop policies were followed by increased convictions in two jurisdictions); Donna Coker, *Mandatory Policies Can Be a Threat to Women*, *N.Y. TIMES* (Sept. 10, 2014, 6:54 PM), <https://www.nytimes.com/roomfordebate/2014/09/10/going-after-abusers-like-nfl-player-ray-rice/mandatory-policies-can-be-a-threat-to-women>.

50. See Corsilles, *supra* note 46, at 875–76.

51. Kalyani Robbins, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 *STAN. L. REV.* 205, 232 (1999) (further arguing that “battery itself cannot be legally consented to, which is essentially what is happening when we ‘respect the wishes’ of battered women not to prosecute.”).

52. For an analysis of why “the law is best left undisturbed as to consent” when serious injury results from BDSM, see Cheryl Hanna, *Sex Is Not a Sport: Consent and Violence in Criminal Law*, 42 *B.C.L. REV.* 239, 246 (2001).

either do not align with conventional parameters of law and order,<sup>53</sup> or that present exposures that people may not be willing to risk.<sup>54</sup> Because “conventional morality” produces tensions with the adjudication of BDSM within the law,<sup>55</sup> people in BDSM communities may feel compelled to handle consent disputes extra-legally as a matter of internal policy<sup>56</sup> or to otherwise document incidents that involve law enforcement.<sup>57</sup> This understandable reticence to accord with traditional law and order, however, does not equate with de facto lawlessness in BDSM communities and organizations. Rather, many have built and adopted self-policing mechanisms (formal and informal) intended to replicate the goals and protections of conventional law enforcement—safeguarding life, property, public safety and order, and community well-being—albeit with an added layer of appreciation (or even accommodation) for the unique, unconventional needs of consent-driven cultures.<sup>58</sup>

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53. Under the definitions of assault in most jurisdictions, the activities undertaken in BDSM break the law. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1203 (Westlaw current through legislation effective Mar. 27, 2020 of Second Reg. Sess. of the Fifty-Fourth Legis.) (Arizona defines Simple Assault in part under (A)(1)–(3) as a person: “1. Intentionally, knowingly or recklessly causing any physical injury to another person; or 2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or 3. Knowingly touching another person with the intent to injure, insult or provoke such person.”). There is no give-back for consent. Arizona’s aggravated assault statute, meanwhile, increases the severity of the criminality for a person who “commits the assault while the victim is bound or otherwise physically restrained or while the victim’s capacity to resist is substantially impaired.” ARIZ. REV. STAT. ANN. § 13-1204. Such definitions are clearly problematic when rope and restraint are further hallmarks of much BDSM activity (*see* sources cited *supra* note 12).

54. *See CAPEX Policy*, *supra* note 27 (“Discretion is absolutely necessary. Some members’ family, friends and/or jobs may be threatened if their lifestyle were known.”); *The Mission of Club KINK*, <https://www.clubkinkjax.com/club-kink-mission-and-rules/> (last visited Nov. 11, 2019) (“Do not mention any[one] at the party to those not at the party without that person’s express permission to name him. These parties are PRIVATE; what happens here, stays here.”) [hereinafter CKJ]; *NOBLE Rules*, *supra* note 27 (“[M]isconceptions about BDSM remain widespread and may be personally and/or professionally damaging.”).

55. Anne Onoma, *Legal Censure of Unconventional Expressions of Love and Sexuality: Finding A Place in the Law for BDSM*, 28 HASTINGS WOMEN’S L.J. 25, 26 (2017).

56. *Membership Application*, LRA, [http://lra-chicago.org/test\\_wordpress/wp-content/uploads/2018/12/NEW-Membership-Application.pdf](http://lra-chicago.org/test_wordpress/wp-content/uploads/2018/12/NEW-Membership-Application.pdf) (last visited Sept. 16, 2018) (requiring that applicants affirm that they are “not acting in the capacity of a law enforcement agent, or in association with any law enforcement, media, or religious organization”).

57. Susan Wright, *2018 Incident Reporting & Response Report*, NCSF (Jan. 9, 2019), <https://ncsfreedom.org/2019/01/09/incident-reporting-response-2018-report/>. The National Coalition for Sexual Freedom offers an Incident Reporting and Response Process. Their 2018 Report notes that NCSF helped in areas including “assistance in educating law enforcement, investigators, prosecutors and victim advocates” and directing people to “resources and referrals to assist in defending themselves against accusations of assault, sexual assault, domestic violence, stalking, harassment, Restraining Order, parole violations or the appeals process.” *Id.*

58. *Infra* Sections II.A.I, II.B.1, II.C.1; *see also* Elizabeth Mincer, *Fifty Shades and Fifty States: Is BDSM A Fundamental Right? A Test for Sexual Privacy*, 26 WM. & MARY BILL RTS. J. 865, 866 (2018) (noting that “communities have created their own culture of self-policing and safety protocols, designed to help carefully navigate the legal reality that the justice system has not developed in a way that recognizes and incorporates BDSM.”).

These self-policing mechanisms are not unique to kinksters. We know that various cultures and professions have produced extra-legal, community-policing mechanisms for ensuring compliance with norms when legal protections are absent;<sup>59</sup> when legal protections exist but are subpar;<sup>60</sup> when legal protections are built on norms other than those that operate in a community;<sup>61</sup> and when these norms are based on different understandings of what is essential for ordered liberty<sup>62</sup>—all of which appear evident in the current legal landscape when it comes to BDSM.

## II. COMPARING LEGAL VS. BDSM DOMAINS IN CONSENT DEFINITIONS, ADJUDICATION OF ALLEGED CONSENT VIOLATIONS, AND SCOPE OF REMEDIES/RESOLUTIONS

In his seminal work on extra-legal norms, Robert Ellickson posited that “fieldwork is integral to researching the norms of social control that make up the world of non-formal law.”<sup>63</sup> His research not only supported his central hypothesis—“that norms maximize welfare in close-knit groups”—but also challenged prior assumptions on the behaviors and mechanisms operating in groups that eschewed conventional legal systems or rules.<sup>64</sup> This framework has been applied to a variety of proto-legal situations, including roller derbies,<sup>65</sup> the diamond industry,<sup>66</sup> and multiple occupations dealing in intellectual property rights.<sup>67</sup> In this Note, I consider the proto-legal environments that are codified as rules and contracts

59. Jacob Loshin, *Secrets Revealed: How Magicians Protected Intellectual Property Without Law* 1, 3 (July 25, 2007) (Working Draft), <http://www1.udel.edu/richard/cisc356/SSRN-id1005564.pdf> (last visited Mar. 3, 2019) (examining the “norm-based intellectual property system that governs the magic community in the absence of law.”).

60. See, e.g., David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093, 1096–97 (2012) (positing that “extralegal norms arise because IP law is substantively or practically unavailable to regulate the intangible goods” created by comedians wanting to protect their jokes); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 116 (1992) (noting that “shortcomings in the American legal system . . . make litigation unattractive to diamond dealers . . .”).

61. See *infra* Section II.A.2.

62. See Fagundes, *supra* note 60, at 1098 (noting that extralegal regulatory rules “may arise even if—and in fact regardless of whether—law provides a plausible governance option”); *id.* at 1093 (positing that “so long as the relevant group is close-knit and the norms are welfare enhancing . . . norms (can) emerge independently of law’s substantive (un)availability.”).

63. Robert P. Merges, *Among the Tribes of Shasta County*, 18 LAW & SOC. INQUIRY 299, 300 (1993).

64. *Id.* at 306.

