

**I'M A SLAVE 4 U: THE ANTI-PATRIARCHAL VIEW OF
BDSM IN RAPE AND DOMESTIC VIOLENCE
ALLEGATIONS**

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This comment discusses the stereotypes and discrimination faced by those who participate in bondage, discipline, dominance, submission, sadism, and/or masochism (commonly referred to as BDSM), with an emphasis on the importance of creating further legal safety nets for those who participate in BDSM when sexual activities transition from consensual to non-consensual sex.

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INTRODUCTION

Stereotypes and gender roles pertaining to sex have a long-standing tradition of influencing pop culture, movies, and television. These stereotypes and gender roles have worked their way into households, workplaces, and education systems. This has pushed much-needed conversations about sex onto a back burner and is due in part to the subordination of women. Subordination is the twentieth century theory that “because men view women as fundamentally different from themselves, women are reduced to the status of the second sex and hence subordinate.”²

Subordination of women has led to sexual and physical violence primarily being committed against women. During the twentieth century, the third wave of feminism pushed for harsher legislation and more protections to be put in place to safeguard consent, safety, and progression; still, this has not been enough.

Perhaps you have already been the subject of some kind of sex stereotype, but imagine you are the subject of one of the most prohibited stereotypes. The kind that can only be found on specific websites dedicated to sexual fantasies, such as swinging,³

² Abeda Sultana, *Patriarchy and Women's Subordination: A Theoretical Analysis*, 4 The Arts Fac. J. 1, 7 (2010).

³ Kelly Benamati, *A Swinging Relationship Can Be Healthy For You, if You Follow the Rules*, Huffington Post (Jan. 19, 2016, 10:27 PM), https://www.huffingtonpost.com/kelly-benamati/a-swinging-relationship-c_b_9020986.html (“Swingers are couples or singles who choose to have an open relationship, allowing their partners to have sex with other people, with their permission, of course.”).

polyamory,⁴ sex clubs,⁵ and more specifically: “bondage and discipline (B/D), dominance and submission (D/s), and sadism and masochism (S/M)” (hereinafter “BDSM”).⁶

While still taboo in day-to-day life, BDSM is very popular amongst a variety of people across all ages, sexual orientations, and ideologies.⁷ BDSM can be found in big cities and on the world-wide-web, one could even rent a dungeon as if it was an Airbnb.⁸ Until March 2018, Craigslist was once filled with BDSM desires,⁹ and it permeated throughout pop culture – even influential artist Rhianna had a hit 2010 song, titled “S&M,” in which she

⁴ Tara Struyk, *7 Polyamory Myths It's Time to Stop Believing*, Glamour (Feb. 1, 2018, 5:40 PM), <https://www.glamour.com/story/7-polyamory-myths-its-time-to-stop-believing> (“polyamory—the practice of having more than one romantic or sexual partner at the same time...”).

⁵ Tara Block, *Sex Club Etiquette 101*, PopSugar (Sept. 12, 2017), <https://www.popsugar.com/love/Sex-Club-Etiquette-36105846> (discussing that sex clubs are a place for swingers, singles, and couples to have public sex).

⁶ Ortmann, David M. & Richard A. Sprott, *Sexual Outsiders: Understanding BDSM Sexualities and Communities*, xiii (Rowman & Littlefield Publishing Group, Inc. 2013).

⁷ *Id.* at 3.

⁸ Katherine Bernard, *BDSM Is Everywhere From High Culture to High Fashion*, Garage (Feb. 14, 2018, 6:31 AM), https://garage.vice.com/en_us/article/evmgak/bdsm-is-everywhere-from-high-culture-to-high-fashion); *Bondage Category*, Pornhub, https://www.pornhub.com/video/search?search=bdsm&filter_category=10 (last visited Feb. 24, 2018); *About Us*, KinkBNB, https://www.kinkbnb.com/about_us/ (last visited Nov. 12, 2018).

⁹ Niraj Chokshi, *Craigslist Drops Personal Ads Because of Sex Trafficking Bill*, N.Y. Times (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/business/craigslist-personals-trafficking-bill.html> (“Visitors to the personals section of Craigslist are now redirected to a short statement about the bill, the Fight Online Sex Trafficking Act, which gives law enforcement officials greater authority to go after websites used for sex trafficking, while removing protections from legal liability for hosting such content.”).

stated, “sticks and stones may break my bones but chains and whips excite me.”¹⁰

Imagine that you are a submissive who is in a BDSM relationship that contains a contract.¹¹ You and your partner, the dominant,¹² have had a plethora of encounters with sexual conduct and have also dabbled in some fetish play.¹³ On one occasion, you engaged in sexual conduct where you used a safe word—indicating that you no longer consented to the sexual conduct taking place—even though you previously consented on prior occasions. The dominant does not stop, but continues with the sexual encounter. You are now the victim of rape.¹⁴ What if you and the dominant engaged in wax play¹⁵ where you used a safe word—indicating that you no longer consented to the conduct taking place—even

¹⁰ Rihanna, S&M (Def Jam Recordings 2010); Rihanna, *S&M*, Genius <https://genius.com/Rihanna-s-m-lyrics> (last visited Nov. 14, 2018) (Lyrics to Rihanna’s S&M).

¹¹ Andrea E. White, *The Nature of Taboo Contracts: A Legal Analysis of BDSM Contracts and Specific Performance*, 84 UMKC L. REV. 1163, 1164 (2016) (defining submission as “an act of submitting to the authority or control of another.”).

¹² Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U L. REV. 89, 117 (discussing that “one partner assumes authority over the other partner and inflicts pain or other types of punishment on the submissive partner.” That partner asserting authority is the dominant.).

¹³ Sophie Saint Thomas, *11 of the Most Common Sexual Fetishes*, Allure (Nov. 1, 2017), <https://www.allure.com/story/common-sexual-fetishes-kinks> (“A fetish is typically referred to as a behavior that someone cannot get sexually aroused without.”)

¹⁴ *Common-Law or Forcible Rape*, US Legal, <https://rape.uslegal.com/common-law-or-forcible-rape/> (last visited Nov. 14, 2018) (“Common-Law or forcible rape refers to sexual intercourse against [some]one’s will or consent.”).

¹⁵ Rebecca Reid, *What is Wax Play and How Do You Do it?*, Metro News (July 10, 2018) <https://metro.co.uk/2018/07/10/what-is-wax-play-and-how-do-you-do-it-7695733/> (last visited Nov. 25, 2018), (“Wax play is a BDSM game which involves pouring hot wax on your partner.”).

though you previously engaged in wax play where you consented the entire time? The dominant continues to use the wax on your skin even though you have used your safe word, and you sustain severe burns. You are now the victim of assault, battery, and possibly domestic violence.¹⁶ These are two scenarios where a purely consensual encounter can quickly turn into a crime of rape or domestic violence. As a submissive, you likely have many questions pertaining to what rights you have and the possible criminal charges involved. This Comment seeks to answer those questions, amongst others.

The purpose of this Comment is to illustrate the relationship between BDSM, rape, and domestic violence as a Venn diagram, with BDSM in the middle, and crimes of sexual and domestic violence on either side. This Comment will first focus on consent to analyze how, and to what extent, BDSM becomes rape or domestic violence. Then, it will examine the extent that courts across the United States have utilized rape and domestic violence when analyzing a case containing a BDSM relationship.

¹⁶ NATIONAL CONFERENCE OF STATE LEGISLATIONS, <http://www.ncsl.org/research/human-services/domestic-violence-domestic-abuse-definitions-and-relationships.aspx> (last visited Nov. 14, 2018), (citing that 38 states include domestic violence in their criminal codes but that there are variances from state to state, including “broad definitions that may include stalking, harassment and, in some instances, nonphysical abuse including intimidation and emotional abuse.”).

This Comment will be broken down into five parts. Part II will introduce BDSM by explaining the acronym, various terms, and how critical consent is.¹⁷ This section will explore the possibilities of contractually consenting to hard and soft limits. Part III will discuss BDSM regarding rape to include the evolution of marital rape and the rape shield evidence rule (or the equivalent) of all states in relation to “prior sexual conduct between the parties” and why this consent is important to victims of BDSM sexual abuse.¹⁸ Part IV will discuss BDSM as it relates to domestic violence—why it’s different and at what point BDSM can be come domestic violence.¹⁹ The purpose of this Comment is to illustrate that there is room for BDSM in the law where submissive partners become the victims in rape and domestic violence crimes. Part V will suggest additions and edits all state legislatures can make to their own laws in order to protect victims who revoke consent in BDSM scenarios.²⁰ Part VI will conclude by reviewing the legal analysis of BDSM sexual and physical crimes.²¹

I. What is BDSM Anyway?

In order to properly explore the effect BDSM has on sexual and physical violence, there must be a foundation of the history,

¹⁷ See *Infra* Part 0.

¹⁸ See *Infra* Part 0.

¹⁹ See *Infra* Part 0.

²⁰ See *Infra* Part 0.

²¹ See *Infra* Part **Error! Reference source not found..**

terms, and some of the working parts of BDSM. BDSM actually dates back to Sparta, when ritual flagellations²² took place in religious settings.²³ BDSM is the most common term used to describe dominant submissive relationships and stands for Bondage, Discipline/Domination, Sadism/Submission, and Masochism.²⁴ Another abbreviation commonly used interchangeably with BDSM is “SM,” which stands for Sadomasochism.²⁵ BDSM is an umbrella term that contains a plethora of “practices, relationship types, and roles, ranging from the more common[,] for instance, rope bondage or flogging to the less so playing with incest themes or playing at being a pony.”²⁶ BDSM even contains wax play, genital piercing, and the use of electrical shock.²⁷

²² Dictionary, <http://www.dictionary.com/browse/flagellation?s=t> (last visited Nov. 14, 2018) (defining flagellation is a “masochistic or sadistic act in which the participants receive erotic stimulation from whipping or being whipped.”).

²³ THE EXTENDED HISTORY OF BDSM, <https://historymsu.wordpress.com/2017/04/26/the-extended-history-of-bdsm/> (last visited Nov. 11, 2018). (“The history of Ancient Greece also includes BDSM from ritual flagellation of men and women in Sparta to The Tomb of Whipping, a room where whipping for sexual pleasure happened.”)

²⁴ ORTMANN AND SPROTT, *supra* note 6 at xiii.

²⁵ MARGOT WEISS, *TECHNIQUES OF PLEASURE: BDSM AND THE CIRCUITS OF SEXUALITY VII* (Duke Univ. Press 2011) (discussing that sadomasochism is the combination of sadism and masochism in the same person).

²⁶ *Id.*

²⁷ Mark Griffiths, *Candle with Care: A Beginner’s Guide to Wax Play*, WordPress (May 11, 2015), <https://drmarkgriffiths.wordpress.com/2015/05/11/candle-with-care-a-beginners-guide-to-wax-play%E2%80%AC/>; *BDSM, Subcultures and Sociology*, <http://haenfler.sites.grinnell.edu/subcultures-and-scenes/bdsm/#ffs-tabbed-11> (last visited Nov. 14, 2018).

Bondage is a highly technical technique that involves “the physical restraint of one partner.”²⁸ Bondage has become so technical that “practitioners specialize in rope harnesses, suspension bondage, bondage on a budget...and more.”²⁹ Discipline refers to “the training administered by a dominant partner to her or his submissive regarding how the submissive should behave” and “punishment and correction when the submissive fails to act in the proper manner.”³⁰ Domination and submission “refers to the explicit exchange of power.”³¹ These practices can range from short-term, long-term, live-in (master-servant and mistress-slave situations), and sometimes may not even involve physical contact.³² Lastly, in 1890, sexologist Richard von Krafft-Ebing developed the idea that sadism and masochism could occur in the same person in his book *Psychopathia Sexualis*.³³ While his book was written more than a

²⁸ Merriam-Webster’s Dictionary, https://www.merriam-webster.com/dictionary/bondage?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Nov. 14, 2018).