65. See Fagundes, *supra* note 60, at 1097–98.

66. See Bernstein, *supra* note 60, at 115.

67. See Loshin, *supra* note 59, at 1; Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1794 (2008) (proposing that with respect to comedians and IP law, “social norms can supplement, or in some cases stand in for, legal regulation and that lawmakers should consider them—their existence, their potential emergence or dissolution, their reinforcement, or their supplementing—prior to making law.”).

in Dungeons and other “play spaces,” and compare those to state statutes. This comparison is across three dimensions: what standards of behavior are indicated under the rubric of consent; how deviations from the consent standard are comparatively adjudicated; and how deviations from the consent standard are resolved.

Before undertaking this comparison, it is important to review what can and cannot be understood from this analysis. The methods here involve content analysis of language from a limited number of private BDSM Clubs and organizations, selected not for their prominence or reputation but rather because their rules, bylaws, or other documents were publicly available on the Internet. The Clubs tend to share common characteristics;<sup>68</sup> as such, the selection process might best be described as “purposive sampling.”<sup>69</sup> The value of the language evaluated here, then, is not in its generalizability or representativeness. Rather, the value is in the richness of information that can be gleaned around the characterization of consent, and the adjudications and remedies available in BDSM communities when consent is violated.

This Note also examined statutory language across eight states and the District of Columbia regarding consent, sexual assault, and other assaults and batteries.<sup>70</sup> These locations were selected because Clubs with publicly available rules are housed within them, providing some intellectual basis for comparisons between Club rules and legal statutes.

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68. Among the common elements: play parties and other events are held in a business location owned or rented by the organization (as opposed to in a private home); they have membership requirements that include completion of an application and adherence to club rules; and Dungeon Monitors are appointed or volunteer to keep an eye on spaces and to oversee scenes.

69. Ted Palys, *Purposive Sampling*, SAGE ENCYCLOPEDIA OF QUALITATIVE RES. METHODS 2 (2012), <https://methods.sagepub.com/base/download/ReferenceEntry/sage-encyc-qualitative-research-methods/n349.xml> (positing that Stakeholder sampling as a strand of purposive sampling is “[p]articularly useful in the context of evaluation research and policy analysis, [as] this strategy involves identifying who the major stakeholders are who are involved in designing, giving, receiving, or administering the program or service being evaluated, and who might otherwise be affected by it.”).

70. The states whose statutes are examined in this Note are: (1) Arizona; (2) California; (3) Florida; (4) Illinois; (5) Louisiana; (6) New York; (7) South Carolina; (8) Virginia; and (9) Washington, D.C. *See infra* Appendix A.

### A. Consent Defined: Statutory Domains vs. BDSM Domains

Statutory language around consent covers a variety of contexts;<sup>71</sup> these include language of consent to assault and battery<sup>72</sup> and, in about half of the states, consent in light of sexual assault.<sup>73</sup> In the analysis that follows, the scope of consent definitions and applications is limited to that which may be relevant to the activities undertaken in BDSM.

#### 1. Consent in Statutory Domains

Let's not bury the lede: the language in penal codes around consent is short, pro forma, and generally defined as agreement to, or cooperation with, an action or set of actions.<sup>74</sup> In all circumstances, consent cannot be given by someone under age, impaired by drugs or alcohol, cognitively impaired or developmentally disabled, or coerced.<sup>75</sup> Consent is, importantly, a defense available only under a limited set of circumstances applicable to BDSM, namely consent to sexual contact.<sup>76</sup>

Of the statutes reviewed for this Note, South Carolina's consent language may be the most limited: the only consent language around sexual or other assault or battery is in reference to nonconsensual administration of drugs to incapacitate.<sup>77</sup> Illinois, meanwhile, offers this: "'Consent' means a freely given agreement to the act of sexual penetration or sexual conduct in question."<sup>78</sup> As is true of most state

71. There are thousands of federal and state regulations about consent in various contexts, ranging from federal regulations of human subjects research (28 C.F.R. § 46.117 (Westlaw current through Apr. 9, 2020)) to Arizona Rules of Probate Procedure (A.R.S. Rules Probate Proc., Rule 14 (Code of Jud. Admin. current with amend. received through Mar. 1, 2020)) and from the United States Code on the "written consent for reconcentration of cotton" (7 U.S.C.A. § 1383a (West, Westlaw current through P.L. 116-135)) to New York Federal Court Rules' Consent to Involuntary Petition (U.S. Bankr. Ct. Rules S.D.N.Y., LBR 1011-1 (Westlaw current with amend. received through Jan. 17, 2020)). From the breadth and depth of consent laws at both state and federal levels, we can certainly conclude that consent is recognized as an essential part of legitimacy in jurisprudence.

72. See Shipley, *supra* note 25.

73. Jocelyn Noveck, *In Sex Assault Laws, Definition of Consent Varies Widely*, AP (Dec. 16, 2017), <https://apnews.com/ec7bca54931544f7b71651406566206b/in-sex-assault-laws,-definition-of-consent-varies-widely>.

74. See, e.g., *infra* notes 77–78, 80–83, 85, 86, 89–90, 92.

75. See, e.g., *infra* notes 77, 79–81, 84–85, 90; see also the MODEL PENAL CODE § 2.11(3) (AM. LAW INST. 1985), under which consent is void if sullied by a consenter's incompetence (by reason of age, mental capacity, or intoxication, among other nullifiers) or coerced through any "force, duress or deception."

76. See, e.g., *infra* notes 78, 81, 87, 91.

77. S.C. CODE ANN. § 16-3-652(1)(c) (Westlaw current through 2020 Act. No. 115) (where it is a crime when "[t]he actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance").

78. See 720 ILL. COMP. STAT. ANN. 5/11-1.70(a) (West, Westlaw current through P.A. 101-629) ("When the charges are Criminal Sexual Assault, Aggravated Criminal Sexual Assault, Predatory Criminal Sexual Assault, Criminal Sexual Abuse, or Aggravated Criminal Sexual Abuse" under Sections 11-1.20 through 11-1.60).

statutory language reviewed for this Note, Illinois does not recognize consent that is the result of force or threat of force,<sup>79</sup> and limits consent to sexual contact.<sup>80</sup>

In Florida, too, consent can only be to sexual contact; to be legitimate, it must be given in ways that are “intelligent, knowing, and voluntary,” and cannot include “coerced submission.”<sup>81</sup> Florida also has a no-drop policy that would make it difficult for consenting adults perceived as victims to request that a case not be pursued on the basis of this consent, should arresting officers elect to proceed with charges.<sup>82</sup>

New York takes a slightly different approach to consent: rather than presenting it as an affirmative defense, the statutory language focuses on the consequences of an *absence* of consent.<sup>83</sup> This absence is criminal when the victim is underage; “mentally disabled; or mentally incapacitated; or physically helpless”; or in some form of commitment for care.<sup>84</sup> For more egregious charges like rape in the third degree, consent becomes qualitatively (but undefinedly) different, with guilt assumed when “lack of consent is by reason of some factor other than incapacity to consent.”<sup>85</sup>

Among the most robust definitions of consent is California’s, where consent “shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.”<sup>86</sup> Given its statutory location, however—in the chapter Rape, Abduction, Carnal Abuse of Children, and

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79. *Id.*

80. See 720 ILL. COMP. STAT. 5/11-1.70(c) (“[A] person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct.”). Troublingly, Illinois also feels it worth noting that “the manner of dress of the victim at the time of the offense shall not constitute consent”—a statement so obvious that it bespeaks of a painfully rudimentary understanding of consent.

81. FLA. STAT. ANN. § 794.011(1)(a) (West, Westlaw current with chapters from 2020 Second Reg. Sess. of the 26th Legis.).

82. FLA. STAT. ANN. § 784.046(13) (“The decision to arrest and charge shall not require consent of the victim or consideration of the relationship of the parties.”).