²⁹ WEISS, *supra* note 25, at viii.

³⁰ Carolyn Meeker, *Bondage and Discipline, Dominance and Submission, and Sadism and Masochism (BDSM) Identity Development*, FLA. INT’L U. 154, 155 (2011).

³¹ WEISS, *supra* note 25, at ix.

³² *Id.*

³³ RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS: MED. HIST. THE CLASSIC STUDY OF DEVIANT SEX*, 142 (ARCADE PUBLISHING, 1965). Von Krafft-Ebing acknowledged that sadism and masochism are different concepts, but that they “are not merely the results of accidental associations, occasioned by change or an opportune coincidence, but results of associations springing from causes existing under normal circumstances, easily produced under certain conditions.” *Id.*

century ago, his definition remains quite current.³⁴ Sadism is “the experience of sexual pleasurable sensation (including orgasm) produced by acts of cruelty, bodily punishment afflicted on one’s own person or when witnessed in others.”³⁵ Masochism is “the desire to suffer pain” and to be “controlled by the idea of being completely and unconditionally subject to the will of a person...of being treated by this person as by a master, humiliated and abused.”³⁶ In Von Krafft-Ebing’s analysis, he included marital rape as an example of sadism and flagellation and foot and shoe fetishes as a few examples of masochism.³⁷

Two words that are commonly used when discussing sex in any way are “kinky” and “vanilla.” The word *kinky* is used to describe the sexual encounters of BDSM relationships, versus *vanilla*,³⁸ which is the opposite.³⁹ While these kinky dominate-submissive relationships have clearly existed throughout history,⁴⁰

³⁴ See generally Harry Oosterhuis, *Sexual Modernity in the Works of Richard von Krafft-Ebing and Albert Moll*, 56(2) *Med. Hist.* 133 (2012).

³⁵ VON KRAFFT-EBING see *supra* note 28, at 53.

³⁶ See VON KRAFFT-EBING, *supra* note 28, at 86 and 133. Von Krafft-Ebing said that the desire to suffer pain was “at the hands of the person of the opposite sex.” But there can be same sex BDSM, its just in the hands of the dominant, not a specific sex. *Id.*

³⁷ VON KRAFFT-EBING, *supra* note 35 at 93 and 114.

³⁸ Srinii Pillay, *Overcoming the Anxiety of Vanilla Sex*, *PSYCHOLOGY TODAY* (Sept. 15, 2010) <https://www.psychologytoday.com/blog/debunking-myths-the-mind/201009/overcoming-the-anxiety-vanilla-sex> “Vanilla sex refers to conventional sex that conforms to the very basic expectations with a culture. Classically, in heterosexual sex, it refers to sex in the missionary position, and broadly speaking, it excludes fetishes such as S&M.” *Id.*

³⁹ WEISS, *supra* note 25, at viii.

⁴⁰ See generally THE EXTENDED HISTORY OF BDSM, <https://historymsu.wordpress.com/2017/04/26/the-extended-history-of-bdsm/> (last visited Nov. 11, 2018).

they recently have been illustrated in the book series written by E. L. James, the *Fifty Shades* trilogy.⁴¹ The book series follows Anastasia Steele, a young, innocent, recent college graduate as she meets Christian Grey, a successful billionaire with sadist tendencies.⁴² Grey dominates a majority of Steele's life with a BDSM contract that contains every detail of their relationship.⁴³ In the second book, the pair shreds the contract and indulges in a vanilla-relationship while still exploring Grey's sadist needs.⁴⁴ By the third book, the couple marries, has a baby, and lives happily ever after.⁴⁵ Examining the pop culture embrace of the Grey-Steele romance, one could go as far as to say that James' books lessened the taboo connotation of BDSM contractual relationships and made BDSM into a well-known, household term.⁴⁶ Prior to the first movie's release, surveys suggested that only ten to fifteen percent of Americans had tried any BDSM-related activities.⁴⁷

⁴¹ See generally E.L JAMES, FIFTY SHADES OF GREY (Vintage Books 2011); See generally E.L James, Fifty Shades Darker (Vintage Books 2012); See generally E.L James, Fifty Shades Freed (Arrow Books 2012).

⁴² See E.L JAMES, FIFTY SHADES OF GREY (Vintage Books 2011).

⁴³ See E.L JAMES, *supra* note 42.

⁴⁴ See E.L JAMES, FIFTY SHADES DARKER (Vintage Books 2012).

⁴⁵ See E.L JAMES, FIFTY SHADES FREED (Arrow Books 2011).

⁴⁶ Laura Duca, *How '50 Shades of Grey' Made BDSM Go Mainstream*, THE HUFFINGTON POST (Nov. 06, 2014 7:52 AM), However, the BDSM written about in the pages of the E.L. James Triologies is not what BDSM actually is. https://www.huffingtonpost.com/2014/11/05/middelbrow-50-shades-of-grey_n_6106816.html ("What the book does say for sure is that there are women who want to explore sexual themes that aren't mainstream and that books are giving those women who are curious an avenue to do that.").

⁴⁷ William Saletan, *The Trouble With Bondage*, SLATE (Mar. 4, 2013, 3:32 PM), http://www.slate.com/articles/health_and_science/human_nature/2013/03/bondage_dominance_submission_and_sadomasochism_why_s_m_will_never_go_mainstream.html.

After the movie aired, the membership of Fetflife, a social networking site for BDSM, reported their membership doubled to two-million users.⁴⁸

These BDSM relationships contain two people,⁴⁹ a dominant and a submissive.⁵⁰ The dominant asserts “dominance” or the “appearance of rule over one partner by another.”⁵¹ There are multiple synonyms used instead of the word “dominant,” such as sadist, “dominator, dominatrix, top, master, mistress, or just ‘S’.”⁵² The other partner, the submissive, partakes in submission, which is described as “an appearance of obedience to a partner” or the dominant.⁵³ Other names for submissive are masochist, bottom, slave, or just “M.”⁵⁴

Some people choose to partake in a contractual relationship explicitly defining all of the limits, safe words, and any consideration if necessary.⁵⁵ These boilerplate contracts are easy to find online, fill out, print, and sign.⁵⁶ But, Sophie Morgan,

⁴⁸ *Id.*

⁴⁹ Casey Gueren, *25 Facts about BDSM That You Won't Learn in "Fifty Shades of Grey"*, BUZZFEED (Feb. 12, 2015 3:51 PM), https://www.buzzfeed.com/caseygueren/ultimate-guide-to-bdsm?utm_term=.ehZr1Wvd4#.kwMW6RMak (discussing that “BDSMers can be monogamous, polyamorous, or whatever the hell they want.”).

⁵⁰ *Id.*

⁵¹ Martin Weinberg et al, *The Social Constituents of Sadomasochism*, 31:4 SOC. PROBLEMS, 380 (1984).

⁵² *Id.* at 381.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *infra* note 64 and accompanying text.

⁵⁶ DOMINANT SUBMISSIVE CONTRACT PDF FORM, <https://www.pdfFiller.com/381835133-TPE-Contractpdf-submissive-pdf-form-Various-Fillable-Forms> (last visited Nov. 14, 2018).

author of *Diary of a Submissive* told The Atlantic that “[t]he sex contract is filler and about as sexy as Sheldon Cooper’s Roommate Agreement.”⁵⁷ With that being said, there are plenty of BDSM relationships in which only a spoken implied contract or agreement exists between the parties.⁵⁸

A. *The Safe Word*

Undoubtedly, the largest and perhaps the most important aspect of BDSM is consent. Consent is mainly given through the use of verbal expression or implied body language but can be revoked through the use of a “safe word.”⁵⁹ Safe words are designed for use by the submissive so that the dominant partner is aware that “limits have been reached” and are defined before the encounter begins.⁶⁰ Additionally, safe words are especially important when approaching a submissive’s limits.⁶¹ Limits are the defined parameters of what the submissive is willing or unwilling to do.⁶² There is a laundry list of items that can be

⁵⁷ Jen Doll, *An Actual Submissive on what ‘Fifty Shades of Grey’ Got Wrong*, THE ATLANTIC (Sept. 4, 2012), <https://www.theatlantic.com/entertainment/archive/2012/09/actual-submissive-what-fifty-shades-grey-got-wrong/324004/>.

⁵⁸ See Gueren, *supra* note 49.

⁵⁹ Kate H., *Consent, Explained*, MEDIUM (Jul. 13, 2016), <https://medium.com/consent-explained/consent-explained-72ca3ec10773> (discussing that the purpose behind using a safeword instead of “stop” is because it can get confusing. The submissive may say stop a lot, but in reality they are really enjoying it and want the dominant to continue.).

⁶⁰ See Weinberg et al., *supra* note 51, at 385.

⁶¹ *Id.*

⁶² Kate H., *supra* note 59.

considered limits.⁶³ When speaking of a BDSM contract, the limits are typically clearly defined in the contract.⁶⁴ But a verbal BDSM agreement will usually be less detailed and will likely only include the “hard limits,” which indicate certain acts that are not to be done under any circumstances.⁶⁵ There is another limit, called a “soft limit,” which is an act that the submissive is not overly eager about and is similar to the analogy of a yellow stoplight.⁶⁶ The soft limit indicates to the dominant to be patient, to proceed with caution, and await confirming consent with a safe word or body language that illustrates consent.⁶⁷

While a dominant and submissive can choose their own safe words, two universally known safe words are “red” which indicates a hard limit has been reached and there is a desire to stop immediately, and “yellow” which indicates a soft limit has been reached and means to slow down, take a break, or “approaching my limit.”⁶⁸ Regardless of the word that the submissive chooses, the dominant should always be aware of these words in order to have a more fluid, shared communication system.⁶⁹ When a

⁶³ BDSM CHECKLIST, <http://latches.webslaves.com/checklist.htm> (last visited Feb. 24, 2018).

⁶⁴ Melli Jay, *BDSM Contracts Really Exist – I’m a Sexual Submissive and Here’s How ‘Fifty Shades’ Got Them Wrong*, BUSTLE (Feb. 20, 2015), <https://www.bustle.com/articles/65251-bdsm-contracts-really-exist-im-a-sexual-submissive-and-heres-how-fifty-shades-got-them>.

⁶⁵ *Id.*

⁶⁶ *Infra* note 71 and accompanying text.

⁶⁷ *Infra* note 71 and accompanying text.

⁶⁸ WEINBERG, *supra* note 51; Jay, *supra* note 64.

⁶⁹ Jay, *supra* note 59.

submissive uses a safe word such as “red” that is their way of revoking consent.⁷⁰

The fine line between BDSM and rape and domestic violence is the safe word. In Keith Edwards’ Ted Talk called “Ending Rape,” he states that the key to ending sexual violence is “every step of the way, affirmative consent, freely given.”⁷¹ He used a similar stoplight analogy, where red means stop, yellow means slow down, and green means go.⁷² What was interesting about yellow was that when asked what it meant, audience members stated it meant “go faster.”⁷³ Edwards pointed out that to “go faster” is what society has taught us, and he stated: “If you’re unsure, go really fast. If someone is unsure or has not said anything, we’ve been taught to go faster before their parents come back, before their friends come back, or before they change their mind. That is not consent.”⁷⁴

Without a verbal or non-verbal green light, there is no consent.⁷⁵ Edwards’ analogy to a stoplight, using the two universal safe words in BDSM, is a great way to illustrate just how

⁷⁰ Kelly Egan, *Mortality-Based Legislation is Alive and Well: Why the Law Permits Consent to Body Modification But Not Sodomasochistic Sex*, 70 ALB. L. REV. 1615, 1618 (2007).

⁷¹ Keith Edwards, *Ending Rape*, YOUTUBE (Apr. 4, 2016), <https://www.youtube.com/watch?v=9VXOknUzbBM>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

dominants can prevent a purely consensual experience from becoming an act of sexual or physical violence to the submissive.

The safe word limits or revokes consent when used; this is the turning point where an act of a BDSM agreement, contract, or relationship turns into an act of sexual and physical violence. If a dominant partakes in an act that they know is a hard limit for the submissive, and the submissive uses a safe word, there has been no consent given.⁷⁶ Similar to any sexual conduct, even if the submissive has previously consented to a hard limit—or even a soft limit that turned to a hard limit, that doesn't mean that they consent to the conduct for an infinite period of time.⁷⁷ While wildly contested and perhaps an unpopular opinion amongst certain groups, consent can be revoked at any time.⁷⁸

1. The Importance of the Safe Word

Think back to the hypothetical proposed at the beginning of this Comment. If you used or claim to have used a safe word, then it would seem to most that your dominant cannot claim that you

⁷⁶ Gueren, *supra* note 44 and accompanying text.

⁷⁷ Kate H., *supra* note 54 and accompanying text.

⁷⁸ Cf. Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 64-65 (1990) (“Marital Rape exemptions are strikingly easy to trace to misogynist roots, from Hale’s infamous argument that a woman is presumed to consent to all marital sex and, therefore, cannot be raped, to the common law’s assumption that marriage results in the unification of husband and wife...”).

consented to your injuries.⁷⁹ However, if you didn't use your safe word during an act that was not previously identified as a hard limit, and you sustained injuries, then it would be up to the judge or jury to decide if the dominant is guilty.⁸⁰ This is the problem that court systems have been facing for many years—the he-said-she-said dilemma as it relates to consent—yet it will likely continue.⁸¹

B. BDSM Contracts and Agreements as Compared to Contract Law

In its the simplest form, a contract is defined as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”⁸² Since a contract is comprised of a legally enforceable promise, it must be noted that not all promises are enforceable.⁸³ What makes a promise teeter between enforceable and unenforceable is a term called *consideration*.⁸⁴ In order to

⁷⁹ See generally *United States v. Christopher*, No. 201600084, 2017 WL 4003158, (N.M.Ct.Crim.App. Sept. 12 2017).

⁸⁰ But see Eris M., *Why I Still Don't Use Safewords*, KINKY SPRINKLES (Jan. 23, 2017) <https://kinkysprinkles.com/2017/01/23/dont-use-safewords/> (discussing that safewords are not the “end all be all of BDSM.”). Id. (“Safewords are scary, because when you negotiate into a safeword, you are relinquishing your typical rules of consent where your say about an activity can be withdrawn at any time by any word of ‘no thanks’ and reducing yourself to one word.”).

⁸¹ See generally Mary K. Stohr and Ann C. Beck, “*He Said, She Said*”: *Sexual Harassment in the Fractured Criminal Justice Work Place*, 18 AM. J. OF CRIMINAL JUSTICES 235 (1994).

⁸² Restatement (Second) of Contracts § 1 (1981).

⁸³ JEFFREY FERRIELL, UNDERSTANDING CONTRACTS, 51 (Matthew Bender & Company, Inc. 3d ed. 2014).

⁸⁴ *Id.* (emphasis added).

satisfy consideration, a “performance or a return promise must be bargained for.”⁸⁵ Typically, whether consideration has been satisfied for a promise “depend[s] on whether something—almost anything—was given ‘quid pro quo’ for the promise.”⁸⁶ In most contract settings, consideration or the bargained-for exchange is illustrated in “mutual assent” which is comprised of an offer and acceptance.⁸⁷ An offer is defined as “the manifestation of a willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”⁸⁸ Lastly, acceptance is defined as “a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.”⁸⁹ When considering case law that relates to BDSM contracts, it is alarming to learn that the element of consideration is difficult to meet.

Think back to your hypothetical role as the submissive in the BDSM relationship. You and the dominant have entered into a written BDSM contract. Within your agreement, you designate the two universal safe words and the conduct that you’re going to engage in. Finally, at the end of the agreement, there is a provision that you and the dominant are both agreeing to a consensual

⁸⁵ Restatement (Second) of Contracts § 71(1) (1981).

⁸⁶ FERRIELL, *supra* note 83

⁸⁷ *See supra* note 11 at 1169 (discussing the basic elements of a contract and contract formation.).

⁸⁸ Restatement (Second) of Contracts § 24 (1981).

⁸⁹ Restatement (Second) of Contracts § 50(1) (1981).

engagement of BDSM activities. You both sign the contract and agree that the relationship will have an expiration date of one month from the date signed.

When considering this hypothetical BDSM contract, it seems that there would be an enforceable contract. Since whether an enforceable contract turns on the presence of consideration, the majority of analysis will be contained within their bargained-for exchange. What did the parties give to one another to be bound by their agreement? You consented to a laundry list of soft and hard limits of BDSM activities. But where is the other end of the bargained-for exchange? While you may be aroused by being a submissive and being dominated, in contractual terms, the sadist gets aroused by the infliction of pain, which means they only meet the bargained-for exchange when the submissive is a true masochist. Consideration cannot be met, and there would not be an enforceable contract.

On the other hand, let's say the contract included a provision that in exchange for your submission and consent to the laundry list of soft and hard limits, the dominant would pay for your beauty needs, health care costs, a housing allowance, and a small budget for other miscellaneous expenses. In contractual terms, this seems like a typical service in exchange for payment contract. The dominant would be giving money as consideration

and there would be a bargained-for exchange in which this submissive would provide services by submitting to the BDSM activities. At what point does this contract turn from an unenforceable contract laying out consent to BDSM activities, to perhaps an enforceable but suspect quasi-prostitution contract?⁹⁰

The concept of formalizing a BDSM contract that contains consent to sexual acts and physical pain is something common law contracts do not acknowledge.⁹¹ This is due in part to the fact that the enforceability of a BDSM contract has not been tested in court, which is due in part to the struggle for either a dominant or submissive to “come out” in a public setting in order to enforce the specifics of the contract.⁹²

A written contract, that may last for an evening or even for a long-term relationship is common amongst BDSM practitioners; however, the contract will likely end at a certain point and be re-negotiated.⁹³ Even though these contracts may designate limits and give consent to certain activities, it is “explicitly acknowledged that consent is negotiated and given at several points during a scene, not just at the beginning.”⁹⁴ Accordingly,

⁹⁰ *Infra* notes 103-106 and accompanying text.

⁹¹ Jane Doe, *Nonbinding Bondage*, 128 HARV. L.R. 713, 714 (2014) (“BDSM contractors have yet to bring a contractual dispute to court, and indeed, often expressly draft the contracts in the belief that they are legally unenforceable.”).

⁹² WHITE, *supra* note 87, at 1167.

⁹³ DAVID ORTMANN AND RICHARD SPROTT, *SEXUAL OUTSIDERS.: UNDERSTANDING BDSM SEXUALITIES AND COMMUNITIES* 75-76 (Rowman & Littlefield Publishing Group, Inc. 2013).

⁹⁴ *Id.* at 76

the distinguishing factor between BDSM and sexual or physical violence is this practice of ensuring consent is still being given *during* a BDSM activity, even when a contract consenting to the activities has been executed.⁹⁵ Without this factor of consent during the activity, BDSM moves alarmingly closer to being a crime of sexual or physical abuse.

Most people assume that once a contract has been formed, they are bound by the contract. Since sex contracts are generally void for a variety of public policy concerns, two people in a BDSM sex contract should not assume their consent is bound by the agreement.⁹⁶ For example A Dutch company LegalThings One, has plans to launch an app called “LegalFling” that is aimed to “help people comply with Sweden’s proposed legislation to require explicit contracts for sex.”⁹⁷ With the help of this app, if two people are on a date, you could open the app and send a request for consent to your partner, and the app can even be used to communicate sexual preferences and boundaries.⁹⁸ Elie Mystal, a writer for Above the Law, expressed his concern about apps of this nature: “My concern is that explicit consent, memorialized by a blockchain, creates a period of time when consent cannot

⁹⁵ *Id.*

⁹⁶ *See supra* notes 87 and 91 and accompanying text.

⁹⁷ Ellie Mystal, Blockchain Sex Contracts Will Be Weaponized Against Women, ABOVE THE LAW (Jan. 22, 2018 4:02 PM), <https://abovethelaw.com/2018/01/blockchain-sex-contracts-will-be-weaponized-against-women/>.

⁹⁸ *Id.*

functionally be revoked.”⁹⁹ Mystal expressed the fact that if a man accused of rape presented this kind of contract as evidence, a jury will not believe that she revoked consent but rather that *she merely regrets giving consent*.¹⁰⁰

1. Monetary Consideration for BDSM Relationships is Not Prostitution

According to Slate, 76% of women that partake in BDSM contracts and relationships self-report that they are the submissive.¹⁰¹ The acts involved in BDSM can quickly turn to a sexual or physical crime.¹⁰² The use of the safeword is the only way to avoid instances of sexual or physical abuse from occurring.¹⁰³ Aside from crimes involving sex or violence without consent, BDSM faces criticism when submissives partake in BDSM activities for monetary consideration because it is perceived as an act of prostitution.¹⁰⁴ Individuals and clubs alike

⁹⁹ *Id.*

¹⁰⁰ *Id.* (emphasis added).

¹⁰¹ William Saletan, *Spank You Very Much*, Slate (Jul. 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

¹⁰² Sunny Megatron, *Kinky Sex: The Difference Between BDSM and Abuse*, VERY WELL MIND (Dec. 3, 2017) <https://www.verywellmind.com/difference-between-bdsm-and-abuse-4065395> (arguing that, “Consent is the cornerstone of all BDSM activity, and it’s one of the major factors that differentiates it from abuse.”).

¹⁰³ *Supra* note 49 and accompanying text.

¹⁰⁴ Nick Chester, *I Get and Whipped by Rich British Men for a Living*, VICE NEWS (Apr. 16, 2015 1:00 AM), https://www.vice.com/en_uk/article/7bdzgy/this-is-what-its-like-to-be-a-professional-bdsm-submissive-345 (“I get some people who disapprove of sex work and ask why I don’t get a respectable job”).

face this stereotype.¹⁰⁵ Wicked Eden is a Columbus, Ohio owned BDSM Dungeon. On their website, they include a disclaimer:

Wicked Eden is a professional BDSM facility and does not offer sexual activity of any kind. This includes oral sex, intercourse, or other types of sexual contact. We do not engage in illegal activity of any sort. BDSM is legal in Columbus, and we want it to stay that way. We are not a brothel, escort agency, or prostitution house. Please seek those desires elsewhere.¹⁰⁶

Dominant and submissive partners avoiding accusations of prostitution by arguing, that no sexual penetration occurs between the parties when money is exchanged is a very common theme in the BDSM world.¹⁰⁷ For example, submissives may want to be dominated due to their splashing, foot, or knismolagnia fetishes for the exchange of money, but there is no sexual penetration or oral sex between the parties.¹⁰⁸

¹⁰⁵ *Id.*; See also *infra* note 106.

¹⁰⁶ Wicked Eden, Central Ohio's Premiere BDSM Studio (Accessed November 14, 2018 at 3:34pm) <http://www.wickededen.com>.

¹⁰⁷ *YOU CAN MAKE MONEY WITHOUT A DICK TOUCHING YOUR FOOT?* Guys We Fucked: the Anti-Slut Shaming Podcast (Oct. 10, 2014) (downloaded using iTunes).

¹⁰⁸ *Id.* (discussing that splashing is the addition to having food thrown, rubbed, and massaged over the individual's body); 46 Sexual Fetishes You've Never Heard Of, https://www.huffingtonpost.com/2013/10/23/sexual-fetish_n_4144418.html (last visited Nov. 14, 2018) ("knismolagnia [is] arousal to being tickled.").