83. N.Y. PENAL LAW § 130.05 (McKinney, Westlaw current through L.2019, ch. 758 & L.2020, ch. 1–25, 59) (“Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without consent of the victim.” The statute goes on to differentiate between “sexual abuse or forcible touching,” which requires only that a victim “expressly or impliedly acquiesce” to demonstrate consent, and rape or criminal actions in the third degree, which posits that there is no consent if “the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor’s situation would have understood such person’s words and acts as an expression of lack of consent to such act under all the circumstances.”).

84. *Id.* § 130.05(3).

85. N.Y. PENAL LAW § 130.25(3).

86. CAL. PENAL CODE § 261.6 (West, Westlaw current with urgency legislation through Ch. 3 of 2020 Reg. Sess.).

Seduction—it is clear the focus of this consent is to sexual contact,<sup>87</sup> while consent to battery has not been affirmed as a defense.<sup>88</sup>

Washington D.C.’s consent language is perhaps among the most expansive: “‘Consent’ means words or overt actions indicating a freely given agreement to the sexual act *or contact in question*. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.”<sup>89</sup> Still, in situating this language within the chapter on sexual abuse, D.C. likewise gives a sense of its limitations within BDSM contexts.<sup>90</sup>

At the time of this writing, there do not appear to be any consent defenses to assault or battery in any state statute directly germane to BDSM activity. This is problematic since by definition much of what goes on during scenes can readily produce the “physical contact of an insulting or provoking nature”<sup>91</sup> prohibited by statute, and among people in established relationships to boot.<sup>92</sup>

## 2. Consent in BDSM Domains

Whereas definitions of consent in legal domains are narrow and vague, definitions of consent in BDSM domains are far more rich and descriptive. Here, for example, is language from APEX in Arizona:

“No” means “No”. If someone draws a boundary with us, it is our responsibility to respect it without question or coercion. Nothing will happen to us or with us . . . without our consent. It is our responsibility to make sure that is true for everyone with which we interact. While “no” only means “no”, it is unequivocal and permanent. The absence of “no” does not mean “yes” . . . EVER.<sup>93</sup>

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87. California has also recently passed legislation focused on sexual assault in higher education, with the goal of elevating the importance and understanding of consent in college campuses. The emphasis in this legislation is on “affirmative consent” as a standard to increase student safety against sexual assault. *See* CAL. EDUC. CODE § 67386(a)(1) (West, Westlaw current with urgency legislation through Ch. 3 of 2020 Reg. Sess.).

88. *See* California v. Gray, 36 Cal. Rptr. 263 (1964); *see also* California v. Lucky, 45 Cal. 3d 259, 291 (1988) (“Voluntary mutual combat outside the rules of sport is a breach of the peace, mutual consent is no justification.”).

89. D.C. CODE ANN. § 22–3001(4) (West, Westlaw current through Mar. 19, 2020) (emphasis added).

90. *Id.*

91. A la Illinois’s definition of battery. 720 ILL. COMP. STAT. ANN. 5/12-3(a)(1)–(2) (West, Westlaw current through P.A. 101-629).

92. In both Illinois and Virginia, for example, statutory language calls out domestic violence as a distinct penal category; *see* 720 ILL. COMP. STAT. ANN. 5/12-3.2(a)(1)–(2). (distinguishing battery which is targeted toward a “family or household member”); VA. CODE ANN. § 18.2-57.(A) (West, Westlaw current through End of 2019 Reg. Sess.) (noting that violence against a family or household member is a misdemeanor, with appropriate remedies to include counseling and probation for the accused).

93. *Did You Know*, APEX, (Jan. 30, 2018), <https://arizonapowerexchange.org/apexculture/did-you-know/> [hereinafter *APEX Policy*].



CAPEX in South Carolina uses the following consent language, which includes edification with respect to social cues and norms:

No means no. If someone says to you, “Please leave me alone,” that is considered a “Social safeword.” Do not initiate further conversation or hover near them for the rest of the event . . . Ask before touching. Do not touch another person’s body, clothing or equipment without their specific permission.<sup>94</sup>

Aphrodite in New York offers examples to make concrete their consent definitions:

Consent is always required. This includes, but is not limited to, participating in scenes, touching other people, touching other people’s gear, photography (including people in the background), etc. Do not harass others. Harassment may include, but is not limited to, non-consensual touching, puppy-dogging (unwanted following), purposely disrespecting someone’s protocol, purposely making offensive comments, body shaming, spreading false rumors, etc.<sup>95</sup>

Club Kink Jacksonville in Florida captures the scope of activities that require permission, including hugging, in their consent language:

A primary rule is: “Don’t touch without advance permission.” Don’t assume that because someone else walks up to someone and hugs them that you can do the same. Those people probably have some kind of relationship. You probably don’t. That don’t touch rule also applies to someone else’s toys. Many people are pleased to show off their toys, and may well let you try them. Simply grabbing one without asking is not the way to do it.<sup>96</sup>

What these definitions tend to have in common is that they are *directive* and *instructive*: they direct people in what to do and what not to do, and they instruct people in how to go about navigating consent. As such, these definitions are much more accessible, much less ambiguous, and ultimately much more useful if the goal is to ensure a common meaning and understanding around consent.

There appears to be only one point of clear alignment in consent definitions across statutory and BDSM domains: consent cannot be given if one is incapacitated. In statutory language, incapacitation may be a function of age, ability or disability, being in state custody or under supervised health care, and more.<sup>97</sup> Most of the Clubs in this analysis likewise have specific prohibitions against alcohol or drug use on the premises, and reserve the right to dismiss from the premises—temporarily or permanently—people who are compromised to the degree that consent cannot be

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94. CAPEX Policy, *supra* note 27.

95. Play Party Rules, THE APHRODITE GROUP, [http://theaphroditegroup.net/index.php/rules/?ao\\_confirm](http://theaphroditegroup.net/index.php/rules/?ao_confirm) (last visited Sept. 23, 2018) [hereinafter *Aphrodite Rules*].

96. CKJ, *supra* note 54.

97. Legal Role of Consent, RAINN (RAPE, ABUSE & INCEST NATIONAL NETWORK), <https://www.rainn.org/articles/legal-role-consent> (last visited Apr. 14, 2019).

freely and knowingly given.<sup>98</sup> (And one Club even goes farther, recognizing that “mental clarity can also be impaired by anger, exhaustion, and/or grief” and cautioning members to be attuned to these emotions as part of their self-assessment of readiness to play.)<sup>99</sup>

Some Clubs have also forwarded a narrative of personal responsibility, under the theory that adults who participate in BDSM within Clubs are responsible for themselves. APEX in Arizona, for example, notes that “each member is responsible for their own well-being. . . . If any subject or demonstration makes someone uncomfortable, rather than stay and make others wrong, [members should] take the opportunity to leave.”<sup>100</sup> Aphrodite in New York likewise encourages members to “try to resolve all issues in an adult manner,” noting that “unless someone is doing something illegal, extreme/unsafe, or repetitively causing problems, you are encouraged to work out any issues amongst yourselves, leave each other alone, or exit the premises.”<sup>101</sup>

There are two primary explanations for the discrepancy seen in consent language between statutory and BDSM domains. The first is that the more expansive the definition of consent, the more infractions to consent are to be expected, making policing of violations impractical. Second, because the courts have already demonstrated reluctance to recognize the validity of certain forms of consent, the moral or safety concerns that make these activities illegal in the first instance may preclude the legitimization of consenting to them.<sup>102</sup>

### ***B. Adjudication of Alleged Consent Violations in Statutory vs. BDSM Domains***

Adjudication, according to Black’s Legal Dictionary, involves the “giving or pronouncing a judgment or decree in a cause; also the judgment given.” Its forms

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98. *Infra* Section II.C.1. While there appear to be no specific practices or definitions of “compromised” in the public information evaluated for this Note, appearance is a certainly one consideration, as illustrated by this rule from The Aphrodite Group in NY: “Anybody who appears to be intoxicated or under the influence of drugs will be escorted out, and no refunds will be granted.” *Aphrodite Rules*, *supra* note 95.