II. BDSM AND SEXUAL VIOLENCE

A simple internet search of “sexual violence” displays results of websites and documents explaining types of sexual violence: definitions from the CDC of sexual violence; statistics about sexual violence; and even an article on sexual assault on college campuses.¹⁰⁹ Anyone who merely scrolled through Facebook over the last six months noticed all of the women making sexual assault violence allegations against countless well-known men. Unfortunately, their stories dated back many years and illustrated that rape is not a new epidemic to our country. For example, marital rape was long exempt from prosecution because of the “social understanding that women were the property of men, first of their fathers and then of their husband.”¹¹⁰ The long-standing history of punishment for rape was to compensate the father or the husband of the victim who was raped.¹¹¹ Even a

¹⁰⁹ Sexual Violence, <https://www.cdc.gov/violenceprevention/sexualviolence/index.html> (last visited Sept. 27, 2018); National Violence Resource Center, Statistics about Sexual Violence http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_statistics-about-sexual-violence_0.pdf (last visited Sept. 27, 2018); Kate Murphy, *Four Weeks. A Dozen Sexual Assaults Reported. And Ohio University Students are 'Fed Up,'* USA Today (Sept. 26, 2018), <https://www.usatoday.com/story/news/nation-now/2018/09/26/ohio-university-sexual-assault-rape-culture-campus/1424931002/>.

¹¹⁰ RAQUEL KENNEDY BERGEN, *WIFE RAPE: UNDERSTANDING THE RESPONSE OF SURVIVORS AND SERVICE PROVIDERS*, 2 (Sage Publications, 1996).

¹¹¹ *Id.* at 3.

husband who raped his wife was not liable for his conduct until the domestic violence movement in the 1970s pushed for a change.¹¹²

Psychologist Sigmund Freud asserted that sadism was the underlying cause of aggression,¹¹³ and many other psychologists and theorists expanded his research to support their theories that aggression is the cause of rape.¹¹⁴ Sadistic rape is a category of rape that is described as “physically violent but also involving ‘perverse’ acts or torture.”¹¹⁵ Victims of sadistic rape have reported being choked to the point where they passed out and then were raped, forced to watch sadistic pornography to then reenact, and due to the “terroristic nature” of the assault by their partner, have also reported a high frequency of occurrence.¹¹⁶

Sadistic rape, or rape that occurs in a BDSM relationship, is analogous to marital rape. In both scenarios, the victims must overcome the problem that they have previously consented to the conduct (or maybe they didn’t consent but provided no physical or oral manifestations of distaste or resistance) and are alleging rape.

¹¹² IDA M. JOHNSON & ROBERT T. SIGLER, FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS 20, (Dartmouth Publishing Company Limited, 1997).

¹¹³ Sigmund Freud, *Three Contributions to the Sexual Theory*, *Journal of Nervous and Mental Disease*, 21 (1910), https://www.stmarys-ca.edu/sites/default/files/attachments/files/Three_Contributions.pdf (“The sexuality of most men shows a taint of aggression...Sadism would then correspond to an aggressive component of the sexual impulse which has become independent and exaggerated and has been brought to the foreground by displacement.”). *Id.*

¹¹⁴ JOHNSON and SIGLER *see supra* 112 at 109. If these theorists are using Freud’s assertion that aggression stems from sadism and masochism, then rapists who are aggressive are likely sadists or masochists.

¹¹⁵ *Id.* at 17.

¹¹⁶ *Id.* at 17-18.

These victims have to “overcome the problem” of previous consent because of the Rape Shield Law. Some states make the Rape Shield Law a part of their evidence rules,¹¹⁷ but other states codify it within the crime itself.¹¹⁸ The Rape Shield Rule¹¹⁹ is regarded as one of the most pro-defense evidence rules.¹²⁰ For example, in

¹¹⁷ Ala. R. Evid. 412(b)(2); Alaska. R. Evid. 404; Ariz. R. Evid. 404, Ark. R. Evid. 411(b); Cal. Evid. Code § 1106; Co. R. Evid. 13-25-138; Conn. R. Evid. 4-11; Fla. R. Evid. 794.022(2); Ga. R. Evid. 24-4-412(a); Haw. R. Evid. 412(a); Idaho R. Evid. 412(b)(2); Ind. R. Evid. 412(b)(1)(B); Iowa R. Evid. 5.412(2)(B); Kan. R. Evid. 21-5502(b); Ky. R. Evid. 412(b)(1); LA. R. Evid. 412(A)(2)(b); Me. R. Evid. 412(a); Mass. R. Evid. 412(b)(1); Miss. R. Evid. 412(b)(1)(B); Neb. R. Evid. 27-412(b)(2)(a)(ii); Nev. R. Evid. 50.090; N.H. R. Evid. 412(b); N.M. R. Evid. 11-412; N.Y. 60.43; N.C. R. Evid. 8C-412(d)(effective 12/1/2018); N.D. R. Evid. 412(1)(B); Okla. Evid. R. 12-2412; Or. R. Evid. 412; S.D. R. Evid. 19-19-412(b)(1)(B); Tenn. R. Evid. 412(c)(3); Tex. R. Evid. 412(b)(2)(B); Utah R. Evid. 412(b)(2); Vt. R. Evid. 3255(a)(A); Va. R. Evid. 2-412(a); W. Va. R. Evid. 412.

¹¹⁸ DEL. CODE ANN. tit. 11 § 3509(a) (2018); 725 ILL. COMP. STAT. 5/115-7(a) (2018); MD. CODE ANN. 3-319 (West 2018); MICH. COMP. LAWS 750.520j (2018); MINN. STAT. § 609.347 (2018); MO. REV. STAT. § 491.015(1)(1) (2018); MONT. CODE ANN. § 45-5-511 (2018); N.J. STAT. ANN. § 2C:14-7 (2014); O.R.C § 2907.02(D); 18 PA. CONS. STAT. § 3104 (2018); R.I. GEN. LAWS § 11-37-13 (2018); 2018 S.C. CODE ANN. § 16-3-659.1; WASH. REV. CODE § 9A.44.020(2) (2018); WIS. STAT. § 972.11 (2018); WYO. STAT. ANN. § 6-2-312.

¹¹⁹ The relevant portion of Federal Rule of Evidence Rule 412 reads as:

- (a) “Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
 - (1) evidence offered to prove that a victim engaged in other sexual behavior; or
 - (2) evidence offered to prove a victim’s sexual predisposition.
- (b) Exceptions.
 - (1) Criminal cases. The court may admit the following evidence in a criminal case:
 - (A) evidence of specific instances of a victim’s sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
 - (B) evidence of specific instances of a victim’s sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor...”

¹²⁰ Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEORGE WASHINGTON L.R. 51, 57 (2002) (discussing that the Rape Shield Law is unfairly prejudicial to the victim when prior sexual conduct with the defendant is used as evidence for consent.).

terms of two parties where the victim previously consented to sexual intercourse ten times before and now alleges she did not consent to the eleventh time, the defendant can use those ten times that she did undeniably consent to sexual intercourse as evidence for the eleventh time. This not only goes behind the purpose of evidence rules,¹²¹ but defies the notion that consent is indefinite and can be freely revoked.

C. Consent as a Defense to Sexual Violence

States vary on their adoption of the rape shield rule. Some states have adopted the federal rape shield rule (stylized as “Federal Rule” or similar nomenclature). These states allow prior sexual conduct between the parties to be introduced as evidence to support the affirmative defense of consent.¹²² Other states do not allow for prior sexual conduct between the parties to be used as evidence of consent.¹²³ The remaining states have very bizarre

¹²¹ Fed. R. Evid. 102. (“These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”). *Id.*

¹²² Ala. R. Evid. 412(b)(2); Co. R. Evid. 13-25-138; Conn. R. Evid. 4-11; DEL. CODE ANN. tit. 11 § 3509(a) (2018); Fla. R. Evid. 794.022(2); Ga. R. Evid. 24-4-412(a); Idaho R. Evid. 412(b)(2); 725 ILL. COMP. STAT. 5/115-7(a) (2018); Ind. R. Evid. 412(b)(1)(B); Iowa R. Evid. 5.412(2)(B); Ky. R. Evid. 412(b)(1); LA. R. Evid. 412(A)(2)(b); Me. R. Evid. 412(a); MD. CODE ANN. 3-319 (West 2018); Mass. R. Evid. 412(b)(1); MINN. STAT. § 609.347 (2018); Miss. R. Evid. 412(b)(1)(B); MO. REV. STAT. § 491.015(1)(1) (2018); Neb. R. Evid. 27-412(b)(2)(a)(ii); N.M. R. Evid. 11-412; N.D. R. Evid. 412(1)(B); O.R.C § 2907.02(D); 18 PA. CONS. STAT. § 3104 (2018); S.D. R. Evid. 19-19-412(b)(1)(B); Tenn. R. Evid. 412(c)(3); Tex. R. Evid. 412(b)(2)(B); Utah R. Evid. 412(b)(2); Vt. R. Evid. 3255(a)(A); WASH. REV. CODE § 9A.44.020(2) (2018); W. Va. R. Evid. 412; WIS. STAT. § 972.11 (2018); WYO. STAT. ANN. § 6-2-312.

¹²³ Ariz. R. Evid. 404; Ark. R. Evid. 411(b); Haw. R. Evid. 412(a); Kan. R. Evid. 21-5502(b); MICH. COMP. LAWS 750.520j (2018); MONT. CODE ANN. § 45-5-511 (2018); Nev. R. Evid. 50.090; N.H. R. Evid. 412(b); N.Y. 60.43; N.C.

tests and requirements to allow the evidence to be admissible.¹²⁴

This Comment seeks to explain why all states should remove this aspect of the rape shield rule.

Courts have discretion to allow or disallow evidence of prior sexual conduct between the parties, depending on their respective evidence rules. In a court-martial proceeding, decided in September 2017, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) allowed testimony from a victim and the alleged defendant about their BDSM encounters.¹²⁵ Brian Christopher and his girlfriend, “ND,” had previously entered into a written BDSM relationship.¹²⁶ One of ND’s hard limits was anal penetration, but she had consented twice to anal sex and had tried “anal training”¹²⁷ with Christopher.¹²⁸ The third time she was anally penetrated occurred after ND had returned from a party; Christopher had bound her hands behind her back, forced her face down, and questioned her about what she had done at the party.¹²⁹ Christopher was dissatisfied by her answers and he repeatedly

R. Evid. 8C-412(d)(effective 12/1/2018); Okla. Evid. R. 12-2412; Or. R. Evid. 412; R.I. GEN. LAWS § 11-37-13 (2018); 2018 S.C. CODE ANN. § 16-3-659.1; Va. R. Evid. 2-412(a).

¹²⁴ Alaska. R. Evid. 404; Cal. Evid. Code § 1106; N.J. STAT. ANN. § 2C:14-7 (2014).

¹²⁵ United States v. Christopher, 2017 WL 4003158, *4-6 (N.M.C.M.R. 2017).

¹²⁶ *Id.* at *2.

¹²⁷ *Anal Training*, Kinkly, <https://www.kinkly.com/definition/10130/anal-training> (last visited, Nov. 25, 2018) (“Anal training is used to describe preparing and training the anus to become accustomed to anal sex.”).

¹²⁸ United States v. Christopher, 2017 WL 4003158, *2 (N.M.C.M.R. 2017).

¹²⁹ *Id.* at 5.

penetrated her anus with his fingers, not stopping despite ND's pleas and her use of their safe word.¹³⁰ He was convicted of sexual assault, indecent visual recording, and assault consummated by a battery.¹³¹ On appeal, Christopher renewed his claim that his act was "consensual," and for which he "had a mistaken belief that she consented."¹³² The court rejected his contention, stating:

The appellant's strongest argument—that they had engaged in consensual anal penetration prior to the incident so she must have consented on this occasion—misses the point: prior anal penetration does not equate to consent on this particular occasion. We reject the appellant's mistake of fact as to [his] consent defense.¹³³

This notion from the court reiterates Edwards'¹³⁴ point that affirmative consent must be freely given at every point during the sexual encounter in order to avoid situations where consent may be ambiguous or unknown to the other partner.¹³⁵ This is strictly persuasive authority for a vast majority of courts, but because of its powerful message, more courts should adopt the same perspective.