99. *CAPEX Policy*, *supra* note 27.

100. *APEX Policy*, *supra* note 93. That said, the club aims to divorce mere discomfort from consent violations, with members experiencing the latter encouraged to bring their concerns to club officers or a Dungeon Monitor’s attention.

101. *Aphrodite Rules*, *supra* note 95. It is of course worth noting that the “illegal” activity reference is ill-considered given that so much of the activity in BDSM spaces is illegal in the first instance.

102. *See supra* note 25 and cases cited in notes 34–37, 42; *see also* State v. Brown, 143 N.J. Super. 571, 579–80 (Ct. Law Div. 1976) (“To allow an otherwise criminal act to go unpunished because of the victim’s consent would not only threaten the security of our society but also might tend to detract from the force of the moral principles underlying the criminal law . . . . [which] would seriously threaten the dignity, peace, health and security of our society.”); State v. Collier, 372 N.W.2d 303, 307 (Iowa Ct. App. 1985) (“Whatever rights the defendant may enjoy regarding private sexual activity, when such activity results in the whipping or beating of another resulting in bodily injury, such rights are outweighed by the State’s interest in protecting its citizens’ health, safety, and moral welfare.”); State v. Hatfield, 218 Neb. 470, 474 (1984) (“[A]ll attempts to do physical violence which amount to a statutory assault are unlawful and a breach of the peace, and a person cannot consent to an unlawful assault.”).

are varied, and its limitations debated.<sup>103</sup> It has been characterized as both “a means of settling disputes or controversies” and “a form of social ordering, as a way in which the relations of men to one another are governed and regulated.”<sup>104</sup> The goals of adjudication hold true across both statutory and BDSM domains, insofar as adjudication is principally focused on evaluating the facts in light of the rules, in particular when violations thereof are alleged.

In the following Section, I examine different ways in which notice and right to be heard—the cornerstones of due process and, more importantly for the purposes of this analysis, the hallmarks of what we collectively understand to be justice—are differentially implemented.

### *1. Adjudication of Alleged Consent Violations in Statutory Domains*

“The principle objective of criminal procedure,” writes Abraham Goldstein, “is to assure a just disposition of the dispute before the court.”<sup>105</sup> The processes developed over time in juridical environs are in service to these just ends, with Federal Rules of Evidence, in addition to ever-evolving refinements of criminal and civil procedures, intended to ensure a structural balance between individual rights, and public order and safety.<sup>106</sup> Relative to adjudication in statutory domains, we need not reexamine too deeply that which is already well established: that the Federal Rules, reproduced wholesale or articulated through statutory language by each state, “incorporate and expound upon all guarantees included within the U.S. Constitution’s Bill of Rights, such as the guarantee to due process and equal protection, the right to legal counsel, the right to confront witnesses, the right to a jury trial, and the right to not testify against oneself.”<sup>107</sup> The Federal Rules of Evidence are also structured to increase uniformity and predictability in criminal hearings; these, in turn, are informed at least in part by Blackstone’s ratio, which is rooted in the idea that “all presumptive evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape than that one innocent suffer.”<sup>108</sup>

There are clear advantages to such formulaic and consistent rules of criminal procedure: they are intended to recognize the importance of both individual rights and public security. That said, criminal justice rules and practices have been criticized for producing multiple human rights concerns, resulting in criminalization disproportionately distributed across race and class, along with mass incarceration

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103. Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 355 (1978) (“Questions of the permissible forms and the proper limits of adjudication have probably been under discussion ever since something equivalent to a judicial power first emerged in primitive society.”).

104. *Id.* at 357.

105. Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1149 (1959).

106. *See generally, e.g.*, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1 (1984–85); Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1 (2013).

107. *Criminal Procedure*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/criminal\\_procedure](https://www.law.cornell.edu/wex/criminal_procedure) (last visited Feb. 23, 2019).

108. 4 WILLIAM BLACKSTONE, *COMMENTARIES* 352.

in unsafe and inhumane conditions.<sup>109</sup> The objectives of transparency and consistency have been imperfectly met.<sup>110</sup> The adjudication of sexual assault allegations under these rules has also proven incredibly complicated, and retraumatization of victims as a consequence of these legal procedures has recently been documented.<sup>111</sup>

## 2. *Adjudication of Alleged Consent Violations in BDSM Domains*

If comparing definitions of *consent* between legal and BDSM domains is akin to a line drawing exercise—meaning, there are clear lines between sets of definitions—then comparing *adjudication processes* is more like trying to deconstruct a collage. This is not surprising, given that notice and right to be heard may mean different things when the spectrum of consent violations is both broader and deeper, making the implementation of traditional due process routines akin to the proverbial hatchet against the better-suited scalpel. Additionally, the extra-legal framework under which BDSM Clubs operate is layered on a legal framework under which we all function. As we all do, members of Clubs maintain the right to contact law enforcement to help resolve a dispute; inculcated as we are here in the United States to notions of “due process”—whether we call it by that name or not—we do not like the idea of holding someone accountable for transgressive actions without providing notice and the right to be heard.<sup>112</sup> Indeed, it is clear from a review of the range of written adjudication practices of BDSM Dungeons and Clubs that “best

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109. *Criminal Justice*, HUMAN RIGHTS WATCH, <https://www.hrw.org/united-states/criminal-justice> (last visited Mar. 3, 2019) (“The criminal justice system—from policing and prosecution through to punishment—is plagued with injustices like racial disparities, excessively harsh sentencing, and drug and immigration policies that improperly emphasize criminalization . . . . Specific policies often have a particularly harsh impact on youth, racial minorities or low-income populations accused of or victimized by crime.”).

110. See generally Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 948 (2006) (“Criminal procedure’s shortcomings obstruct the substantive criminal law’s goals of deterring, educating, vindicating victims, and expressing condemnation.”).

111. See, e.g., Noah Hilgert, Note, *The Burden of Consent: Due Process and the Emerging Adoption of the Affirmative Consent Standard in Sexual Assault Laws*, 58 ARIZ. L. REV. 867, 882–83 (2016) (discussing concerns that affirmative consent standards and non-legal adjudicators on college campuses fail to safeguard constitutionally-protected-due-process rights of those accused); Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81 (2020).

112. Emily Steward, *Trump Wants “Due Process” for Abuse Allegations. I Asked 8 Legal Experts What That Means*, VOX (Feb. 12, 2018, 3:08 PM), <https://www.vox.com/policy-and-politics/2018/2/11/16999466/what-is-due-process-trump>; Emma Whitford, *Students Want Due Process—With Limited Rights in Sexual Misconduct Cases*, INSIDE HIGHER ED (June 13, 2018), <https://www.insidehighered.com/news/2018/06/13/survey-finds-student-support-due-process-campus>; Michel Martin, Host, *What Kind Of Due Process Are Those Accused Of Sexual Misconduct Entitled To?*, NPR (Dec. 22, 2017), <https://www.npr.org/2017/12/22/573046500/what-kind-of-due-process-are-those-accused-of-sexual-misconduct-entitled-to> (interview with constitutional law professor Elizabeth Price Foley, who states that “. . . in the colloquial sense, we all have a gut sense of what is fair process. . . . I think we would all agree as citizens that we would want anyone who is accused of . . . impropriety to get notice of the charges against them, an opportunity to rebut those charges and some sort of at least quasi-neutral decision making process.”).

practice” is far from settled within the community. Again, I must reiterate that any findings here are not generalizable; rather, their best utility may be in that they tend to capture the complexities inherent in establishing what due process looks like in such extra-legal domains. Additionally, what is evaluated below are the publicly available, written policies. How closely practice follows policy is beyond the scope of this analysis.

What emerges from a review of adjudication practices in the Dungeons selected for this Note are three rather distinct adjudication “strands”: (1) those that were clearly written by or with deference to lawyers, replete with the language of the law (material noncompliance, appellants, fiduciary duties, etc.); (2) those that reflect what might be termed “home-grown” practices; and (3) those that thread the proverbial needle between home-grown and traditional legal practices. Each is presented in turn.

**a. Legalese (aka Lawyers, lawyers everywhere and not a drop of kink)<sup>113</sup>**

In some Clubs, the adjudication rules precisely mirror those of due process. South Carolina’s CAPEX language around adjudication is so surgically grafted to the language of the law that the activities subject to adjudication—violations of consent within BDSM and kink—are completely obscured.<sup>114</sup> Threshold, a Club in California, likewise brings in language of procedural due process, noting that before “termination” of membership due to alleged infractions, members must be given 15 days’ notice and an opportunity to be heard.<sup>115</sup> Threshold further affirms that accused persons maintain the right to be “informed of the nature and cause of the accusation; to be confronted by one’s accusers and such witnesses as there may be and to question them; to have witnesses in one’s favor; to speak in one’s own defense or choose another member to conduct their defense”<sup>116</sup>—which, collectively, are understood to be components of traditional due process.

Black Rose in D.C. likewise borrows from the law’s adjudication template; there, an initial decision is made by the board (in some cases following a recommendation from an Ombudsperson); upon an appeal, an “Arbiter” oversees a process that includes a hearing, witnesses, appellant, and direct examination, with all “testimony . . . documented in writing, and copies of each document . . . provided by the party to the Arbiter and to the opposing side.”<sup>117</sup> And, lest we have any doubts

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113. With apologies to Samuel Taylor Coleridge, of course.

114. CAPEX Bylaws do not mention kink or BDSM at all, and instead give us things like “1.2 Seniority of Laws, Articles, by-laws, Policies and Resolutions” and “4.13 Arbitration of Deadlocks within Board of Directors” and even a “Part Five: Reserved for future Use” clause. They’re about as titillating as a car manual (unless car manuals are your kink. In that case, they are significantly less exciting). *CAPEX Bylaws*, CAPEX, <http://www.capex.info/bylaws.html> (last visited Feb. 29, 2020).

115. *Corporate Bylaws*, THRESHOLD, <http://threshold.org/info/etiquette-rules-bylaws/bylaws/> (last visited Sept. 16, 2018) [hereinafter *Threshold Bylaws*].

116. *Id.*

117. *Bylaws of Black Rose, Inc.*, BLACK ROSE 13, [http://br.org/docs/BR\\_Bylaws\\_Aproved\\_2017\\_Dec.pdf](http://br.org/docs/BR_Bylaws_Aproved_2017_Dec.pdf) (last visited Sept. 16, 2018) [hereinafter *Black Rose Bylaws*].

that lawyers participated in the drafting of these bylaws, we also get this arbitration clause:

The ruling of the Arbiter shall be binding on all parties and shall be in place and stead of any court determination. By agreeing to have a matter heard by the Arbiter, all parties relinquish any right to redress in a court of law or equity barring cases of fraud.<sup>118</sup>

All of this is not to say that these artifacts and governing materials are bad; on the contrary, the procedural exactness of these adjudication practices reflect both the sophistication of some involved in the BDSM community and the organizational commitment to comport with contemporary standards and practices of governance. That said, there is clearly some dissonance here between the robust, thick language of consent and the dry, formalistic language of its adjudication.

#### b. Unique or home-grown language

Many BDSM communities acknowledge and welcome diversity and inclusivity.<sup>119</sup> One result of such broad demographics may be a unique perspective on the drawbacks involved in traditional legal domains.<sup>120</sup> In particular, one consequence of this diversity may be more sensitivity to the idea that reproducing current legal processes within BDSM contexts holds the risk of (re)producing any number of its undesirable consequences.<sup>121</sup> Thus, when BDSM communities get to decide for themselves how to adjudicate, some take a home-grown approach to permit more discretion in adjudication in order to balance the rights of the victims and the rights of the accused in ways that need not comport with the constraints of legal domains.

The language of adjudication in such spaces—to the degree it exists at all<sup>122</sup>—tends to be vague with respect to process, though the spirit of notice and right to be heard find some space in home-grown policies. At NOBLE in Louisiana, for example, the offer to be heard comes via an invitation to the person against whom a claim has been made; disciplinary decisions, meanwhile, are put on hold until the

118. *Id.* at 14.

119. *APEX Policy*, *supra* note 93 (“While our diversity is one of our huge strengths, it can also lead to many issues in communication styles, boundaries, and levels of tolerance for conduct and behavior.”); *Threshold Bylaws*, *supra* note 115, at 9.01 (“This Corporation shall not discriminate against any person on the basis of race, color, ethnicity, national origin, religion, sex, gender, sexual orientation, physical disability, HIV status, relationship status, and age (if the person is at least 18 years of age)”); *Bylaws*, LAFAYETTE ALTERNATIVE LIFESTYLES Art. I (Sept. 16, 2018), <http://www.lafayettealtlifestyles.com/bylaws> (on file with author) [hereinafter *LAL Bylaws*]. Also available at FETLIFE, <https://fetlife.com/groups/6289/posts/327095> (last visited Apr. 3, 2020) (requires an account for access) (“(LAL) is a safe environment to meet and learn about BDSM in all of its variety. The members of this group are from all walks of life and all experience levels. You will not be turned away as long as you are sincere in joining in fellowship and understanding of all.”).

120. *See* parentheticals, *supra* notes 109–10.

121. *Id.*

122. The Crucible in California appears to have no publicly available adjudication language. *Crucible Rules*, CRUCIBLE, <http://www.the-crucible.com/Rules.htm> (last visited Feb. 29, 2020) [hereinafter *Crucible Rules*].

person either comes in to discuss or declines the invitation to do so.<sup>123</sup> APEX in Arizona, meanwhile, states that upon receipt of a report of inappropriate conduct, a team of members meet “to determine issues like: [w]hat happened; [w]hat kind of incident this was; [w]ho the bad actor was; [and] [w]hether this is an ongoing situation, or if there is a threat to anyone’s physical safety.”<sup>124</sup> In the case of the last, the immediate priority is to “protect everyone involved”—even if such protection means that an “official” response may occur only after “the situation has ended and that everyone is physically safe.”<sup>125</sup> Statutes of limitations may also apply.<sup>126</sup> Typically, and not surprisingly, those charged with evaluating claims are often board members, whose aim is to gather relevant information in service to their task. There is little to suggest that evaluators within these home-grown models must, or even should, follow legally proscribed rules of evidence.

In fact, in every Club policy or bylaw examined for this Note, adjudication was handled in-house, typically by senior members, often elected to their positions.<sup>127</sup> Citadel in California, for example, notes that “[a]nyone who feels they may have been violated may speak to the event host Manager or Citadel Owner privately, and with a promise of confidentiality if so desired.”<sup>128</sup> The adjudication piece is handled “on a case-by-case basis,” with the host or owner serving as investigator with the permission of the complainant.<sup>129</sup>

Clubs that have taken the home-grown approach are arguably best positioned to adjudicate the full range of violations to consent that may occur, as such procedural flexibility allows for more granular and situation-specific investigations. That said, the vagaries associated with the language that side-steps notice and right to be heard may be problematic when the rubber hits the road, should adjudicators have too little in the way of substantive guidance for investigations.

### **c. At the intersection: hybrid legal and home-grown methods of adjudication**

The hybrid model, in place at multiple Clubs, echoes the language of procedural due process borrowed from legal domains but matches its formality with elements that are produced in-house. These models acknowledge the importance of due process but do not allow its requirements to override what justice and fair play look like when the range of consent violations is broad and the remediations varied.