¹³⁰ *Id.*

¹³¹ *Id.* at 1.

¹³² *Id.* at 5.

¹³³ *Id.* at 6.

¹³⁴ *See supra* note 71 (discussing that consent can be revoked at any time, and that consent is like a stop light).

¹³⁵ *See supra* note 71.

1. The difficulties of proving consent

The difficulties of proving consent are quite obvious to most because unless there are more than two people present, there are no witnesses and it becomes a he-said-she-said argument.¹³⁶ But, this issue has been widely discussed for thousands of years as crimes such as rape have evolved alongside the doctrine of consent.¹³⁷

The problem seems to be that many submissive partners assume that if they do not say ‘no,’ then their partner has consent.¹³⁸ But as an anonymous writer for Vice indicated, there is a line, rather a harsh reality, behind the fact that you can be raped by your partner but so many submissive partners assume that it will only happen *this time*.¹³⁹ The difficulty in proving consent

¹³⁶ Donald Dripps, *Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent*, 93 COL. L. REV. 1780, 1795 (1992).

¹³⁷ See *supra* note 81.

¹³⁸ Anonymous, *My Ex-Boyfriend Was My Rapist*, VICE (Jun. 8, 2015, 1:00 AM) <https://www.vice.com/sv/article/3bwn75/we-need-to-talk-more-about-rape-happening-in-relationships-192>. (“As embarrassing as I find it to say in hindsight, I eventually reasoned that if I didn’t say no, then he’d technically have consent and I’d no longer have to deal with the uncomfortable truth that my boyfriend was, essentially, raping me. The word ‘essentially’ is vital here because, for a long time, I couldn’t use the word rape in isolation to describe what was happening without an adverb to lessen the crime: *essentially, basically, kind of, almost*.”) *Id.*; See *supra* note 71 (discussing that consent can be revoked at any time, and that consent is like a stop light).

¹³⁹ *Id.* (“He promised me that he’d never do it again, and I believed him. And, in my warped state of mind, I focused on all the other great things about our relationship. Until the next time. He promised me then, too, of course, that he would change. And I believed him all over again.”) *Id.*

often comes down to the mere fact that many people cannot define consent¹⁴⁰

III. BDSM AND DOMESTIC VIOLENCE

In the domestic violence realm, women are more often the victims than they are the accused; 85% of victims of intimate partner violence are women.¹⁴¹ This number increases with poverty, which in turn, increases a woman's vulnerability to being battered but decreases her likelihood of being able to escape the violence.¹⁴² This cyclical progression of violence in turn increases a woman's vulnerability to a poverty-stricken lifestyle, perpetuating continued instances of violence and the continued inability to get out of the situation.¹⁴³

For purposes of this section, while the focus is on domestic violence, the term *physical violence* may be used to account for other bodily injury crimes that may arise in BDSM. When *physical violence* is used, it is meant to include assault, battery, or

¹⁴⁰ *Id.*; See Elizabeth Enochs, *7 Things That Can Be Rape, Even If You Were Taught To Think That They Can't Be*, *Bustle* (Feb. 12, 2016), <https://www.bustle.com/articles/141289-7-things-that-can-be-rape-even-if-you-were-taught-to-think-that-they-cant>.

¹⁴¹ Alanna Vagianos, *30 Shocking Domestic Violence Statistics That Remind Us it's an Epidemic*, *HUFFPOST* (Oct. 23, 2014 9:25 AM), https://www.huffingtonpost.com/2014/10/23/domestic-violence-statistics_n_5959776.html.

¹⁴² Donna Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, Univ. of Miami 128, https://www.researchgate.net/profile/Donna_Coker/publication/265059150_7_Transformative_Justice_Anti-Subordination_Processes_in_Cases_of_Domestic_Violence/links/5502d55f0cf231de076fa2c0.pdf.

¹⁴³ *Id.*

domestic violence. The type of conduct that occurs during BDSM activities that can amount to physical violence includes, but is not limited to, burns from wax use, skin abrasions and bruising from bondage or restraints, lash marks from whipping or flogging, asphyxiation, or any other sort of bodily injury sustained by the submissive.

Due to the very nature of BDSM, it is very easy for one outside of the community to assume it is inherently or automatically abusive.¹⁴⁴ When the *Fifty Shades of Grey* trilogies began to make their mark in theaters and bedrooms across the country, many domestic violence advocates called for a boycott of the movie because it was only glamorizing domestic violence.¹⁴⁵ Tanya Young Williams, a blogger for the Huffington Post, disagreed with her colleagues by stating that the relationship was consensual, there was a contract that laid out the hard and soft limits, and that Grey did not possess the frequently documented characteristics of an abuser.¹⁴⁶ The National Domestic Violence

¹⁴⁴ Caitlin Roper, *Fifty Shades Darker Isn't Empowering, It's Abuse*, HUFFINGTON POST (Oct. 2, 2017), https://www.huffingtonpost.co.uk/caitlin-roper/fifty-shades-darker-is-fi_b_14674132.html.

¹⁴⁵ See generally *50 Shades is Abuse (@50shadesabuse)*, TWITTER https://twitter.com/50shadesabuse?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eerp%7Ctwgr%5Eauthor.

¹⁴⁶ Tanya Young Williams, *Domestic Violence Victims Advocate: 50 Shades of Grey is NOT about Domestic Violence*, THE HUFFINGTON POST (Feb. 17, 2015), https://www.huffingtonpost.com/tanya-young-williams/domestic-violence-victim_b_6695338.html.

Hotline created a table to differentiate between abuse and
BDSM.¹⁴⁷

Differences between BDSM and Abuse¹⁴⁸

BDSM	Abuse
Always Consensual	Never Consensual
Follows established rules	Has no rules
Negotiated for the safety of both partners involved	Not negotiated
Used for mutual pleasure	Used to terrorize, frighten, and control
Recipient uses safe words to stop unwanted play	Survivor cannot stop the abuse
About pleasure and being connected	About non-consensual power and control
Does not involve drugs or alcohol	May involve drugs or alcohol

The most important difference between BDSM and domestic abuse is that with abuse, one partner is gaining and maintaining power and control over another, whereas a BDSM relationship revolves around a consensual power exchange.¹⁴⁹ There is a fine line between domestic violence and BDSM. Our society must not allow victims to use BDSM as an excuse for domestic abuse or else women will never achieve gender equality, and these reports

¹⁴⁷ Melissa, a Hotline Advocate, *Can BDSM Be Healthy?*, THE NATIONAL DOMESTIC VIOLENCE HOTLINE (Apr. 6, 2017),

<http://www.thehotline.org/2017/04/06/healthy-bdsm-relationships/>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

of BDSM as domestic violence will serve only to hinder the sexual autonomy of women.¹⁵⁰

Many courts have held that they cannot use the BDSM relationship as evidence that the submissive consented to assault, even when the submissive did not want to bring the charges.¹⁵¹

There are states like California and Iowa, and some federal courts, who allow testimony about BDSM relationships where they are related to the alleged injuries; these are the same states that allow dating relationships to be protected under domestic violence statutes.¹⁵² These courts allowed the jury to freely consider the BDSM evidence when deciding whether the prosecution had proven all elements of the charges beyond a reasonable doubt.¹⁵³

But there are other states like New Jersey, Nebraska, and Massachusetts who have declined to allow any evidence of consent to any domestic violence crime because it is contrary to public

¹⁵⁰ Chris Bodenner, *The Line Between BDSM and Emotional Abuse*, THE ATLANTIC (Nov. 29, 2016, 9:00 AM) <https://www.theatlantic.com/notes/2016/11/the-line-between-bdsm-and-emotional-abuse/508922/> (discussing a reader who wrote in and discussed how her long time partner and herself were both into the BDSM lifestyle, and that her partner would dominate her. They would agree that in order to test her limits, he would have to verbally warn her. He would “forget” and do it without the verbal warning they had agreed upon. On top of the physical and sexual abuse she endured, she also endured emotional abuse. Ultimately, the reader was so distraught she sought a protective order and treatment in a mental health facility.).

¹⁵¹ *See* *United States v. Christopher*, 2017 WL 4003158 at *6; *but see* *Iowa v. Scarlette*, 883 N.W.2d 536, 2016 WL 1130039 *2-3 (1st Cir. 2016).

¹⁵² *Iowa v. Scarlette*, 883 N.W.2d 536, 2016 WL 1130039 *2-3 (1st Cir. 2016); *People v. Davidson*, 2015 WL 4751166 *9 (4th Dist. Ca. 2015).

¹⁵³ *See Davidson*, WL 4751166 at *8.

policy.¹⁵⁴ These three states also recognize dating relationships as a protected class under their respective domestic violence statutes.¹⁵⁵ This illustrates the discrepancy between whether BDSM relationships are “dating” or “sexual” for the purposes of protected classes under domestic violence statutes.¹⁵⁶

Women who have engaged in S&M porn have described the after-effects: electrical burns, permanent scars from beatings, and vaginal reconstructive surgery.¹⁵⁷ Activist groups like the National Coalition for Sexual Freedom developed a “Statement on Consent” which would say that the injury is only wrong if it “was not anticipated and consented to.”¹⁵⁸ The group is hopeful that their statement will become embedded in the law to ensure “that consent will be recognized as a defense to criminal charges brought under assault laws.”¹⁵⁹

BDSM becomes abuse when the dominant ignores the safe word or engages in conduct that the submissive did not expressly consent to, which is also called “outside the scene.”¹⁶⁰ Even in the

¹⁵⁴ *State v. Van* (Neb. 2004) 688 N.W.2d 600, 614-615; *Commonwealth v. Appleby* (Mass. 1980) 402 N.E.2d 1051, 1060; *State v. Garron* (N.J. 2003) 177 N.J. 147, 927 A.2d 243.

¹⁵⁵ MASS. GEN. LAWS § 13(M) (2018); NEB. REV. STAT. § 28-323 (2018); N.J. STAT. ANN. § 2C:25-19 (2018).

¹⁵⁶ *See supra* note 154; *See supra* note 152; New Jersey, Nebraska, and Massachusetts would argue that a BDSM relationship is sexual in nature and not a dating relationship, but Iowa and California would argue they are protected as a dating relationship.

¹⁵⁷ Saletan *supra* note 47 and accompanying text.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

“scene” the submissive may be beaten into a state of disorientation, where revoking consent may be beyond her reach.¹⁶¹ The bottom line is that allowing a dominant to use consent as a defense to assault would be pushing the boundaries of whether or not the submissive had the capacity to consent in the first place.¹⁶² Consenting to these types of behaviors will continue to be an issue as it has plagued tort law for many years.¹⁶³ But the real issue that needs to be addressed as it relates to BDSM is why the laws of the states do not adequately protect victims of domestic violence.

1. BDSM Can Subordinate Women Through Toxic Masculinity

Almost any feminist theorist will agree that women are viewed as a sex object.¹⁶⁴ Women are put on this imaginary sexual pedestal in every aspect of their life, which when viewed as this, *only* a sex object, can cause women to become second-class citizens when compared to their male counterparts. This, in turn, carries over to BDSM. Thankfully, the non-subordination theory was created to tackle this problem.¹⁶⁵ It began with Blanch

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. UNIV. L. REV. 1585, 1589 (2012).

¹⁶⁴ Szymanski et al, *Sexual Objectification of Women: Advances to Theory and Research*, 39 THE COUNSELING PSYCHOLOGIST 6, 7-8 (2011), <https://www.apa.org/education/ce/sexual-objectification.pdf> (“The objectification theory postulates that women are sexually objectified and treated as an object to be valued for its use by others.”). *Id.*

¹⁶⁵ See generally Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard Univ. Press 1987).