At LAL in Indiana, for example, all alleged consent violations are investigated in light of two primary objectives, only the latter of which comports

123. *NOBLE Rules*, *supra* note 27, at 4.3.

124. *Incident Report*, APEX, <https://arizonapowerexchange.org/volunteers/incidentreport/> (last visited Feb. 29, 2020) [hereinafter *APEX Incident Report*].

125. *Id.*

126. Aphrodite in New York has a three-month statute of limitations, after which “management is under no obligation to hear a complaint as the likelihood of people accurately remembering what occurred is going to fade over time.” *Aphrodite Rules*, *supra* note 95.

127. *See* Section II.A.2.

128. *Consent Policy*, SF CITADEL, <https://www.sfcitadel.org/code-of-conduct> (last visited Mar. 16, 2020).

129. *Id.*

directly with legal language: “safety of members and due process.”<sup>130</sup> Here, both the accused and accuser have a right to “present testimony and evidence,” and the consequences and remedies are to be informed by the “credibility of the information and the seriousness of the offense.”<sup>131</sup> Unlike the lawyerly language we see in policies more aligned with legal domains, here we see ambiguity with respect to process: after a review of the information, all we’re advised of is that “the board will make a decision on how to handle the situation.”<sup>132</sup> In Louisiana’s NOBLE we see a similar process: a person alleging abuse must first put a Council member on notice that an incident occurred, after which “Corrective Action” involves (a) the scheduling of a time to hear from the victim and then (b) the utilization of a series of guidelines to investigate claims if they are determined to be credible.<sup>133</sup> While some of the goals and practices of law are embedded in this practice, the language clearly does not go so far as to mimic that of legal due process.

Finally, a note about scope: Clubs are hesitant to deal with things outside of the spaces in their immediate control. Only one Club from those reviewed specifically claimed the right to review such complaints—but in doing so, made clear that the type and quantity of evidence would need to be substantively different to that needed for adjudication of violations within their own sanctioned spaces or events.<sup>134</sup>

### *C. Scope of Remedies and Resolutions across Statutory and BDSM Domains*

Comparing dispute resolution outcomes across legal and BDSM domains, I should note at the outset, is a somewhat-misaligned exercise, primarily because the arenas in which they operate are so different. The criminal justice system’s attentions to remedy are focused, by design, on consistency.<sup>135</sup> Resolution of consent violations in BDSM domains, meanwhile, is largely intended to ensure the

130. *LAL Bylaws*, *supra* note 119, at Art. IX(1).

131. *Id.*

132. *Id.*

133. *Abuse Policy*, NEW ORLEANS BONDAGE & LEATHER ENTHUSIASTS, <http://www.lanoble.org/NobleCMS/AbusePolicy> (last visited Jan. 12, 2019) [hereinafter *NOBLE Abuse Policy*].

134. The club notes that it:

[C]annot be held responsible for the actions of others at non-LAL events. However, we can strive to keep a safe community. Thus, the board may choose to research the veracity of those allegations based on the credibility of the information. Should hard evidence (e.g. police records, restraining orders, emails/texts) or credible and substantiated accuser(s) and first-person account(s) be obtained, the LAL Board may choose to proceed as though an incident report had been received for events occurring [at a sanctioned event.]

*LAL Bylaws*, *supra* note 119, at Art. IX (2).

135. 18 U.S.C.A. § 3553(b) (West, Westlaw current through P.L. 116-135). Though not mandatory, federal sentencing guidelines serve as a unified point of departure for remedies in criminal cases.



safety of enclosed, member-only spaces.<sup>136</sup> Nevertheless, certain goals—dispute resolution, deterrence, punishment, restorative justice—can be reasonably understood as important in both, thus legitimizing a comparative exercise.

*1. Remedies and Resolutions in Statutory Domains*

Assault, battery, and aggravated assault are all characterized by “intentional harm inflicted on one person by another.”<sup>137</sup> Legal consequences for assault or battery vary by the type of offense and degree of harm.<sup>138</sup> Other variables that affect the disposition of a case include the existence of a weapon and if the violence “occurs in the course of a relationship that the legal system regards as worthy of special protection,” such as a domestic relationship.<sup>139</sup> In that latter case, punishments may be both substantively different and more severe than they would be but-for that special relationship.<sup>140</sup>

In California, for example, Penal Code § 243 notes that battery may be punished by “a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.”<sup>141</sup> The punishment is ratcheted up in cases where crimes are committed against a domestic partner; for example, probation may be conditioned on participation by the “batterer” in a treatment or counseling program; the making of “payments to a battered women’s shelter” in lieu of a fine; or reimbursement from the batterer to the victim “for reasonable costs of counseling and other reasonable expenses that the court finds are the direct result of the defendant’s offense.”<sup>142</sup>

In Florida, the laws with respect to harm to romantic or sexual partners were written to reflect a legislative commitment to treat domestic violence “as a

136. While some clubs permit members to bring guests, the guests are the responsibility of the member and any repercussions for infractions committed by the guest is borne by the member. This, from a South Carolina club, is typical:

You are responsible for your guests. If you choose to bring guests, ensure that they know what kind of a party they will be attending, what the rules are, and that they can emotionally handle being at such an event . . . You WILL be held responsible for the behavior of your guests.

*CAPEX Policy*, *supra* note 27; *Threshold Party Rules and Etiquette*, THRESHOLD, <http://threshold.org/info/etiquite-rules-bylaws/rules/> (last visited Sept. 16, 2019) (“Please make sure that your guests know the nature of the event. Your guests are your responsibility and cannot be present prior to your arrival or leave after you.”).

137. Paul Bergman, *Assault, Battery, and Aggravated Assault*, NOLO, <https://www.nolo.com/legal-encyclopedia/assault-battery-aggravated-assault-33775.html> (last visited Mar. 2, 2019).

138. *Id.*

139. *Id.*

140. *Assault and Battery Penalties and Sentencing*, FINDLAW, <https://criminal.findlaw.com/criminal-charges/assault-and-battery-penalties-and-sentencing.htm> (last visited Mar. 2, 2019) (“[L]aws may carry harsher penalties for assaults or batteries committed against family members or others living with the offender, or such crimes may be prosecuted under domestic abuse or violence laws.”); *see also infra* note 143.

141. CAL. PENAL CODE § 243(a) (West, Westlaw current with urgency legislation through Ch. 3 of 2020 Reg. Sess.).

142. *Id.* § 243(c)(2)(A)–(B).

criminal act rather than a private matter.”<sup>143</sup> Consequences for assault or battery on a partner thus include the same punishments as for these acts outside of a relationship context, though may also include required attendance in a “batterer’s intervention program as a condition of probation.”<sup>144</sup> In Louisiana, as in California and Florida, the statutory language distinguishes between punishments for assault and battery generally and for those charges when in concert with domestic violence.<sup>145</sup> In the latter case, remediation can include completion of a “court-monitored domestic abuse intervention program”<sup>146</sup> or the required performance of “eight eight-hour days of court-approved community service activities.”<sup>147</sup>

To the degree this sample reflects the broader statutory landscape, it is clear that incarceration, probation, fines, counseling, and community service are all within the suite of available remedies. It is similarly evident that some of these remedies—counseling and community service in particular—are only available to those whose victims are their partners.