Crozier, who dabbled in the theory while she was a member of the Boston University Law Review in the late 1920s and early 1930s, having written three articles that mainly argued that “common law liberty is ‘an exclusively masculine liberty,’ insofar as it protects only men’s freedom to such privileges as the right to work, own property, and serve on juries.”¹⁶⁶

Crozier’s work may have preceded a number of Catharine MacKinnon’s writings, but it was the beginning of what would become non-subordination theory. MacKinnon has contributed to legal feminist theory by “explain[ing] both the fact of men’s dominance, and the fiction that women agree to it.”¹⁶⁷ Her work has discussed the disadvantage a woman has with her sexuality and the possibility of being a victim of sexual violence due to society’s social construct that women are to be “sexual objects trained to obtain their own pleasure from the pleasure they give men.”¹⁶⁸

An example of this subordination and abusive violence against a submissive is illustrated in *People v. Davidson*.¹⁶⁹ Ryan

¹⁶⁶ Blache Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U. L. REV. 723, 734-735 (1935) (discussing that the theory that men possess the inalienable right to life, liberty, and the pursuit of happiness “is a good example of the universality of expression which characterizes judicial statements of the constitutional principles of freedom and equality” which is not yet applied to women). *Id.*

¹⁶⁷ Katherine T. Bartlett, *Feminist Legal Scholarship: A History through the Lens of the California Law Review*, 100 CAL. L. REV. 381, 403 (2012); MacKinnon *supra* note 165 at 155-58.

¹⁶⁸ *Id.* at 403 (citing, “This explanation exposes women’s disadvantage not only in access to jobs, education, and civic participation—areas where the equality principle has made a great deal of headway—but also in the larger domain of sexuality and intimate violence.”); MacKinnon *supra* note 165 at 93-102.

¹⁶⁹ *See People v. Davidson*, 2015 WL 4751166 (Cal. Ct. App. 4th).

Davidson was convicted of torture, corporal injury to a cohabitant, and criminal threats, after he assaulted his girlfriend, CC, over a period of months which culminated in confining her to their home for four days while he threw things at her, hit her with a metal flashlight, choked her, and punched her repeatedly.¹⁷⁰ CC fled to a neighbor's house and she told the neighbor "they had consensual sex but *she wished 'the domestic violence would just end.'*"¹⁷¹ CC had extensive injuries and provided details about what occurred during two police interviews. She explained Davidson was emotionally unstable; during fights he would hit her but then they would talk about their fights, have consensual sex, and "she would ask herself how she could be intimate with someone who was hitting and hurting her, but *she always thought defendant loved her and really did want to help her.*"¹⁷² One should not judge another person for choosing to stay or not stay with an abuser, but this is an example of just how society can rationalize sexual violence by telling the victim that it would make him happy and made her a compliant participant to the treatment.¹⁷³

¹⁷⁰ *Id.* at 1.

¹⁷¹ *Id.* at 2 (emphasis added).

¹⁷² *Id.* (emphasis added).

¹⁷³ See Leslie Morgan Steiner, *Why Domestic Violence Victims Don't Leave*, TEDXRAINIER, https://www.ted.com/talks/leslie_morgan_steiner_why_domestic_violence_victims_don_t_leave/up-next.

The defendant was never charged with domestic violence.¹⁷⁴ While the defendant was in jail for the charges, CC married him.¹⁷⁵ She also recanted her initial story and testified that the defendant never physically abused her or assaulted her without her consent.¹⁷⁶ While testifying, she included that she had a history of BDSM play, and that when she told the defendant of this they began engaging in BDSM practices which resulted in bruises all over her body that were “like a badge of honor.”¹⁷⁷ CC testified that she sustained injuries from an accidental fall as a result of a BDSM activity and the rest of the bruises were from other BDSM activities.¹⁷⁸ The jury was not persuaded by CC’s testimony and ultimately convicted Davidson of all three charges; and the Fourth Circuit Court of Appeals affirmed his conviction.¹⁷⁹ CC is not the first woman to recant her experience of domestic violence and call it consensual BDSM play, and unless our society stops subordinating women, she will not be the last.¹⁸⁰

¹⁷⁴ *Davidson*, 2015 WL 4751166.

¹⁷⁵ *Id.* at 3.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See Paul Elwell, Iowa City Man Charged with Domestic Assault Threatened to Kill Victim, THE DAILY IOWAN (Oct. 1, 2018) <http://dailyiowan.com/2018/10/01/iowa-city-man-charged-with-domestic-assault-threatened-to-kill-victim/>; See Amy B. Wang, Sarah Palin’s Son Arrested on Domestic Violence Charges for the Third Time in Three Years, WASHINGTON POST (Sept. 30, 2018 5:03 PM) https://www.washingtonpost.com/nation/2018/09/30/sarah-palins-son-arrested-domestic-violence-charges-third-time-three-years/?utm_term=.71087c7e5662; Sara Nealeigh, Man Arrest After Police Say He Stabbed, Hit Girlfriend With

1. Difference between Domestic Violence and Assault

The sole difference between domestic violence and assault comes down to the relationship of the victim to the defendant.¹⁸¹

A majority of states define domestic violence as some sort of violence against a “family or household member.”¹⁸² They further define the definition of what domestic violence encompasses if it is not already within the statute.¹⁸³ It may seem cumbersome to have a crime which depends on the relationship between the victim and

Car, BRADENTON HERALD (Sept. 19, 2018) <https://www.bradenton.com/latest-news/article218675030.html>.

¹⁸¹ See generally *Ohio v. Carswell*, 114 Ohio St.3d 210, 871 N.E.2d 547, 2007-Ohio-3723.

¹⁸² ALASKA STAT. § 18.66.990(3) (“household member”); ARK. CODE ANN. § 5-26-303 (“family or household member”); CONN. GEN. STAT. § 46b-38a(2) (2018) (“family or household member”); FLA. STAT. § 741.28(3) (2018) (“family or household member”); HAW. REV. STAT. § 709-906(1) (2018) (“family or household member”); Idaho Code § 18-918 (2018) (“household member”); ILL. COMP. 5/12-3.2(a)(2) (2018) (“family or household member”); IND. CODE 35-42-3-1.3(a)(1) (2018) (“family or household member”); KAN. STAT. ANN. § 21-5414(a)(1) (2018) (“family or household member”); LA. STAT. ANN. § 14:35-3 (2018) (“household member” or “family member”); MASS. GEN. LAWS § 13(M) (2018) (“family or household member”); ME. STAT. TIT. 207-A (2018) (“family or household member”); MINN. STAT. § 609.2242 (2018) (“family or household member”); MO. REV. STAT. § 565.072 (2018) (“domestic victim”); MONT. CODE ANN. § 45-5-206 (“partner or family member”); N.H. REV. STAT. ANN. § 631:2-b (2018) (“family or household member”); N.M. STAT. ANN. § 30-3-15 (2018) (“household member”); N.D. CENT. CODE § 14-07.1(2) (2018) (“family or household member”); O.R.C. § 2919.25(A) (“family or household member”); 23 PA. CONS. STAT. § 6102 (2018) (“family or household member”); R.I. GEN. LAWS § 12-29-2(a) (2018) (“family or household member”); S.C. CODE ANN. § 16-25-20(A)(1) (2018) (“household member”); VT. STAT. ANN. TIT. § 1042 (2018) (“family or household member”); VA. CODE ANN. § 18.2-57.2 (2018) (“family or household member”); WASH. REV. CODE § 26.50.010 (2018) (“family or household member”); W. VA. CODE § 48-27-202 (2018) (“family or household members”); WYO. STAT. ANN. § 6-2-511 (2018) (“household member”).

¹⁸³ ILL. COMP. 5/112A-3(3) (2018); IND. CODE 35-31.5.2-128(a) (2018); KAN. STAT. ANN. 21-5111(i)(2) (2018); ME. STAT. TIT. 19-A § 4002 (2018); Minn. Stat. § 518B.01 (2018); MO. REV. STAT. § 565.002(6) (2018) (“domestic victim [is] a household or family member...[as] defined in section 455.010”); MO. REV. STAT. § 455.010(7) (2018) (defining “household or family member”); N.M. STAT. ANN. § 14-370 (2018); S.C. CODE ANN. § 16-25-10(3) (2018); VA. CODE ANN. § 16.1-228 (2018); W. VA. CODE § 48-27-204 (2018).

the defendant, but its purpose is to protect a certain class of people.¹⁸⁴ This class is victims of domestic violence who need extended protections that victims of assault may not need.¹⁸⁵ For example, with domestic violence there are typically mandatory arrest requirements for the offender, civil protection orders are put into place, and often there are state funds to aid the abused to start a new life.¹⁸⁶ This is because these victims are usually in the same close family setting with their abuser, whether that is by marriage, blood, or adoption.

Domestic violence is more invasive because the crime in itself invades a sense of privacy and trust the victim once had with the defendant. State law statutes typically protect only married spouses, blood-related family, and the other parent of a child.¹⁸⁷ Some states include protections for people in “dating relationships” regardless of whether they live together or not.¹⁸⁸ States have even gone as far as to include that “sexual relationships” constitute protections as a “family or household member” under their respective domestic violence statutes.¹⁸⁹ But until all states include

¹⁸⁴ Morgan Lee Woolley, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS L.J. 269, 272-73 (2007) (discussing that domestic violence laws initially received some resistance because some people believed that “domestic violence should be treated as a private matter and as a less serious crime in similar assaults.”). *Id.*

¹⁸⁵ Sally Goldfarb, *Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 64-65 (2002-2003).

¹⁸⁶ *Id.*

¹⁸⁷ *See supra* note 183.

¹⁸⁸ *See infra* note 207.

¹⁸⁹ *See infra* note 208.

sexual relationship in their domestic violence statutes, BDSM submissives will not be protected.

IV. SUGGESTED STATUTORY CHANGES

“Approximately one in every four women in America has been physically assaulted and/or raped by an intimate partner.”¹⁹⁰

Cases with BDSM overtones, like those mentioned within this Comment, undoubtedly challenged investigators, prosecutors, defense counsels, and the rest of the court system from the time the allegations were investigated to the point the judge or jury read the findings.¹⁹¹ Our justice system must adapt to change, and must do so in order to advance the interests of justice, maintain efficiency, and see that crimes are fairly prosecuted.¹⁹² In order to properly address the needed changes across all fifty states, I will focus on two aspects of rape and domestic violence: the term *family or household member* and the rape shield evidence rule.

These statutes and rules have been on the books for decades and rarely have changes been made. BDSM is not and should not be treated as a crime within itself. When a submissive revokes their consent and becomes a victim of rape or domestic violence,

¹⁹⁰ ALBERT ROBERTS AND BEVERLY SCHENKMAN ROBERTS, *ENDING INTIMATE ABUSE*, 4 (Oxford Unvi. Press 2005).

¹⁹¹ *See supra* note 151; *See supra* note 152; *See supra* note 153; *See supra* note 154.

¹⁹² Doug Collins and Cedric Richmond, *Criminal Justice System Needs Change*, THE HILL (July 13, 2015, 11:00 AM), <https://thehill.com/blogs/congress-blog/judicial/247564-criminal-justice-system-needs-to-change>.

prosecutors need to have proper guidance on how to charge the appropriate individuals, and courts need to have proper statutes to ensure that juries may do their civil service and decide whether the defendant is guilty beyond a reasonable doubt. These changes may seem subtle, but they would have a large impact in protecting victims of rape and domestic violence in the name of public policy. The problems within these respective statutes do not appear facially. More often the issues pertain to the definitions and evidentiary issues as applied.

D. Domestic Violence

Domestic violence against submissive partners has evolved alongside the BDSM community. Slowly, the thin line between consensual sexual encounters and violence against submissive partners has become better defined. In 1848, the Declaration of Sentiments was issued by those who gathered in Seneca Falls to discuss women's rights.¹⁹³ There, a chief complaint concerned the marital contract: "In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement."¹⁹⁴

¹⁹³ JULIE BLACKMAN, *INTIMATE VIOLENCE A STUDY OF INJUSTICE 1* (Columbia Univ. Press 1989).