## 2. Remedies and Resolutions in BDSM Domains

Dispute resolution and remediation within BDSM Clubs generally fall into two distinct columns: removal from the Club’s membership and participation in required education or training.<sup>148</sup> The predominant goal, in all cases, is to ensure the safety of the Club experience for others, and since the most efficient way to do that in Club-owned domains is termination of membership, this option is included as a remedial possibility in all cases.<sup>149</sup>

Restrictions on membership are also an option as a remedy in a number of these Clubs,<sup>150</sup> with Threshold in California a typical example: termination is the default, but the ability to mete out a suspension or warning is likewise within the realm of possibility.<sup>151</sup> Similarly, NOBLE in Louisiana’s remediations can include “punitive action up to and including probation, suspension or expulsion” but can

143. FLA. STAT. ANN. § 741.2901(2) (West, Westlaw current with chapters from 2020 Second Reg. Sess. of the 26th Legis.) goes on to state:

For that reason, criminal prosecution shall be the favored method of enforcing compliance with injunctions for protection against domestic violence as both length and severity of sentence for those found to have committed the crime of domestic violence can be greater, thus providing greater protection to victims and better accountability of perpetrators.

144. *Id.* § 741.281.

145. *See* LA. STAT. ANN. § 14:34.9 (Westlaw current through the 2019 Reg. Sess.).

146. *Id.* § 14:34.9 (C)(1).

147. *Id.* § 14:34.9 (C)(2).

148. *See, e.g., infra* notes 151–53.

149. *See, e.g., CAPEX Policy, supra* note 27 (“Expulsion of Contributor. The board of directors, by a unanimous vote of all the members of the board, may recommend expulsion of a contributor for cause . . . after an appropriate hearing.”); *Crucible Rules, supra* note 122.

150. *See Black Rose Bylaws, supra* note 117, § 4 (a member “may be suspended, reprimanded, or otherwise disciplined, if such member is or has at any time within the preceding two years been in material noncompliance with the Corporation’s policies and procedures” and/or “given a restricted membership wherein they are prohibited from certain Corporation functions.”).

151. *See Threshold Bylaws, supra* note 115.

also focus on “corrective action intended to ensure that the same mistake will not be repeated” for those whose wrongdoings were unintentional.<sup>152</sup>

A smaller number of the Clubs in this study include an educational component for remediation; at APEX, for example, corrective action can include “[r]eorientation with a member of the EC (Executive Committee) and discussion about the code of conduct.”<sup>153</sup> At LAL in Indiana, “verbal warnings, extra monitoring at events, (and) instruction on proper behavior” join expulsion and termination as potential remedies.<sup>154</sup>

As with adjudication, the language of remediation in Club domains is also imprecise, and it is quite possible that the ambiguity is strategic, insofar as it enables the most expansive or least constrained scope of remedies. Aphrodite in New York, for example, notes only that in service to remediation, “the severity of an incident will be taken into account” and then immediately goes on to say that “Repeat offenders (i.e. – people who show either a wanton disregard for the rules or an inability to grasp/follow the rules) will be dealt with more severely.”<sup>155</sup> The former piece is vague, while the latter begs a question of tolerance for violations in the first instance, if one can offend repeatedly and only then suffer some unnamed but nevertheless severe consequence. Finally, and interestingly, only one Club explicitly mentions the inclusion of law enforcement as a possible outcome of an adjudication; at LAL in Illinois, remedies can include “warning the offender, expulsion from the premises, or contacting legal authorities.”<sup>156</sup>

### CONCLUSION

In BDSM communities, self- or community policing has been a necessity both because of the absence of consent as a defense to assault in most jurisdictions<sup>157</sup> and because BDSM adds a layer of complexity to consent that the legal system is currently ill-equipped to nuance.<sup>158</sup> Club and Dungeon practices have prioritized quick (often immediate) action coupled with measured investigation, utilizing arbitrators who, by virtue of their deep engagements with the community’s cultures and expectations, are best positioned to maintain the balance between community safety and individual rights. By acting extra-legally, Clubs are able to make their own rules, adjudicate infractions as best suits their needs, and enforce the rules as

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152. See *NOBLE Abuse Policy*, *supra* note 133.

153. *APEX Incident Report*, *supra* note 124, at “*What Happens After You File a Report*.”

154. *LAL Bylaws*, *supra* note 119, at Art. IX (1).

155. *Aphrodite Rules*, *supra* note 95.

156. See *LAL Bylaws*, *supra* note 119, at Art. VII. Among other references to law: that “in accordance with Louisiana State Law and Local City Ordinances,” solicitation for sexual favors is prohibited (*NOBLE Rules*, *supra* note 27); that the taking of unsolicited pictures is subject to prosecution to the “fullest extent of the law” (*Crucible Rules*, *supra* note 122); and that “Membership shall not be refused because of an applicant’s race sex, gender, sexual orientation, relationship / marital status, physical disability, HIV status or age (provided the applicant is at least 18 years of age) or any other forms of discrimination not allowed by California State law” (*Threshold Bylaws*, *supra* note 115).

157. See *supra* note 102 and accompanying text.

158. *Id.*

required to protect the safety of the community, without being bound by the Blackstone ratio that informs, at least in theory, the rules of contemporary procedure and evidence.

These findings have distinct implications for law as well as for shared sociocultural understandings. First, relative to law, as this Note clearly indicates the language of consent in current legal domains is deficient nearly to the point of irrelevance. It is not directive, it is not instructive, and it is not meaningful, all of which make its use as an affirmative defense an (already-demonstrated) exercise in near-futility. The further evolution of consent as a defense would require thicker, more robust language around what it means to give consent, and to what scope of activities consent can be given.

Second, the current legal practice of categorically framing BDSM activities as both privately and publicly harmful precludes the use of consent as an affirmative defense even when such a defense is statutorily available.<sup>159</sup> The destigmatization of BDSM is critical for preventing actual abuse.<sup>160</sup> A theory that autonomous decisions of consenting adults in BDSM mirror other domains in which consent is an affirmative defense, like athletics and medicine, will allow the rules already on the books far more utility. Further, such a framing better reflects the reality that adults engaged in consensual BDSM do so knowingly and rationally.

There is little question that adopting more consent-heavy standards may make it more difficult to adjudicate claims of consent violation. We see this struggle on college campuses right now as institutions of higher education grapple with how to balance the rights of victims with those of the accused.<sup>161</sup> It explains to some degree why many BDSM organizations have opted against replicating due process standards in their own extra-legal frameworks. Still, law enforcement, prosecutors, and judges should come to understand the rules under which BDSM operates so as to make decisions based on the very real (albeit extra-legal) foundations on which BDSM communities have built their practice.<sup>162</sup> As long as our legal system continues to conflate consensual contact with abuse, there will be negative consequences for those who participate in BDSM activities.<sup>163</sup>

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159. See *supra* Section I.A.

160. Eva Jozifkova, *Consensual Sadomasochistic Sex (BDSM): The Roots, the Risks, and the Distinctions Between BDSM and Violence*, 15 CURR PSYCHIATRY REP. 392, 397 (Sept. 2013).

161. See, e.g., Kelly Rice, *Understanding the Implications of the 2011 Dear Colleague Letter: Why Colleges Should Not Adjudicate On-Campus Sexual Assault Claims*, 67 DEPAUL L. REV. 763 (2018); Conor Friedersdorf, *The ACLU Moves to Embrace Due Process on Title IX*, ATLANTIC (Feb. 8, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/aclu-title-ix/582118/>; Jeremy Bauer-Wolf, *Mattress Protest and its Aftermath*, INSIDE HIGHER ED (July 24, 2017), <https://www.insidehighered.com/news/2017/07/24/media-circus-surrounding-mattress-girl-case-changed-conversation-sexual-assault>; see also Kelly Alison Behre, *Deconstructing the Disciplined Student Narrative and Its Impact on Campus Sexual Assault Policy*, 61 ARIZ. L. REV. 885 (2019).

162. See Jozifkova, *supra* note 160.

163. See *supra* note 27, addressing the exposures those who participate in consensual BDSM experience within legal realms.