¹⁹⁴ *Id.* at 1-2. The current statutes for rape and domestic violence seek to avoid the deprivation of liberty this marital contract once allowed.

Even though feminism has had its waves through history, the current movement started in 1971, when 500 English women and children began to protest for a reduction of milk prices for schoolchildren.¹⁹⁵ Soon, a community meeting place, called Chiswick Women's Aid, was formed (this meeting place was eventually renamed the Battered Wives' Center), where women could come to discuss the abuse they were suffering.¹⁹⁶ American feminists traveled to England to study the changes that the English Parliament was making, and they brought back ideas and basic plans to the states.¹⁹⁷ Since the beginning of the Battered Woman's Movement, it has moved from "grassroots to government-funded programs."¹⁹⁸

When defendants charged with domestic violence or similar crimes related to wife-beating began to enter courtrooms, prosecutors still perceived the situations as something that was a "family matter[]" that did not belong in the court."¹⁹⁹ In the 1970s, during the second wave of feminism, police officers were reluctant to intervene in the homes of aggressive abusers.²⁰⁰ Between

¹⁹⁵ MARGI LAIRD MCCUE, *DOMESTIC VIOLENCE* 15 (ABC-CLIO, 1995).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* Because of the dedication of those feminists, research like this and the rest of those cited in this Comment are possible.

¹⁹⁹ SANA LOUE, *INTIMATE PARTNER VIOLENCE: SOCIETAL, MEDICAL, LEGAL, AND INDIVIDUAL RESPONSES* 105 (Kluwer Academic/Plenum Publishers, 2001).

²⁰⁰ Jeffrey R. Baker, *The Failure and Promise of Common Law Equity in Domestic Abuse Cases*, 58 *LOYOLA L.R.* 559, 587 (2013), <http://law.loyno.edu/sites/law.loyno.edu/files/Baker-FINAL.pdf>.

prosecutors and police officers that were unwilling to arrest and prosecute abusers, women long lived in a world where little remedies were available to them, furthering the subordination of women.²⁰¹ Perhaps this was due to the similarity between domestic violence and assault statutes.²⁰² Today, domestic violence is taken much more seriously with the implementation of civil protection orders and (while still not easy) access to a divorce.²⁰³

Every state has a law on the books for domestic violence, domestic assault, domestic battery, or the like.²⁰⁴ Every state also

²⁰¹ *Id.* at 588.

²⁰² *Ohio v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547, ¶ 29. The Court distinguished the fact that both assault and domestic violence “prohibit the act of ‘knowingly caus[ing] or attempt[ing] to cause physical harm,’ but the accused’s relationship with the victim is the determining element. Physical harm caused to another is an assault, R.C. 2903.13; physical harm caused to a family or household member is domestic violence, R.C. 2919.25.” *Id.*

²⁰³ Domestic Violence Protection Order Forms, SUPREME COURT OF OHIO, https://www.supremecourt.ohio.gov/JCS/domesticViolence/protection_forms/DVForms/ (last visited Feb. 25, 2018).

²⁰⁴ ALA. CODE § 13A-6-130; ALASKA STAT. § 18.66.990(3); ARIZ. REV. STAT. ANN., § 13-3601; ARK. CODE ANN. § 5-26-303; CAL. PENAL CODE § 243 (West 2018); COLO. REV. STAT. § 18-6-800.3; CONN. GEN. STAT. § 46b-38a(2) (2018); DEL. CODE ANN. TIT. § 1041; FLA. STAT. § 741.28(3) (2018); GA. CODE ANN. § 19-13-1 (2018); HAW. REV. STAT. § 709-906(1) (2018); IDAHO CODE § 18-918 (2018); ILL. COMP. 5/12-3.2(a)(2) (2018); IND. CODE 35-42-3-1.3(a)(1) (2018); IOWA CODE § 708.2A (2018); KAN. STAT. ANN. § 21-5414(a)(1) (2018); KY. REV. STAT. ANN. § 508.032 (2018); LA. STAT. ANN. § 14:35-3 (2018); ME. STAT. TIT. 207-A (2018); MD. CODE ANN. § 4-501; MASS. GEN. LAWS § 13(M) (2018); MICH. COMP. LAWS § 750.81 (2018); MINN. STAT. § 609.2242 (2018); MISS. CODE ANN. § 97-3-7 (2018); MO. REV. STAT. § 565.072 (2018); MONT. CODE ANN. § 45-5-206 (2018); NEB. REV. STAT. § 28-323 (2018); NEV. REV. STAT. § 33.018 (2018); N.H. REV. STAT. ANN. § 631:2-b (2018); N.J. STAT. ANN. § 2C:25-19 (2018); N.M. STAT. ANN. § 30-3-15 (2018); N.C. GEN. STAT. § 50B-1 (2018); N.D. CENT. CODE § 14-07.1(2) (2018); O.R.C. § 2919.25(A); OKLA. STAT. TIT. 21, § 644(c) (2018); 23 PA. CONS. STAT. § 6102 (2018); R.I. GEN. LAWS § 12-29-2(a) (2018); S.C. CODE ANN. § 16-25-20(A)(1) (2018); S.D. CODIFIED LAWS § 25-10-3.1 (2018); TENN. CODE ANN. § 39-13-111 (2018); TEX. PENAL CODE ANN. § 22.01 (2018); TEX. PENAL CODE ANN. § 71.0021 (2018); UTAH CODE ANN. § 77-36-1(4) (2018); VT. STAT. ANN. TIT. § 1042

defines to whom domestic violence can be committed against or refers to “family or household member.”²⁰⁵ The term “family or household member” is then defined further in the respective code section, usually in the definitions portion.²⁰⁶ As mentioned, some states even include dating relationships within their protected class,²⁰⁷ but only nine states go as far as including dating and sexual relationships to be covered within their domestic violence statute.²⁰⁸ In order to be guilty of domestic violence in twelve states you cannot be in just a dating or sexual relationship; there must be a more intimate relationship.²⁰⁹ There are also four states

(2018); VA. CODE ANN. § 18.2-57.2 (2018); WASH. REV. CODE § 26.50.010 (2018); W. VA. CODE § 48-27-202 (2018); WIS. STAT. § 968.075 (2018); WYO. STAT. ANN. § 6-2-511 (2018).

²⁰⁵ See *infra* notes 208-211.

²⁰⁶ *Id.*

²⁰⁷ ALA. CODE § 13A-6-139.1 (2018); ARK. CODE ANN. § 5-26-303 (2018); ARK. CODE ANN. § 5-26-302(2) (2018); CAL. 272 CODE § 242 (West 2018); CAL. 272 CODE § 243(e)(1) (West 2018); CONN. GEN. STAT. § 46b-38a(2) (2018); DEL. CODE ANN. TIT. § 1041(2) (2018); ILL. COMP. 5/12-3.2(a)(2) (2018); ILL. COMP. 5/112A-3(3) (2018); IOWA CODE § 708.2(A); KAN. STAT. ANN. § 21-5414(a)(1) (2018); KAN. STAT. ANN. § 21-5111(i) (2018); MASS. GEN. LAWS § 13(M) (2018); MICH. COMP. LAWS § 750.81; MO. REV. STAT. § 565.072 (2018); MONT. CODE ANN. § 45-5-206; NEB. REV. STAT. § 28-323 (2018); NEV. REV. STAT. § 33.018 (2018); N.J. STAT. ANN. § 2C:25-19 (2018); N.M. STAT. ANN. § 30-3-15 (2018); N.M. STAT. ANN. § 14-370 (2018); N.Y. PENAL § 120.05 (West, 2018); N.Y. PENAL § 459-a-2 (West, 2018); N.C. GEN. STAT. § 50B-1 (2018); OHIO REV. CODE ANN. § 2919.25(A); OKLA. STAT. TIT. 21, § 644(c) (2018); R.I. GEN. LAWS § 12-29-2(a) (2018); S.D. CODIFIED LAWS § 25-10-1(1) (2018); S.D. CODIFIED LAWS § 25-10-3.1 (2018); TENN. CODE ANN. § 39-13-111 (2018); TEX. PENAL CODE ANN. § 22.01 (2018); TEX. PENAL CODE ANN. § 71.0021 (2018); WYO. STAT. ANN. § 6-2-511 (2018).

²⁰⁸ ALASKA STAT. § 18.66.990 (2018); ARIZ. REV. STAT. ANN § 13-3601 (2018); IND. CODE 35-42-3-1.3(a)(1) (2018); LA. STAT. ANN. § 14:35-3 (2018); ME. STAT. TIT. 207-A (2018); ME. STAT. TIT. 19 § 4002 (2018); MD. CODE ANN. § 4-501 (West 2018); MINN. STAT. § 609.2242 (2018); MINN. STAT. § 518B.01 (2018); VT. STAT. ANN. TIT. § 1042 (2018); W. VA. CODE § 48-27-202 (2018); W. VA. CODE § 48-27-204 (2018).

²⁰⁹ COLO. REV. STAT. § 18-6-800.3 (2018); FLA. STAT. § 741.28 (2018); GA; HAW. REV. STAT. § 709-906(1) (2018); IDAHO CODE § 18-918 (2018); KY. REV. STAT. ANN. § 403.720; MISS. CODE ANN. § 97-3-7 (2018); N.D. CENT. CODE § 14-07.1(2) (2018); S.C. CODE ANN § 16-25-20(A)(1) (2018); VA. CODE ANN. §

which include that a sexual relationship, but not a dating relationship, as a qualified protected class.²¹⁰ Lastly, there are eight states that, while allowing a dating relationship to qualify, require police officers, prosecutors, and courts to run an extensive, objective, and sometimes subjective test, to determine if there was a dating relationship.²¹¹ These varying definitions present an abundance of issues: relationships in which the parties are not married, have children, or couples who do not reside together.

The reason for the differentiation between domestic violence and assault is valid, but in order to protect women from further subordination, the definition for *family or household member* or its equivalent should be extended to protect other categories of close persons to the defendant. In order to do this, I propose the 41 states that do not include both dating and sexual relationships as a protected class in their domestic violence statutes include the following:

Family or household members also includes any of the following:

18.2-57.2 (2018); VA. CODE ANN. § 16.1-228 (2018); WASH. REV. CODE § 26.50.010 (2018); WIS. STAT. § 968.075 (2018).

²¹⁰ N.H. REV. STAT. ANN. § 631:2-b (2018); OR. REV. STAT. § 163.175; OR. REV. STAT. § 135.230(3)-(4); 23 PA. CONS. STAT. § 6102 (2018); UTAH CODE ANN. § 77-36-1(4) (2018); UTAH CODE ANN. § 78B-7-102(2) (2018).

²¹¹ ARIZ. REV. STAT. ANN. § 13-3601 (2018); DEL. CODE ANN. TIT. § 1041(2) (2018); IOWA CODE § 708.2(A); KAN. STAT. ANN. § 21-5414(a)(1) (2018); MASS. GEN. LAWS § 13(M) (2018); N.Y. PENAL § 120.05 (West, 2018); R.I. GEN. LAWS § 12-29-2(a) (2018); TEX. PENAL CODE ANN. § 22.01 (2018); TEX. PENAL CODE ANN. § 71.0021 (2018).

(i) Persons who are or were previously sexual or intimate partners;

(ii) Persons who are or were previously dating; or

(iii) Persons who are or were previously engaged to be married.

Duration of the relationship, frequency of the relationship, and nature of the relationship need not be factors.

As previously mentioned, relationships take no specific shape or size and sex is an intimate thing between people that should allow for vulnerability. Some people choose not to reside together, some choose to have multiple partners, some choose to keep it monogamous, and some choose to live in a BDSM lifestyle. The implementation of such a definition would allow for other types of relationships to be incorporated in order to protect victims in the event of a domestic abuse allegation. Additionally, including the phrase “persons are or were sexual or intimate partners” allows for submissives in casual BDSM relationships to be protected. Moreover, the state legislative bodies, their constituents, and the justice system would be better served with a statute that fully protects the victims the statute seeks to serve.

E. Rape

In 2017, there were over 300-million people that lived in the United States and 99,856 reported rapes.²¹² However, a recent study found that for every 1,000 rapes that are committed, only 310 are actually reported.²¹³ States vary in their classification of unlawful sexual penetration, with some states referring to it as sexual assault,²¹⁴ others as rape,²¹⁵ and the remainder using anything from sexual battery to unlawful sexual penetration.²¹⁶

The current statutes that states use to criminalize rape, sexual

²¹² NUMBER OF REPORTED FORCIBLE RAPE CASES IN THE UNITED STATES FROM 1900-2017, <https://www.statista.com/statistics/191137/reported-forcible-rape-cases-in-the-usa-since-1990/> (lasted visited Sept. 27, 2018).

²¹³ THE VAST MAJORITY OF PERPETRATORS WILL NOT GO TO JAIL OR PRISON, <https://www.rainn.org/statistics/criminal-justice-system> (last visited, Sept. 27, 2018).

²¹⁴ ALASKA STAT. § 11.41.410 (2018); ARIZ. REV. STAT. ANN. § 13-1406, COLO. REV. STAT. § 18-3-402 (2018); CONN. GEN. STAT. § 53A-72A (2018); HAW. REV. STAT. § 707-732; 720 ILL. COMP STAT. 5/11-1/20 (2018); ME. STAT. § 253 (2018); MONT. CODE ANN. § 45-5-502 (2018); NEB. REV. STAT. § 28-319 (2018); NEV. REV. STAT. § 200.366; N.H. REV. STAT. ANN. § 6320A:2 (2018); N.J. STAT. ANN. § 2C:14-2 (2018); N.D. CENT. CODE § 12.1-20-07 (2018); R.I. GEN. LAWS § 11-37-2 (2018); TEX. PENAL CODE ANN. § 22.011 (WEST 2018); VT. STAT. ANN. § 3252 (2018); W. VA. CODE § 61-8B03 (2018); WIS. STAT. § 940-225 (2018); WYO. STAT. ANN. § 6-2-302 (2018).

²¹⁵ ALA. CODE § 13A-6-61 (2018); ARK. CODE ANN. § 5-14-103 (2018); CAL. PENAL CODE § 263 (2018); DEL. CODE ANN. § 772 (2018); GA. CODE ANN. § 16-6-1 (2018); IDAHO CODE § 18-6101 (2018); IND. CODE § 35-42-4-1 (2018); KAN. STAT. ANN. § 21-5503 (2018); KY. REV. STAT. ANN. § 510.040 (2018); LA. STAT. ANN. § 42.1 (2018); MD. CODE ANN. § 3-303; MASS. GEN. LAWS § 22 (2018); MO. REV. STAT. § 566.030 (2018); N.Y. PENAL LAW § 130.35 (2018); N.C. GEN. STAT. § 14-27.21 (2018); O.R.C. § 2907.02(D); OKLA. STAT. § 1114 (2018); OR. REV. STAT. § 163.375 (2018); PA. CONS. STAT. § 3121 (2018); S.D. CODIFIED LAWS § 22-22-1 (2018); TENN. CODE ANN. § 39-13-503 (2018); VA. CODE. ANN. § 18.2-61 (2018); WASH. REV. CODE § 9A.44.040.

²¹⁶ FLA. STAT. § 794.011(B) (2018); IOWA CODE § 709.1; MICH. COMP. LAWS § 750.520B (2018); MINN. STAT. § 609.342 (2018); MISS. CODE ANN. § 97-3-65 (2018); N.M. STAT. ANN. § 30-9-11 (2018); S.C. CODE ANN. § 16-3-652 (2018); UTAH CODE ANN. § 76-5-406 (2018).

assault, or sexual battery typically are not at issue, aside from some which provide for gender-based crimes and marital exceptions.²¹⁷

The main problem with the states and the way they handle rape is dealing with a case where the victim has previously consented to the conduct but on a new occasion is alleging she did not. A majority of rape statutes do not require that the victim attempted to physically resist.²¹⁸ Yet, the evidentiary provisions that apply to the statute only hinder the rights of submissives since they are unable to revoke consent at any time when the prior consensual sexual conduct between the parties would be admissible.²¹⁹ Typically, consent has to be raised by the defendant in order for evidence of prior sexual conduct between the parties to be admitted,²²⁰ and then there is an evidentiary hearing. But in the case of sadistic and marital rape, where the parties have more than likely engaged in sexual conduct previously, consent will almost

²¹⁷ ALA. CODE § 13A-6-61 (2018); ARK. CODE ANN. § 5-14-103 (2018); GA. CODE ANN. § 16-6-1 (2018); IOWA CODE § 709.1; KY. REV. STAT. ANN. § 510.040 (2018); ME. STAT. § 253 (2018); MICH. COMP. LAWS § 750.520B (20118); MINN. STAT. § 609.342 (2018); MISS. CODE ANN. § 97-3-65 (2018); MICH. COMP. LAWS § 750.520B (20118); MO. REV. STAT. § 566.030 (2018); MONT. CODE ANN. § 45-5-502 (2018); N.C. GEN. STAT. § 14-27.21 (2018); R.I. GEN. LAWS § 11-37-2 (2018); TENN. CODE ANN. § 39-13-503 (2018).

²¹⁸ Bethy Squires, *Why Do We Still Have Laws That Say It's Not Rape Unless the Victim Fights Back?*, BROADLY (Jul. 27, 2017, 1:29 PM) https://broadly.vice.com/en_us/article/evdedn/earnest-resistence-laws-that-say-its-not-rape-unless-the-victim-fights-back.

²¹⁹ *But see* DOES PRIOR SEXUAL CONDUCT AFFECT A RAPE CASE?, <https://www.criminaldefensene.com/a-sexual-assault-attorney-explains-defenses-to-rape/> (last visited, Sept. 29, 2018).

²²⁰ *See* Dripps, *supra* note 136 and accompanying text.

always be raised by the defendant. These evidentiary rules are usually within the states' evidence rules, but also may be codified.

The best way to combat sadistic rape would be to eliminate the exception in the rape shield rule that allows for prior sexual activity as evidence for consent.²²¹ Jurors like being presented with probabilistic evidence, but have had a tendency to misuse, overuse, and improperly use probability evidence.²²² The premise that prior consent to sexual conduct between the victim and defendant is evidence of consent gives juries the idea that when a victim has previously consented ten times, then she must have consented the eleventh time even though she alleges she did not.

Evidence rules have a large amount of fundamental fairness and public policy, which supported the need for their establishment and support the need for the rules to maintain a place in our judiciary system. Unfortunately, not all the rules are as fair as one may wish them to be. These rules disallow opinion or reputation evidence that illustrates a propensity²²³ purpose, yet the rape shield rule allows just that. The rape shield rule allows evidence to prove consent when the victim previously consented to the same sexual

²²¹ Meg Garvin et al, *Excluding Evidence of Special Sexual Acts Between the Victim and Defendant Under Rape Shield*, NAT'L CRIME VICTIM L. INST., 2-3 (2010).

²²² D.H. Kaye & Jonathan J. Koehler, *Can Jurors Understand Probabilistic Evidence?*, 154 J. of the ROYAL STAT. SOC. 75, 81 (1991) <http://www.jstor.org/stable/pdf/2982696.pdf?refreqid=excelsior%3A8d20ad4c9e8424a37bbce3620a280e4c>. (discussing, probabilistic evidence is "mathematic evidence.").

²²³ Fed. R. Evid. § 404.

conduct that she now complains of.²²⁴ This evidence rule is counterintuitive because any form of consent is not a definite term.²²⁵

This argument is not to be construed that consent is not an affirmative defense to rape or any form of sexual violence. This argument is to be construed that there are other ways to prove consent. The defendant can either testify on the stand that the victim gave verbal or non-verbal indications of consent or the defendant's counsel can cross-examine the victim to ask if they ever told the defendant they did not want to engage in that sexual behavior. This aspect of the rape shield rule otherwise subordinates victims and will continue to do so until all states remove this aspect of the rape shield rule.

Evidence rules which continue to allow evidence of prior sexual conduct between the parties will continue to subordinate women. Rape shield rules routinely allow evidence of prior sexual conduct between the parties into court.²²⁶ But even in the states where courts are reluctant to admit this kind of evidence, it still opens up expensive attorney's fees and court costs as these evidentiary determinations are often appealed.²²⁷ Even as costly as

²²⁴ See *supra* note 221.

²²⁵ See *supra* note 71.

²²⁶ See *supra* note 221.

²²⁷ See *Sterling v. State*, 267 Ark. 208, 590 S.W.2d 254 (1979) (holding, "Prior acts of sexual conduct are not within themselves evidence of consent in a subsequent sexual act."); See *State v. Patten*, 2018 WL 41777838, 2018 V.T. 98 ¶ 21 (holding that prior sexual conduct as evidence of consent is admissible, but

this may become, that is not even comparable to the experience the victim must relive.²²⁸ This, plus the fact the offender may not even be indicted, leaves the victim little incentive to come forward at all.²²⁹ Until the rape shield statute no longer allows prior sexual conduct between the parties as evidence of consent or our justice system drastically changes the way rape and sexual assault is tried, victims will continue to be silent and women will continue to be subordinated.

CONCLUSION

Consent is the absolute cornerstone of every sexual encounter, and BDSM is no different. Unfortunately, the lifestyle can go too far and become sadistic rape and domestic violence when there is no longer consent. Consent can be revoked with the use of the safe word, words that equate to revocation of consent, and even by the body language of the submissive. BDSM in and of itself is not a crime, it shouldn't be treated as such. BDSM is a

the court must decide whether the conduct complained of is reasonably contemporaneous to the previous conduct); *See State v. Sarfraz*, 356 Wis.2d 460, 851 N.W.2d 235 (2014) (holding that proffered evidence of prior sexual conduct would have to “relate[] to a fact or proposition that is of consequence to the determination of the action.”)

²²⁸ Rebecca Adams, *For Victims of Sexual Assault, There's Little Incentive to Come Forward – Besides 'Justice'*, THE HUFFINGTON POST (Dec. 15, 2014 3:47 PM) https://www.huffingtonpost.com/2014/12/15/victims-sexual-assault-come-forward-justice_n_6294152.html.

²²⁹ *Id.*

lifestyle, which can be considered a fetish, and which has a quite detailed history in our society.

Think back to the hypothetical scenario from the introduction of this Comment. You are the victim in a rape case. You've engaged in sexual conduct countless times with the defendant. Removing the rule from the Rape Shield Rule that prior sexual conduct as evidence for consent with the defendant is admissible would allow the jury to be less biased and would allow you to be protected by the mere fact that you can revoke consent at any time, consent is not indefinite. With the proposed removal of the Rape Shield Rule, many would argue that it would leave the defendant unable to produce a consent defense.

The purpose of this article is not to say that the dominant in this scenario cannot raise a consent defense but rather that they can; they just cannot use evidence of prior sexual *conduct* to do so. Additionally, as a victim of domestic violence, the proposed changes in the Revised Code would protect you in a multitude of ways. No matter your relationship status with the dominant, so long as you are sexual or dating partners, the statute would protect you.

The justice system will never be perfect, but it was designed to be fair and just. For our justice system to be fair and just, it must evolve and adapt to the changes in our society.

Women across the United States and the prosecutors who indict suspects of these types of crimes would be better served if their respective statutes reflected its use in the BDSM realm.

This Comment serves to aid the conversation about sex and crimes against women to no longer be on a back burner, but rather move the conversation to a place that ignites the fire where women can attain sexual equality. Crimes involving sexual and physical violence likely will always exist to some extent. But, with harsher statutes that protect victims and incorporate other types of relationships, the ability to combat such crimes and decrease the subordination of women will be much more manageable.