Being clear about the parameters of consent is particularly important given that our legal system is relatively inflexible with respect to adjudication. Whereas BDSM Dungeons and Clubs have been able to experiment with various due process procedures and adjudication practices, our legal system does not have such flexibility, nor should it. What this means, however, is that defining consentable activities in a thoughtful, expansive way in the first instance is all the more pressing. Such strengthening would be value-added in: (a) giving more substance to courts clearly poorly positioned to adjudicate consent violations in BDSM contexts; and (b) shifting cultural norms, which is important to mitigate some of the need for judicial adjudication in the first place. There are already a number of arenas in which consent regimes, some of which are informed by BDSM communities, are finding important purchase.<sup>164</sup> Conversations about consent are happening in spaces like Girl Scouts blogs<sup>165</sup> and parenting magazines,<sup>166</sup> aimed toward changing how families characterize consent for children. There are consent monitors adopted in contexts like dance clubs.<sup>167</sup> Popular media is helping expand notions of consent beyond sexual.<sup>168</sup> The need for broader conversation is clearly acute in the political realm, where understandings are still demonstrably fuzzy.<sup>169</sup> And on some college campuses, complicated Title IX issues aside, kinky spaces and the conversations they demand have been warmly welcomed.<sup>170</sup> Moving forward, college campuses in particular are well-positioned to promote the language and ethos of consent-based interactions as a sociocultural (if not justiciable) paradigm shift.<sup>171</sup> Wherever they're

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164. Malory Yu, *How To Talk About Sex (And Consent): 4 Lessons From The Kink Community*, NPR (June 1, 2019, 9:00 AM), <https://www.npr.org/sections/health-shots/2019/06/01/728398532/how-to-talk-about-sex-and-consent-4-lessons-from-the-kink-community>.

165. *Reminder: She Doesn't Owe Anyone a Hug. Not Even at the Holidays*, GIRL SCOUT BLOG, <https://www.girlscouts.org/en/raising-girls/happy-and-healthy/happy/what-is-consent.html> (last visited Apr. 7, 2019).

166. Kirsten Clodfelter, *Reluctant Hugs: Why You Shouldn't Force Kids to Show Physical Affection*, PARENTS.COM, <https://www.parents.com/parenting/better-parenting/advice/reluctant-hugs-why-you-shouldnt-force-kids-to-show-physical/> (last visited Apr. 7, 2019).

167. Emily Witt, *Is 2019 the Year of the Consenticorn?*, NEW YORKER MAG. (Feb. 11, 2019), <https://www.newyorker.com/magazine/2019/02/11/is-2019-the-year-of-the-consenticorn> (noting the use of dance-floor monitors to ensure all contact is consensual).

168. Kae Burdo, *What Nobody Talks About When They Talk About Consent*, BUSTLE MAG. (Apr. 25, 2016), <https://www.bustle.com/articles/154179-what-nobody-talks-about-when-they-talk-about-consent> (see item #6: "we're taught to actively ignore consent, agency, and bodily sovereignty early on — both our own and others'.")

169. Emily Moon, *What Joe Biden's Joke About 'Permission' to Hug Reveals About Men's Understanding of Consent*, PACIFIC STANDARD (Apr. 5, 2019), <https://psmag.com/news/joe-bidens-joke-about-permission-to-hug-and-mens-understanding-of-consent>; see also Safronova & Van Syckle, *supra* note 43.

170. Allie Grasgreen, *Fifty Shades of Crimson*, INSIDE HIGHER ED (Dec. 5, 2012), <https://www.insidehighered.com/news/2012/12/05/kink-clubs-harvards-well-established-healthy-students> (byline: "Harvard is just the latest campus to sanction a kinky sex club, which students and experts say is a healthy and positive educational tool.>").

171. College campuses have required freshman orientations, advising appointments, and Greek Life oversight, making front-end conversations about consent

happening, it's clear that we are overdue for some honest, uncomfortable conversations, because until and unless we can develop broader understandings about the contours of consent, we will continue to see arguably misguided concerns about public harm trumping the private, consensual decisions made by autonomous actors.

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possible. A number of institutions already offer consent conversations; a few even make these mandatory. *See, e.g., Mandatory Online Training for Undergrads*, USC STUDENT AFFAIRS, <https://studentaffairs.usc.edu/mandatory-online-training-for-undergrads/> (last visited Mar. 2, 2020). Universities also have the structural capacity to engage or insist upon consent monitors and safe spaces in university-sanctioned events. *See, e.g., Leah Winerman, Making Campuses Safer for All*, AM. PSYCHOL. ASS'N (Oct. 2018), <https://www.apa.org/monitor/2018/10/campuses-safer>. The downside, of course, are concerns that such structures produce institutional exposures and liability if consent violations are reported.

**APPENDIX: STATES, DUNGEONS, AND STATUTES REFERENCED IN THIS NOTE**

State	Dungeon/Club	Statutes on Battery and Assault
Arizona	AZ Apex	<i>Referenced in this note:</i> <b>ARIZ. REV. STAT. ANN. §§ 13-1203, 13-1204, simple and aggravated assault (n.54)</b>
California	Threshold  Citadel	<i>Referenced in this note:</i> <b>CAL. EDUC. CODE § 67386, student safety (n.87)</b> <b>CAL. PEN. CODE § 243, battery and punishment (n.141)</b> <b>CAL. PEN. CODE § 261.6, definitions of consent (n.86)</b> <i>Examined but not referenced:</i> CAL. PEN. CODE § 7, words and phrases defined CAL. PEN. CODE §§ 240–245, various statutes on assault, battery, and punishment
Florida	FL Club Kink	<i>Referenced in this note:</i> <b>FLA. STAT. § 794.011(1)(a) Sexual battery - consent (n.143)</b> <b>FLA. STAT. § 784.046(13) Action by victim (n.82)</b> <i>Examined but not referenced:</i> FLA. STAT. §§ 784.011–784.045; various statutes on assault and battery
Illinois	Chicago LRA Lafayette Alternative Lifestyles (LAL)	<i>Referenced in this note:</i> <b>Ill. § 11-1.70 (n.78, n.80) Defenses to sexual assaults</b> <b>Ill. § 12-3(a1-2) (n. 92) Battery</b> <i>Examined but not referenced:</i> Ill. § 12-1–12-5; various statutes on assault and battery

Louisiana	Louisiana NOBLE	<p><i>Referenced in this note:</i></p> <p><b>RS 14:34.9, battery of a dating partner (RS145)</b></p> <p><i>Examined but not referenced:</i></p> <p>RS 14:34–RS 14:38; various statutes on assault and battery</p>
New York	The Aphrodite Group	<p><i>Referenced in this note:</i></p> <p><b>N.Y. PENAL LAW § 130.25(3) rape and capacity to consent (n.84)</b></p> <p><i>Examined but not referenced:</i></p> <p>N.Y. PENAL LAW §§ 120.00–120.25, various assaults and other aggressions</p> <p>N.Y. PENAL LAW § 130.05, Sex offenses; lack of consent</p>
South Carolina	CAPEX (Charlotte Area Power Exchange)	<p><i>Referenced in this note:</i></p> <p><b>S.C. CODE ANN. § 16-3-652 – Criminal Sexual Assault</b></p> <p><i>Examined but not referenced:</i></p> <p>S.C. CODE ANN. § 16-3-600, assault and battery</p>
Virginia	Black Rose	<p><i>Referenced in this note:</i></p> <p><b>VA CODE ANN. § 18.2-57.2-3(b) (n.89)</b></p> <p><i>Examined but not referenced:</i></p> <p>VA CODE ANN. § 18.2-57, Assault and Battery</p>
Washington, DC	Crucible	<p><i>Referenced in this note:</i></p> <p><b>D.C. CODE ANN. § 22-3001. Definitions. (4) consent (n.90)</b></p> <p><i>Examined but not referenced:</i></p> <p>D.C. CODE ANN. § 22-404, statutes on assault and aggravated assault</p> <p>D.C. CODE ANN. § 22-407, threats of bodily harm</p>